OUTLINE — DISCUSSION CLASS 10

The Institutes of National Law

England:

Sir Edward Coke, 1552–1634, *The Institutes of the Laws of England*
John Cowell, 1554–1611, *Institutiones iuris Anglicani ad methodum et seriem institutionum imperialium compositae & digestae*

French Customary Lawyers (revisited):

Charles Dumoulin, 1500–1566, the 'French Papinian,' systematizer of the custom of Paris
Guy Coquille, 1523–1603, custom of Nivernais treated comparatively
Antoine Loysel, 1536–1617, maxims arranged according to the *Institutes*
Louis Charondas Le Caron, 1534–1613, historical inquiry into the custom of Paris
Charles Loyseau, 1566–1627, treatises on specific topics

Jean Domat, 1625–1695
Gabriel Argou, 1640–1703
Robert Joseph Pothier, 1699–1772

Guy Coquille, *Institution au droict des francois*, tit. 12 (Concerning the rights of the married), *Mats.* XVII–2 to 7

A married woman, after the words of present tense and solemnization of the marriage in

the face of the church, is in the power of her husband and out of the power of her father, and cannot contract or go to court without the authority of her husband. Nivernais, tit. concerning the rights of married persons, ar. 1. Paris, art. 223. Poitou, art. 225. Sens, art. 111. Auxerre, art. 221. Melun, art. 213. Bourbon, art. 232. Orleans, art. 194. Troyes, art. 80. Laon, art. 19. Reims, 12.13. Blois, art. 3. Bourgogne, art. 20. None of said customs remits the nullity of the contracts which the wife makes without authority after the dissolution of the marriage, either with regard to her husband, or herself or her heirs. [Citations omitted.] This decision of absolute nullity has been taken from the subtleties of the Roman law, in that an act done by a *filiusfamilias* when he is in power, remains null, even after his emancipation [D.29.1.33 (an odd cite for this proposition); D.19.6.1.2 (on point)], and so it was desired to infer the same of the wife in power of her husband. But it seems that since the power of the husband is all that renders the woman incapable of disposition that only the respect of the husband ought to make the nullity and not that the nullity be in and of itself. A woman considered in herself, who has reached the age of majority, can without difficulty make all sorts of contracts, so that her person does not carry any prohibition. Only the survival of the husband, who has the wife in his power, clouds and covers that liberty of the woman. It is therefore only in respect of the said power that there is a prohibition, which is a temporary hindrance, not inherent in the person, but being outside and causative, it ought to cease when the cause ceases. ...

The customs of Nivernais in the said art. 1 and Burgundy art. 20 do not permit the wife to make a will without the authority of her husband. But Poitou, art. 275, Auxerre, art. 238, Berry, concerning wills, art. 3 and Reims, art. 12, permit the married woman to make a will without the authority of her husband. In truth the will cannot and ought not be subject to the authority nor depend in any way on the will of another, so that it ought to move of the pure and entire liberty of the testator. [D.28.5.32 (on point)]. Wherefore it would seem that if the prohibition of the custom ceases, or if the husband doesn't complain, one cannot challenge the validity of a will made without the authority of the husband in those provinces where a woman is forbidden to make a will without the authority of her husband.

A married man and woman are common, without there being any agreement, [in] movables, debts, and movable credits, made and to be made, and in conquests made during the marriage. This is said in almost all the customs of France. Nivernais, concerning the rights of married people, art. 2, and in the first article, speaks of solemnization in the face of the church. Paris art. 220 speaks of from the day of the nuptial blessing. Poitou, art. 229, speaks of the nuptial blessing in the face of holy church. Nivernais in speaking of the solemnization of marriage in the face of holy church speaks with greater efficacity than Paris which speaks simply of the nuptial blessing for two reasons. The first is that the nuptial blessing can be made by the priest in a private house, or clandestinely without assembly. The second reason is that all weddings are not subject to the nuptial blessing, for second and third weddings do not receive the ceremony of blessing and blessing is there forbidden. [X 4.21.1, .3.] And that this public ceremony is required was decided by my teacher, Mariano Socini, the younger. Consilium 31 and Consilium 86, vol. 1. And he cites [Nicholas de Tudeschis on X 4.17.15], and the same [Nicholas] decided this in Consilium 1, vol. 1, saying that when there are only words of the present tense, they are called *sponsalia de presenti* and the words “matrimony” and “husband and wife” are used if the marriage has been

consummated.[1] This modification of the public ceremony ought to be general, for although the words of the present tense make the marriage according to the canon law so far as the bond of marriage is concerned, nonetheless with regard to those matters of the civil law, such as marital power, the community and the dower, publication and ceremony is necessary, which consists not only in the ministry of the priest by the nuptial blessing but also in a grand and notable assembly of Christians in the place where Christians are accustomed to assemble, for "church" signifies both the assembly of Christians and the place where they assemble. Sens, art. 272. Auxerre, art. 190. Berry, marriages, art. 7, speak of deflowering or consummation as the solemnization, but Poitou and Nivernais speak more properly. Bourbon, art. 223, is satisfied with words of the present [tense].

1. The French text is corrupt here. This seems to be what it means. Panormitanus says that the word "matrimony" is sometimes used of *sponsalia de presenti* and sometimes only of those that have been consummated.

The World of Ideas—17th and 18th Centuries

1550–1610, Francisco Suarez, Spanish philosopher, theologian, jurisprude
1567–1622, Francis de Sales, French (Swiss) bishop, reformer, saint
1561–1626, Francis Bacon, English philosopher and stateman
1557–1638, Johannes Althaus (Althusius), German jurist, political theorist
1564–1642, Galileo Galilei, astronomer, mathematician, physicist
1583–1645, Hugo Grotius (Huigh de Groot)
1596–1650, René Descartes, mathematician, philosopher
1623–1662, Blaise Pascal, mathematician, religious thinker (Jansenist)
1632–1677, Baruch (Benedict) Spinoza, Dutch philosopher, moralist
1588–1679, Thomas Hobbes, *Leviathan*
1627–1704, Jacques Bénigne Bossuet, French bishop, preacher, absolutist
1632–1704, John Locke, *Treatises on Government*
1646–1716, Gottfried von Leibniz, mathemetician, philosopher, jurisprude
1641–1727, Isaac Newton, English physicist, philosopher
1679–1754, Christian von Wolff, German mathematician, jurisprude
1689–1755, Charles Montesquieu, French *philosophe*, writer on government
1711–1776, David Hume, Scottish philospher, political theorist
1694–1778, François Arouet de Voltaire, French *philosophe*, writer
1712–1778, Jean Jacques Rousseau, Genevan *philosophe*, writer on politics
1696–1787, Alphonsus Ligouri, Italian saint, moral theologian
1723–1790, Adam Smith, Scottish political economist
1703–1791, John Wesley, English religious leader
1738–1794, Cesare Beccaria, Italian penal reformer
1724–1804, Immanuel Kant German philosopher