

OUTLINE — LAW SECTION 11
INTELLECTUAL DEVELOPMENTS AND THE LAW
THE INSTITUTES OF NATIONAL LAW
The World of Ideas—17th and 18th Centuries

1548–1617, Francisco Suarez, Spanish philosopher, theologian, jurisprude
1567–1622, Francis de Sales, French (Swiss) bishop, reformer, saint
1561–1626, Francis Bacon, English philosopher and statesman
1557–1638, Johannes Althusius (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, mathematician, 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 philosopher, 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

1. The move from Aristotle (Suarez) to Plato or something more like Plato.
2. Mathematical philosophy as practiced by Descartes, Spinoza, and Leibniz has much more in common with Plato than it does with Aristotle.
3. The 18th century is much more empirical and hence more Aristotelian: Hume, Montesquieu, Smith, Beccaria, even Voltaire.
4. Starting with the individual in metaphysics something new. Descartes *Cogito ergo sum*. Hobbes's political theory also starts with the individual, and this can lead to radical secularism. The 17th century did not go there, however; even the scientists, like Newton, were firm believers.
5. The separation of law and morals. By and large, it is not until Hume that we get a

radical separation of the two.

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

Later French Jurists

Jean Domat, 1625–1695, *The Civil Laws in Their Natural Order*

Gabriel Argou, 1640–1703, French law arranged according the *Institutes*

Robert Joseph Pothier, 1699–1772, treatises on specific topics

1. Let us look more carefully at the overall structure of the three treatises that we have extracted in the *Materials*, beginning with Argou on p. XVII-8.
 - a. Argou shows the most obvious influence of Justinian’s *Institutes*. It is divided into four books, persons, things, obligations, and, here he departs from J’s titles, accessories and consequences of obligations, but it turns out that this book includes at the end (title 11 forward) the law of actions, including a relatively full treatment of the *ordo*. Except for a two sections on crimes (3.38-39), which turn out to have to do largely with delict, and one on seigneurial justice (2.5), public law is no place to be found. Commercial law receives a skimpy treatment at the end (4.20), something of an afterthought. The topics within the books are treated in the order that we would expect from reading Justinian, the law of things proceeds from single things to testaments, to intestate succession to obligations, beginning with contract. There’s one notable exception to Justinian’s order: marriage and marital property are treated as part of the law of obligations, rather than as part of the law of persons and of single things. The law of obligations as Justinian would have understood it, however, is largely derived from Roman law, as can be seen from the titles (3.23-39). The law of things, on the other hand, incorporates much of French customary law. We learn of fiefs and free-alods, the *retrait lignagier*, dower, the distinction between *propres* and *conquêts*.
 - b. Loysel (*Materials*, p. XVII-7) has six books, further away from Justinian’s basic scheme. But he, too, follows the basic scheme of the *Institutes* in that he proceeds from persons to things to actions. Within the law of things, the basic pattern runs from single things, to succession, to obligations, but the law of obligations is far less contractual than it is Justinian and more concerned with property. Public law appears a bit more frequently in Loysel than it does in Argou. There is, for example, section on taxes (6.6), but it is still not prominent.
 - c. Coquille is the least concerned with the order and content of Justinian’s *Institutes*. His pattern largely follows the pattern of the titles of the custom of Nivernais on

which he is commenting (titles on *Materials*, p. XVII-2 then skip over to XVII-6). It begins with a kind of law of persons, proceeding from the king through the peers to castellans to rights of feudal justice. Then there is a longish series of titles on the law of things. The final titles, however, are decidedly mixed up from the point of view of Justinian. Titles concerning persons are mixed in with titles concerning obligations with titles concerning property. The final title (on *chaptel*, a kind of partnership in herd animals) has all the hallmarks of an afterthought, as it may well have been in the original.

2. Maxims in the Institutional Treatises

- a. Important as the overall structure is, perhaps more important is their focus on principle. This is most obvious in Loisel. The content of his treatise is a series of maxims, pithy statements of rules, derived, for the most part, from customary law. The Roman jurists did make use of maxims, but they were quite cautious about it. “In matters of civil law,” Javolenus (D.50.17.202) tells us, “all definitions are dangerous. There is hardly one that cannot be subverted.” Title 17 of Book 50 of the *Digest* contains 211 maxims derived from juristic writing, some of which almost certainly did not have the status of maxims in classical law, although some of them may have. One of them (D.50.17.30) is quite relevant to our topic of marriage: “Marriages are not made by bedding together but by consent.” Another maxim, not in D.50.17 and almost certainly torn out of context, was to have, as we have seen, an important role in developing Western political thought: “The prince is not bound by the laws.” (D.1.3.31)
- b. *Digest* 50.17 attracted the interest of the jurists quite early on. Bulgarus wrote a commentary on D.50.17, and works in this genre appear throughout the Middle Ages and into the early modern period.
- c. Maxim jurisprudence does not have a very good press these days, particularly in the Anglo-American world. We need to be reminded that as smart a jurist as Francis Bacon, who was an almost exact contemporary of Loisel’s, thought that a truly scientific approach to English law would involve extracting principles from the amorphous mass of case law and arranging these principles in a structured and logical fashion. His effort in this regard is interesting but odd, and like most of his works, he probably never finished it. Loisel did finish, and his work was an instant success. What it did show was that there were guiding principles in the customary law. Some of them looked very much like Roman law; some of them had probably in fact been borrowed from Roman law (the same was true of Bacon’s maxims and even those of Lord Coke in England).
- d. Part of the difficulty that we have with maxim jurisprudence today probably did not concern the jurists of the 17th century. We have difficulty with maxim jurisprudence because we do not regard it as a precise solvent of cases. I’m not sure that anyone in the 17th century thought that it was. The notion that a judge can be bound by the law to reach a unique result in any given case is a product largely of the 18th and 19th centuries not of any earlier period. I think that the jurists of the earlier period liked maxims and brocards because they expressed central tendencies of the law, ways of organizing a mass of disorganized material, ways of creating presumptions about a result that would then admit exceptions if reasons could be found for making the exception.
- e. The other reason why today we are uncomfortable with maxim jurisprudence is that a careful study of many maxims shows that there are frequently maxims on opposite

sides of the same proposition. Let me take an example from Loisel (p. XVII-7), one that touches upon one of our major institutional themes, the relationship between the tenure of land and feudal jurisdiction. In this regard French customary law had two maxims: *fief et justice sont tout un* ‘fief and justice are all one’ (found in L. 2.2.33 in the form *la justice est patrimoniale* ‘justice is patrimonial’) and *fief et justice n’ont rien de commun* ‘fief and justice have nothing in common’ (L. 2.2.35 in the form: *fief, ressort et justice n’ont rien de commun ensemble* ‘Fief, ressort [geographical judicial competence], and justice have nothing in common’). Obviously confrontation with such seemingly contractory principles makes for thought. In a world that is seeing increasing distinctions between public and private law, the second of the two maxims sounds more like what makes sense. Loisel avoids the contradiction by changing the contradictory maxim, substituting instead *la justice est patrimoniale*. The question is whether that principle could be reconciled with the notion that *fief et justice n’ont rien de commun*. Ultimately it was in this way: What the first maxim means, the 17th century lawyers said, as had apparently some of the medieval lawyers is that someone who has the right to hold a feudal court cannot separate that right from the land to which it is attached. Fief and justice are all one means that one cannot sever the justice from the fief, granting the fief to one person and the justice to another. On the other hand, fief and justice have nothing in common means that one is a matter of private law, the other of public, and the king can certainly create jurisdiction independent of land-holding.

We can see how it all came out in Argou’s treatment of the topic: (bk. 2. ch. 5, pp. 1.188-9 of the 1753 ed. [p. XVII-8]): “The justice of lords is patrimonial in France. It gives many rights to those who possess it, but some of these rights are purely of public law, such as the nomination or provision of officers, the exercise of justice, the matters of which their officers can have cognizance.

“There are other rights purely lucrative or honorary and which can be considered as a true patrimony. Even though the lords enjoy them only by reason of the high justice which pertains to them, one can nonetheless put these rights among the rights of property.” [A. goes on to describe a number of which escheat is most important.]

Just in case you missed the point, the 1753 edition adds at the beginning: “All justice, royal or seigneurial, comes from the king, and is dependent on him mediately or immediately.”

3. The Underlying Method of the Institutional Treatises Illustrated by Coquille

- a. Guy Coquille, 1523-1603, was a practicing lawyer in the customary courts. All of his works were published posthumously. Nivernais, where Coquille practiced, is a small duchy located at the eastern end of the Loire plain, bordered by the Orléanais on the north, Burgundy on the east, the Bourbonnais on the south and Berry on the west. Its custom, like that of Clermont en Beauvaisis about which Beaumanoir wrote so famously in the thirteenth century, would not be important were it not for the fact that Coquille wrote a commentary on it in the late 16th century.



- b. The fact that all the customs of France, some 285 of them, were homologated in the 16th century made it possible to Coquille to do the kind of exercise that we see him doing here. What makes Coquille's work on the custom of Nivernais interesting is that, like many of the customary lawyers of this period, Coquille went far beyond the specific custom on which he was commenting to do an exhaustive comparison of the rules of the custom of Nivernais with other customary jurisdictions and with Roman law. The results of the comparative method can be seen in the extracts from Coquille in the *Materials*. In one sense it is quite mechanical. Once the customs had been redacted, it is a relatively simple task to lay them side by side the way he does in the title on marital property in his *Institutions* to see how the rules are similar and how they differ. But there is much more to Coquille's effort than simply getting it all under the right category. There is running throughout Coquille's work a sense that once one makes the comparative effort one is also obliged to ask the question what is the right rule. In this way, very early on the stream that runs from the comparativists and the historians connects with that being espoused by the systematizers. If the historians never ceased to remind Frenchmen how it was that their institutions and laws had come to be the way they were, the systematizers never ceased to remind them what it was that they ought to be. The comparativists, then, provided the link between the two.
- c. Perhaps the easiest of Coquille's methodological moves to see is where he makes a comparison and the comparison reveals that there is a difference among the customs. Here he has a tendency to look to the Roman law rule, the rule of the *ius commune*, and to privilege that rule. He won't deny that the contrary custom exists but he will require that it be clearly stated and he will apply it only in those situations to which it applies. We saw basically the same techniques being used by the Italian jurists in the 15th century when they were dealing with statutes that were contrary to the *ius commune*. But Coquille's search for principle goes further. Sometimes he will ask what the purpose of the custom is and will refuse to apply it

in situations where he does not believe that its purpose applies. Again, we saw the same technique in Panormitanus's interpretation of the statutes of the Italian city-states. Occasionally we will find an argument that the custom is just flat-out wrong, either that it contradicts other higher principles or that it—this argument is usually only hinted at—does not correspond with social reality.

- a. The way that I have told the story so far, it looks as if the *ius commune* and juristic interpretation totally wins the day. But the *ius commune* was malleable stuff. Let us take a look at how Coquille handles the problem of when a marriage is deemed to be complete for marital property purposes. *Mats.* p. XVII-3:

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.

We begin with the basic proposition, almost all the customary jurisdictions have community property. Indeed, almost all of them have the version that is the basic version in France today, community property of moveables and acquets. The community bears the debts and has the benefit of the moveable credits. Each of the spouses keeps his or her own patrimonial land. The question is when are they married for purposes of establishing the community? We have already gotten some indication of how Coquille is going to come out on this issue by the way in which he treats the question of coverture, the incapacity of married women (p. XVII-2):

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.

Here's what Coquille has to say about the question here:

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 efficacy 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.¹ 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. 1,² 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.³ 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, which speaks of deflowering or consummation as the solemnization, but Poitou and Nivernais speak more properly.

¹ Professor of law at Bologna, and a member of a distinguished legal family, Socini died in 1556.

² See above Sec. 14C.

³ 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.

I.e., in Nivernais, community property doesn’t arise until there are words of the present tense and solemnization of the marriage in the face of the church. The Paris custom makes it arise at the nuptial blessing. But this, C. tells us, makes no sense because in canon law a blessing can be done privately or clandestinely without assembly, and not all marriages have a nuptial blessing. It is unclear whether he is thinking of the Tridentine rules, but there’s no reason why he should be because they were not in effect in France. Amazingly, he does not mention the ordonnance of Blois. Rather, he relies on a *consilium* of his teacher, Mariano Socini, junior, (who taught at Bologna and died in 1556), and Socini had, in turn, relied on the very *consilia* of Panormitanus that we have already examined. Now Panormitanus, you will recall, had been willing to import a requirement that for purposes of dowry there must be a *deductio in domum*; he considers, but apparently rejects, a requirement that the marriage be consummated. But what Panormitanus was concerned about was the notion that the husband had to bear the expenses of the wedding and maintaining the wife in his household. Coquille is concerned about publicity. He simply rejects the customs that call for consummation. He sharply distinguishes the canonic requirements from the civil requirements. He does not say so, but he almost certainly goes off in this direction because it is critically important in a community property system that creditors know with whom they are dealing. Publicity is essential for community property not only for the rare instances when the a dispute arises as upon the division of the property but for the day to day dealings of the community with the couple.

The rest of the paragraph is less interesting, though it tells us something about the multiple variations that might exist in the system, including the system of option in Reims, similar to the deferred community that exists today in many parts of Germany. More interesting is his treatment of the custom of Tourraine, which is apparently unique, but which he argues should be generalized, that the surviving spouse takes his (and probably her) personal clothes, a knight his arms, a lawyer his books. Already we are seeing distinctions being drawn between property for personal use and property as an investment.

More on Coquille

1. The nature of the critical argument in para. 1, p. XVII-2:

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.

All the customs that Coquille cites makes the contract of a married woman absolutely void. This means that the contract has no effect even after the death of the husband or the divorce of the couple. Coquille does not like this rule. Why he doesn't like this rule is not completely clear. He doesn't think that there is anything about being a woman that makes a woman incompetent to contract, and he cites the proposition that an unmarried woman who has reached the age of majority can contract. He also (in the next paragraph) notes that women may be sued for their delicts, that they can trade, and that they have capacity sue when there has been a separation of goods. We may speculate that C. feels that absolute incapacity does not correspond to social reality. In any event the problem is how is he going to get around the unanimous testimony of his authorities. He does it by saying that the rule was derived from Roman law. Not only that, it was derived from Roman law and it was by analogy. Therefore the authorities do not require it. The true rule, he says, is that a woman is incapacitated from contracting only in respect of the power of her husband. Take away the power and the rule ceases. It is not a personal incapacity but a relational incapacity. I'm not sure that it's such a great argument. What is interesting is that makes it.

2. The next issue that C. takes up is the will made by a married woman without the authority of the husband.

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.

Here his method is much more typical of the rest of the work. Nivernais and Burgundy require that a married woman have the consent of her husband in order to make a will. Poitou, Auxerre, Berry and Reims are to the contrary. This is the kind of conflict that comparative analysis uncovered quite quickly in dealing with 285 diverse customs. One way to resolve such a conflict would be simply to say that when in Nivernais or Burgundy get the husband's permission and when in Poitou, Auxerre, Berry and Reims don't. But in general that is not the way these guys thought. The question to ask is what is the "true rule." This would suggest that we are still in a world in which there is a true rule; law is not simply a matter of the will of the legislator or even of the will of the community expressed in the homologated custom. The true rule is that a will cannot depend on the will of another. That is in the nature of a will. How does he know that? Because Roman law says so. But we

don't simply override the custom of Nivernais or Burgundy. The rule still has some force in those areas. But what we will do is limit the scope of the rule. If the custom is abolished, then the rule has no force because the *ius commune* is to the contrary. But even more important, we limit the people who can raise the objection. If the husband in Nivernais or Burgundy does not raise the objection, then no one can. A rule contrary to the *ius commune* will be held to be a kind of privilege, exercisable only by those who have been granted it.

3. There's very complicated issue involving assignments for dotal payments on p. XIV-4. It's too long to read in full, and even if we did read it, I'm not sure that we could understand it. The important point about it is that Coquille is willing to assign a purpose for these assignments, and on the basis of this purpose to criticize both the custom of Nivernais and perhaps that of Burgundy for what they do with them. American lawyers have a tendency to think that examining law from a teleological point of view is an invention of the American legal realists of the early twentieth century. I think that we can see here in the late sixteenth.