OUTLINE — LECTURE 11

Courts and Custom

Courts in the 12th and 13th Centuries:

1. The most solemn judgment given by the highest authority is that given in a general assembly.
    a. Innocent IV deposed Frederick II at the council of Lyons in 1245
    b. the parliaments of Edward I of England hear cases as well as passing legislation
    c. the *parlement* of Paris and the French 'estates general'
    d. the *cortes* of Aragon and the *justicia*, the judicial department
    e. the Castilian *cortes* and legislation
2. Multiplication of judges associated with the growth of administration
    a. England: the itinerant justices of Henry I and the central royal courts of Henry II; judges of feudal and manorial courts
    b. French royal justice associated with the expansion of the royal domain: *baillis* (English 'bailiffs') in the north *sénéchaux* (English 'seneschals') with associated *juges* in the south; feudal justice at least in some places
    c. Castile—the judicial function of royal governors, *albedrios*, gave judgments called *fazanyas*, 'precedent'
    d. Aragon—characterized by urban justice (also characteristic of the Italian cities, the cities in the Low Countries, and some of the cities in modern Spain)
    e. By the middle of the thirteenth century every bishop in the West had his own court staffed by a professional judge called an 'official'.
    f. Low-level rural justice

Customary law

1. Secular courts did not apply only customary law.
2. The problem of definition. The anthropologists' definition of customary law won't quite do because:
    a. There were written records
    b. There was written law
    c. Academic study of law was happening
3. But some of the elements of the anthropologists' customary law were there. The earl of Warenne and the *quo warranto* inquiries of Edward I. Efforts were made to preserve the customary system by writing it down in books of customary law, custumals (*coutumiers*, *fueros*).

Coutumiers* and *fueros

1. Chronology.

a. The English are the earliest. This is not surprising granted the early development of English institutions.

The Treatise on the Laws and Customs of England Commonly Called Glanvill (G. Hall ed. 1965) [1187 X 1189]

Bracton on the Laws and Customs of England (G. Woodbine ed. S. Thorne trans. 4 vols to date 1968–) (not entirely the work of Henry of Bratton (c.1210–1267), but a work of composite authorship the earliest parts of which probably date from the 1220's and 1230's)

b. The Norman are the next. They differ from *Glanvill* and *Bracton* in that they make more effort to state substantive rules and in that Roman law influence is less obvious.

Coutumiers de Normandie (J. Tardif ed. 3 vols. Rouen 1881–1903) (includes the *Très ancien coutumier* (c. 1200) and *Summa de legibus in curia laicali* (c. 1250))

c. The four great French ones from the end of the 13th century are all like *Bracton* in the sense that they attempt to integrate Roman and canon law. They are also like *Bracton* and *Glanvill* and unlike the Norman ones in that there is a speaker.

Le conseil de Pierre de Fontaines (M. Marnier ed. 1846) (written in the 1250's by a royal counsellor and bailiff of Vermandois, n.e. of Paris)

Li livres de jostice et plet (L. Rapetti ed. 1850) (a mélange of Roman-canon and customary law, rules of Orléans predominating in the customary parts, perhaps composed by a student associated with the university of Orléans, c. 1260)

Les établissements de Saint Louis (P. Viollet ed. 4 vols. 1881–1886) (a. 1273, cc. 1–9 concern the *prevoté* of Paris and give the work its title; chapters 10–175 of book 1 are based on the *coutume* of Tourraine-Anjou, the primitive text of which is given in the third vol.; book 2 is based on the *coutume* of Orléans)

Phillippe de Beaumanoir, *Les coutumes de Beauvaisis* (A. Salmon ed. 2 vols. 1899) (first redaction 1283, by a ?poet, royal official and bailiff of the small customary jurisdiction of the county of Clermont en Beauvaisis near Paris)

d. As in England the 14th century brings a departure from the learned law, but the glossed *coutume* of Burgundy is an exception.

La très ancienne coutume de Bretagne (M. Planiol ed. 1896) (anonymous coutumier in rule format from early 1300's)

Le grand coutumier de France (E. Laboulaye, R. Dareste eds. Paris 1869) (uncritical edition of the 14th c. coutumier of the Île de France)

Le coutumier bourguignon glosé: (*fin du XIVe siècle*) (Michel Petitjean et Marie-Louise Marchand eds., Paris 1982).

2. Two things stand out among the large number of things that we might say about these efforts:

a. Most of these products seem to be connected with specialization and teaching if not professionalization. *Glanvill* and *Bracton* are consciously trying to describe the custom and practice of the king's central royal court, a relatively new institution at the time that they write and one that is greatly expanding. The first Norman custumal may be associated with an attempt to write down the rules for English administrators; the

second is probably to be associated with an attempt to give guidance to the French *bailli*. Pierre des Fontaines and Beaumanoir were both royal *baillis* and were almost certainly trying to describe a jurisdiction that their successors would have to administer. The *Livres de jostice et plet* and the *Établissements* are more complicated but may be connected with law study at Orléans.

b. Every one these documents is affected by Roman law. *Glanvill*, *Bracton* and the Norman ones are written Latin. All of them make reference to ecclesiastical institutions and thereby indirectly to Roman law. Beyond that the amount of the learned law in them and they way in which it is used varies considerably. *Bracton* and the *Livres* have the most Roman and canon law in them, citing it frequently and consciously making comparisons. *Glanvill*, Pierre and Beaumanoir are further away, though they all know some Roman and canon law and it affects their habits of thought. Intellectual influence is harder to see in the Norman custumals and the *Établissements*.

3. Spain was somewhat different.

Fuero de Leon (1017/20)

Usatges de Barcelona (almost certainly not, as it says, the work of Raymond Berenguer I (1035–76), probably the first 80 or so chapters were compiled c. 1162; whether the whole work dates from that time is controverted)

Fuero Viejo (1212), Castilian, but known only in a redaction of 1356

Fuero General (1234/53), Navarre

Fori Aragonum (1247)

Fuero Real (1252/55), a genuine work of Alfonso the Wise or of his court

Libro de las Leyes (later known as *Siete Partidas*) (1256/1325), this work seems to have gone through four redactions, how many of which date from the time of Alfons the Wise is controverted

Fori antiqui Valentiae (1301/41)

a. The word is not *coutume* or *coutumier* but *fuero*. The word is derived from Latin *forum* and originally means a court, but the Spanish always have a notion that the *fuero* is in some sense promulgated by a king. Once promulgated, however, it becomes the privilege of the area for which it is promulgated. There are *fueros* for particular towns, a great many of them. Any town worthy of the name in medieval Spain had its own *fuero*. Certain types of people would have their own *fuero*. The *fuero viejo* of Castile in its original form was probably a *fuero* for the nobility. There were *fueros* for mozarabs, Christians living under Moslem rule, and for mudejars, Moslems living Christian rule.

b. The continued vitality of the Visigoth code had considerable effect. Ferdinand III gave the *fuero juzgo* to many of the towns that he refounded in the areas that he took from the Moors.

c. By the middle of the 13th century the Castilian monarchs came to regard the diversity among the *fueros* as a problem. It is difficult to organize a kingdom that is subject to a multiplicity of laws, and in Castile, precedent, *fazanya*, was also recognized as a source of law. Ferdinand III's giving of the *fuero juzgo* to the newly reconquered cities was probably an effort at unification. The *fuero real* the first effort of his son Alfonso

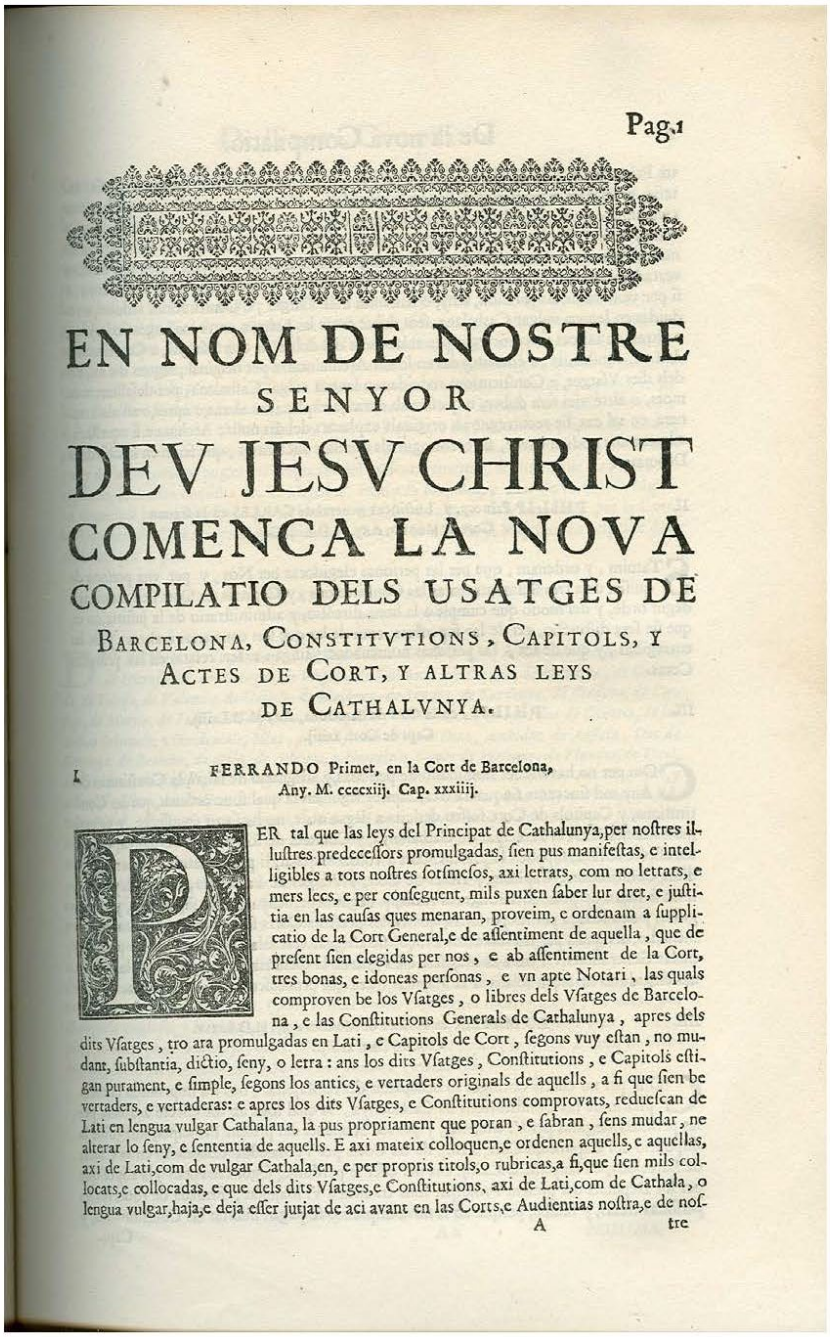
X (el Sabio) was clearly designed to restrict the privileges of the nobility and to get some unity in the law. Alfonso gave this *fuero* as the *fuero* for a number of cities. It may have applied in the central royal court, a court of appeal in Castile, as in France. It would seem, however, that it was not until the Alfonso XI (1311–1350) that the *fuero real* came to have a more general applicability and even here it was only in the absence of a specific provision in a local *fuero*.

d. Alfonso X did not stop at the *fuero real*. He also had compiled large book about law in general. The work was reedited into seven parts and has been known ever since as the *Siete Partidas*. It is written in the vernacular and is quite comprehensive. It is of enormous importance for Spanish legal history. I have chosen, however, not to extract it in the materials for two reasons: (i) What it says about witnesses, marriage and wild animals it simply repeats the rules of the academic law, as it does in many other areas. (ii) There is no evidence that it was ever used as a working law-book in Alfonso's time. Indeed, there is considerable evidence that it was not even regarded as authoritative in the courts until 1348, and then it was only a secondary authority. The work is, however, a political statement that the only way for Spain to achieve legal unity—and legal unity is intimately connected with political unity—is by the use of the academic law. This is a theme that will become more and more important as time goes on; it seems to have appeared first in Spain.

e. The realities, however, in the Iberian Peninsula in the 13th century were considerably messier. There was no political unity even within the individual kingdoms, and there were four of them. The *Usatges de Barcelona* (*Mats.*, § 10) shows us a *coutume* that probably was being used in the 13th century, though we must puzzle over exactly how it was being used. The word *usatges* is interesting. It is much closer to *coutumier* than *fuero*. What we are looking at is probably a redaction of the mid-twelfth century containing material that is considerably older, some of which probably goes back to the eponymous Raymond Berenguer I in the mid–11th century. Most of the scholarly effort with this document has been with recovering the earliest material. My efforts with it in connection with producing a translation for this class have suggested to me that some of it, perhaps a quite a bit of it, is probably later than the mid–12th century. I'm encouraged in this by the fact that the most recent editor of the text agrees with me, but not everyone agrees with him.

f. The document continued to be promulgated and copied throughout the Middle Ages.

This is manuscript of the *Usatges de Bacelona* with a promulgation decree by Alfonso III, king of Aragon, 1285-1291, but the manuscript. dates from the mid-14th century.



Pag.1

EN NOM DE NOSTRE
SENYOR
DEV JESV CHRIST
COMENCA LA NOVA
COMPILATIO DELS USATGES DE
BARCELONA, CONSTITVTIONS, CAPITOLS, Y
ACTES DE CORT, Y ALTRAS LEYS
DE CATHALVNYA.

I FERRANDO Primer, en la Cort de Barcelona,
Any. M. cccxiij. Cap. xxxiiij.

PER tal que las leys del Principat de Cathalunya,per nostres illustres predecessors promulgadas, sien pus manifestas, e intelligibles a tots nostres sotsmesos, axi letrats, com no letrats, e mers lecs, e per conseguent, mils puxen saber lur dret, e justitia en las causas ques menaran, proveim, e ordenam a supplicatio de la Cort General,e de assentiment de aquella, que de present sien elegidas per nos, e ab assentiment de la Cort, tres bonas, e idoneas persones, e vn apte Notari, las quals comproven be los Vsatges, o libres dels Vsatges de Barcelona, e las Constitutions Generals de Cathalunya, apres dels dits Vsatges, tro ara promulgadas en Lati, e Capitols de Cort, segons vuy estan, no mudant, substantia, dictio, seny, o lerra : ans los dits Vsatges, Constitutions, e Capitols estigan purament, e simple, segons los antics, e vertaders originals de aquells, a fi que sien be vertaders, e vertaderas: e apres los dits Vsatges, e Constitutions comprovats, reduescan de Lati en lengua vulgar Cathalana, la pus propriament que poran, e sabran, sens mudar, ne alterar lo seny, e sententia de aquells. E axi mateix colloquen,e ordenen aquells, e aquellas, axi de Lati,com de vulgar Cathala,en, e per propris titols,o rubricas,a fi,que sien mils collocats,e collocadas, e que dels dits Vsatges,e Constitutions, axi de Lati,com de Cathala, o lengua vulgar,haja,e deja esser jutjat de aci avant en las Corts,e Audientias nostra,e de nostre

A

This is an early printed edition (?1702) of the *Usatges de Barcelona*, with a promulgation decree by Ferdinand I, king of Aragon, 1412–1416 (1413).

The text was probably not fixed until the fifteenth century. With that kind of a history we should not expect that there will be much order in the materials. We will not be disappointed. The only discenable order is that the earlier provisions tend to be in the earlier chapters and the later ones in the later chapters.

The *Usatges de Barcelona*

[The translation is mine from the edition by Joan Bastardas i Parera (‘JB’) compared with the translation of Donald Kagay (‘DK’), with which I do not always agree. The chapter numbers

given here are the traditional ones followed by Bastardas' numbers in brackets. Where Bastardas has a letter before his chapter number, it means that he regards the chapter as a later addition to the basic 12th-century core.]

1. We have some wonderful stories at the beginning:

> 1. Before the usages were issued, so that all misdeeds might always be emended if they could not be ignored, the judges used to judge by oath and by battle or by cold or hot water, saying thus: "I (name) swear to you (name) by Jesus God and these four holy gospels that the evil that I have done to you I have done by my right and your wrong (a mon dret et ton tort); and I would stand to battle about this or to one of the above-said judgments, of cold or hot water."
>
> 2. Homicide and adultery which cannot be neglected were adjudged according to the laws and customs and emended or vindicated.
>
> 3 [2]. When the lord Raymond Berenguer the old, count and marquis of Barcelona and subjugator of Spain, had the honor, he saw and recognized that the Gothic laws could not be observed in all causes or businesses of this country . He also saw many quarrels and pleas which these laws did not specifically treat or adjudge. With the advice and counsel of his upright men, along with his most prudent and most wise wife, Almodis, he constituted and published usages by which all quarrels and evils inserted in them were controlled,[1] 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."[2] "Only the royal power shall alone be free in all things whatsoever penalty he commands be put in the pleas."[3]

1. "submitted to judgment." DK.

2. Fuero juzgo 2.1.13.

3. Fuero juzgo 2.5.8.

> And the usages that he issued begin thus:
>
> 4 [3]. These are the practices (*usualia*) of court usage that the lord Raymond the old, count of Barcelona, and his wife Almodis constituted to be held forever in their country, with the assent and acclaim of the magnates of the land, to wit: ... . [Nineteen names follow, three viscounts and sixteen men described as "judges."]
>
> [4]. Whoever kills a viscount or wounds or dishonors him in any way shall make amends to him as for two comdors[4] and a comdor like two vavassors.

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

> 5. Concerning a vavassor who had five knights, he shall emend for his death with 60 ounces of seared gold[5] and for a wound with 30 ounces. If he has more knights, the composition shall grow according to the number of knights. Whoever kills a knight shall give 12 ounces of seared gold in composition. Whoever wounds shall emend to him with 6.

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

> Clearly, there's a problem with the transmission, though not so great that one can't guess about origins. A probably accurate description of an ancient form of proceeding, coupled

with the statement that the usages abolished them, which they clearly did not, see, e.g., c.112:

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

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

2. I think that the prelude is 12th century and it reflects the concern of the period with making the procedure more "rational." The document which purports to be adoption document looks genuine.

3. A core of material that looks like it is an attempt to integrate feudalism into the wergild system of the *fuero juzgo*. This may well be from the mid–11th century.

The *Usatges de Barcelona*: witnesses

4. The provisions about witnesses suggest a gradual acceptance of the Romano-canonical scheme. The beginning is clearly in c.57 where witnesses are being used instead of battle, apparently, for the situation in which the tenant is not in possession.

> 57 [54]. Fees which knights hold, if their lords deny that have given them to them, they shall aver them by oath and by battle and shall have them. Those which they do not hold and claim,[7] they shall either prove by witnesses or by writing that they acquired them from their lords, or they shall abandon them."

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

Even here we must be careful. Witness procedure is mentioned in the Visigothic Code, and the man who wrote the dissertation on the topic found some documents as early as the 11th (?) century that mention them. It is tempting to see the distinction here as being like that of writ of right and novel disseisin. In any case this is the base case. It's the only one that the most recent editor includes in his edition of the base (mid-12th century) text.

> 85 [B2]. We command in order that perjuries be guarded against [that] witnesses not be admitted to take an oath before they are examined. If they cannot otherwise be examined, they shall be separated from each other and examined singly. The accuser may not chose witnesses in the absence of the accused. In no way shall anyone shall be admitted to the oath and to testimony unless he is entirely fasting.[8] If a witness is recused, let him who is recusing say or prove why he ought not be received. Witnesses shall be chosen from this territory and not from another, unless the case must be investigated far from the county. If anyone is convicted of perjury, let him lose his hand or redeem it with 100 shillings. [Parallels: C.3.20.14; C.22 q.5 c.6; X 2.20.2; MGH, *Capitularia regum francorum* 1.124 (805); *P*. 310–12.[9]]

8. DK's translation of this is just wrong.

9. 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. An * indicates that that parallel seems particularly close.

> 86 [B3]. Before witnesses are interrogated about the case, they shall be constrained by an oath that they will say nothing other than the truth. We also order this, that faith shall be admitted to more honest rather than more vile witnesses.[10] The testimony of one, however, however splendid and suitable a person he might seem, shall never be heard. [Parallels: Petrus 4.36; Brev. Alaric 11.14.2 (interp.); Benedict the Levite 1.283; Ivo, Decret. 16.204; Panorm. 55.21; *P*. 312–13.]

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

> 87 [B4]. If someone is proven to have made an unjust appeal, he ought to be forced to recompense the expenses that he compelled his adversary to bear, not in simple but in four-fold. Two or three suitable witnesses suffice to prove all matters. The testimony of one is disapproved by the laws and the canons. [Parallels: Petrus 4.30 (s. 2–3);* Brev. Alaric 5.39 (s. 1);* Epit. Aegidii (epitome of the Breviary of Alaric);* C.3.20.9; C.2 q.6 c.27; Ivo, Decret. 5.285; Ivo, Pan. 4.131; *P*. 313–15.]
>
> 88 [B5]. No one shall ever presume to be at once accuser, judge and witness, since in every judgment it is necessary that four persons be present, i.e., chosen judges, suitable accusers, appropriate defenders and legitimate witnesses. Judges moreover ought to use equity, accusers claim to amplify the cause, defenders extenuation to diminish the cause; witnesses ought to prove the truth. [Parallels: Petrus 4.7, 12; Benedict the Levite 3.339;* C.4 q.4 c.1; Ps. Isid. Epistle of Fabian;* Ivo, Pan. 4.81; Ivo, Decret. 7.321; *P*. 315–17.]
>
> 89 [B6]. Accusers and witnesses cannot be those who a day or two before were enemies, lest in their wrath they seek to harm and lest the injured seek to avenge themselves. An unoffended affect [*inoffensus effectus*] is to be sought in accusers and witnesses, not a suspect one. Suitable witnesses are not those who can be ordered to be witnesses. [Parallels: D.22.5.3, .5; *P*. 317.]

The substance of cc. 85–89 can all be found in 11th century canonical collections and they are largely drawn from Pseudo-Isidore. C.89 probably requires a more profound knowledge of Roman law, though it could be by way of proceduralists, like Tancred. It is possible that these provisions date from the mid-12th century, but it seems unlikely, both because they are not in all the early mss. and because the effort that would have been necessary to put them together from existing sources in the mid-12th century is probably beyond the folks that were putting this material together.

> 143.[11] Because we have frequently received complaint by our subjects that truth is obscured and repressed by the corruption of witnesses, following in this part the imperial laws, we order that if any witness be produced by anyone he shall be bound by oath that no money or anything else was given or promised to him nor, to his knowledge, to anyone subject to him. Further, to put an end to the slipperiness of witnesses (*testium facilitate*) by which the contrary to the truth is put forward, we order that anyone litigating before us or anyone delegated by us who knowingly produces a false witness or corrupts a witness shall lose his cause and shall incur the publication [*sic*, probably means a type of forced sale] of all his movable goods, of which one-half shall be assigned to his lord and the other half shall be

kept in our treasury. The same penalty of publication of goods shall be incurred by anyone convicted of having borne false testimony, and above that he shall lose his hand and his tongue, and the possessions [does this mean immovables?] of both shall devolve on those who are called to their goods by right of succession. [Parallels: D.22.5.5, .16, .3; *P*. 320–1.]

11. JB omits this and c. 144 because they are not in his early mss

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

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

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

Cc. 143–144 are interesting because they are so clearly legislative (parallels of Innocent III?). In order to follow this form this carefully we need to have either the Code or papal decretal letters or both. (Even that needs to be checked out against the Visigothic examples.) The reference to "slipperiness of witnesses" (*testium facilitate*) is to me, at least, is some indication of 13th century origins (though the phrase does occur in the Digest), as is the efforts of both Innocent III and Innocent IV to limit frivolous appeals to the papacy. When this is combined with the fact that these texts are in none of the early manuscripts, we pretty clearly have reached another stage of development.

Bottom line: With care but with some guess-work, it is possible to contstruct stages of the reception of at least the formal law of Romano-canoical procedure in Barcelona. To what extent this was reflected in the courts is question that might be answered (the Aragonese archives are very rich), but no one seems to have done the work yet.

[The *Materials* have more provisions from the *Usatges* about witnesses.]

The *Usatges de Barcelona: marriage*

108 [85]. If anyone violently corrupts a virgin, he shall either marry her if she and her parents wish and give her *exovar* [roughly, "dowry" or "bride- price"], or he shall give her a husband of her worth. If anyone violently commits adultery.[12] 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.]

12. *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*.

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.
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> *Exceptiones Petri*, c. 54 [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 may be derived from the King Euric's laws (466 X 484)]: If a freeborn girl, or a widow, should go to the house of another for the purpose of committing adultery, and the man who is implicated should wish to marry her, and her parents, if she has any, should acquiesce; he shall give to the parents of the girl as large a sum as they may demand, or as much as shall be agreed upon between him and the woman herself. But the woman shall not share with her brothers in the inheritance of her parents, unless the latter desire.

But this does not exhaust the possible parallels. One might consider, for example, consider cc. 82–84 of Aethelberht's Code (*Materials*, p. IV-4):

> c. 82. If a man forcibly carries off a maiden, [he shall pay] 50 shillings to her owner, and afterwards buy from the owner his consent.
>
> c. 83. If she is betrothed at a price to another man, 20 shillings shall be paid as compensation.
>
> c. 84. If she is brought back, 35 shillings shall be paid, and 15 shillings to the king.

Or the following provisions from the Burgundian Code (*Materials*, p. IV-7):

> 12.1. If anyone 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.
>
> 12.2. 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.
>
> 12.3. But if the abductor does not have the means to make the above-mentioned 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.
>
> 12.4. 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.
>
> 12.5. 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.

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?

In order to answer this question, you are going to have to do two things:

(1) Examine the texts given above carefully to see their similarities to and differences from the provision in the *Usatges*.

(2) Outline an overall scheme that indicates how law and institutions are likely to have developed in the county of Barcelona by the middle of the twelfth century (at the earliest) or the mid-thirteenth century (at the latest). Both the analysis of the texts and the overall outline will then inform your final judgment as to "what is going on" in this text.

109 [86]. Concerning the things and faculties of peasants who are *exorchs* [one ms. glosses as "sterile"], those who have left this world, their lords shall have that part of their goods that their children [perhaps "sons"] would have had if such had survived. [There are no known parallels to this provision.]

There are no known parallels to this provision, in contrast to all the rest in this group all of which have parallels in the Fuero juzgo. That is encouraging. We may be dealing here with a real custom of 12th-century Barcelona. The 'peasants' (*rustici*) of which the provision speaks are probably serfs, perhaps even in some sense slaves. The word *exorch* seems to be related to Latin *extorquere*, which means 'extort'. What the provision seems to be saying is that if the peasant dies and is not survived by children, the lord gets that portion of the inheritance that would have gone to the children if any had survived. The fact that *exorch* is used to describe the practice suggests that those who used word did not regard the practice as altogether justified.

110 [87]. Similarly, concerning the things and possessions of adulteresses, if the adultery was committed their husbands unwilling, they and their lords shall divide the entire portion of the adulteress equally. If, on the other hand – may it never happen – the adultery was done by the will, order or assistance of their husbands, the lords shall have right and justice entirely. [Parallel: Fuero juzgo 2.4.12 [*recte* 3.4.12]; *P.* 285.]

Fuero juzgo 3.4.12 (Scott trans., called 'Ancient law', perhaps going back to Euric's laws): We have already decreed, by a former law, that an adulterous wife, as well as the adulterer, shall be

delivered up to her husband. And, because doubt concerning the disposition of their property may sometimes arise in the minds of the judges, therefore we consider it necessary to especially provide, that if the adultery of the wife should be manifest upon evidence introduced by her husband, and if neither adulteress nor adulterer should have legitimate children by a former marriage, the entire inheritance of both of them, along with their persons, shall be delivered up into the power of the husband of the woman. But if the adulterer should have legitimate children by a former marriage, his property shall belong entirely to them, and only his person shall be surrendered to the husband of the adulteress. But if the adulterous wife should be known to have legitimate children, either by a former, or later marriage, the portion belonging to the children of the former marriage shall be set apart and delivered to them; but the husband shall have the portion which would otherwise belong to her children born after she had been convicted of adultery, and he may bequeath it, after his death, to those children. And, after the adulterous wife has been brought back into the power of her husband it shall not be lawful for any marital relations to exist between them. If, in violation of this, such relations should thereafter exist, he himself shall have none of her property, and all of it shall be given to her legitimate children; or, if there are no children, to her other heirs. A similar decree is hereby made concerning persons who have been betrothed.

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

Fuero juzgo 3.6.5 (3.5.4 in the MGH ed. with different wording) (Scott trans., atrributed to King Chindaswith, 642–653): That crime must not be unpunished which, in the violation of morality, has always been considered most execrable; we therefore decree, in cases of pederasty [it is unclear that pederasty is meant here as opposed to male homosexual acts without regard to the age of the parties], where their guilt has been proved after proper investigation by the judge, that both parties shall be emasculated without delay, and be delivered up to the bishop of the diocese where the deed was committed, to be placed in solitary confinement in a prison; so that, against their will, they may expiate the crime which they are convicted of having voluntarily perpetrated. If, however, any one should have been forced to commit this horrible offence, and is proved to have done so unwillingly, he shall then not be liable to punishment, if the person who discovered the crime should be present as a witness; but he who engaged in it voluntarily shall undergo the full penalty. The children, or legitimate heirs of married men who have been found guilty of this crime, shall have their property; and it shall be lawful for their wives, having received back their dowries, and retaining all their possessions, to afterwards marry whomsoever they will.

112 [89] Husbands can accuse their wives of adultery by suspicion, and they ought to purge themselves by an *avagant* [champion][13] by oath and by battle, if there are manifest *indicia* and competent signs in it: the wives of knights by oath and also by a knight, the wives of citizens and burgesses and noble bailiffs by a foot-soldier, the wives of peasants [*rusticorum*] by their own hands by the cauldron. If the wife wins, her husband shall retain her honorably and shall pay her all the expenses that her friends and relatives made in the plea and in the battle and the damage to the champion [*bataier*]. If she loses, she shall come into her husband's hand with all the goods that she has. [Parallel: Ivo, Decret. 4.20.si mulier; *P*. 319; Fuero juzgo 3.4.3; *P*. 285–6.]

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

Fuero juzgo 3.4.3 (Scott trans., called ‘Ancient law’, perhaps going back to Euric’s laws): If the wife of any one should commit adultery, and not be caught in the act, her husband may accuse her before a judge by the introduction of competent evidence [*competentibus signis vel indiciis*]. And if the adultery of the woman should be plainly manifest, both adulterer and adulteress, according to the provisions of a former law, shall be given up to the husband, to be disposed of in any way he may select.

The parallels to cc. 110–112 in the Fuero juzgo are close enough that it seems clear that these provisions contain ideas, and in some cases words and phrases, that are derived from the Fuero juzgo. They are not the same, however. C. 110 seems to say that lords get part of the forfeitue and that they will be adjudicating cases of adultery. Lords are not mentioned in this context in the Fuero juzgo. The parallel to c. 111 deals not with adultery but with male homosexual acts. The specification of the procedure by oath and battle or ordeal in c. 112 is not found in the Visigothic parallel, which speaks simply of “manifest *indicia* and competent signs,” the same words that are found in c. 112.

147 [C4] 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.]

Fuero juzgo 3.2.8 (Scott trans., called ‘Ancient law’, perhaps going back to Euric’s laws): If any freeborn girl should marry a freeman before the latter has consulted her parents, and if he then should obtain consent to have her as his wife, he shall pay the legal dowry to her parents; but if he can not furnish that sum, the girl shall be again placed under their control. If she should have been voluntarily married without the consent and knowledge of her parents, and they should then be unwilling to receive her, she shall not inherit along with her brothers, for the reason that she married without the permission of her parents. If her parents should give her any of their property, she shall have full liberty to dispose of it at her pleasure.

Fuero juzgo 4.2.14 (Scott trans., called ‘Ancient law’, perhaps going back to Euric’s laws): A mother, during her lifetime, or so long as she remains a widow, shall share equally with her children in the income derived from the estate of her deceased husband. But she cannot give away, or sell, or bestow upon any of her children her share of the aforesaid property. And if the children should become aware that their mother, either through negligence, or through hatred of them, was about to dispose of any of said property, they may, at once, make application to the governor of the city, or to the judge, in order that the latter may warn their mother not to alienate such property, and only to use the income of it. She, however, shall have the right to give to her children any or all of said income, and she can unquestionably dispose of any profits derived from the same. And if it should be proved that she has alienated any of her portion, full restitution must be made therefor after her death.

After the death of the mother, whatever she received from her husband shall be equally distributed among the children, because they must not be defrauded of their paternal inheritance. If the mother should marry again, from that very day the children can claim as their own that portion of their father's property which their mother received at his death.

Fuero juzgo 3.2.1 (Scott trans., called ‘Ancient law’, perhaps going back to Euric’s laws): If any woman, within a year after the death of her husband, should marry another, or commit adultery, the children by her first marriage shall receive half of her property; or, if there are no children, the nearest heirs of the deceased husband shall receive half of her property, by order of the court. We have especially prescribed this penalty lest the woman, having been left pregnant by her husband, and desiring to enter into a second marriage, should destroy her unborn offspring. We decree, however, that those only shall be exempt from the operation of this law, who marry within the prohibited time under order of the king.

The manuscript tradition suggests that this provision is later than the ones about adultery. The parallel provisions in the Fuero juzgo are, however, old. They even have parallels in the Burgundian laws. The meaning of ‘adultery’ in this provision is unclear, and it is not completely clear in the parallels. The property arrangements for widows are also not completely clear, nor are they in the parallels. What is clear in c. 147 is that there is a category of property called an ‘honor’, not mentioned in the parallels. The widow forfeits the honor if she commits ‘adultery’, which may include simply remarrying. She also seems to have a life estate in at least part of what is not the honor.