

5. One of the great themes in the study of Anglo-Saxon institutions is the decline of the kindred. It's a theme that can be exaggerated. Anglo-Saxon kindreds were small to start off with. The evidence of language suggests a rather narrow group, bilateral terminology but preference for the patriline. Then too, the documents show that the blood feud was still alive at the end of the period. Here are some relevant texts from the dooms:

Abt 30—individual responsibility (above, p. 7).

Alf 42—surrounding the house and demanding justice:

42. We also command that any one knowing his enemy to be at home shall not fight him before demanding justice of him [in court]. If [the accuser] has strength to surround and besiege his enemy inside [the latter's house], let him be held there seven nights and not attacked so long as he will remain inside. Then after seven nights, if the [besieged enemy] will surrender and give up his weapons, let him be kept unharmed for thirty nights while news of him is sent to his kinsmen and friends. . . . If, however, [the accuser] lacks the strength to besiege his enemy, he shall ride to the alderman and ask him for aid; if the latter refuses him aid, he shall ride to the king before beginning a fight. . . . We declare furthermore that one may fight for his lord without incurring blood-feud, if the lord has been attacked. So also the lord may fight for his man. In the same way one may fight for his blood-relative, should the latter be unjustly attacked, except against his own lord—that we do not permit....

2 Aethelstan 2—everyone must have a lord:

2. And with regard to lordless men from whom no justice is to be obtained, we have ordained that their kindred be commanded to settle them in homes where they will be subject to folkright, and to find them lords in the popular court (*folcgemote*). And if, by the day set, the kindred will not or cannot do so, he shall thenceforth be an outlaw, to be treated as a thief by any one who meets him. . . .

Edmund 2.1—further isolating the individual:

2.1. Henceforth, if any man slays another, [we order] that he by himself shall incur the blood-feud, unless he, with the help of his friends, buys it off by paying the full wergeld [of the slain man] within twelve months, no matter of what rank the latter may be. If, however, his kinsmen abandon him, refusing to pay anything in his behalf, then it is my will that the whole kindred, with the sole exception of the actual slayer, be free of the blood-feud so long as they give him neither food nor protection. If, on the other hand, one of his kinsmen later gives him such assistance, the former shall forfeit to the king all that he has, and he shall incur the blood-feud [along with the slayer] because the latter has already been disowned by the kindred. And if any one of the other kindred takes vengeance on any men besides the true slayer, he shall incur the enmity of the king and all of the king's friends, and he shall forfeit all that he has.

B. BOOK OF CONSTITUTIONS OR LAW OF GUNDOBAD

in THE BURGUNDIAN CODE, Contents, Preface, cc. 1-45[†]
(K. F. Drew, trans., 1949; repr. 1972),[†] xi-xv, 17-51¹

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- II. Of Murders.
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- VII. Of Slaves (*Servi*) and Serfs (*Originarii*) Who Are Accused of Crimes.
- VIII. Of the Commission of Crimes Which Are Charged Against Native Freemen.
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¹ The text followed in this translation is that of L. R. de Salis, *Leges Burgundionum (Monumenta Germaniae Historica, Sectio I, Tomus II, Pars I)* (Hanover, 1892) [KFD].

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Assembly of the Burgundians.

a. PREFACE

FIRST CONSTITUTION

1. In the name of God in the second year of the reign of our lord the most glorious king Gundobad, this book concerning laws past and present, and to be preserved throughout all future time, has been issued on the fourth day before the Kalends of April (March 29) at Lyons.²

2. For the love of justice, through which God is pleased and the power of earthly kingdoms acquired, we have obtained the consent of our counts (*comites*) and leaders (*proceres*), and have desired to establish such laws that the integrity and equity of those judging may exclude all rewards and corruptions from themselves.

3. Therefore all administrators (*administrantes*) and judges must judge from the present time on between Burgundians and Romans according to our laws which have been set forth and corrected by a common method, to the end that no one may hope or presume to receive anything by way of reward or emolument from any party as the result of the suits or decisions; but let him whose case is deserving obtain justice and let the integrity of the judge alone suffice to accomplish this.

4. We believe the condition of this law should be imposed on us that no one may presume to tempt our integrity in any kind of case with favors or rewards; first, since our zeal for equity repudiates from ourselves those things which we forbid to all judges under our rule, let our treasury accept nothing more than has been established in the laws concerning the payment of fines.

5. Therefore let all nobles (*optimates*), counsellors (*consilarii*), bailiffs (*domestici*), mayors of our palace (*maiores domus nostrae*), chancellors (*cancellarii*),³ counts (*comites*) of the cities or villages, Burgundian as well as Roman, and all appointed judges and military judges (*judices militantes*) know that nothing can be accepted in connection with those suits which have been acted upon or decided, and that nothing can be sought in the name of promise or reward from those litigating; nor can the parties (to the suit) be compelled by the judge to make a payment in order that they may receive anything (from their suit).

6. But if any of those mentioned, corrupted against our laws, or even judging justly, has been convicted of receiving rewards from suits or decisions, and the crime has been proved, let him be punished capitally as an example to all: with the further provision that the penalty which has been imposed shall not cause any loss of property to the sons or legitimate heirs of him whose dishonesty was punished.

7. Indeed for the payments given to the scribes (*notarii*) of our appointed judges in rendering decisions in suits exceeding ten *solidi*,⁴ we give the opinion that a single *tremissis* should suffice; in suits involving less than ten *solidi*, let smaller payments be sought.

² The following is a translation of the Restored Introduction of the True Law of Gundobad as devised by de Salis:

“First Constitution

“The most glorious Gundobad, king of the Burgundians. Since we have given deep thought to the enactments of our predecessors and of ourselves regarding the peace and welfare of our people, we have considered what is most fitting to promote honesty, discipline, good sense, and justice with reference to individual cases and titles of law. We have consulted on all these matters with the nobles (*optimates*) of our people, and we have attempted to write down not only our own opinion but theirs as well, established in laws to last forever. For the love of justice through which God is pleased, etc.”

This introduction as restored by De Salis may represent the introduction prepared by Gundobad at his original collection of the laws, while that given in the main text may represent a preface prepared by Gundobad’s son, Sigismund, at a later period when Sigismund reissued the lawbook together with additions of his own. That this is true is indicated by the fact that in Section 1, a number of the manuscripts designated by De Salis A 1, 2, 3; B 1, 2, 4, 6, attribute the codification of this work to King Sigismund whose name is substituted for that of King Gundobad in this first section. Also, the fact that this preface was issued from Lyons would point to a period in Sigismund’s reign since Gundobad ruled from Vienne while Sigismund ruled from Lyons. Manuscripts A 4, B 5, 7, 8, 9, 10, 11, retain the name of Gundobad. Cf. *ibid.*, pp. 29–30.

³ We have little information about the functions in the Burgundian kingdom of the various officials mentioned here in the preface. For *proceres* (Sec. 2), cf. DuCange, *Glossarium Mediae et Infimae Latinitatis*, V, 460; for *consilarii*, cf. *ibid.*, II, 551; for *domestici*, cf. *ibid.*, II, 904; for *cancellarii*, cf. *ibid.*, II, 79–84; and for *notarii* (Sec. 7), cf. *ibid.*, IV, 647.

8. Since a similar condition has been forbidden among Romans in cases of the crime of venality, we command that Romans be judged by the Roman laws just as has been established by our predecessors; let them know that they must follow the form and statement of the written law when they render decisions so that no one may be excused on grounds of ignorance.

9. In the case of unjust decisions rendered before this time, let the conditions of the earlier law be followed. But we add this also, that if perchance a judge has been accused of corruption and has been convicted without sufficient reason, let the accuser be compelled to receive a punishment similar to that which we ordered the corrupted judge to receive.

10. If indeed anything is not covered by the statement of our laws, we order those judging to refer such matters to us.

11. Indeed if any judge, barbarian as well as Roman, shall not render decisions according to those provisions which the laws contain because he has been prevented by ignorance or negligence, and he has been diverted from justice for this reason, let him know that he must pay thirty *solidi* and that the case must be judged again on behalf of the aggrieved parties.

12. We apply this principle: if judges have entertained an appeal for the third time and have not rendered judgment, and if he who has brought suit believes that an appeal to us should be sought, and if he has proved his judges to have been present three times and not to have heard the case, let the judge suffer a fine of twelve *solidi*. But if anyone shall presume to come to us concerning any sort of case without consulting the

⁴. There are three Roman coins named in the Burgundian Code: the *solidus*, the *semissis*, and the *tremissis*. The *solidus* was a gold coin which under Constantine succeeded the *aureus* and continued to be coined until the fall of the Byzantine Empire. In western Europe it was later called the bezant. Originally, the *solidus* was worth about 25 *denarii*, although in the later empire it was reduced to about half that amount; as a medieval money of account it was equal to 12 *denarii*. The *semissis* was a coin minted under the later emperors worth half a *solidus* and said to contain 59.8 grains of gold. The *tremissis* was worth a third of a *solidus*. However, it is hard to give any comprehensible value to these moneys, even in purchasing power, since it would seem almost impossible for the Burgundians of the lower classes to raise the sums which might be levied against them under the terms of the laws. It has been suggested by Professor Summerfield Baldwin of the University of Akron that the establishment of a wergeld (money value) which was placed upon the life of each barbarian, a wergeld described in the laws in terms of Roman money, was an attempt by the barbarians to establish their social and legal equality with the Romans, to set some value upon their lives which might be comprehensible to their Roman subjects, a value which in the barbarian mind represented the inherent worth and dignity of a particular individual, yet also a value which was modified by his special class and position in society. In such a case the wergeld placed upon the life of a man or the composition set for stealing animals or inflicting certain wounds might not necessarily mean that the Burgundian kings meant an actual exchange of money to take place. Instead these values might indicate the relative value placed upon the lives of individuals of different classes, or they might indicate the importance set upon the stealing of certain animals or the inflicting of certain wounds in the minds of the barbarians since their more primitive revenges and compositions would hardly be accepted by their more advanced Roman subjects. On the other hand, the Burgundian kingdom was a well-established federate kingdom in a relatively fertile and rich region, so it might well be that the Burgundians had adopted the use of this Roman money and readily accepted the imposition of money compositions. In order to get some conception of the value of these coins to the Burgundians, we might note some of the wergelds and compositions.

| Wergelds: | Compositions in case of theft: |
|---|-----------------------------------|
| The Unfree (wergeld would be paid to master): | A bondservant—25 <i>solidi</i> |
| An ordinary slave—30 <i>solidi</i> | A "best" horse—10 <i>solidi</i> |
| A slave, Roman or barbarian, ploughman or swineherd— | An ordinary horse—5 <i>solidi</i> |
| 30 <i>solidi</i> | A mare—3 <i>solidi</i> |
| A slave carpenter—40 <i>solidi</i> | An ox—2 <i>solidi</i> |
| A slave blacksmith—50 <i>solidi</i> | A cow—1 <i>solidus</i> |
| A slave silversmith—100 <i>solidi</i> | A pig—1 <i>solidus</i> |
| A slave goldsmith—200 <i>solidi</i> | A sheep—1 <i>solidus</i> |
| A trained house servant or messenger (barbarian)—60 | A beehive—1 <i>solidus</i> |
| <i>solidi</i> | A goat—1 <i>tremissis</i> |
| A royal agent (steward)—150 <i>solidi</i> | A dog—5 <i>solidi</i> |
| A private person's agent (steward)—100 <i>solidi</i> | A falcon—6 <i>solidi</i> |
| The Freemen: | A ship—12 <i>solidi</i> |
| Lower class (<i>minores personae</i>)—150 <i>solidi</i> | A boat—2 <i>solidi</i> |
| Middle class (<i>mediocres</i>)—200 <i>solidi</i> | |
| Nobility (<i>optimates</i>) 300 <i>solidi</i> | |

judges—that is, not having appealed the case for a third time as we have ordered—let him pay the fine which we ordered a negligent judge to pay so that business may not be delayed through avoidance of the appointed judges.

13. Let no Roman or Burgundian count, in the absence of the other judge, presume to decide any case however often they may desire it, so that consulting frequently they may not be in doubt concerning the provisions of the laws.⁵

14. Finally it is pleasing that our constitutions be confirmed with the signatures of the counts added below, so that this statement of the law which has been written as the result of our effort and with the common consent of all may, observed throughout posterity, maintain the validity of a lasting agreement.

Here follow the names of those who have signed the laws and ensuing constitutions and those things which are set forth in the previous pages and which are to be observed in time to come under the guidance of God.

(At this point are appended the seals of the following counts)

| | | |
|-----------|-----------|-----------|
| Abcar | Aumemund | Sunia |
| Aunemund | Aveliemer | Gundeful |
| Unnan | Conigasd | Gundemund |
| Hildeulf | Viliemer | Effo |
| Hildegern | Coniaric | Widemer |
| Usgild | Wallaer | Wadahamer |
| Walest | Siggo | Silvan |
| Aumemund | Fredemund | Fastila |
| Andar | Avenahar | Coma |
| Amgath | Vulfia | |
| Auderic | Sigisvuld | |

⁵ Evidently it was the custom for the justices to sit in pairs, perhaps one Burgundian count and one Roman count making up the court. Cf. G. A. Davoud-Oghlou, *Histoire de la Législation des Anciens Germains*, I, 435.

I OF THE PRIVILEGE OF BESTOWING GIFTS PERMITTED TO FATHERS, AND CONCERNING ROYAL GIFTS AND GRATUITIES.

1. Because nothing concerning the privilege of bestowing gifts which is permitted to fathers, or concerning the gifts (and gratuities) of rulers, has been provided in the laws, we have decreed in the present statute, with the common consent and will of all, that it be permitted to a father to give to anyone from the common property or from the produce of his labor before he makes a division, except that land acquired by allotment (title of lot, *sors*¹ concerning which the arrangement of previous laws will still stand.²

2. If a father has divided (his property) with his sons and offered them their portions, and afterward had one or more sons by another wife, those sons who are by the second wife shall succeed to that portion which the father has acquired (subsequent to the first division):³ and when the father makes a division of his property, these children (of the second wife) can require nothing more from the other children.

¹ The land designated *terra sortis* was that land which a barbarian “guest” was assigned from the property of his Roman “host,” according to the system of hospitality followed in dividing the land between the Burgundians and Romans. Among the Burgundians and Romans the practice seems to have been that the Burgundian received two-thirds of the land and one-third of the slaves of his Roman host. Cf. LIV, 1.

² See XIV, XLII, LI, LIII, LXII, LXXV, and LXXVIII.

³ I.e., apparently that property acquired subsequent to the division among the sons of the first wife.

3. Also it is pleasing that this rule be added to the law, that if any one of our people is known to have received anything in the way of gift from our predecessors, we decree in the present statute that he pass on to his sons that which was given to him out of our largesse.⁴

4. Moreover we decree that if anyone has received anything either from our gift, or shall receive otherwise, God granting, let the text of our gift show it. Further, let it be said that such gifts shall pass to their posterity provided they serve with such devotion and faith that these gifts of our predecessors may be increased and preserved.⁵

II OF MURDERS.⁶

1. If anyone presumes with boldness or rashness bent on injury to kill a native freeman of our people of any nation⁷ or a servant of the king, in any case a man of barbarian tribe, let him make restitution for the committed crime not otherwise than by the shedding of his own blood.

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

3. If a slave unknown to his master presumes to kill a native freeman, let the slave be handed over to death, and let the master not be made liable for damages.

4. If the master knows of the deed, let both be handed over to death.

5. If the slave himself flees (*defuerit*) after the deed, let his master be compelled to pay thirty *solidi* to the relatives of the man killed for the value (wergeld) of the slave.

6. Similarly in the case of royal slaves, in accordance with the status of such persons, let the same condition about murderers be observed.

7. In such cases let all know this must be observed carefully, that the relatives of the man killed must recognize that no one can be pursued except the killer; because just as we have ordered the criminals to be destroyed, so we will suffer the innocent to sustain no injury.

III OF THE EMANCIPATION OF OUR SLAVES.

If it shall be established that any were the freedmen or freedwomen of our ancestors of royal memory, that is, Gibica, Godomar, Gislaharius, Gundaharius, also of our father and our uncle, let them remain in that same state of freedom; whoever among them has been in a servitude of lower status under our ancestors, let them remain under our dominion (*dominium*).

IV OF SOLICITATIONS AND THEFTS.

1. If anyone solicits another's bondservant, or anyone, either native Burgundian or Roman, presumes to take in theft a horse, mare, ox, or cow, let him be killed: and let him who lost the bondservants and animals mentioned above, if he is not able to find them in the possession of the solicitor or thief, receive compensation in fee simple: that is, if he is not able to find that bondservant, for the bondservant, twenty-five *solidi*; for the best horse, ten *solidi*; for an ordinary one, five *solidi*; for the mare, three *solidi*; for the ox, two *solidi*; for the cow, one *solidus*.

⁴ Those who had received land from the king's grant were not allowed to share the property of a Roman host. Cf. LIV, 1.

⁵ Davoud-Oghlou regards this law as an indication of incipient feudalism for it seems to say that those who held land of the king owed some service in return. Cf. Davoud-Oghlou, *op. cit.*, I, 428 (O, 13), 443 (S, 5).

⁶ These killings (*homicidia*) are apparently murders not unpremeditated homicides.

⁷ Nation, i.e., barbarian nation or tribe.

2. If indeed a slave commits the theft, let him be handed over to death: and let the master of the slave requite by a single payment (i.e., in fee simple) and without claim to further damages him who lost those things which were taken away by theft, including the above-mentioned animals which cannot be found, in accordance with the tariff of established prices.

3. And if any native freeman, either Burgundian or Roman, takes in theft a pig, a sheep, a beehive, or a she-goat, let him pay threefold according as their value is established, and in addition, let him pay a fine of twelve *solidi*. Let the composition be for the pig, one *solidus*; for the sheep, one *solidus*; for the beehive, one *solidus*; for the goat, a *tremissis*. Indeed, let their value be paid threefold.

4. If a slave of a Burgundian or of a Roman admits the theft of the afore-mentioned animals (livestock), let the slave be handed over for punishment that he may receive three hundred blows of a stick. Moreover, let the master pay in simple for the crime; and a fine is not required from the master.

5. If a native freeman steals the little bell (*tintinnum*)⁸ attached to a horse, let him return another horse like it (i.e., a horse like the one to which the bell was attached); and let a like provision be observed concerning a lead ox. If a slave take it, let him be beaten.

6. Moreover, if a native freeman steals the hobble (*pedica*)⁹ of a hobbled horse, let him know that a horse of like value must be returned. If a slave commits such an act, let him receive a hundred blows of a stick for each offense.

7. If a native freeman presumes to ride a horse without the owner's permission, let him know that two *solidi* must be given to him to whom the horse belongs if the horse has been taken for a journey of one day only; but if indeed for more than that, let him be held according to that law which we have ordered to be observed concerning horses used for journeys.¹⁰ If a slave does this, let him be beaten.

8. Let him who presumes to do work with the ox of another without the owner's knowledge or permission be compelled to hand over two oxen to the owner.

V OF THOSE WHO STRIKE OTHERS WITH LASH OR ROD, WITH A KICK, OR WITH A BLOW OF THE FIST.

1. If anyone strikes a native freeman with such presumption, let him pay a single *solidus* for each blow, and let him render a fine of six *solidi* to the king's treasury.

2. Whoever strikes another's freedman, let him pay a single *semissis* for each blow; moreover, let the fine be set at four *solidi*.

3. Whoever strikes another's slave, let him pay a single *tremissis* for each blow; moreover, let the fine be set at three *solidi*.

4. If anyone seizes a native freeman violently by the hair, if with one hand, let him pay two *solidi*; if with both hands, four *solidi*; moreover, let the fine be set at six *solidi*.

5. If anyone seizes a freedman or another's slave violently by the hair, either with one hand or with both, it is pleasing that determination of punishment be made as in the case of blows, whether against a freeman, a freedman, or a slave, and so also assessment of both composition and fine is required in cases of this kind.

⁸ 1 Cf. DuCange, *op. cit.*, VI, 592.

⁹ Cf. *ibid.*, V, 173. It is suggested by Davoud-Oghlou that the heavy payment imposed for the theft of a little bell or a hobble—the *pedica* of the animal to which it was attached—results from the fact that the animal could easily become lost without the *tintinnum* or *pedica*. Cf. Davoud-Oghlou, *op. cit.*, I, 415 (L, 11).

¹⁰ The word used here is *invenicicus* which is very obscure. The root seems to be the same as that of *adventicius*, from which is derived the Castilian word *adventicio*, meaning something strange or unusual; the Portuguese word *aduenticio* (*adventiciamente*), meaning adventitious, foreign, strange, extraordinary, and the Italian word *adventiccio*, which seems to mean a stranger, one who has come from abroad. Cf. DuCange, *op. cit.*, I, 97. Substituting the prefix *in* for *ad*, we get a word meaning something or someone coming from within and, when applied to a horse, might refer to a horse used for journeys within the realm or district under consideration. An alternative possibility deriving the word from *vendo* rather than *venio* might give the meaning of “riding horse,” “livery horse,” or a horse “for hire” as related to *venditio* (sale, for sale) or *ventitio* (customs, tax, payment) for which see *ibid.*, VI, 788. Davoud-Oghlou, *op. cit.*, I, 415 (L, 12) suggests only that the man who keeps a horse more than one day shall be considered a thief.

6. If a slave strikes a native freeman with a blow of his fist, let him receive a hundred blows.

7. If indeed a master of a slave engages in a fight (is hard pressed in a struggle) with another and the slave, while wishing to help his master, strikes his master's opponent, let the master pay one *solidus* for the blow struck by the slave.

VI OF FUGITIVES.

1. If anyone seizes a fugitive within the provinces belonging to us, let him receive a *solidus* for the fugitive; and if the fugitive takes a horse with him, let him (the man who seizes the fugitive) receive a *semissis* for a pack horse, a *tremissis* for a mare, and let him return the fugitive with all these things. And if it is without the realm, let him who seizes a fugitive receive two *solidi* for the fugitive, and for the horse one *solidus*, for the mare a *semissis*.

2. Let him who has followed a fugitive, and by chance kills him while resisting, be free from all blame (prosecution); or if he who follows is struck by the fugitive, let no blame attach to the master of the fugitive.

3. If a fugitive is captured by anyone, either Burgundian or Roman, and he escapes his custody by chance, let him from whom he fled swear that he had escaped without his collusion or knowledge, and after an oath has been given as stated above, let him suffer no blame.

4. Whoever unintentionally provides a native freeman or slave who is a fugitive with false hair (*capillum fecerit*),¹¹ let him forfeit five *solidi*; if he provides him with such hair intentionally, let him be compelled to pay the wergeld of the fleeing man.

5. Whoever intentionally aids a fugitive to cross a river, let him suffer the punishment of an accomplice (solicitor).

6. If a fugitive shall escape, let him (from whose custody he fled) take oath that the escape was made neither by his own collusion, as stated above, nor by the collusion of his slaves, and that he escaped his bonds neither with his nor with their knowledge.

7. If indeed he will not give such an oath, let him pay fifteen *solidi* for the fugitive.

8. But if it happens that he (the fugitive) escaped with his collusion, he who allowed him to escape shall be compelled to pay thirty *solidi*. If indeed he who is seized takes with him something belonging to his master or to another and exhibits it in the house of the man from whose custody he escaped (with his consent), let that man restore it singlefold.

9. If a native freeman intentionally gives bread to a fugitive of a Burgundian or of a Roman, let him bring him back. If unintentionally he gives him bread, or helps him across a river, or shows him the road, let him suffer no loss after an oath has been given.

10. If a native freeman, knowing him to be a fugitive, gives letters¹² to the fugitive to aid his escape, let him be condemned to the loss of a hand; if a slave does this, let him be condemned to the loss of a hand after receiving three hundred blows.

¹¹ There is some difficulty with the phrase *capillum fecerit*, but it probably means "to provide with false hair," i.e., with a wig. Since loss of the hair was particularly degrading to a barbarian, it might well be that a slave might have his head shaved and that he would need a wig to conceal the fact that he was a fugitive slave. But the law mentions *freeman* or slave. Here we can only guess that the freeman had been apprehended for some crime and had his head shaved, and then escaped; or simply that he wanted a wig to conceal or disguise his identity. For other possibilities, cf. Davoud-Oghlou, *op. cit.*, I, 417, n. 1.

¹² Perhaps letters of direction or just possibly forged documents of manumission.

VII OF SLAVES (*Servi*) AND SERFS (*Originarii*) WHO ARE ACCUSED OF CRIMES.¹³

This procedure will be observed among Burgundians and Romans: if a crime is charged by anyone which cannot be proved at the present, we order that it be observed that whether it be the slave (*servus*) of Burgundian or Roman who is accused of the crime, let his master not be compelled to take oath either for slave (*servus*) or serf (*originarius*); but when a crime has been charged, either let the value of the slave (*servus*) or serf (*colonus*) be established according to his condition, which (value) the master to whom the slave (*servus*) or serf (*colonus*) belongs shall receive from the accuser in person, or let him (the master) receive a slave (*mancipium*) of like value. When this has been done thus, let him who has been charged with the crime be handed over to a judge for torture so that if he shall have admitted by confession that which is charged, let the man (who brought the charge) receive back the wergeld which he had given (to the master of the slave). Then let the slave (*servus*) be killed for the confessed crimes so that the penalty which has been established above may be observed. But if, however, the slave (*servus*) or serf (*colonus*) shall not have confessed under torture, let him who made the charge make restitution to his master: let the master obtain either a substitute slave (*servus*), whom he receives on account of the punishment of an innocent slave (*servus*), or let him keep the wergeld (which the man who brought the charge was obliged to give the master of the slave against whom the charge was brought).

VIII OF THE COMMISSION OF CRIMES WHICH ARE CHARGED AGAINST NATIVE FREEMEN.¹⁴

1. If a native freeman, either barbarian or Roman, is accused of a crime through suspicion,¹⁵ let him render oath, and let him swear with his wife and sons and twelve relatives: if indeed he does not have wife and sons and he has mother or father, let him complete the designated number with father and mother. But if he has neither father nor mother, let him complete the oath with twelve relatives.

2. But if he who must take oath wishes to take it with raised hand (*de manu*), and if those who are ordered to hear the oath—those three whom we always command to be delegated by the judges for hearing an oath—before they enter the church declare they do not wish to receive the oath, then he who was about to take oath is not permitted to do so after this statement, but they (the judges) are hereby directed by us to commit the matter to the judgment of God (i.e., to ordeal).¹⁶

3. If however, having received permission, he has taken the oath, and if he has been convicted after the oath, let him know that he must make restitution by a ninefold payment (*in novigildo*) to those in whose presence the judge ordered him to give his oath.

4. But if they (those appointed to hear the oath) fail to come to the place on the appointed day, and if they shall not have been detained by any illness or public duty, let them pay a fine of six *solidi*. But if they were detained by any illness or duty, let them make this known to the judge or send other persons in their place whom they can trust to receive the oath for them.

5. If moreover he who is about to take the oath does not come to the place, let the other party wait until the sixth hour of the day; but if he has not come by the sixth hour, let the case be dismissed without delay.

¹³ At this period there is no clear distinction between the *servi* and *mancipia* in the unfree status and between the *coloni* and *originarii* in the semifree status. That this is true is quite clear in this law where *servi* and *mancipia* seem to be used interchangeably, while the same thing is true of *coloni* and *originarii*. Perhaps it is a mistake, however, to translate *colonus* and *originarius* as “serf,” for they are not yet serfs in a strictly medieval sense, they are closer to the unfree in status and might even be sold away from the land with which they were associated. For *servus*, cf. DuCange, *op. cit.*, VI, 221; for *mancipium*, *ibid.*, IV, 218; for *colonus*, *ibid.*, II, 441; and for *originarius*, *ibid.*, IV, 734. Cf. LXXVII.

¹⁴ Cf. XLV.

¹⁵ Not a Roman technical term, but a perfectly good Latin word meaning pretty much what it means in English. See *Digest* 48.19.5: The emperor Trajan ordered that “no one should be condemned on the ground of suspicion alone.” (The phrase is followed by the famous aphorism: “It is better to leave the crime of the guilty unpunished than to condemn the innocent.” Ed.)

¹⁶ I have no confidence in the translation of this passage. Perhaps what it says is: “But if he to whom the oath is to be sworn (presumably the accuser) wishes to take the oath from him (the accused) out of his hand, ...” The rest follows pretty much as Drew has it, except that at the end what it probably means is “they (i.e., both the accuser and the accused) are directed to us, to be committed to the judgment of God.” (The slight difference in translation leading at least to the possibility that the judgment of God here is battle [between the two of them] rather than ordeal.) Ed.

6. But if the other (the accusing party) does not come, let him who was about to take the oath depart without loss.¹⁷

IX OF ACTS OF VIOLENCE

If any Burgundian or Roman shall take away anything, even a young animal, we order him who took it away to pay the price which has been set by us ninefold.

X LET BURGUNDIANS AND ROMANS BE HELD UNDER THE SAME CONDITION IN THE MATTER OF KILLING SLAVES

1. If anyone kills a slave, barbarian by birth, a trained (select) house servant or messenger, let him compound sixty *solidi*; moreover, let the amount of the fine be twenty *solidi*. If anyone kills another's slave, Roman or barbarian, either ploughman or swineherd, let him pay thirty *solidi*.

2. Whoever kills a skilled goldsmith, let him pay two hundred *solidi*.

3. Whoever kills a silversmith, let him pay one hundred *solidi*.

4. Whoever kills a blacksmith, let him pay fifty *solidi*.

5. Whoever kills a carpenter, let him pay forty *solidi*.

XI OF INFLICTED WOUNDS.

1. Whoever cuts off with a blow the arm of a man, either a freeman or slave, let him compound half his wergeld; if he does not cut the arm off, let him be judged according to the nature of the wound.

2. If anyone inflicts a wound on another's face, we order him to pay three times the price in fee simple established for wounds on a part which is protected by clothing.

XII OF THE STEALING OF GIRLS.

1. If anyone shall steal a girl, let him be compelled to pay the price set for such a girl ninefold, and let him pay a fine to the amount of twelve *solidi*.

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

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

4. If indeed, the girl seeks the man of her own will and comes to his house, and he has intercourse with her, let him pay her marriage price threefold; if moreover, she returns uncorrupted to her home, let her return with all blame removed from him.

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

XIII OF CLEARINGS (*Exarti*).

If anyone, Burgundian as well as Roman, makes a clearing in the common forest, let him give another such tract of forest to his host (or guest as the case may be), and let him possess the clearing which he made without any disturbance¹⁸ by his host (or guest).

¹⁷ The Latin of 8.3-6 is not as clear as the translation. Ed.

¹⁸ Here for the word *commotione* Beyerle substitutes *communione*, a reading given by the larger number of manuscripts (A 3, B 2, :3, 11; *communione* A 4, B 1, 8; *commune* B 5). This would change the law to read: "If anyone Burgundian as well as Roman, makes a clearing in the common forest, let him give another such tract of forest to his host (or guest as the case may be) and let him possess the clearing which he made without any community of possession shared with his host (or guest)." Cf. Franz Beyerle, *Gesetze der Burgunden, Germanenrechte*, Band 10, 28; and De Salis, *op. cit.*, p. 52.

XIV OF SUCCESSION.

1. Among Burgundians we wish it to be observed that if anyone does not leave a son, let a daughter succeed to the inheritance of the father and mother in place of the son.

2. If by chance the dead leave neither son nor daughter, let the inheritance go to the sisters or nearest relatives.

3. It is pleasing that it be contained in the present law that if a woman having a husband dies without children, the husband of the dead wife may not demand back the marriage price (*pretium*) which had been given for her.

4. Likewise, let neither the woman nor the relatives of the woman seek back that which a woman pays when she comes to her husband if the husband dies without children.

5. Concerning those women who are vowed to God and remain in chastity, we order that if they have two brothers they receive a third portion of the inheritance of the father, that is, of that land which the father, possessing by the right of *sors* (allotment), left at the time of his death. Likewise, if she has four or five brothers, let her receive the portion due to her.

6. If moreover she has but one brother, let not a half, but a third part go to her on the condition that, after the death of her who is a woman and a nun, whatever she possesses in usufruct from her father's property shall go to the nearest relatives, and she will have no power of transferring anything therefrom, unless perhaps from her mother's goods, that is, from her clothing or things of the cell (*rescellulae*),¹⁹ or what she has acquired by her own labor.

7. We decree that this should be observed only by those whose fathers have not given them portions; but if they shall have received from their father a place where they can live, let them have full freedom of disposing of it at their will.

XV OF STARTING A FIGHT.

1. If any freeborn Burgundian enters another's house to fight, let him pay six *solidi* to him to whom the house belongs; and let the fine be twelve *solidi*. Furthermore we wish this to be observed equally among Burgundians and Romans.

2. Indeed if a slave enters another's house by force or violence, let him receive a hundred blows for punishment, and let the master of the slave suffer no loss on that account.

XVI OF HUNTING FOR ANIMALS.

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

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

3. If there is a way-pointer (tracker, *veius*)²⁰ present and he has received his payment (*vegiatura*) and he to whom he points the way is not able to find them (the animals), let the way-pointer (tracker, *veius*) pay for the theft in fee simple because he lies that he has pointed the way to them.

¹⁹ *Rescellulae* seems to be a compound of *res* and *cellulae*. *Res* is the classical Latin "things" while *cellula* is vulgar Latin for "nun's room" or "apartment." So *rescellulae* may mean "things" or "trappings of the cell."

²⁰ Cf. DuCange, *op. cit.*, VI, 753-54. The word *vegius* seems to refer to some type of soothsayer, prophet, or diviner (*harioli*, *vates*, *divini*) whom the Saxons call *vigileri* and the Germans *viclars*, whence *viglias* means soothsayers, for these consult the auspices to determine whether slaves and animals have been taken away by theft so that they might point out where they are. The payment for providing this information is called *vegiaturum*. Others deduce a meaning from the Saxon word *veg* or *vaeg*, which means a road, thus they are road-pointers (*vegi*) who point out the tracks of animals. Cf. XCV.

XVII OF OTHER CASES AND THE REMOVAL OF LIABILITY FOR PUNISHMENT.

1. All cases which involve Burgundians and which were not completed before the Battle of Chalons²¹ are declared dismissed.

2. If anyone shall identify his slave or maidservant, let him receive him back.²²

3. For a freeman killed previously twenty *solidi* may be imposed and let all further prosecution cease.

4. And also we wish it to be particularly observed, that if any Burgundian has been twice admonished for any cause by him who brings a case against him that he should come to court and provide a guarantor (oathtaker)²³ and, if he does not provide a guarantor (oathtaker) or come to court, and the summoner is able to prove this fact with two or three native freeborn witnesses, let him (the man who refused to come to court) pay a fine of six *solidi* and nonetheless be compelled to come to judgment.

5. With the further condition that a Roman freeman who has a case with a barbarian (serf) should admonish either his master or his overseer (actor), and if the overseer shall not come after he has been admonished repeatedly (twice?) to reply to the charge in behalf of the serf (*originarius*) committed to him, let the overseer receive a hundred blows.

XVIII OF THOSE THINGS WHICH HAPPEN BY CHANCE.

1. If any animal by chance, or if any dog by bite, causes death to a man, we order that among Burgundians the ancient rule of blame²⁴ be removed henceforth: because what happens by chance ought not to conduce to the loss or discomfiture of man. So that if among animals, a horse kills a horse unexpectedly, or an ox gores an ox, or a dog gnaws a dog, so that it is crippled, let the owner hand over the animal or dog through which the loss is seen to have been committed to him who suffers the loss.²⁵

2. In truth, if a lance or any kind of weapon shall have been thrown upon the ground or set there without intent to do harm (*simpliciter*), and if by accident a man or animal impales himself thereupon, we order that he to whom the weapon belongs shall pay nothing unless by chance he held the weapon in his own hands in such a manner that it could cause harm to a man.²⁶

XIX OF THE REMOVAL OF PLEDGES AND GUARANTORS (OATHTAKERS).

1. If anyone removes pledges of any sort whatsoever before the hearing, let him lose his case, and let him pay a fine of twelve *solidi*.

²¹ The Battle of Chalons or of Mauriac (the *Lex Gundobada* refers to it as *pugna Mauriacensis*) is the battle which took place in 451 in which a federate army of Romans and barbarians under Aetius faced an invasion of the Huns who, under their leader, Attila, were threatening to subjugate all of Gaul. To face this threat, Aetius got together an army consisting of imperial troops and Franks, Burgundians, Bretons, and Visigoths. The Huns were turned back at Chalons, but Theodoric, king of the Visigoths and the most influential of the barbarian leaders at this time, was killed. That the date 451 seemed an important one to the barbarians is attested by the fact that the year 451 is a delimiting date in the *Lex Gundobada* and in the Visigothic code of Euric. Cf. *Frag. Visig. (Antiqua)*, ed. Bluhme, p. 4).

²² Davoud-Oghlou suggests that a master may seek back such an identified slave even when the loss of the slave dated prior to the Battle of Chalons. Cf. Davoud-Oghlou, *op. cit.*, I, 420 (L, 48).

²³ *fideiussor*, Roman technical term, meaning something like our "surety." Whether the word is meant here in its Roman technical sense or a different technical sense more like that of the mainpneror or pledge of the English common law is a matter about which we may have some doubt. Ed.

²⁴ By the phrase "the ancient rule of blame" [*inter Burgundiones antiquam calumniam*] perhaps this statute is referring to the earlier customary law of the Burgundians that was in effect among the people of that tribe before they entered the Roman Empire and came into contact with the written Roman law. Perhaps this is a reference to the early Germanic *faida* or law of revenge, for our law here seems to imply that under the "ancient rule of blame" a man was held personally accountable for the actions of his animals. Cf. *ibid.*, I (C, 2).

²⁵ De Salis, *op. cit.*, p. 56, n. 3, suggests that it is probable that the legislator wished to follow the Roman law in this instance since he states specifically that the ancient Burgundian law has been abolished or replaced.

²⁶ Cf. XII Tables, VIII.24a: "If a javelin flies from the hand more than he threw it, a ram is substituted [i.e., for the execution of the person who threw the javelin]." It is just possible that some of the Romans living in Burgundy knew of this provision. Ed.

2. If anyone takes another's horse as if identified for his own, and is not able to prove it his, let him be sentenced to the loss of another (additional) horse of like worth.

3. If anyone receives pledges (*pigneraverit*) (from a third party) in behalf of him with whom he thinks he has a case and he does not have a case with that person, if he has taken horses or oxen or seized a bondservant, let him pay two *solidi* for each bondservant and animal (and return the pledges).²⁷

4. If he has taken a native freeborn person as a pledge, let him pay four *solidi* for this presumption.

5. If anyone is a guarantor (oathtaker) for his relative, or friend, or for anyone for any debt whatsoever, and if he (the debtor) who has departed while under oath (pledge) has been warned three times in the presence of witnesses, and if he (the debtor), still under pledge after this warning, has been convicted of removing the pledges of his guarantor (oathtaker) by force, so that it was necessary that the guarantor (oathtaker) be bound and forced to pay the debt from his own property, then let whatever it has been established that the guarantor (oathtaker) paid in this case be rendered threefold by him in whose behalf he took the oath (or, in whose behalf he gave pledges).

6. The manner of giving pledges shall be this: let the guarantor (oathtaker) raise a third part more than the sum of the debt (i.e., the total debt) and let him make declaration to the debtor in the presence of witnesses. But if when the debt has been paid, he (the guarantor) shall not take back his pledges within three months thereafter, he shall no longer have the right (*pontificium*)²⁸ of seeking them back.

7. If he who offers a guarantor (oathtaker) does not have the wherewith to pay, let the guarantor (oathtaker) hand the debtor over to the creditor to clear himself, and let nothing else be required from the guarantor (oathtaker).

8. But if he has failed to pay what it has been established that he owes (*quod placitum est*), and it shall be necessary that the guarantor (oathtaker) be bound and compelled to pay the debt from his own property, let satisfaction be received by the guarantor who offered the oath (or pledges) threefold whatever it is established he has paid in this case.

9. If any guarantor (oathtaker) hands over a debtor's property to him to whom the guarantor (oathtaker) has given pledges, let him bring it up to the creditor's house in his own defense (to satisfy his obligation); if he does not do it, let him not be wholly released from his obligation.

10. If a guarantor (oathtaker) does not wish to render satisfaction in a debtor's behalf, under circumstances where it shall be necessary that the guarantor (oathtaker) pledge his own property, and if the guarantor (oathtaker) wishes to resist, let him make satisfaction (to the creditor) from his own property in such amount as may be demanded from him on account of his oath (i.e., as due on his oath).

11. If a debtor places a guarantor (oathtaker) under pledge and he (the debtor) in whose behalf the guarantor (oathtaker) has given pledges shall believe that the pledges of his guarantor (oathtaker) or his own pledges, if the guarantor (oathtaker) has given them, may be taken away or destroyed, let him pay ninefold the amount he is convicted of taking away and let him pay a fine in the sum of twelve *solidi*.

XX OF THEFTS COMMITTED BY FUGITIVES.

1. If any slave has fled, and while in flight steals any ornaments, clothes, or anything belonging to anyone and takes them with him, let none of these things be sought back from the master of the slave; provided only that if the master is able to recall him from his flight and the slave is convicted of having stolen anything, let him (the master) make restitution in fee simple.

2. If a slave has committed the theft while under the dominion (*in obsequio*) of his master, and if he flees after committing the theft, let his master prove by oaths that he should not be held liable to punishment

²⁷ The law does not specifically state "and return the pledges," but it is obviously implied. Cf. Davoud-Oghlou, *op. cit.*, I, 450 (T, 4).

²⁸ For this unusual meaning of the word *pontificium* as *potestas* or *ius*, cf. DuCange, *op. cit.*, V, 347. See also Title XL, 1.

either for the theft or for the flight of the slave because of his own knowledge about the matter. But when he has given oath, nothing may then be sought from the master of the slave.

3. Indeed, those who seize fugitives must send them back to their masters; and besides that *solidus* which is due for a fugitive within the realm, he shall receive a *solidus* for a journey of one hundred miles²⁹ on which he has sent some messenger or brought news of the matter himself.

4. But if he does not deliver him and the fugitive escapes, and if he has not delivered him within thirty days, let him absolve himself either by oaths as stated above, or let him pay fifteen *solidi* for the fugitive.

XXI OF CONTRACTS ENTERED INTO BY SLAVES.

1. If anyone, Burgundian as well as Roman, lends money to a serf or slave without consulting his master, let him lose the money.

2. Indeed whoever has permitted a slave to exercise his assigned occupation in public as gold, silver, iron, or bronze smith, tailor or shoemaker, and perchance the slave destroys what he has received from anyone to work upon, let his master render satisfaction for the same, or if he chooses, let him give up the servant to the man who has suffered loss.

XXII OF THE ABOLITION OF THE ADVOCACY (*Patrocinium*)³⁰ OF BARBARIANS IN LAWSUITS INVOLVING ROMANS.

Whatever Roman hands over a case which he has with another Roman to be transacted by a Burgundian as advocate, let him lose the case, and let him who receives it pay a fine in the amount of twelve *solidi*.

XXIII OF INJURIES WHICH ARE CAUSED BY ANIMALS.

1. If a man has enclosed or shut away an animal from his crops or from any place where it can do damage, and if the man to whom the animals belong drives them by force out of the courtyard of him who confined them as a voluntary act of presumption before the value of the damage done has been established, let him pay six *solidi* to him against whom he used force and let there be a fine of six *solidi* for the estimated loss. If a slave does this, let him receive a hundred blows; likewise concerning the estimated loss.

2. If any animal is impaled while being driven from a field, from a meadow, from a vineyard, or from a wheat field, let nothing be required from him who was driving it away.

3. But if a man undertakes to remove animals belonging to himself from a field or from any place while they are being guarded in an enclosure because of the damage they have done, let him pay a single *tremissis* for each animal, and let the amount of the fine be three *solidi*.

4. If anyone's pigs have done damage in a vineyard, in the meadows, in the tilled fields, or in the acorn-bearing forests, and the master of the pigs has been warned twice that he must guard his pigs, and he does not wish to, let him to whom they did the damage have the power to kill the best from the herd of pigs and turn it to his own use.

5. But if there is no contest (i.e., the master has not been warned), and so the man damaged kills the pig, let him pay a *solidus* for the pig, with the further provision that that which the pigs have destroyed will be compounded.

²⁹ The Latin here is not clear as to whether it means that the man will receive a *solidus* for each hundred miles which he travels, or whether he will receive a *solidus* for a journey of a hundred miles or more. The first alternative seems the more probable.

³⁰ The *patrocinium* or *advocatus* represents a wide variety of legal powers. The advocate was originally a person called or summoned (*advocatus*) by the injured party to assist at court, one who might exercise a moral influence on the judge because of his position or prestige. This advocacy was termed *patrocinium* in cases where the patron of an enfranchised serf acted as such an advocate. The custom of appearing and speaking in behalf of the client became established among the advocates and patrons who knew the laws better, owing to their social position and the fact that they had more talent in pleading cases before the courts. The personal relationship between patron and client involved in the *patrocinium* is generally regarded as one of the basic legal institutions which underlies the later feudal relation of lord and vassal. Cf. Davoud-Oghlou, *op. cit.*, I, 439, n. 2, and DuCange, *op. cit.*, V, 116.

XXIV OF BURGUNDIAN WOMEN ENTERING A SECOND OR THIRD MARRIAGE.

1. If any Burgundian woman, as is the custom, enters a second or third marriage after the death of her husband, and she has children by each husband, let her possess the marriage gift (*donatio nuptialis*) in usufruct while she lives; after her death, let what his father gave her be given to each son, with the further provision that the mother has the power neither of giving, selling, or transferring any of the things which she received in the marriage gift.

2. If by chance the woman has no children, after her death let her relatives receive half of whatever has come to her by way of marriage gift, and let the relatives of the dead husband who was the donor receive half.

3. But if perchance children shall have been born and they shall have died after the death of their father, we command that the inheritance of the husband or children belong wholly to the mother. Moreover, after the death of the mother, we decree that what she holds in usufruct by inheritance from her children shall belong to the legal heirs of her children. Also we command that she protect the property of her children dying intestate.

4. If any son has given his mother something by will or by gift, let the mother have the power of doing whatever she wishes therewith; if she dies intestate, let the relatives of the woman claim the inheritance as their possession.

5. If any Burgundian has sons (children?) to whom he has given their portions, let him have the power of giving or selling that which he has reserved for himself to whomever he wishes.

XXV OF THEFTS AND ACTS OF VIOLENCE.

1. If anyone enters a garden with violence, let him pay three *solidi* for such presumption to him to whom the garden belongs, and let the fine be six *solidi*.

2. If a slave does this, let him receive a hundred blows.

XXVI OF KNOCKING OUT TEETH.

1. If anyone by chance strikes out the teeth of a Burgundian of the highest class, or of a Roman noble, let him be compelled to pay fifteen *solidi*.

2. For middle-class freeborn people, either Burgundian or Roman, if a tooth is knocked out, let composition be made in the sum of ten *solidi*.

3. For persons of the lowest class, five *solidi*.³¹

4. If a slave voluntarily strikes out the tooth of a native freeman, let him be condemned to have a hand cut off; if the loss which has been set forth above has been committed by accident, let him pay the price for the tooth according to the status of the person.

³¹ The divisions of Burgundian and Roman society in the realm of the Burgundians are not at all clear. In addition to the royal servants and officials mentioned in the preface, *Constitutiones Extravagantes* XXII, 14, and various laws throughout the *Lex Gundobada*, we have a more general division of all society into free and unfree with the *coloni* or *originarii* occupying a halfway position between those who were free and those who were not free. The present law, XXVI, deals with four classes of free men: the highest, middle, and lowest classes of men who were free from birth, and the freedmen or slaves who had been emancipated by their masters or who had earned their freedom in some way. The freedman is obviously quite low in the social scale when we observe these tariffs, but the children of freedmen were regarded as freemen, and even the freedman himself might gain that status following the death of his former master (cf. XL, 2). However, we have no indication as to how the distinctions among the freemen were determined. We may assume that the nobles, the *optimates*, constituted the highest class, but as for the two lower classes, there is no basis for the distinction stated anywhere in the *Lex Gundobada*, although from the tenor of the laws it seems that the middle class was more closely connected with the highest class than with the lowest class. The caste line between the free and unfree was sharply drawn, for the daughter of a freeman who united with a slave faced a penalty of death or perpetual servitude to the king (cf. XXXV, 2, 3), but intermarriage among the classes of freemen was evidently quite common. We have no indication as to what the status of the offspring of such a mixed marriage might be however. The chief distinction between the classes of freemen as far as the materials within the *Lex Gundobada* are concerned is the difference in the *wergeld* or value attached to the life of each man. Cf. II, 2.

5. If any native freeman strikes out the tooth of a freedman, let him pay him three *solidi*. If he strikes out the tooth of another's slave, let him pay two *solidi* to him to whom the slave belongs.

XXVII OF BROKEN FENCES, CLOSED ROADS, ALSO THEFTS AND ACTS OF VIOLENCE.

1. If a native freeman breaks and opens another's fence when subject to no impedient (impairment) therefrom, only for the purpose of causing such damage, let him pay a single *tremissis* for each stake to him to whom the crop belongs; if a slave does this, let him receive a hundred blows, and let the fence which was broken be repaired.

2. We also command this to be observed concerning meadows and vineyards.

3. We wish all to recognize this: whoever blocks a public road (i.e., a main highway) or a country lane, let him know that he must pay a fine of twelve *solidi*, with the further consequence that the fence may be removed and the crops may be destroyed with impunity by travellers to the extent that they occupy space on the highway.

4. If a native freeman breaks another's fence and lets his horses or animals voluntarily into a field or meadow, he shall pay a single *solidus* for each animal for the damage to the crop or to the meadow.

5. If a slave does this, let him receive a hundred blows; and furthermore, let the damage which was done be compounded by the master of the slave.

6. If he to whom the horses belong is found by the owner of the meadow, and attempts to resist when he is held to an accounting, and if he shall then be slain or injured, let him to whom the field or meadow belongs suffer no loss (legal accountability) therefrom.

7. If anyone has entered another's vineyard secretly or violently by day so that he causes loss, let him pay three *solidi* for this presumption; if a slave does this, let him be killed.

8. If anyone at night has entered a vineyard bearing fruit and has been killed by the keeper of the vineyard within the vineyard, let nothing be required by the master or relatives of the man killed.

9. If a native freeman steals a ploughshare by theft, let him be compelled to give to the master two oxen with yoke and attachments (harness); if a slave does this, let him receive one hundred fifty blows of a stick.

XXVIII OF THE PRIVILEGE OF CUTTING WOOD GRANTED IN COMMON.

1. If any Burgundian or Roman does not have forest land, let him have the right to cut wood for his own use from fallen trees or trees without fruit in anyone's forest, and let him not be driven away by the owner of the forest.

2. If perchance anyone fells a fruit-bearing tree in another's forest without the owner's permission, let him pay the owner of the forest one *solidus* for each tree he has cut. We command this to be observed also with regard to pines and fir trees. But if a slave does this, let him be beaten and let his master suffer no loss or blame.

3. If anyone does not permit a man to take the wood necessary for his use from the fallen trees or those not bearing fruit, and if the man seeking wood offers pledges to him, let the pledges be returned threefold, and let a fine of six *solidi* be paid.

XXIX OF THOSE COMMITTING ASSAULT AND BREACH OF THE PEACE.

1. If anyone in an act of assault or robbery kills a merchant or anyone else, let him be killed; with the further condition that if those things which he took cannot be found, let them be compensated in fee simple from his property.

2. But if a man committing an assault shall have been killed by those whom he intended to rob, let no suit be brought for this reason against the killers by the master or relatives of the man killed.

3. We order all lawbreakers who plunder houses or treasure chests to be killed.

XXX OF WOMEN VIOLATED.

1. Whatever native freeman does violence to a maidservant, and force can be proved, let him pay twelve *solidi* to him to whom the maidservant belongs.
2. If a slave does this, let him receive a hundred fifty blows.

XXXI OF PLANTING VINEYARDS.

1. Among Burgundians and Romans, we order that the rule be observed that whoever plants a vineyard in a common field with no opposition shall restore a like field to him in whose holding he placed the vineyard.
2. If indeed after prohibition anyone presumes to plant a vineyard in another's field, let him lose his labor, and let him whose field it is receive the vineyard.

XXXII OF HIM WHO HAS BOUND A MAN ILLEGALLY OR WITHOUT CAUSE.

1. If a native freeman binds an innocent native freeman, let him pay twelve *solidi* to him whom he bound, and let the amount of the fine be twelve *solidi*.
2. If he binds a freedman, let him pay six *solidi* to him whom he bound, and let the amount of the fine be six *solidi*.
3. If he binds a slave, let him pay him three *solidi*, and let the amount of the fine be three *solidi*.
4. If a slave does this, let him receive a hundred blows.

XXXIII OF INJURIES WHICH ARE SUFFERED BY WOMEN.

1. If any native freewoman has her hair cut off and is humiliated without cause (when innocent) by any native freeman in her home or on the road, and this can be proved with witnesses, let the doer of the deed pay her twelve *solidi*, and let the amount of the fine be twelve *solidi*.
2. If this was done to a freedwoman, let him pay her six *solidi*.
3. If this was done to a maidservant, let him pay her three *solidi*, and let the amount of the fine be three *solidi*.
4. If this injury (shame, disgrace) is inflicted by a slave on a native freewoman, let him receive two hundred blows; if a freedwoman, let him receive a hundred blows; if a maidservant, let him receive seventy-five blows.
5. If indeed the woman whose injury we have ordered to be punished in this manner commits fornication voluntarily (i.e., if she yields), let nothing be sought for the injury suffered.

XXXIV OF DIVORCES.

1. If any woman leaves (puts aside) her husband to whom she is legally married, let her be smothered in mire.
2. If anyone wishes to put away his wife without cause, let him give her another payment such as he gave for her marriage price, and let the amount of the fine be twelve *solidi*.
3. If by chance a man wishes to put away his wife, and is able to prove one of these three crimes against her, that is, adultery, witchcraft, or violation of graves, let him have full right to put her away: and let the judge pronounce the sentence of the law against her, just as should be done against criminals.
4. But if she admits none of these three crimes, let no man be permitted to put away his wife for any other crime. But if he chooses, he may go away from the home, leaving all household property behind, and his wife with their children may possess the property of her husband.

XXXV OF THE PUNISHMENT OF SLAVES WHO COMMIT A CRIMINAL ASSAULT ON FREEBORN WOMEN.

1. If any slave does violence to a native freewoman, and if she complains and is clearly able to prove this, let the slave be killed for the crime committed.
2. If indeed a native free girl unites voluntarily with a slave, we order both to be killed.

3. But if the relatives of the girl do not wish to punish their own relative, let the girl be deprived of her free status and delivered into servitude to the king.

XXXVI OF INCESTUOUS ADULTERY.

If anyone has been taken in adultery with his relative or with his wife's sister, let him be compelled to pay her wergeld, according to her status, to him who is the nearest relative of the woman with whom he committed adultery; and let the amount of the fine be twelve *solidi*. Further, we order the adulteress to be placed in servitude to the king.

XXXVII OF DRAWN SWORDS.

Anyone who draws out his sword or dagger for striking another, and does not strike him, let him pay a fine of twelve *solidi*. If he strikes him, let him likewise pay twelve *solidi* and be judged according to the inflicted wound.

XXXVIII OF THE REFUSAL OF HOSPITALITY³² TOWARD LEGATES OF FOREIGN TRIBES AND TRAVELERS.

1. Whoever refuses his roof or hearth to a guest on arrival, let him be fined three *solidi* for the neglect.
2. If a member of the royal court be refused, let the amount of the fine be six *solidi*.
3. We wish it to be observed concerning the legates of foreign tribes, that wherever they take quarters, they have the right to expect one pig and one sheep; and let him who prohibits this from being done be compelled to pay a fine of six *solidi*.
4. And let him who made gifts to the legates be compensated by those who live within the boundaries of his village.
5. Moreover, if in the wintertime a legate asks for hay or barley, let this likewise be provided by those dwelling within the bounds of the village, Burgundian as well as Roman, without any refusal. We order this to be observed especially by people of higher rank.
6. If, however, he is a person who has been the beneficiary of our largesse and so can receive a legate, let him prepare a suitable lodging for a night for the legate at his own expense. But if he does not do this, let him know that a fine of twelve *solidi* must be paid.
7. If a man making a journey on private business comes to the house of a Burgundian and seeks hospitality and the latter directs him to the house of a Roman, and this can be proved, let the Burgundian pay three *solidi* to him to whose house he directed the traveller, and let the amount of the fine be three *solidi*.
8. If anyone seeks hospitality on the royal domain or at the dwelling of a serf (*colonus*)³³ and it is not granted, let the serf be beaten.
9. If moreover the guest destroys something insolently, let him restore it ninefold.

³² Hospitality here is used in the more general or common sense meaning that reception or kindness which is shown to a temporary guest. We have here something which resembles the later feudal duty of entertainment required of a vassal or a tenant. *Hospitalitas* was not only permitted to officials who were *in truste* of the king, but it was also extended to legates from abroad charged with missions to the king. All such persons enjoyed the full hospitality which the law imposed on the inhabitants of the districts through which they travelled. Cf. Davoud-Oghlou, *op. cit.*, I, 446. Indeed, the principle of *hospitalitas* seems to have been extended to all persons such as royal officers and personal legates who may be regarded as *in truste* of the king. These officials are apparently the Burgundian equivalents of the *antrustiones* among the Franks. Most of these officials were not only associated with the judicial system but also charged with administrative and police duties; furthermore in time of war these trusted personal servants of the king acted as officers in command of the military forces, that is, the same officials acting in their military capacity in war may be described as *in hoste*, whereas in time of peace, they were declared to be *in truste* in the sense of persons in the intimate personal retinue of the king who enjoyed his trust and confidence.

³³ Among the Merovingian Franks and probably also among the Burgundians, the *coloni* were lower in the social scale than the actually free men. The *coloni* were freeborn persons and were recognized as persons before the law, but they enjoyed only a limited freedom. They held land from which they could not be ejected, but which they might not leave. Even though they were left unharassed when they paid certain dues and performed certain duties, the fact that they were enrolled on the land deprived them of real freedom. Cf. Gregory of Tours, *The History of the Franks*, translation and introduction by O. M. Dalton, I, 391.

10. If there is a steward (*conductor*) in the village who is a native freeman, and he does not provide roof or hearth, let him pay a fine of three *solidi*. If he is a slave, let him be beaten.

11. We wish these things to be observed by the serfs and slaves of all Burgundians and Romans.

XXXIX OF RECEIVING STRANGERS.

1. If anyone receives a stranger coming to him from any nation, let him present him to the judge for investigation so that he may confess under torture to whom he belongs.

2. But if anyone does not do this within seven days, and the matter is learned by the master of the slave, let him with whom the slave has been found be held to a triple payment of the slave's wergeld; those slaves are excepted who have been carried away into captivity and would return to their masters, relatives, and homes.

3. If however a stranger shall have been received or concealed by the agent or serf of anyone whomsoever without the master's knowledge, let the agent or serf receive three hundred blows; and let the master support by oaths that he had no knowledge of the hiding place of the fugitive.

4. Thirdly, let the same condition be observed in the case of a bondservant as with captives, to the end that he to whom he came may not conceal him, but immediately take action to restore him to his master. But if he does not do this, let him restore the bondservant whom he had withheld to the detriment of his master with a double wergeld payment to the master.

5. But if a slave, unknown to his master, is convicted in the retention of a bondservant, let him receive two hundred blows.

XL OF MANUMISSIONS.

1. If any Burgundian gives his liberty to a bondservant under his jurisdiction,³⁴ and if upon the occasion of a slight offense he thinks the servant ought to be recalled into servitude, let the manumitter know that he is denied this privilege by the present law; nor can the manumitter recall him to his original condition, unless by chance he has been convicted before a judge of having committed such acts to the loss and disgrace of his manumitter that he should deservedly lose the liberty conferred on him. Further, we order that the right (*pontificium*)³⁵ of this action be permitted to manumitters only in the case of their own freedmen.

2. Let the heirs of him by whom the bondservant has been freed know that in any lawsuit whatsoever the freedman of their father must be regarded as a freeman.

XLI OF CROPS BURNED BY FIRE.

1. If anyone makes a fire in a clearing, and the fire, with no wind driving it, runs over the land and comes to another's fence or field, let whatever has been burned by it be replaced by him who started the fire.

2. If indeed the force of the wind takes the fire to another's fence or field, let restitution for the damage which has been suffered not be sought from him who started the fire.

XLII OF THE INHERITANCE OF THOSE WHO DIE WITHOUT CHILDREN.

1. Although we have ordered many things in former laws³⁶ concerning the inheritance of those who die without children, nevertheless after considering the matter thoroughly, we perceive it to be just that some of those things which were ordered before should be corrected. Therefore we decree in the present constitution that if a woman whose husband has died without children has not taken her vows a second time, let her possess securely a third of all the property of her husband to the day of her death; with the further provision that after her death, all will revert to the legitimate heirs of her husband.

³⁴ Beyerle, *op. cit.*, p. 61, suggests the translation, "If any Burgundian gives the freedom of his tribal law to a bondservant, and if ..."

³⁵ Cf. DuCange, *op. cit.*, V, 347.

³⁶ Cf. XIV, 2.

2. Let that remain in effect which has been stated previously concerning the morning gift (*morgengeba*, *morginegiva*).³⁷ For if she wishes to marry within a year from the time of the death of her first husband, let her have full right to do so, but let her give up that third part of the property which she had been permitted to possess. However, if she wishes to take a husband after a year or two have passed, let her give up all as has been stated above which she received from her first husband, and let the heirs in whose portion the inheritance of her former husband belongs receive the price which must be paid for her (second) marriage.

Given in council at Ambérieux, September 3rd (501), Abienus *vir clarissimus* being consul.

XLIII OF GIFTS.

1. Although our law prescribes many things concerning gifts set forth in earlier times, nevertheless because some things arise under the same heading concerning which the law is not clearly established, it is necessary that by the addition of the present law those things be defined which were formerly omitted. And therefore in this decree gifts and wills made among our people become valid provided five or seven witnesses to the gift or will append their marks and signatures so far as they are able.

2. But if a lesser number of witnesses is proved to have been present, let the gift which has been made, or the will which has been devised, be invalid.

3. Indeed in other instances, that is in lesser matters, we order three appropriate witnesses to be admitted.

4. And in other matters concerning wills and gifts, let the procedure established above be observed.

XLIV OF THE ADULTERY OF GIRLS AND WIDOWS.

1. If the daughter of any native Burgundian before she is given in marriage unites herself secretly and disgracefully in adultery with either barbarian or Roman, and if afterward she brings a complaint, and the act is established as charged, let him who has been accused of her corruption, and as has been said, is convicted with certain proof, suffer no defamation of character (*calumnia*) upon payment of fifteen *solidi*. She indeed, defeated in her purpose by the vileness of her conduct, shall sustain the disgrace of lost chastity.

2. But if a widow who has not been sought, but rather overcome by desire, unites with anyone, and she bursts forth in an accusing voice, let her not receive the stated number of *solidi*, and we order that she, demanding marriage thus, be not awarded to him to whom she has joined herself in such a disgraceful manner, because it is just that she, defeated by her vile conduct, is worthy of neither matrimony nor reward.

XLV. OF THOSE WHO DENY THOSE THINGS CHARGED AGAINST THEM, AND OFFER OATHS³⁸

We know that many of our people are corrupted through inability to establish a case and because of instinct of greed, so that they do not hesitate frequently to offer oaths about uncertain matters and likewise to perjure themselves about known matters. To break up this criminal practice, we decree by the present law that as often as a case shall arise among our people and he who has been accused denies by offering oaths that that which is sought is owed by him, and that that has been done which is charged, it is fitting that an end be made to their litigation in this manner: if the party to whom oath has been offered does not wish to receive the oath, but shall say that the truthfulness of his adversary can be demonstrated only by resort to arms, and the second party (the one accused) shall not yield (the case charged), let the right of combat not be refused; with the further provision that one of the same witnesses who came to give oath shall fight, God

³⁷ The word *pretium* is used to express the idea of a price or wergeld of the woman, but it also refers to the present made at the time of the marriage. Title XLII, 2, apparently defines the *morgengaba* as *pretium quod de nuptiis inferendum est*. This definition of *pretium* in the law seems to indicate that *pretium uxoris*, *pretium de nuptiis*, *morgengaba*, and *donatio nuptialis* designate the same general idea. However there are concrete distinctions: the *morgengaba* designates the present made the day after the wedding night; *pretium uxoris* is probably the price or wergeld of the woman, the *donatio nuptialis* is a present which is made at the occasion of the wedding by the parents of the husband to the woman, and by her parents to the husband; the *pretium de nuptiis* seems to be a general expression which includes the *wiffimon*, *donatio*, and *morgengaba*. The *wittimon* is a payment made by the husband to the father of the bride and may correspond to the *pretium uxoris* or *nuptiale pretium*. For *pretium nuptiale*, see XII, 4; LII, 3, LXI; for *donatio nuptialis*, see XXIV, 1, 2; for *morgengaba*, see XLII, 2, for *wiffimon*, see LXIX; LXXXVI, 2; and CI. Cf. Davoud-Oghlou, *op. cit.*, I, 430, n. 2.

³⁸ Compare tit. 8, above p. III-26. Ed.

being the judge. For it is just that if anyone shall say without delay that he knows the truth of the matter and shall offer to take oath, he should not hesitate to fight. But if the witness of him who offered oath was overcome in combat, let all witnesses who promised that they would take oath be compelled to pay a fine of three hundred *solidi* without any grant of delay. But if he who refused to receive the oath (the accuser) shall have been killed, let the victorious party be repaid ninefold the sum (debt) involved taken from his property (i.e., from the property of the dead man) as damages, so that as a result, one may delight in truth rather than falsehood.

Given the 28th of May (502) at Lyons, Abienus *vir clarissimus* being consul.

[The Code continues through no. 105, and some mss. also add four *Constitutiones Extravagantes*. See the Contents.]

b. NOTES ON THE BURGUNDIAN “CODE”

1. *Titles in the Lex Romana Burgundionum (the Roman Law of the Burgundians; L.R.B). compared to the Lex Burgundionum (the Law of the Burgundians, above; L.B.):*

- L.R.B. 1. Concerning the gift of father or mother or the munificence of lords
- L.B. 1. Of the privilege of bestowing gifts permitted to fathers, and concerning royal gifts and gratuities
- L.R.B. 2. Concerning homicides
- L.B. 2. Of murders
- L.R.B. 3. Concerning grants of freedom (*libertatibus*) [to slaves]
- L.B. 3. Of the emancipation of our slaves
- L.R.B. 4. Concerning enticements [of slaves] and thefts
- L.B. 4. Of solicitations and thefts
- L.R.B. 5. Concerning admitted injuries [*iniuriis*] and blows
- L.B. 5. Of those who strike others with lash or rod, with a kick or with a blow of the fist
- L.R.B. 6. Concerning fugitives to be sought out and debated about
- L.B. 6. Of fugitives
- L.R.B. 7. Concerning the objection (?accusation) of crimes and inscriptions of free persons or slaves
- L.B. 7. Of slaves (*servi*) and serfs (*originaarii*) who are accused of crimes
- L.B. 8. Of the commission of crimes which are charged against native freemen
- L.R.B. 8. Concerning acts of violence
- L.B. 9. Of acts of violence
- L.R.B. 9. Concerning the seizures (rapes) of virgins and widows
- L.B. 10. Let Burgundians and Romans be held under the same condition in the matter of killing slaves
- L.B. 11. Of inflicted wounds
- L.B. 12. Of the stealing of girls
- L.B. 13. Of clearings (*exartii*)
- L.R.B. 10. Concerning different successions
- L.B. 14. Of succession
- L.R.B. 11. Concerning the stirring up of quarrels
- L.B. 15. Of starting a fight
- L.R.B. 12. Concerning the seekings out of animals and things
- L.B. 16. Of hunting for animals [better trans. of “seeking out animals”]

- L.R.B. 13. Concerning the damages of animals or if anything is done by them by accident
- L.B. 17. Of other cases and the removal of liability for punishment
- L.B. 18. Of those things which happen by chance
- L.R.B. 14. Concerning pledges and sureties that have been removed
- L.B. 19. Of the removal of pledges and guarantors (oath takers)
- L.R.B. 15. Concerning the thefts of fugitives
- L.B. 20. Of thefts committed by fugitives
- L.B. 21. Of contracts entered into by slaves
- L.B. 22. Of the abolition of the advocacy (*patrocinium*) of barbarians in lawsuits involving Romans
- L.B. 23. Of injuries which are caused by animals
- L.R.B. 16. Concerning women who go to second or third marriages
- L.B. 24. Of Burgundian women entering a second or third marriage
- L.R.B. 17. Concerning rights-of-way or other servitudes blocked off
- L.B. 27. Of broken fences, closed roads, also thefts and acts of violence [note out of order]
- L.B. 28. Of the privilege of cutting wood granted in common
- L.R.B. 18. Concerning attackers by surprise and burglars
- L.B. 25. Of thefts and acts of violence
- L.B. 26. Of knocking out teeth
- L.B. 29. Of those committing assault and breach of the peace
- L.R.B. 19. Concerning women who have been corrupted
- L.B. 30. Of women violated
- L.B. 31. Of planting vineyards
- L.R.B. 20. Concerning those who bind a man unlawfully and without cause
- L.B. 32. Of him who has bound a man illegally or without cause
- L.B. 33. Of injuries which are suffered by women
- L.R.B. 21. Concerning divorces
- L.B. 34. Of divorces
- L.B. 35. Of the punishment of slaves who commit a criminal assault on freeborn women
- L.B. 36. Of incestuous adultery
- L.B. 37. Of drawn swords
- L.B. 38. Of refusal of hospitality toward legates of foreign tribes and travellers
- L.B. 39. Of receiving strangers
- L.B. 40. Of manumissions
- L.B. 41. Of crops burned by fire
- L.R.B. 22. Concerning gifts
- L.B. 43. Concerning gifts [out of order]
- L.R.B. 23. Concerning oaths
- L.B. 45. Of those who deny those things charged against them, and offer oaths
- L.R.B. 24. Concerning robbers who have been convicted

L.B. 46. Of the condemnation of thieves, of their wives, and of their children

L.R.B. 25. Concerning adulteries

L.B. 44. Of the adultery of girls and widows

L.R.B. 26. Concerning those who do not hand over the things owed of the portion of sons from the maternal goods

L.B. 51. Of those who do not give their sons the portions of their property due to them

L.R.B. 27. Concerning espoused girls and women

L.B. 52. Of betrothed women who, incited by desire, go to consort with others

L.R.B. 28. Concerning sorrowful inheritances

L.B. 42. Of the inheritance of those who die without children [out of order]

L.R.B. 29. Concerning horses [a vulgar word] whose bone or shin or tail is bound

L.B. 58. Of horses which have bones or sticks tied to their tails

L.R.B. 30. Concerning apparitors

L.R.B. 31. Concerning the prescription of times

L.B. 79. Of prescription

L.R.B. 32. Concerning falsifiers and false witnesses

L.B. 80. Of those bearing false witness and false accusers

L.R.B. 33. Concerning interpellations and appeals

L.B. 81. Of future appeals before judges

L.R.B. 34. Concerning things acknowledged

L.R.B. 35. Concerning sales

L.R.B. 36. Concerning the tutelage of minors

L.B. 85. Of wards

L.R.B. 37. Concerning lawful nuptials or natural children

L.R.B. 38. Concerning pacts or cessions this form is to be kept

L.R.B. 39. Concerning boundary-markers crossed over or broken up

L.R.B. 40. No one can buy without tax or the rest (?back taxes)

L.R.B. 41. Concerning the right of *postlimium* [return of captives]

L.R.B. 42. Let no one be a judge in his own cause

L.R.B. 43. That no one pretend the name of more powerful men in litigation or falsify the titles of his land

Cf. L.B. 22. Of the abolition of the advocacy (*patrocinium*) of barbarians in lawsuits involving Romans

L.R.B. 44. Concerning the reason for granting freedom or concerning the works of freed men

Cf. L.B. 40. Of manumissions

L.R.B. 45. Concerning testaments

Cf. L.B. 43. Of gifts

L.R.B. 46. Concerning the true condition or recognition of public bodies

L.R.B. 47. Concerning partners (*consortibus*)

2. *Some Specific Comparisons of the two laws:*

(a) L.R.B. tit. 2.1:

“A man who commits homicide, be he freeborn or slave, if they are [sic] found outside of a church, shall be condemned to death”

L.B. tit. 2.1 (above, p. III-23):

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

(b) L.R.B. tit. 7.1:

[This is pretty confused in the Latin, but it contains a reference to C.Th. 9.1.14. That passage is reasonably clear, and what it says is that if someone accuses someone else of a crime, he will not be allowed to proceed, or even to proceed with the torture of slaves for evidence, until the accuser binds himself to suffer the same penalty (if he loses the case). This is probably what L.R.B. 7.1 means too, and it contains the key phrase “if proof should fail,” at least suggesting that the writer of the L.R.B. is still thinking of a Roman trial with proof by witnesses and instruments in writing, and lawyers’ arguments about them. The provision in the Theodosian Code seems to be confined to capital cases, or at least, serious crimes. The same may be case with the provision in the L.R.B., though this is less clear.]

L.B. tit. 8 (above, p. III-26):

“1. If a native freeman, either barbarian or Roman, is accused of a crime through suspicion, let him render oath, and let him swear with his wife and sons and twelve relatives: if indeed he does not have wife and sons and he has mother or father, let him complete the designated number with father and mother. But if he has neither father nor mother, let him complete the oath with twelve relatives.

“2. But if he who must take oath wishes to take it with raised hand (*de manu*), and if those who are ordered to hear the oath—those three whom we always command to be delegated by the judges for hearing an oath—before they enter the church declare they do not wish to receive the oath, then he who was about to take oath is not permitted to do so after this statement, but they (the judges, or, perhaps, the delegates) are hereby directed by us to commit the matter to the judgment of God (i.e., to ordeal).

“3. If however, having received permission, he has taken the oath, and if he has been convicted after the oath, let him know that he must make restitution by a ninefold payment (*in novigildo*) to those in whose presence the judge ordered him to give his oath.

“4. But if they (those appointed to hear the oath) fail to come to the place on the appointed day, and if they shall not have been detained by any illness or public duty, let them pay a fine of six *solidi*. But if they were detained by any illness or duty, let them make this known to the judge or send other persons in their place whom they can trust to receive the oath for them.

“5. If moreover he who is about to take the oath does not come to the place, let the other party wait until the sixth hour of the day; but if he has not come by the sixth hour, let the case be dismissed without delay.

“6. But if the other (the accusing party) does not come, let him who was about to take the oath depart without loss.”

(c) L.R.B. tit. 12:

“12.1 If any freeman prohibits someone who is seeking his animals or his things from entering his house to investigate, let him be held for theft, so that the thing which is being sought be paid for four-fold, by the same reason that when he has suspicion of finding theft he enters with three free witnesses.¹

“12.2. But if a colonus or a slave prohibits someone who is so inquiring, his presumption shall be vindicated by the judges by torture of blows and by these [presumably the coloni] the things lost shall be paid for simply, after the fashion of Gaius who lays this down concerning prohibitions.”²

¹ GI.3.192 has some of this, including the four-fold pretorian penalty. There is nothing in GI about the number of witnesses.

² The reference is probably to GI.3.186, 188, 192, or to some epitome of these passages: “**186.** There is what is called *furtum conceptum*, when a stolen thing has been sought and found on a man’s premises in the presence of witnesses. Against him, even if he be not the thief, a special action called *concepti* has been established.” “**188.** There is also an action *prohibiti furti* against one who prevents another who wishes to search for a stolen thing from doing so.” “**192.** An action for preventing search (*prohibiti furti*) for fourfold has been introduced by the praetor’s Edict. The law of the Twelve Tables provides no penalty for this, but merely ordains

L.B. tit. 16 (above, p. III-28):

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

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

(d) L.R.B. tit. 13:

“13.1. If anyone’s animal does damage, the owner shall either pay the estimate of the damage or turn over the animal; this we also wish to be observed concerning a dog or a biped, according to the species of Paul’s *Sentences* book one, under the title, ‘If a four-footed animal does pauperies’.³

“13.2. Concerning the dog also included in the same title, that if anyone has a vicious dog and does not restrain it on a leash in the streets and public ways during the daytime hours, whatever damage he does, let it be paid by the owner.

“13.3. This is added to these things: that if anyone has any horse [a vulgar word] or another animal that has mange [probable translation, though the word can be broader] and allows it wander in such a way that joined with the flocks of the neighbors it transfers its own disease, whatever damage has been done through it, let it similarly be remedied by the owner.⁴

“13.4. In the accidents of fire or shipwreck and ruin, if by this accident things that have been lent gratuitously perish, he, to whom the thing has been lent, cannot be held to pay for the thing, unless it happens to be proved that he freed his own thing, when he could have pulled out the thing that was lent from the same accident, according to the opinion of Paul, book two, under the title ‘Concerning gratuitous loans, deposits, pledges, and fiducia [things given on trust]’.”⁵

[Can we see in these four passages at least hints of the author’s thoughts on the general question of when someone should be held liable for damages to another’s person or property?]

L.B. tit. 18 (above, p. III-29):

“18.1. If any animal by chance (*casu*) or if any dog by bite, cause death to a man, we order that among Burgundians the ancient rule of blame be removed henceforth: because what happens by chance ought not to conduce to the loss or discomfiture of man. So that if among animals, a horse kills a horse unexpectedly, or an ox gores an ox, or a dog gnaws a dog, so that it is crippled, let the owner hand over the animal or dog through which the loss is seen to have been committed to him who suffers the loss.

that one wishing to search must do so naked, girt with a *licium* and holding a platter; if he finds anything, the law says it is to be manifest theft.” Note that GI says nothing about a slave or *colonus*.

³ Cf. Paul, *Sentences* [PS] 1.15.1: “If a four-footed animal does *pauperies* or does damage or depastures something, an action is given against the owner, so that he either undergoes the estimate of the damages or gives over the four-footed animal. This is also for a dog by the *lex Pesolania*.” For the classical law on the topic, see D.9.1. In addition, to the *lex Pesolania*, mentioned here, see D.9.1.4, which indicates that the praetor gave an *actio utilis* for other kinds of animals.

⁴ Though the modern editors of Paul’s *Sentences* put both LRB 13.2 and 13.3 in PS (cleaning up the spelling), there is no indication other than the LRB that these provisions were in PS. Granted the LRB’s predilection for free quotation, it is virtually certain that if something were in PS on these topics, it would not have been worded like this. What we do know is that the next provision in PS (15.2) deals with keeping wild beasts in areas where the public frequents. Here the liability is on the owner in full, presumably under the principles of *damnum iniuria datum* under the *lex Aquilia*. The provision after that (15.3) deals with the situation where someone has provoked an animal. Here, there is no liability of the owner at all. LRB 13.2 corresponds to the classical law (D.9.1.1.5), and the aediles’ edict confirmed this with regard to dogs and wild animals in crowded places. D.21.1.40–42. I have not found the example of the mangy horse in the classical law (though it may be there), but I have little doubt that this, too, would be case of *damnum iniuria datum*, and not of *pauperies* liability.

⁵ PS 2.4.2: “If a fire, shipwreck, or ruin [a technical term meaning the collapse of a building], or some other similar accident (*casus*) happens and an item lent gratuitously is lost, he to whom the thing was lent will not be held under this heading [i.e., the *actio commodati*], unless it happened that he could have saved the thing lent but preferred his own thing.”

“18.2. In truth, if a lance or any kind of weapon shall have been thrown upon the ground or set there without intent to do harm (*simpliciter*), and if by accident (*casu*) a man or animal impales himself thereupon, we order that he to whom the weapon belongs shall pay nothing unless by chance he held the weapon in his own hands in such a manner that it could cause harm to a man.”

(e) L.R.B. tit. 21:

“21.1. By the consent of the father of each repudiation can be given and marriage dissolved.[Cf. Nov. Th. 12.1; (439); C.J.5.17.8pr, 9pr (none of these mentions mentions parental consent).]”⁶

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

“21.3. But if the woman wants to repudiate the man, the husband unwilling, not otherwise shall it be allowed her, unless she prove the man a homicide or a violator of graves or a poisoner. And if she proves one of these crimes, she shall dismiss the man, and shall rightfully keep the gift granted for herself, and she shall vindicate the dowry that her husband made for her, according to the Theodosian law promulgated under the title, ‘Concerning repudiations’ [C.Th.3.16.1 (which also mentions the possibility of relegation as punishment for the woman, if she fails in her proof).”

L.B. tit. 34 (above, p. III-34):

“34.1. If any woman leaves (puts aside) her husband to whom she is legally married, let her be smothered in mire.

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

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

“34.4. But if she admits none of these three crimes, let no man be permitted to put away his wife for any other crime. But if he chooses, he may go away from the home, leaving all household property behind, and his wife with their children may possess the property of her husband.”

(f) L.R.B. tit. 23 (“Concerning Oaths”):

“1. If it is ordered by the judge or agreed to by the parties that oaths be taken about dubious matters, he alone ought to swear from whom something is being sought, nor are other persons required for oaths. Once the oath is taken, all claim on this cause shall cease.

“2. This procedure of oath is nonetheless denied to one who is noted of infamy, according to the constitutions of Gregory and Hermogenianus.” [The referenced text has not survived.]”⁷

L.B. tit. 45 (above p. III-37).

“We know that many of our people are corrupted through inability to establish a case and because of instinct of greed, so that they do not hesitate frequently to offer oaths about uncertain matters and likewise to perjure themselves about known matters. To break up this criminal practice, we decree by the present law that as often as a case shall arise among our people and he who has been accused denies by offering oaths that that which is sought is owed by him, and that that has been done which is charged, it is fitting that an end be made to their litigation in this manner: if the party to whom oath has been offered does not wish to receive the oath, but shall say that the truthfulness of his adversary can be demonstrated only by resort to arms, and the second party (the one accused) shall not yield (the case charged), let the right of combat not be refused; with the further provision that one of the same witnesses who came to give oath shall fight, God being the judge. For it is just that if anyone shall say without delay that he knows the truth of the matter and shall offer to take oath, he should not hesitate to fight. But if the witness of him who offered

⁶ Nov. Th. 12.1 mentions the repeal of previous constitutions on the topic of divorce and a return to the “old laws” (*veteres leges*). These may have included a requirement of parental consent for divorce, as they certainly did for the marriage itself.

⁷ While this institution is not attested in the surviving texts of classical Roman law, it has some parallels in the decisory oath (*iusiurandum necessarium*), which was used in certain cases of debt. That one who is infamous is not to be trusted with an oath is also consonant, if not quite required, by the classical law. See Berger, s.v. *infamia*. Ed.

oath was overcome in combat, let all witnesses who promised that they would take oath be compelled to pay a fine of three hundred *solidi* without any grant of delay. But if he who refused to receive the oath (the accuser) shall have been killed, let the victorious party be repaid ninefold the sum (debt) involved taken from his property (i.e., from the property of the dead man) as damages, so that as a result, one may delight in truth rather than falsehood.”