OUTLINE — LAW SEMINAR 9

CUSTUMALS
THE "TWELFTH CENTURY RENAISSANCE"

Custumals

Usatges de Barcelona

What follows is from the most recent edition of the text by Joan Bastardas (JB), *Usatges de Barcelona: El Codi a mitjan segle XII* (Barcelona, 1984). He renumbered the texts but included the traditional numbering which is given below in round brackets preceded by 'us.'. He also includes a parallel translation into Catalan. The translation is medieval, but probably postdates the Latin text. The notes occasionally refer to the translation by Donald Kagay (DK), *The Usatges of Barcelona: The Fundamental Law of Catalonia* (Philadelphia, 1994). It should be used with catution. Here's how the text starts:

[**1 (us. 1–2)**] ANTEQVAM VSATICI fuissent missi solebant iudices iudicare ut cuncta malefacta fuissent omni tempore emendata, si non potuerint esse neglecta, per sacramentum uel per bataiam uel per aquam frigidam siue calidam, ita dicendo: "Iuro ego tibi quod hec malefacta, que tibi habeo facta, sic ea tibi feci ad meum directum et in tuo neglecto, quod ego tibi illa emendare non debeo, per Deum et per hec sancta"; et inde stetisset ad bellum uel ad unum ex supra dictis iudiciis, scilicet aque frigide uel calide.

HOMICIDIVM et cucutia[1] que non possunt neglectari, fuissent secundum leges et mores iudicata et emendata siue uindicata.

[**2 (u.s. 3)**] CVM DOMINVS Raimundus Berengarii uetus, comes et marchio Barchinone atque Ispanie subiugator, habuit honorem et uidit et cognouit quod in omnibus causis et negociïs ipsius patrie leges gotice non possent obseruari, et eciam uidit multas querimonias et placita que ipse leges specialiter non iudicabant, laude et consilio suorum proborum hominum, una cum prudentissima coniuge sua Adalmode, constituït et misit usaticos cum quibus fuissent omnes querimonie et malefacta, in eis inserta, districte et placitate et iudicate atque ordinate seu eciam emendate uel uindicate. Hoc enim fecit comes auctoritate Libri Judicis qui dicit: "Sane adiciendi leges, si iusta nouitas causarum exegerit, principalis eleccio licenciam habebit," "et potestatis regie discretione tractetur qualiter exortum negocium legibus inseratur ," et "sola uero potestas regia erit in omnibus libera, qualemcunque iusserit in placitis inserere penam."

<Et usatici quos misit incipiunt ita.>[2]

[**3 (us. 4.1)**] HEC SVNT VSVALIA de curialibus usibus, quos constituerunt tenere eorum patria omni tempore, dominus Raimundus, Barchinonensis uetus comes et Adalmodis eius coniux, assensione et acclamatione illorum terre magnatum, uidelicet: Poncii uicecomitis Gerunde et Raimundi uicecomitis Cardone et Vdalardi, uicecomitis Barchinone,[3] nec non et Gondeballi de Bisora et Mironis Guilaberti et Alamandi de Ceruilione et Bernardí Amati Clarimontis et Raimundi Montis Catani et Amati Eneas et Guillelmi Bernardí de Cheralt et Arnalli Mironis de Tost et Vgonis Dalmacii Ceruarie et Arnalli Mironis Sancti Martini et Guillelmi dapiferi et Gaufredi Bastonis et Renardi

[1] [Probably 'adultery'. See DuCange, s.v. *cugus*.]

[2] [JB notes that not all the early manuscripts have this phrase.]

[3] [JB notes (p. 36 n.28] that there are some anacrhonisms in the names of the magnates, but speculates that the attendees at two different assemblies have been truncated.]

Guillelmi et Girberti Guitardi et Vmberti de Ipsis Acutis et Bonefilii Marchi atque Guillelmi Borrelli iudicum.

[**4 (us. 4.2–5)**] Vt qui interfecerit uicecomitem uel uulnerauerit siue in aliquo desonorauerit, emendet eum sicut duos comitores et comitorem sicut duos uasuassores.

DE VASVASSORE, qui quinque milites habet, per mortem eius emendentur .LX. uncie auri cocti, et per plagam .XXX. Et si plus habuerit milites, crescat composicio secundum numerum militum.

Militem uero qui interfecerit, det in composicione .XII. uncias auri. Qui uero uulnerauerit, tam pro una plaga quam pro multis, emendet ei uncias .VI.

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

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

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

[3] "submitted to judgment." DK.

[4] Fuero juzgo 2.1.13.

[5] Fuero juzgo 2.5.8.

And the usages that he issued begin thus:

3 (us. 4.1). These are the practices (*usualia*) of court usage that the lord Raymond the old, count of Barcelona, and his wife Almodis constituted to be held forever in their country, with the assent and acclaim of the magnates of the land, to wit: ... . [Nineteen names follow, three viscounts and sixteen men described as "judges."]

4 (us. 4.2). Whoever kills a viscount or wounds or dishonors him in any way shall make amends to him as for two *comdor*s[6] and a *comdor* like two vavassors.

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

(us. 5). Concerning a vavassor who had five knights, he shall emend for his death with 60 ounces of seared gold[7] and for a wound with 30 ounces. If he has more knights, the composition shall grow according to the number of knights.

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

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

C. 85 (us. 108) probably dates from the mid-12th century; c. C4 (us. 145) [below] probably dates from the 13th century.

[**85 (us. 108)**] SI QVIS VIRGINEM VIOLENTER corruperit, aut ducat eam in uxorem, si illa et parentes eius uoluerint et dederint[4] ei suum exouar, aut donet ei maritum de suo ualore. Si non uirginem quis uiolenter adulterauit et impregnauerit, similiter faciat.

Usatges 108 [85]. If anyone violently corrupts a virgin, he shall either marry her if she and her parents wish and give her *exovar* [roughly, "dowry" or "bride- price"], or he shall give her a husband of her worth. If anyone violently commits adultery[1] with a woman who is not a virgin and impregnates her, likewise. [Parallels: Petrus, c. 54; Exod. 22:16–17 in X 5.16.1 (Ivo, Decret. 5.292–3); J.I. 4.18.4; Fuero juzgo 3.4.7; *P*. 284.][2]

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

[2] These suggested parallels are derived from a remarkable doctoral dissertation: Charles Poumarède, *Les usages de Barcelone* (Toulouse: Bonnet, 1920). The last reference, '*P.*', gives the page number in Poumarède where one will find the suggestion and frequently some discussion.

Consider the following texts from fn. 9 on p. X–4, as possible 'sources' of UB 108:

Justinian, *Institutes* 4.18.4 (*Materials*, p. II–106): The *lex Iulia*, passed for the repression of adultery, punishes with death not only defilers of the marriage-bed, but also men who indulge in criminal intercourse with those of their own sex, and inflicts penalties on anyone who without using violence seduces a virgin or a widow of a respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation.

Exceptiones Petri, c. 54 [The work is a handbook of Roman law for practitioners probably compiled in the early 12th century; there are other passages in the *Usatges* that seem to rely on the *Exceptiones Petri*]: If anyone violates a virgin without using force, or even if she consents, or seduces a widow of respectable character, if he who does this is of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation.

Exodus 22:16–17: When a man seduces a virgin who is not engaged to be married, and lies with her, he shall give the bride-price for her and make her his wife. But if her father refuses to give her to him, he shall pay an amount equal to the bride-price for virgins. [This same passage from the Bible appears in a canonical collection of the late 11th century attributed to Ivo of Chartres (*Decretum* 5.292–3). There is other evidence that the compiler of the *Usatges* knew this work of Ivo's. The text also appears in X 5.16.1, derived from 1 Comp. 5.13.1.]

The Visigothic Code (*Forum iudicum*, *Fuero juzgo*), 3.4.7 [the provision is probably derived from the Code of Euric (466 X 484)]: If a freeborn girl, or a widow, should go to the house of another for the purpose of committing adultery, and the man who is implicated should wish to marry her, and her parents, if she has any, should acquiesce; he

[4] The plural (*daran*) is also found in the Catalan translation.

shall give to the parents of the girl as large a sum as they may demand, or as much as shall be agreed upon between him and the woman herself. But the woman shall not share with her brothers in the inheritance of her parents, unless the latter desire.

But this does not exhaust the possible parallels. One might consider, for example, consider cc. 31, 82–4 of Aethelberht's Code (*Mats.*, § 4A), or the Burgundian Code, tit. 12 (*Mats.*, § 4B). The question, then, is what is likely to have been in the mind of the compiler of the *Usatges*: Roman law? Canon law? "Germanic" law? All three? None of the above?

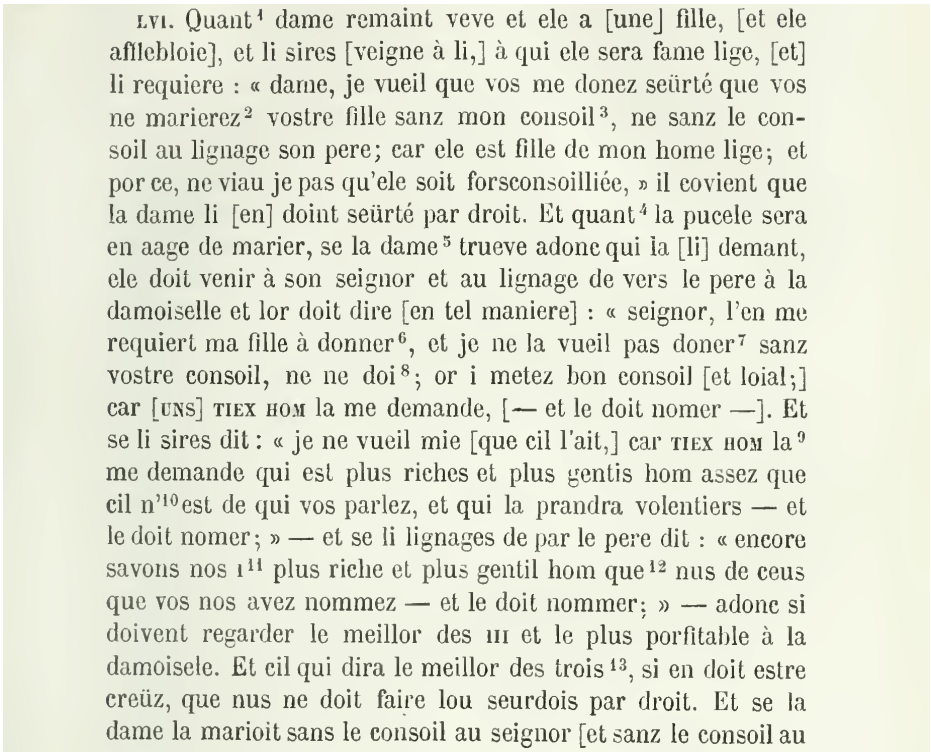
Cc. 110–112 also deal with adultery and give some hints as to the marital property system in effect. In combination, these provisions would make a great paper. Note that c. 110 seems to contemplate that lords will be adjudicating cases of adultery.

[**C4 (us. 147)**] Vidua si honeste et caste post mortem uiri sui in suo honore, bene nutriendo filios suos uixerit, habeat substanciam uiri sui, quamdiu steterit sine marito. Si se adulterauerit et cubile uiri sui uiolauerit, amittat honorem suum et totum auere uiri sui et ueniat in potestate filiorum, si in etate fuerint, uel illorum propinquorum; ita tamen ut non perdat suum, si in presenti apparuerit auere, nec sponsalicium amittat, quamdiu uixerit, et postea redeat ad filios uel propinquos.

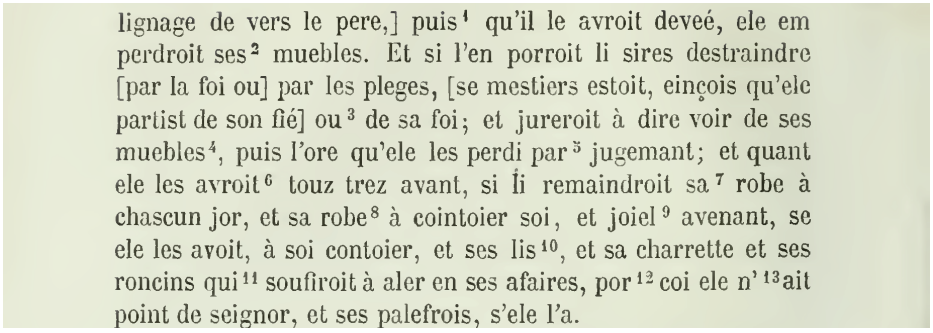
[C4 (147)].[3] If a widow lives honestly and chastely in her honor after the death of her husband, she shall have her husband's substance so long as she remains without a husband. If she commits adultery and violates the bed of her husband, she shall lose her honor and all the property of her husband, and the honor shall come to the power of her children [perhaps "sons"] if they are of age or of their relatives, in such a way, however, that she shall not forfeit her property (*suum*), if she appears to have a present interest in it (*si in presenti apparuerit avere*), nor shall she lose her spousal gift (*sponsalicium*) so long as she lives; afterwards it shall return to the children or the relatives. [Parallels: Fuero juzgo 3.2.8, 4.2.14, 3.2.1; *P.* 289–90.]

[3] Chapters that begin with a letter are those that JB regards as later additions.

Touraine-Anjou (The text that we have of this *coutume* probably dates from the middle of the 13th century.)



LVI. Quant[1] dame remaint veve et ele a [une] fille, [et ele afflebloie], et li sires [veigne à li,] à qui ele sera fame lige, [et] li requiere : « dame, je vueil que vos me donez seürté que vos ne marierez[2] vostre fille sanz mon consoil[3], ne sanz le consoil au lignage son pere; car ele est fille de mon home lige; et por ce, ne viau je pas qu'ele soit forsconsoilliée, » il covient que la dame li [en] doint seürté par droit. Et quant[4] la pucele sera en aage de marier, se la dame[5] trueve adonc qui la [li] demant, ele doit venir à son seignor et au lignage de vers le pere à la damoiselle et lor doit dire [en tel maniere] : « seignor, l'en me requiert ma fille à donner[6], et je ne la vueil pas doner[7] sanz vostre consoil, ne ne doi[8]; or i metez bon consoil [et loial;] car [UNS] TIEX HOM la me demande, [— et le doit nomer —]. Et se li sires dit : « je ne vueil mie [que cil l'ait,] car TIEX HOM la[9] me demande qui est plus riches et plus gentis hom assez que cil n'[10]est de qui vos parlez, et qui la prandra volentiers — et le doit nomer; » — et se li lignages de par le pere dit : « encore savons nos I[11] plus riche et plus gentil hom que[12] nus de ceus que vos nos avez nommez — et le doit nommer; » — adonc si doivent regarder le meillor des III et le plus porfitable à la damoisele. Et cil qui dira le meillor des trois[13], si en doit estre creüz, que nus ne doit faire lou seurdois par droit. Et se la dame la marioit sans le consoil au seignor [et sanz le consoil au



lignage de vers le pere,] puis[1] qu'il le avroit deveé, ele em perdroit ses[2] muebles. Et si l'en porroit li sires destraindre [par la foi ou] par les pleges, [se mestiers estoit, einçois qu'ele partist de son fié] ou[3] de sa foi; et jureroit à dire voir de ses muebles[4], puis l'ore qu'ele les perdi par[5] jugemant; et quant ele les avroit[6] touz trez avant, si li remaindroit sa[7] robe à chascun jor, et sa robe[8] à cointoier soi, et joiel[9] avenant, se ele les avoit, à soi contoier, et ses lis[10], et sa charrette et ses roncins qui[11] soufiroit à aler en ses afaires, por[12] coi ele n'[13]ait point de seignor, et ses palefrois, s'ele l'a.

c. 56. [From headings that do not seem to be in the original text: Of the surety given for suspicion of marriage to one's liege lord and of doing honor and the proof on behalf of the unmarried lady made by her relatives.] When a lady remains a widow and she has a daughter, and she (the lady) is getting old, and her lord comes to her, to whom she was liege lady, and requires her: "Lady, I wish that you give surety that you not marry your daughter without my counsel, nor without the counsel of the lineage of her father; for she is the daughter of my liege man, and because of that, I do not wish that she be outcounselled."; it is fitting that the lady give him surety for it by right. And when the maid is of age to marry, if the lady finds someone who asks her of her, she ought to go to her lord and to the lineage on the side of the girl's father and speak to them in this manner: "Sir, someone is asking me to give my daughter, and I do not wish to give her without your counsel, nor ought I. Now give me good and lawful counsel, for such a man asks her of me (and she ought to name him)." And if the lord says, "I do not wish that he have her, because such a man asks her of me, who is more rich and more gentle than he of whom you speak, and he will take her willingly (and he ought to name him)", and if the lineage on the father's side says, "We know someone still more rich and gentle than any of those whom you have named to us (and it ought to name him)", them they ought to look to the best of the three and the most profitable for the young lady. And he who is said to be the best of the three ought to exceed the others so that no one could rightfully misunderstand it. And if the lady marries her without the counsel of the lord and without the counsel of the lineage on the side of the father, as she ought to have, she will lose her movable. And the lord can distrain her by faith or by pledges, if necessary, before she leaves her fee or her faith; and she should swear to tell truly about her movable even before she loses them by judgment; and when they have all been taken away from her, there ought to remain to her a dress for every day and a dress for adornment, and suitable jewels for adornment, if she has them, and her bed and her carriage, and her war horse which suffices for her affairs, since she has no husband, and her palfrey, if she has one.

c. 108 has more on marriage gifts

cc. 129 and 132 contain more than hints of community property.

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

cc. 598–600, canonical rules more or less accurately stated:

[598] Sometimes it happens that two gentle persons who are married separate by their will and with the permission of holy church for no evil reason; as when they wish to vow

chastity or enter religion. But this separation cannot be made without the agreement of the two parties, for the man cannot do it without the agreement of the woman nor the woman without the agreement of her husband; and if they have children, they do not cease for this reason to be legal, nor for this reason [fail] to come to succeed their father and mother.

[599] Those who it is certain are bastards and adulterine can in no way be legal so far as coming to the descent of inheritances of the father and mother. But those who are only bastards can be made legal heirs by being placed under the veil (*paile*) at the espousals, as we have said below. Adulterines are those who are engendered in married women by another other than their lords, the married man. Therefore if it happens that a man has a child in adultery[4] of a woman who has a husband and the husband dies and the man who is living takes her to wife, the children which are born after the marriage or who were engendered or born when she was a widow can be made legal, but those who were engendered or born in adultery when she had another husband cannot be made legal for succession to the father nor to the mother. But we have seen those who by the apostolic grace became clerks or held goods of holy church,[5] but in these things the lay courts are not to mingle, for the administration of holy church pertains to the apostolic see and to prelates.

[4] Akehurst translates "in concubinage." The phrase (*en soignantage*) can mean either.

[5] The reference may be to Innocent III's famous decretal *Per venerabilem*. X 4.17.13.

[600] One ought not doubt that when a man has company with a woman outside of the bond of marriage, and he marries her when the children are born or when she is pregnant, if the children are placed under the cloth (*drap*)—which cloth it is the custom to place over those who marry solemnly in holy church—they are not legal until they are put with the father and mother making the marriage; and after that, the children are not bastards but are heirs and can inherit as if they were legal children born in marriage. And by this grace which holy church and custom accords to all sorts of children, it frequently happens that fathers marry mothers for pity of the children, so that less evil is done them.

cc. 621–628 the varieties of *compagnie* (translated here as 'partnership')

Ci commence li .xxi. *chapitres de cest livre liqueus parole comment compaignie se fet et le peril qui i est, et d'oster enfant de son bail.*

621. Pluseur gaaing et pluseur pertes avienent souvent[a] par compaignie qui doit[b] estre apelee compaignie[c] selonc nostre coustume, et pour ce se doit chascuns garder avec qui il se met en compaignie ou qui il[d] reçoit a compaignon. Et ces compaignies de quoi[e] nous voulons[f] parler[g], c'est des compaignies qui sont teles que par la compaignie[h] li avoir vienent a partie quant la compaignie faut, et teus compaignie se fet en pluseurs manieres. Et pour ce nous traiterons[i] en ceste partie comment teus compaignie se fet selonc nostre coustume, et de la perte et du gaaing qui en puet[j] nestre; et si parlerons en quel maniere l'en puet et doit oster enfant[k] de son bail a ce qu'il ne puist[l] riens demander par reson de compaignie.

622. Chascuns set[m] que compaignie se[n] fet par[o] mariage,

car si tost comme mariages est fes, li bien de l'un et de l'autre sont commun par la vertu du mariage. Mes voirs est que, tant comme il vivent ensemble, li hons en est mainburnisseres et convient que la fame suefre et obeïsse de tant comme il apartient a leur muebles et as[a] despueilles de leur eritages: tout soit ce que la fame i voie perte[b] tout apertement, si convient il qu'ele en[c] suefre la volenté de son seigneur[d]. Mes voirs est[e] que le tresfons de l'eritage qui est[f] de par la fame ne puet li maris vendre[g], se ce n'est de l'otroi et de[h] la[i] volenté de sa fame, ne le sien meisme, se[j] ele ne renonce a son douaire, qu'ele n'en port son[k] douaire, se ele le seurvit. Et des parties qui doivent estre fetes par la compaignie de mariage quant mariages faut, nous en parlasmes[l] ou chapitre qui parole[m] des douaires[l]: si nous en terons ci endroit.

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

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

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

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

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

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

lose or gain by reason of partnership with their father and their step-mother or their mother and their step-father. . . .

cc. 1626–1639, separations

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

[The chapter is too long to translate in full, but it makes it clear that the court had a quite well developed fault-based jurisprudence for determining whether a separation of goods should be made.]

[1639] When marriages are separated between husband and wife for reasonable cause witnessed by holy church,[6] one ought to know that if there were acquests while they were together each one ought to take one half; and if they have movable, each one ought to take a half; and of the inheritances, each one ought to take his own. If they have children who have passed seven years, the fathers ought to have ward of half of the children; if there is only one, he has it if he wishes and the mother ought to provide half its nourishment [*au nourir*]; and if the children are under seven years, the ward ought to be bailed to the mother, and the father ought to pay half their reasonable sustenance. And all such cases when they arise ought to be supervised by the estimation of lawful judges.

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

Bracton (English legal historians would be surprised to hear *Bracton* called a custumal, but the work is called *De legibus et consuetudinibus Angliæ*. It is written in Latin, and makes considerable use of Roman and some of canon law. It is now thought to be a work of multiple authors and that most of it was written in the 1220s and 1230s and not by Henry of Bratton (c. 1210–1268). There are some additions that bring us into the 1250s, which may be by Bratton. The passages below are among the most theoretical in work. (Woodbine ed., Thorne trans., online http://amesfoundation.law.harvard.edu/cgi-bin/brac-hilite.cgi?Unframed+Latin+2+33+Deo; http://amesfoundation.law.harvard.edu/cgi-bin/brac-hilite.cgi?Unframed+Latin+2+304+f.)

[fol. 5b] [**12**] Parem autem non habet rex in regno suo, quia sic amitteret præceptum, cum par in parem non habeat imperium. Item nec multo fortius superiorem, neque potentiorem habere debet, quia sic esset inferior sibi subiectis, et inferiores pares esse non possunt potentioribus. Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem. Non est enim rex ubi dominatur voluntas et non lex. Et quod sub lege esse debeat, cum sit dei vicarius, evidenter apparet ad similitudinem Ihesu Christi, cuius vices gerit in terris. Quia verax dei misericordia, cum ad recuperandum humanum genus

ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, qua ad destruendum opus diaboli non virtute uteretur potentiæ sed iustitiæ ratione. Et sic esse voluit sub lege, ut eos qui sub lege erant redimeret. Noluit enim uti viribus, sed iudicio. Sic etiam beata dei genetrix, virgo Maria, mater domini, quæ singulari priveligio supra legem fuit pro ostendendo tamen humilitatis exemplo legalibus subdi non refugit institutis. Sic ergo rex, ne potestas sua maneat infrenata. Igitur non debet esse maior eo in regni suo in exhibitione iuris minimus autem esse debet, vel quasi, in iudicio suscipiendo si petat. Si autem ab eo petatur, cum breve non currat contra ipsum, locus erit supplicationi, quod factum suum corrigat et emendet, quod quidem si non [f.6] fecerit, satis sufficit ei ad pœnam, quod deum expectet ultorem. Nemo quidem de factis suis præsumat disputare nec multo fortius contra factum suum venire.

[fol. 5b] **[12]** The king has no equal within his realm, <Subjects cannot be equals of the ruler [cf. D.4.7.3.pr], because he thereby lose his rule, since equal can have no authority over equal.> nor *a fortiori* a superior, because he would then be subject to those subjected to him. The king must not be under man but under God and under the law, because law makes the king, <Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power.> for there is no *rex* where will rules rather than *lex*. Since he is the vicar of God, <And that he ought to be under the law appears by the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. [Cf. Gal. 4:5.] For He did not wish to use force but judgment. [Cf. Leo the Great in P.L. 54:196.] And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord,, who by an extraordinary privilege was above law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established law. Let the king, therefore, do the same, lest his power remain unbridled.> there ought to be no one in his kingdom who surpasses him in the doing of justice, but he ought to be the last, or almost so, to receive it, when he is plaintiff. If it is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend this act; if he does not, it is punishment enough for him that he await God's vengeance. No one may presume to question his acts, much less contravene them.

[fol. 107–107b] Cum autem de regimine sacerdotii nihil pertineat ad tractatum istum, ideo videndum est de his quæ pertinent ad regnum, quis primo et principaliter debeat et possit iudicare. Et sciendum quod ipse rex et non alius, si solus ad hoc sufficere possit, cum ad hoc per virtutem sacramenti teneatur astrictus. Debet enim in coronatione sua in nomine Ihesu Christi præstito sacramento hæc tria promittere populo sibi subdito. Imprimis se esse præcepturum et pro viribus opem impensurum ut ecclesiæ dei et omni populo christiano vera pax omni suo tempore observetur. Secundo, ut rapacitates et omnes iniquitates omnibus gradibus interdicat. Tertio, ut in omnibus iudiciis æquitatem præcipiat et misericordiam, ut indulgeat ei suam misericordiam clemens et misericors deus, et ut per iustitiam suam firma pace gaudeant universi. Ad hoc autem creatus est rex et electus, ut iustitiam faciat universis, et ut in eo dominus sedeat, et per ipsum sua iudicia discernat, et quod iuste iudicaverit sustineat et defendat, quia si non esset qui iustitiam faceret pax de facili posset exterminari, et supervacuum esset leges condere et iustitiam facere nisi esset qui leges tueretur. Separare autem debet rex cum sit dei vicarius in terra ius ab iniuria, æquam ab iniquo, ut omnes sibi subiecti honeste vivant et quod nullus alium lædat, et quod unicuique quod suum fuerit recta contributione reddatur. Potentia vero omnes sibi subditos debet præcellere. Parem autem habere non debet nec multo fortius superiorem maxime in iustitia exhibenda, ut dicatur vere de eo, magnus dominus noster, et magna virtus eius etcetera. Licet in iustitia recipienda minimo de regno suo comparetur, et licet omnes potentia præcellat, tamen cum cor regis in manu dei

esse debeat, ne sit effrenata frenum apponat temperantiæ et lora moderantiæ, ne cum effrenata sit trahatur ad iniuriam. Nihil enim aliud potest rex in terris, cum sit dei minister et vicarius, nisi id solum quod de iure potest, nec obstat quod dicitur quod principi placet legis habet vigorem, quia sequitur in fine legis cum lege regia quæ de imperio eius lata est, id est non quidquid de voluntate regis temere [f.107b] præsumptum est, sed quod magnatum suorum consilio, rege auctoritatem præstante et habita super hoc deliberatione et tractatu, recte fuerit definitum. Potestas itaque sua iuris est et non iniuriæ, et cum ipse sit auctor iuris non debet inde iniuriarum nasci occasio unde iura nascuntur, et etiam qui ex officio suo alios prohibere necesse habet, id ipsum in propria persona committere non debet. Exercere igitur debet rex potestatem iuris sicut dei vicarius et minister in terra, quia illa potestas solius dei est, potestas autem iniuriæ diaboli et non dei, et cuius horum opera fecerit rex eius minister erit cuius opera fecerit. Igitur dum facit iustitiam vicarius est regis æterni, minister autem diaboli dum declinet ad iniuriam. Dicitur enim rex a bene regendo et non a regnando, quia rex est dum bene regit, tyrannus dum populum sibi creditum violenta opprimit dominatione. Temperet igitur potentiam suam per legem quæ frenum est potentiæ, quod secundum leges vivat, quod hoc sanxit lex humana quod leges suum ligent latorem, et alibi in eadem, digna vox maiestate regnantis est legibus, scilicet alligatum se principem profiteri. Item nihil tam proprium est imperii quam legibus vivere, et maius imperio est legibus submittere principatum, et merito debet retribuere legi quod lex tribuit ei, facit enim lex quod ipse sit rex.

[fol. 107–107a] Since nothing pertaining to the clerical estate is relevant to this treatise, we therefore must see who, in matters pertaining to the realm, [has ordinary jurisdiction, and then who] ought to act as judge. It is clear that it is the king himself and no other, could he do so unaided, for to that he is held bound by virtue of his oath. For at his coronation the king must swear, having taken an oath in the name of Jesus Christ, these three promises to the people subject to him: In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign. Secondly, that he will forbid rapacity to his subjects of all degrees. Thirdly, that he will cause all judgments to be given with equity and mercy, so that he may himself be shown the mercy of a clement and merciful God, in order that by his justice all men may enjoy unbroken peace. To this end is a king made and chosen, that he do justice to all men <that the Lord may dwell in him, and he by His judgments may separate> and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*, equity from iniquity [D.1.1.1.], that all his subjects may live uprightly, none injure another, and by a just award each to be restored to what which is his own [I.1.1.3; D.1.1.10.1]. He must surpass in power all those subjected to him, <He ought to have no peer, much less a superior, especially in the doing of justice, that it may truly be said of him, 'Great is our lord and great is his virtue etc.,' [Ps. 146:5] though in suing for justice he ought not to rank above the lowliest of the kingdom.> nevertheless, since the heart of a king ought to be in the hands of God, [Prov. 21:1; C.1.1.8.3] let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*, <despite the statement that the will of the prince has the force of law, [I.1.2.6; D.1.4.1pr] because there follows at the end of the *lex* the words 'since by the *lex regia*, which was made with respect to his sovereignty'; nor is that anything rashly put forward of his own will, [I.1.2.6, gloss on *placuit* "not every word of a judge is a sentence just like not every word of the prince is law."] what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.> His power is that of *jus*, not *injuria* <and since it is he from whom *jus* proceeds, from the source whence *jus* takes its origin no instance of *injuria* ought to arise, [C.8.4.6] and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself. [D.8.5.15]> as vicar and minister of God on earth, for that power only is from God, <the power of *iniuria* however, is from the devil, not from God, and the king will be the minister of him whose work he performs,> whose work he

performs. Therefore, as long as he does justice he is the vicar of the Eternal King, but the devil's minster when he deviates into injustice. For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. [John of Salisbury, *Policraticus*, 8.17] Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, [D.2.2; D.2.2.1] and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws. [C.1.14.4] Nothing is more fitting to the sovereign than to live by the laws, [C.6.23.3] nor is there any greater sovereignty than to govern according to law, [C.1.14.4] and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.

The 'Twelfth-century Renaissance'

Why did Bologna happen?

The question that I want to pose now is not what happened at Bologna or even how did it happen but why did it happen. How would you evaluate the following propositions as "explanations" of the extraordinary revival of legal studies in the twelfth century (you may take the "facts," some of which are controversial, as true)?

1. *The conflict between* regnum *and* sacerdotium. Just because the investiture controversy was settled at the beginning of the 12th century that doesn't mean that the tensions that underlay it disappeared nor does it mean that reformist zeal ceased. The 12th century, after all, was the century of the conflict between Becket and Henry II of England, and between Alexander III and Frederick Barbarossa.

2. *Economics*. The twelfth century saw an extraordinary revival of economic activity. Numbers are hard to come by, but some economic historians estimate that the percentage growth of gross domestic product in western Europe in the twelfth century was greater than in the sixteenth century, perhaps even than in the nineteenth century (the other two leading candidates for the centuries of greatest economic growth before the twentieth).

3. *The revival of culture*. In France, there is an extraordinary flowering of sculpture and architecture in the great Romanesque churches of central France and the very beginnings of Gothic in the north. There is a notable revival of secular literature. In the south of France the Troubadour poets develop a love lyric the likes of which had not been seen in the West certainly since the Romans and perhaps never before. It is the century of Abelard and Heloise, of Henry II of England and Eleanor of Acquitaine, of a transnational Latin culture. It is perhaps the last century in which a man named John could be born in Salisbury in England, write the first original treatise of political thought since the Romans in a Latin as good as Cicero's, and end his life as bishop of Chartres.

4. *Contact with the East*. The first Crusade was conducted between 1196 and 1199. Whatever its true motivations, it resulted in a Latin Kingdom in Palestine that lasted, at least in part, for almost two hundred years and brought renewed contact between the Christian West and the Christian, Muslim, and Jewish East. Importation of ideas of Roman law, particularly from Byzantium, may have stimulated interest in such law in the West.

5. *The revival of other kinds of disciplines*. The twelfth is a century of the study of the Bible and of what today we would call theology and philosophy in the monastic and cathedral schools, particularly in France. Abelard (d. 1148) is a major figure in this tradition, but his work probably comes too late to have influenced the beginnings of university study of Roman and canon law. The glossators of the Bible, however, certainly

are early enough. It was also the century that saw by its end the development of a new discipline for which they still did not have a name but which we call ‘moral theology’.

6. *Increase in judicial activity, particularly in Italy*. We know that in the eleventh century and probably before there was a law school at Pavia where Lombard law (a Romanic-Germanic mix) was studied. A recent book (by Charles Radding) has pointed out that the Pavese jurists served as judges, and Radding tries to argue that they were beginning what we might call legal method. There probably isn’t enough material that certainly antedates the revival at Bologna to make that statement with any confidence, though practical concerns at a lower level than the high politics of the reform movement are almost certainly important in the development of the method and of Bologna. All of the first Bolognese civilians are known to have acted as judges. An even more recent book (by Anders Winroth) argues that Irnerius was largely mythical and that the real study of Roman law doesn’t get going at Bologna until the 1230’s, by which time Gratian had already composed the first draft of his *Concordance of Discordant Canons*.

7. *The growth of canonic institutions*. That the growth happened is clear enough from what we have said in lecture. The problem is is this the chicken or the egg?

8. *Violence*. Despite all of these developments, which frequently go under the name of the “twelfth-century Renaissance” the twelfth century, particularly its first half was a very violent time. Castellans all over Europe beat up the peasants and spent a great deal of time fighting each other. The second half of the twelfth century, it has recently been argued (Thomas Bisson) sees the emergence of more centralized authority, itself pretty violent, but powerful enough to tame the castellans, at least in many areas. The more centralized authority (it wasn’t always kings) used accounting and then law (indeed the two were inextricably intertwined) to exercise their power when they were not doing it with force of arms.