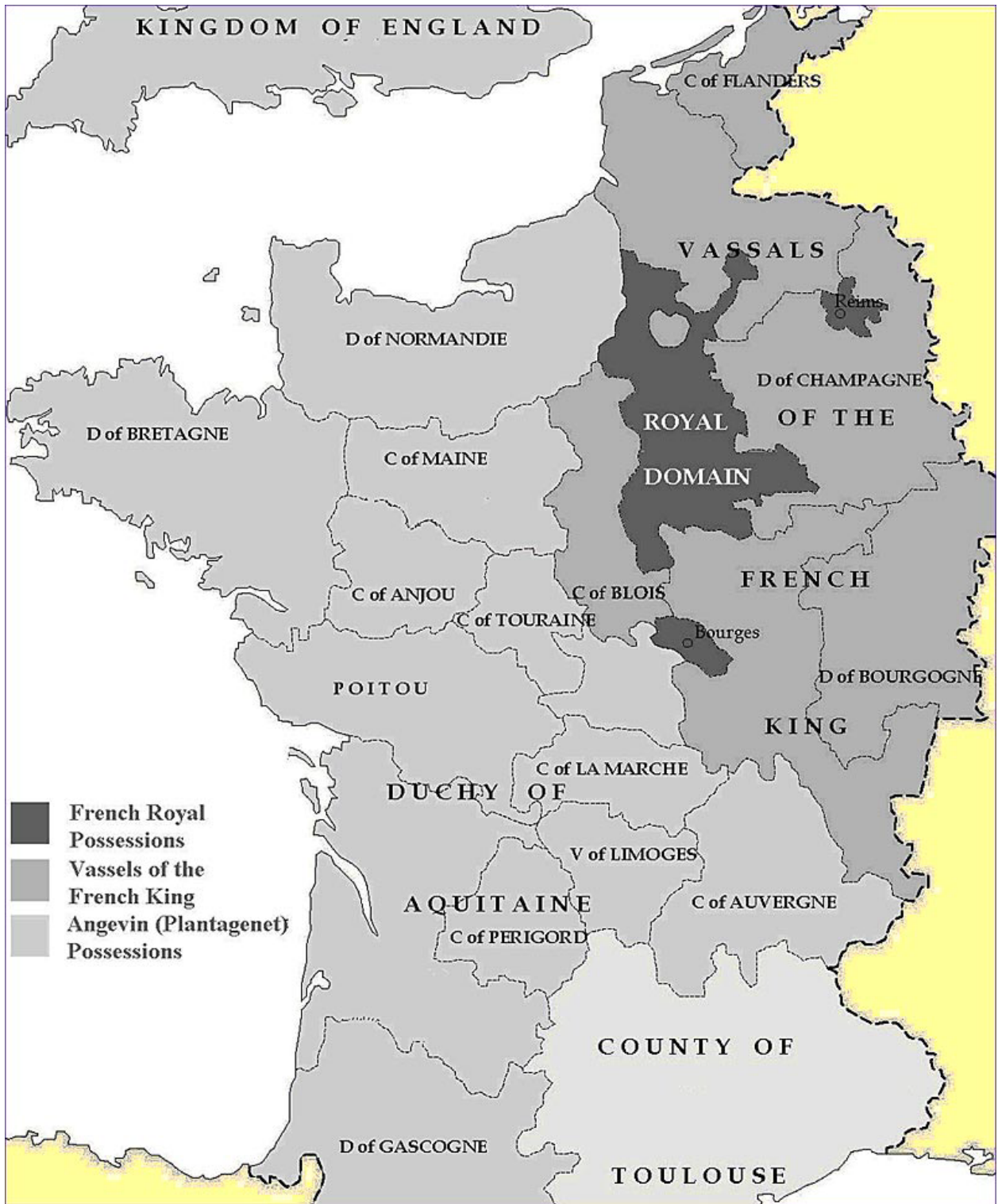


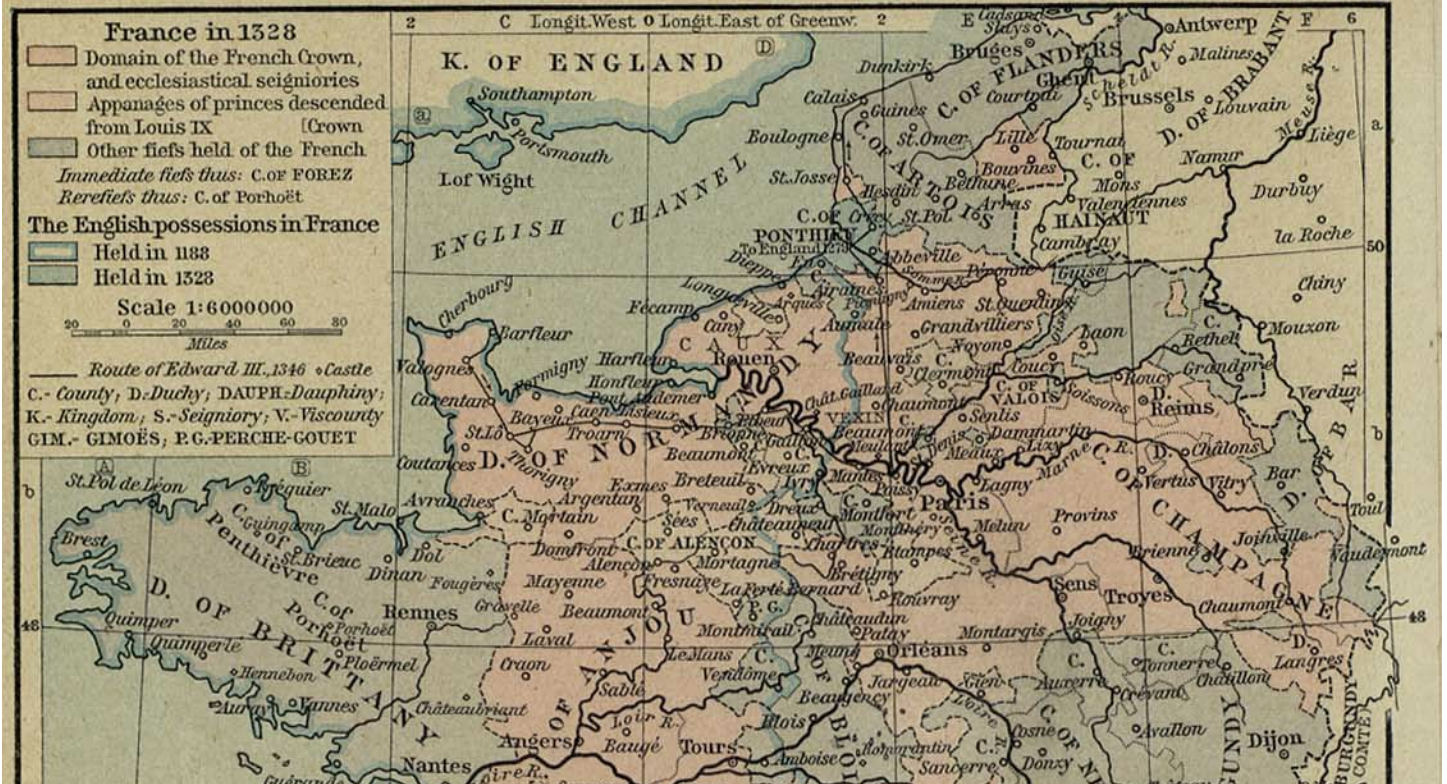
OUTLINE — LECTURE 12

CUSTOMALS OF TOURAINE-ANJOU AND BEAUMANOIR

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



Beuanoir (Contains 70 chapters, c. 2000 articles. This is a large work by Philippe de Rémi, sire de Beuanoir, courtier and bailiff of the small county of Clermont-en-Beuanois. The work is dated in 1283, and there's no reason to doubt that.)



1. Organization

a. Touraine-Anjou

- arts. 1–17 inheritance and marital property
- arts. 18–35 criminal justice
- arts. 36–37 parage (a type of co-tenancy)
- arts. 38–74 feudal obligations and feudal justice
- arts. 75–165 miscellaneous all mixed in

What do we make of this?

b. Beaumanoir

“Since it would be hard for those who want to consult this book on some matter which is relevant to what they want to do for themselves or their families to have to search through this book from end to end, in this section we will set out briefly and give a name to all the chapters which will be contained in this book, in the order in which they will appear, and designate them by a number in this division and each chapter when it appears by the same number, so that in this way you can easily find the material you want to study.”

cc. 1–11 basic procedure (complaint and non-appearance)

- c. 1 Office of the bailiff
- c. 2 Summons and summoners

- c. 3 essoins and of countermands [fifteen-day adjournments]
- c. 4 Proctors
- c. 5 Advocates
- c. 6 Complaints
- c. 7 Defenses (exceptions), replications, denials
- c. 8 Time within which to bring an action
- c. 9 The view
- c. 10 Non-feudal jurisdiction of the count
- c. 11 Ecclesiastical jurisdiction
- cc. 12–23 inheritance and marital property
- cc. 24–33 feudal rights and wrongs (including feudal justice)
- cc. 34–38 contracts
- cc. 39–44 proof and procedure (great hunk of stuff on pp. XI–23 to XI–26)
 - c. 39 Proofs and false witnesses
 - c. 40 Inquisitors, auditors, appraisals, and examining witnesses
 - c. 41 Arbiters and arbitration
 - c. 42 Stipulated penalties
 - c. 43 Pledges
 - c. 44 Reclamations [*rescousses*] of inheritances and exchanges
- cc. 46–57 status obligations and their enforcement
- cc. 58–67 procedure again (war and appeal)
 - c. 58 High and low justice
 - c. 59 [Private] wars
 - c. 60 Truces and assurances
 - c. 61 Appeals
 - c. 62 Appeals for default of right
 - c. 63 Defenses for those who are appealed
 - c. 64 Presentations made in gages in arms and words, and oaths after battle
 - c. 65 Delays before judgment
 - c. 66 Refusing judges
 - c. 67 Judgments and the manner of making judgment
- cc. 68–70 miscellaneous

Beaumanoir's basic scheme is that of the *ordo iudiciarius*.

- c. The Paris custom of 1580 (*Mats.*, p. XIV–4)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tit. 16—Of public proclamations [*criées*] (arts. 345–362). This is a title concerning public law that is added somewhat awkwardly at the end of the customal. There is otherwise no public law in it, nor is there any criminal law.

There's no parallel to the order of either Beaumanoir or of Touraine-Anjou. The absence of an agreed-upon organization for this type of material is going to haunt the customary lawyers in the 16th century.

2. Wild Animals in Touraine-Anjou and Beaumanoir:

a. TA art. 44 and 162 only provisions on wild animals.

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

The point, of course, is that poaching is on a level with feudal treason.

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

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

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

What is interesting about this provision – and we'll see it in a number of other places in the custom of Touraine-Anjou – is the formal dialogue that is imagined as taking place in court. Customary courts – the English are no exception – seem to be enamored of these formal dialogues. Once they harden,

the courts are reluctant to depart from them, even if the facts don't quite fit, or, in some cases, don't fit at all.

b. Beaumanoir c. 935 wild animals

[935] Some think that if someone is taken in present misdeed, taking rabbits or other large wild beasts in someone else's ancient warren, that he cannot be hanged, but² that they can be if they are taken by night, for it appears that they came with the intention of taking away [*par courage d'embler*]. But if they come by day, as sport leads some to do stupid things, they can get away with a fine of money: that is to say, 60 lb. for gentlemen and 60 s. for commoners. And just as we have said for warrens, we say for fish that are in enclosures or vivaria. And by this we can see that they are put in the position of those who are taken for thieves when they do the deed at night and not when they when the deed is done by day

². Akehurst adds in brackets "I say."

Roman law has, of course, nothing to do with this.

3. Marital property

a. TA 4.

TA 4. A gentleman keeps for his life that which has been given him at the door of the church in marriage, after the death of his wife, even though he has no heir, because he had one who cried and bawled, so long as his wife was given to him as a maid; for if she were a widow or if she were not a maid, he will keep nothing of it.

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

b. TA art. 57 marriage negotiations, a wonderful dialogue

TA 57. 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)”, then they ought to look to the best of the three and the most profitable for the young lady. And he who is said to be the best of the three ought to exceed the others so that no one could rightfully misunderstand it. And if the lady marries her without the counsel of the lord and without the counsel of the lineage on the side of the father, as she ought to have, she will lose her movable. And the lord can distraint 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.

It will be noted that the decision is taken by three parties, whose interests may not necessarily coincide. It is taken on the basis of which of the suitors is the richest and most gentle, but the suggestion is – it doesn’t quite say this – that the choice of the mother is to prevail unless the suitor proposed by the lord or the lineage is clearly better. It will also be noted that the young lady who is to marry seems to have nothing to say about it. This is quite different from what seems to be contemplated by Alexander III’s rules about the formation of marriage. Finally, this is a decidedly upper-class operation, and this widow is no pushover. She is expected to have a war-horse; she may or may not have another horse just for riding.

c. TA art. 108 more on marriage gifts

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

to their heirs which would issue from the two, in their view and knowledge, and thus it will remain to the eldest. And if it cannot be proven, a third part will remain to the younger of the other husband, and the elder will hold it in parage.

...

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

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

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

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

Though there are differences in detail, the similarity of this to the later, and I might add, the modern, French community of moveables and acquests is quite striking. There is nothing like this in England in this period, at least not in the central royal courts.

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

[487] A knight and lady during their marriage, bought a fief in the inheritance of the knight;¹ they had children. After the mother died, the children sought half of the fief by reason of the conquest of their mother, and the knight who was their father, within a year and a day from the death of the mother, retrieved it [*le retraist*] from his children for money, and the lord from whom the fief was held demanded two homages from the fief: one by reason of the half which he [the knight] had in his own right by his purchase, and the other by reason of the other half which he retrieved from his children for money. And the knight replied that he ought have but one homage, for the children had no right of inheritance in it, since he wanted to have it back for money, and since he is the man of the whole fief and no one took anything except him, he was not obliged to do two homages; and on this point they were at issue.

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

f. Beaumanoir arts. 621–628 the varieties of *compagnie*:

[621] Many gains and many losses arise often by partnership² which ought to be called partnership according to our custom, and for this reason one ought to take care with whom he places himself in partnership and whom he receives as partner. And these partnerships of which we wish to speak are those which by reason of the partnership the property is partitioned when the partnership fails, and such partnerships are formed in several ways. ...

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

[623] The second way in which partnerships are made is by merchandise³

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

¹ Akehurst translates “which was part of the knight’s realty.” I think what happened here is that couple agreed that this would be inherited in the line of the knight (rather than in the line of his wife, to the extent that the two diverged). The two did not diverge, however, because they had children, though the children seem to have had a claim even before the knight died.

² Akehurst translates “association” here, though the French uses the same word (*compagnie*). Clearly, Beaumanoir is distinguishing between *compagnie* in a loose sense and *compagnie* in a technical sense.

³ Akehurst translates “through a business [*marcheandise*].”

[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;⁴ in such a case they can lose or gain by reason of partnership with their father and their stepmother or their mother and their step-father. ...

Beaumanoir's equation of marriage with other forms of partnership has long been noted. The administration of community property by the husband was a feature of French community property until quite recently. What is missing from Beaumanoir's account, which can be found in Tourraine-Anjou is the notion that acquired land is also in the community, though what he says is not inconsistent with the notion that only the inheritances were separate property. In art. 1639 (below), he seems to make the distinction between inherited lands and acquired lands.

4. Substantive law of marriage. There is little in TA other than what is suggested above.

- a. Beaumanoir arts. 598–600

[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.

This corresponds exactly to the canon law on the topic. Beaumanoir does not mention that the consent of both of the couple was not required if the marriage had not been consummated. He may have known that, but it was a refinement that was probably not worth mentioning.

[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 adultery⁵ 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

⁴ Akehurst translates “to look after them.” This may well be what it means, but I have preferred the more literal translation, with its decidedly feudal connotations.

⁵ Akehurst translates “in concubinage.” The phrase (*en soignantage*) can mean either.

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,⁶ 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.

The distinction that Beaumanoir draws between adulterine children and those that are simply born out of wedlock comes right out of canon law. The canon law was uncomfortable with marriages of couples who had previously committed adultery, but the situation that Beaumanoir poses of a child born in adultery and ones born after adultery was no longer possible is a possible one in canon law. His reference to apostolic grace is a reference to the fact that it was possible to get a papal dispensation allowing a bastard to take orders in the church. Beaumanoir is quite right that this was not something that concerned the secular courts.

[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.

The institution with which this article deals is known as legitimation by subsequent matrimony. It was an institution that the English refused to recognize. Beaumanoir does recognize it, though he insists, as canon law did not, that those who are to be so legitimated be put under the veil at the wedding ceremony.

These are the canon law rules more or less accurately stated. The deference to the canon-law rules here seems quite complete.

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

[1626] We see that often ill-will arises between husband and wife who are together by marriage, so that they cannot endure to remain together, and there is not reason for separating the marriage so that they can remarry. Nevertheless, they hate each other so much that they do not wish to remain together, and sometimes it is by the blows of one, and sometimes by the blows of both. And when such a state of affairs comes about, cognizance belongs to holy church, if a plea is brought there. But nevertheless, sometimes women have come to us to require that they be given their common goods for their life and sustenance,

⁶ The reference may be Innocent III's famous decretal *Per venerabilem*. X 4.17.13.

and sometimes the husband does not agree, because he says that he is lord of the things and that it is not by his blows that the woman is not with him. And because such complaints come every day into the lay court, we will treat in this chapter of what one ought to do according to our custom with such request.

The formal canon law on separations was, in this period, something of a mess. It was clear that adultery was a ground for separation, but it was not completely clear that cruelty was. (This changed later in the Middle Ages.) Beaumanoir's chapter is too long to quote in full, but it makes it clear that the lay court in Beauvaisis had a quite well developed fault-based jurisprudence for determining whether a separation of goods should be made. The following article deals with what it to be done with the property when the church does the separating, presumably a divorce *a vinculo*, i.e., an annulment, or, perhaps, a separation from bed and board for adultery:

[1639] When marriages are separated between husband and wife for reasonable cause witnessed by holy church, one ought to know that if there were acquets 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.

5. There's nothing in TA specifically on proof, though matters concerning proof are scattered throughout the custumal (e.g., art. 108, above). There's nothing that requires that the author have been familiar with the *ordines iudicarii*. So far as Beaumanoir is concerned, it's a quite different story. Chapter 39, which B. tells us "speaks of proofs and false witnesses, of negation and affirmation [*espurgement*],³ and of the danger which is threatened, and of speaking against witnesses, and what cases can fall in proof,"⁴ contains 77 articles. The arrangement of the material is quite similar to that of Tancred, though of course is deals with some institutions, such as trial by battle, which Tancred does not recognize. They are too long to read, but they would make an excellent paper. Indeed, Beaumanoir may have written the proof section as a commentary on how Tancred was and was not being followed in Beauvaisis. The following article shows that he's tougher on women witnesses, suggesting, perhaps, that the secular courts in Clermont on Beauvaisis don't do what the church courts do:

⁴ Akehurst translates this entire phrase as "alibis."

⁵ Akehurst translates "can be put to proof." The disagreement depends on whether we should understand *cheoir en preuve* should be taken as meaning "fall in proof" (i.e., fails of proof) or "fall into proof." Since the chapter speaks of both, it is hard to tell precisely which is meant. Supporting the Akehurst translation is the relatively common phrase *cheoir en povreté*, "to fall into poverty."

[1175] Ladies [many mss. read 'women'] who are brought to witness ought not be received if they are challenged by him against whom they are brought in, whatever estate they have, widows, married, or maids, except for one case only: when a matter lies in testimony about the birth of a child or proving its

age, for example, where a woman has two male twin children and the elder wishes to assert his right of age, one can not know which is the elder without the testimony of women, and for this they ought to be believed in such a case.