

OUTLINE — SECTION 11

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Domat, Pothier and the Road to Codification

Writers:

Jean Domat, 1625–1695: *Les loix civiles dans leur ordre naturel* (1689)

Gabriel Argou, 1640–1703: *Institution au droit français* (1692, 11th ed. 1787)

Joseph Pothier, 1699–1772: *Pandectes de Justinien* (1748); *Traité des obligations* (1761); from 1761 until after his death 18 *traités* on specific topics published

François Bourjon, a.1680–1751, *Le droit commun de la France et la coutume de Paris réduits en principes, tirés des loix, des ordonnances, des arrêts des jurisconsultes et des auteurs, et mis dans l'ordre d'un commentaire complet et méthodique sur cette coutume: contenant dans cet ordre, les usages du châtelet sur les liquidations, les comptes, les partages, les substitutions, les dîmes, et toutes autres matières* (ed. 1743, 3d ed. 1773)

Napoleonic Codes (promulgation date):

Code civil (1803)

Code de procédure civile (1806)

Code de commerce (1807)

Code d'instruction criminelle (1808)

Code pénal (1810)

German-speaking areas:

Codex Maximilianeus Bavaricus Civilis (1756) (Bavaria, retained the Pandects as secondary authority) (also criminal and procedural codes)

Allgemeines Landrecht für die preussischen Staaten (1789–1792)

Allgemeines Bürgerliches Gesetzbuch (Austria, 1811)

Domat, *The Civil Laws in their Natural Order* §§ 825–7

[823.] *Two engagements in marriage.*— Marriage makes two sorts of engagements; one whereof if formed by the divine institution of the sacrament, which unites the husband and the wife; the other is made by the contract of marriage, which contains the covenant relating to their goods.¹

[824.] *The engagement of the persons.*— The engagement of marriage, in what relates to the union of the persons, the manner in which it ought to be celebrated, the causes which render it indissoluble except in some singular cases, and other the like matters, are not within the design of this book, as has been observed in the fourteenth chapter of the Treatise of Laws.

[825.] *The covenants concerning the goods.*— As to the covenants about the goods, some of them come within the design of this book, and others not; and in order to distinguish them, we must divide them into three sorts. The first is of those covenants which are not agreeable to the Roman law, although they are in use with us in France, whether it be throughout the whole kingdom, such as the renunciations made by daughters of successions that may happen to fall to them;² institutions of heirs or executors by way of contract, and which are irrevocable³; or which are peculiar only to some provinces, such as the community of goods between husband and wife. The second is of those which are conformable to the Roman law, but which are only received in some

provinces, such as the augmentation of dowries after marriage. And the third sort is of such covenants as are agreeable both to the Roman law and to the general usage of this kingdom, such as those which concern the dowry, or the goods which the wife may have besides her dowry, which the Romans call by the name of *paraphernalia*.

[826.] It is only this last sort of covenants, which, being both agreeable to the Roman law, and in use with us, is of the number of matters which come within the design of this work. But as to the community of goods between man and wife, jointures, the augmentation of marriage portions, and other matters which are peculiar to some customs, or to some provinces, they have their proper rules in the customs of the places where they are received, and which we are not to meddle with here. We shall only observe, that these matters ... have many rules taken out of the Roman law, which will be found in this book in their proper places, in the matters to which they have relation. Thus many rules of partnership, and of other contracts, may be rightly applied to the community of goods between man and wife, wherever it is in use: and many of the rules of successions, as also of covenants, may be applied to the contracts of marriage which settle inheritances as by will.

[827.] *The Subject-Matter of this Title.*— There remains, then, for the subject-matter of this title, only the rules of the Roman law which concern the dowry, or marriage portion, and the goods which the wife has besides her portion; among which we shall only set down those rules which are of common use. ...

[1.](#) These two sorts of engagements are expressed and distinguished in the marriage of Tobias. Tobit vii. 13, 14.

[2.](#) [C.6.20.3 (invalidating such covenants in Roman law)].

[3.](#) [C.2.3.15; C.5.14.5].

Pothier, *Pandectes de Justinien* D.23.2

“Nuptials are the joining of male and female, and casting together of lots for a lifetime, the intersection point of divine and human law.”⁴ [D.23.2] 1. Modestinus, Book 1 of Rules.

First Part: On the form of contracting nuptials. ...

Art. 1: Whose consent is required for the form of contracting nuptials.

Sec. 1: On the consent of the contracting parties

Sec. 2: Of the consent of those in whose power the contracting parties are.

Article 2: Whether instruments or celebration is required for the substance of a marriage? Or bedding together?

Sec. 1: Concerning instruments. . . .

Sec. 2: Concerning celebration. . . .

Sec. 3: Concerning bedding together. . . .

Second Part: Concerning the persons that can contract marriage and those who cannot.

In order for the marriage to be just three things are required with regard to the persons: citizenship, puberty and that they be such as are not entirely interdicted from marriage or from marriage to each other.

Section 1: Concerning citizenship and puberty. . . .

Section 2: Concerning those who are absolutely prohibited from contracting marriage. . . .

Section 3: Concerning those persons who cannot contract marriage with each other.

Art. 1: Concerning blood relation. . . .

Art. 2: Concerning affinity. . . .

Art. 3: Concerning public honesty. . . .

Art. 4: Concerning the impediment of marriage by reason of power. . . .

Section 4: Concerning incestuous and illicit marriages and the penalties for them. . . .

Appendix: Concerning the rites in the celebration of marriage which the Romans used to follow. . . . [Taken from Barnabe Brisson (1531–1591), *De ritu nuptiarum*.]

4. This definition properly pertains to those marriages which took place by *confarreatio* or *coemptio*, in which the woman crossed over into the hand (*manus*) and family of the man. Since a woman in that sort of marriage had the same Penates as the man had, such a marriage is called “an intersection point of divine law.” It was also “an intersection point of human law,” since the woman took all her things to her husband and became one of his heirs. Concerning these things see above [D.1.6]. Nonetheless this definition can be applied to any marriage, even those in which the woman does not come into the hand of the man, in that sense in which Tullius says that friendship is “the consent of divine and human things,” which nothing other than that friends ought to use their things as if they owned them in common.

Pothier, *Contract of Marriage* arts. 1–2, 11–12, 67, 69, 321–2

1. We thought that we could not better finish our Treatise on Obligations and of the different contracts and quasi-contracts born from it than by a Treatise on the Contract of Marriage, this contract being the most excellent and the oldest of all contracts.

It is the most excellent, to consider it only in the civil order, because it is of most concern to civil society.

It is the oldest, because it is the first contract that was made among men. As soon as God had formed Eve from one of Adam’s ribs and he had presented her to him, our two Wrst parents made a contract of marriage with each other. Adam took Eve for his spouse by saying to her: “This now is bone of my bones and flesh of my flesh . . . and the two will be one flesh.” And Eve took Adam for her spouse in turn.

2. The term contract of marriage is equivocal. It is taken in this treatise for the marriage itself. Otherwise it is taken in another sense for the act which contains the particular agreements which the persons who contract marriage make among themselves.

We will see in this treatise on the contract of marriage, taken in the first sense: ...

We will follow this treatise with treatises on the most ordinary agreements that accompany the contract of marriage in the provinces ruled by the customary law, such as community and dower, and on the rights that are born of marriage, such as the rights of marital power and of paternal power. . . .

Of the authority of secular power over marriage. 11. The marriage that the faithful contract, being a contract that Jesus Christ has elevated to the dignity of a sacrament to be the type and the image of his union with his church, is at once a civil contract and a sacrament.

Since marriage is a contract, belonging like all other contracts to the political order, it is as a result subject to the laws of the secular power that God has established to regulate all that belongs to government and to the good order of civil society. Since marriage is the contract of all contracts that most concerns the good order of that society, it is all the more subject to the laws of the secular power that God has established to govern that society.

Secular princes, therefore, have the right to make laws about the marriage of their subjects, either to forbid it to certain persons or to regulate the formalities that they judge appropriate to be observed in order to contract it validly.

12. The marriages that persons subject to these laws contract against their [the laws'] provisions, when they carry the pain of nullity are entirely null, following the common rule for all contracts, that every contract is null when it is made contrary to the disposition of the laws: *no contract, no agreement is contracted if the law prohibits it.*

It is no different in the case of the sacrament of marriage, for the sacrament cannot exist without the thing which is its matter. The civil contract being the matter of marriage, there cannot be a sacrament of marriage when the civil contract is null, just as there cannot be a baptism without the water which is the matter of it.

67. The usage of having marriages preceded by the publication of banns is very old in the church. ...

Innocent III made an ordinance in the Lateran council to have this usage observed in the whole church. [X 4.3.3]

...

69. The council of Trent renewed the ordinance of the Lateran council. The *ordonnance* of Blois gave the force of law to this usage. It says in article 40:

To obviate the abuse and inconvenience which arise from clandestine marriages, we have ordained and ordain that our subjects of whatever estate, quality or condition they may be cannot validly contract marriage without the precedent proclamation of banns made on three different feast days with fitting interval.

Although it would appear by these terms “they cannot validly contract marriage” that the lack of publication of banns ought to render the marriage null, nevertheless since it is principally to prevent clandestinity that the ordinance requires this formality, following what it itself says on the topic as given above, one would not be received to attack, by reason of lack of this formality, a marriage the publicity of which was not contested and which was not accused of clandestinity. ...

321. Everyone agrees that children should not contract marriage without the consent of their father and mother and that they sin grievously if they omit this duty toward them (the parents). Everyone also agrees equally that children who have neither father nor mother should not contract marriage with the consent of their tutors or curators. The sole question that there is about this matter is to know whether a marriage of a minor person, which has in fact been contracted without the consent of his father, mother, tutor or curator, is null because of the lack of that consent? That is what we will examine.

The council of Trent lays down an anathema on those who say that the marriage of children of families contracted without the consent of their parents is null ...

The council, as M. Boileau has well observed in his *Treatise on the impediments to marriage*, c. 9, no. 7, intends only to condemn the opinion of certain Protestants who pretend that by natural law parents have on their own the power to validate or annul the marriages of their children contracted without their consent, without their being necessary for this that there be a positive that declares them null. But the council did not nor could it decide that in the case of civil law that requires the consent their parents, on pain of nullity, their marriages contracted without the consent of their parents, are nonetheless valid. The power that secular authority has to prescribe for the contract of marriage, just like all the other contracts, such laws that it judges appropriate, the non-observance of which renders the contract null, is a power which is essentially attached to it, which it holds from God, and of which the church has never wanted to deprive it, according to what we have established in the first part of this treatise.

322. Following the Roman laws, the marriages of children of families were not valid without the consent in advance of him who had them in their power. ... Never has the church opposed these laws; never has she regarded as valid marriages contracted contrary to their disposition. On the contrary she has regarded them as fornications. This is what we find in the second canonical letter of St. Basil to Amphilochus, canon 42, where this father says that the marriages of slaves and those of children of families, contracted without the consent of him in whose power they are, are fornications rather than marriages until their consent intervenes: “Marriages that happen without those who have power [over the couple] are fornications; during the lifetime of the father or owner they who so come together are not free from accusation until the owners consent to the marriage; then the marriage becomes fixed.” ...

To prove that the council of Trent in declaring valid marriages clandestinely contracted by children of families without the consent of their parents, nor that it considered them in any case other than the one in which there was no positive law that prescribed otherwise, M. Boileau, again, draws this argument from these words “so long as the Church has not declared them invalid.” Hence, the spirit of the council is that the church could render them null if at length it thought it appropriate to make a diriment impediment the lack of consent of the parents. The proposal was even made to the council by the French bishops, according the account of Fra Paolo, to make a decree declaring such marriages null. It did not pass. But if the church has this right, even more so ought the secular power have it, since the contract of marriage belongs just like all other contracts to the political order. The right to prescribe laws that it judges appropriate to establish the validity of this contract belongs principally to the secular authority.

Pothier, *Treatise on the Right of Ownership of Property* summary by CD

Pothier on the topic of wild animals is interesting. His discussion of the topic is quite long, and it contains a number of surprises:

Like Locke, but with somewhat more emphasis on the religious, Pothier begins “God has the sovereign dominion of the universe and everything that it contains: ‘The Lord’s is the earth and its fullness, the world and all that is contained therein.’ [Ps. 24(23):1–2.] He created the earth and all the creatures that it contains for humankind and granted them a dominion subordinate to his own: ‘What is man’, writes the Psalmist, that you are mindful of him? ... You have set him over all the works of your hands, you have made everything subject to his feet.’ [Ps. 8:4, 6]. God made that declaration to human kind by the words that he addressed to our first parents after their creation: ‘Multiply and fill the earth and subject it and dominate the fish of the sea.’ [Gn. 1.28].

“The first men had then all the things that God had given humankind in common. That community was not a positive community, such as the one that exists among several persons who have in the common the ownership of thing in which they have each their part, it was a community which those who have treated of these matters call a negative community, which consisted in that these things which were common to all belonged no more to one of them than to the others and in that no one could prevent another from taking from among these common things that which he judged fitting to take in order to satisfy his needs. While he was satisfying his needs with it, the others were obliged to leave it to him, but after he ceased to satisfy his needs with it, if the thing were not one of those which were consumed in the use that one made of them, that thing returned to the negative community and another could satisfy his needs with it in the same manner.

“Humankind having multiplied, men divided the land and the majority of things that were on the surface among themselves. That which fell to each of them began to belong to him to the exclusion of others. That was the origin of the right of property. ...

“So far as wild animals are concerned, *ferae naturae*, they remained in the ancient state of the negative community.

“All those things that remained in the ancient state of negative community are called *res communes*, by reference to the right that everyone has to seize them; they are also called *res nullius*, because no one has property in them so long as they remain in that state and cannot be acquired except by seizing them.”

Pothier next takes up the question of what the Roman law of the chase was. He notes the basic proposition that conforming to the natural law, Roman law made the chase available to everyone. He correctly interprets D.41.1.3.1 as making it irrelevant whether the capture took place on the hunter’s property or on another’s land. He notes, as does the same Digest passage, that the landowner may, however, prohibit the hunter from entering on his land (which he notes as a consequence of land-ownership), and he raises, as had many before him the question of what happens if the hunter takes game despite the prohibition. Cujas, he tells us, would decide the question in favor of the property owner (as had Accursius 500 years earlier), but Vinnius (a Dutch writer roughly contemporary with Voet) decides the case in favor of the huntsman giving the landowner an *actio injuriarum*: “because,” Pothier tells us, “being the owner of the land he has the right to prevent him [the huntsman] from passing over it, but not being the owner of the wild animals which the hunter has taken on his land he has no reason to prevent that the hunter acquire in it [the game] the ownership by seizing it.”

Pothier goes on to point out that the Romans did not require actual manucaption. He quotes the case of the boar that fell into the trap at length and seems to draw the conclusion that it belongs to the trapper if it cannot get out. He notes that in French law someone who wrongfully sets a trap on another's land cannot claim ownership in the game.

Pothier then proceeds to consider the question of wounding and of interference with the hunt. He notes the conflict between Trebatius and Gaius on the topic. He makes no mention of how Justinian resolves the question. He then reports Pufendorf's resolution, which he describes as allowing the huntsman an action if the wound was *considérable* and the animal could not escape. He then reports Barbeyrac's opinion that pursuit alone is enough and concludes: "Barbeyrac ... thinks that it suffices that I be in pursuit of the animal, even though I not have already wounded it, in order that I be regarded as the first occupant, with the result that another will not be permitted to seize it from me during this time. This idea is more civil; it is followed in usage; it conforms to an article of the ancient laws of the Salians (5.35): where it is said: 'If anyone kills and steals a tired wild boar whom another's dogs have stirred, let him be adjudged liable for 600 *denarii*'."

So far Pothier has been quite consistent. He has grounded the privilege of the huntsman in a divine grant as a matter of natural law, and he has supported the huntsman at every turn. He prevails over the landowner even when he is expressly forbidden from entering onto the land. He prevails over the later huntsman, following a much more Lockean than Hobbesean version of the story. When Pothier gets to the law of France, however, he is surprising. This broad right of the huntsman does not apply in France. Hunting rights are restricted to the nobility. Proprietary rights prevail everywhere over poachers. How can this be? "Some of the old doctors have doubted whether the sovereigns had the right to reserve hunting for themselves and to forbid it to their subjects. They argue that God having given men power (*l'empire*) over beasts, as we have seen above, the prince had no right to deprive his subjects of the right that God had given them. The natural law, one says, permits everyone to hunt; the civil law that forbids it is contrary to the natural law and exceeds, by consequence, the power of the legislator, who is himself subject to the natural law and cannot ordain the contrary to that law.

"It is easy to respond to these objections. From the fact that God gave power over the beasts to humankind it does not follow that it ought to be permitted to every individual member of human kind to exercise that power. The civil law ought not to be contrary to the natural law. That is true with regard to what the natural law commands or that which it forbids. But the civil law can restrain the natural law in that which it only permits. The majority of civil laws do nothing but make restrictions on what the natural law permits. That is why, although in terms of pure natural law, the hunt is permitted to every individual, the prince was within his rights to reserve it to himself and [grant] it to a certain kind of person and forbid it to others. Hunting is an exercise likely to turn peasants and artisans from their work and merchants from their commerce. It would be useful and for their proper interest and for the public interest to forbid them from it. The law which forbids hunting is therefore a just law which it is not permitted to those who are forbidden from it to contravene either in the forum of conscience or in the external forum." The notion of the permission of the natural law goes back to the first glossators of canon law, when they were seeking to justify property. Though I cannot recall having this argument in medieval authors with regard to wild animals, a medieval jurist would certainly have understood it.

In his general discussion of occupation, Pothier turns very briefly to the question that had plagued the Spanish scholastics in the 16th century, the justification for the conquest of the new world. Like all of his predecessors he says that a seaman who discovers an uninhabited land may occupy it and claim it for his own. If he claims it in the name of the prince, property in it passes to the prince. "But when a land is occupied," Pothier continues, "however wild [the French word also means 'savage'] the men who inhabit it appear to us, these men being the true proprietors, we cannot without injustice establish ourselves there against their will."

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