OUTLINE — LECTURE 22

Early Modern Legal Thought and *Pierson v. Post*;
Introduction to Domat and Pothier

The Natural Law School:

Huigh de Groot (Hugo Grotius) 1583–1645—*De jure belli et pacis* [Concerning the law of war and peace] (1625)

Samuel von Pufendorf, 1623–1694—*De jure naturae et gentium libri octo* [Eight books on the law of nature and of nations] (1672)

Christian Thomasius, 1655–1728—*Fundamenta iuris naturae et gentium* [Fundamentals of natural law and of the law of nations] (1705); *Institutionum jurisprudentiae divinae libri tres* [Three books of institutes on divine law] (1687)

Jean Barbeyrac, 1674–1744—Translates and annotates Grotius and Pufendorf


International Law:


[Positivist] Cornelis van Bynkershoeck, 1673–1743—*De dominio maris* [Concerning the dominion of the sea] (1702)

[Naturalist] Christian von Wolff, 1679–1754—*Jus naturae methodo scientifico pertractatum* [The law of nature treated by the scientific method] (1710–19); *Institutiones juris naturae et gentium* [Institutes of the law of nature and of nations] (1754)

[Moderate positivist] Emer (Emerich) de Vattel, 1714–1767—*Le droit des gens ou principes de la loi naturel* [The law of nations or principles of the natural law] (1758)

‘Elegant jurisprudens’:


Bernard Reinold, 1677–1726, *Observationes ad titulum Digestorum de acquirendo rerum dominio* [Observations on the Digest title concerning the acquisition of ownership of things] (1719)

Christfried Wächtler, 1652–1732, *Notae ad Noodt* (1681)

Practical lawyers — *usus modernus pandectarum*:

Diodor von Tuldenus, ?1595–1645, *Commentarius in quattuor libros Institutionum* [Commentary on the four books of Institutes] (1622)

Samuel Stryk, 1640–1710, *Usus modernus pandectarum* (1690) [The Modern Use of the Pandects]

Johannes Voet, 1647–1713, *Commentarius ad Pandectas* [Commentary on the Pandects] (1698–1704)

Gottlieb Gerhard Titius, 1661–1714, *Juris privati romano-germanici ... libri duodecim* [Twelve books on Romano-germanic private law] (1709); *Disputatio de dominio in rebus occupatis ultra possessionem durante* [Disputation concerning dominion lasting beyond
Occupancy and Property in Early Modern Legal Thought

Titius and Thomasius

[Covered in the previous outline.]

Noodt and the historical scholars of “elegant jurisprudence”

Gerardus Noodt, *Probabilia juris* 2.6.1 (1678), in *Opera omnia* (Leyden, 1714) 54:

“It was variously disputed by the ancients whether possession is acquired by intent alone, or by intent and body, not that they had doubts about the origin of possession or the rule, but they disagreed among themselves as to what ought to be observed in practice. There were those, I have convinced myself, who departed from the definition of the majority, as if utility commanded it, and when the holding was that possession is acquired not otherwise than by intent and body, they nonetheless pretended that both were present, as soon as the intent was apparent by a suitable sign together with the probable ability to seize the thing. Thus if a pebble or gem should be found by two people on the shore of the sea, but only by the sight of one and by the seizure also of the other, both fell into common ownership, so that he who first came into corporeal possession would not prevail unless he had previously indicated the affect.”

Christfried Wächtler, 1652–1732, *Notae ad Noodt* (1681) rejects the ideas of Noodt on what seems to us to be solid historical grounds.

Bernard Reinold, 1677–1726, *Observationes ad titulum Digestorum de acquirendo rerum dominio* [Observations on the Digest title concerning the acquisition of ownership of things] (1719) willing, it would seem, to accept Noodt’s history but rejects his ideas as bad law.

Practical ‘elegant jurisprudence’ and the *usus modernus pandectarum*:

Diodor von Tuldenus, *Commentarius in quattuor libros Institutionum* 2.18 [?2.1.13] (1622) (ed. Louvain, 1702):

“The fact that it seemed wrong that someone should take from you the reward of industry had moved some to the contrary opinion. ... But a better reason convinced Justinian, to wit, that hunting has to do with occupation: he is not regarded as having occupied who has not taken with his hands. Further, the laws ought to so provide that they not contain the seeds of perpetual litigation, which would happen if the wild animal were adjudged to him who so wounded that he could be captured; for this very thing, whether he could be captured, would be forever controverted. Nor could it be defined by a certain rule. Justinian therefore decided the controversy in this way so that his decision in one case not excite new controversies.”

Johannes Voet, *Commentarius ad Pandectas* 41.1.2 (1698–1704) (ed. Paris, 1829) 4:85:

“Occupation is the just apprehension of corporeal things that are common by the law of nations done with the intention of becoming owner whereby that which is no one’s is granted by natural reason to the first occupant.”

*Id.* 41.1.7, 4:89:
“Although it is still held now that a wild animal wounded by one person, and occupied by another does not become the property of him who wounds, but of him who occupies, ... still anyone who comes on the scene and occupies a wild animal on the pursuit of which another is still bent ought to be fined, on the ground that he is carrying on a meddlesome form of hunting, the frequent cause of quarrels and of brawls.”

Augustin Leyser, _Meditationes ad Pendectas_ 41.1.439.3 (1727) (ed. Leipzig, 1744) 7:9:

“Occupation and acquisition of ownership is nothing other than reduction to one’s power. He who declares that he will occupy a thing has not yet reduced it to [his] power. It is necessary that another act also be present. Will and thought alone even if expressed in words can have no effect, nor does he who fixes his spear on the gate subject the city to his right and power.”

**Once More, the Natural Law School**

Johann Wolfgang Textor, *Synopsis iuris gentium* 8.15 (Basel, 1680) 62:

[Three principles about occupation:] “(1) The object must belong to no one. (2) It must be susceptible of human ownership, and, without any breach of Natural Reason, it must be possible to exclude other men from the use of it. (3) The occupant must indicate by some adequate external sign or deed his intent to possess and to acquire.”

Christian Wolff, *Jus naturae methodo scientifica pertractatum* 2.2.174, 184 (1740–8, Frankfurt & Leipzig 1764) II:70, 74

“Occupation is a fact, by which someone declares that a thing belonging to no one ought to be his and reduces it to this state so that it can be his. … If someone, when ownership of things has begun to be introduced, reduces a moveable belonging to no one to that state in which it can be seized and the fact is such that at the same time he declares that he wishes the thing to be his, he is deemed to have occupied it and to have acquired its ownership. …

“Wherefore acts of the occupancy consist not in seizure alone, nor is it always required, only that they be such that from them it can be discerned with reasonable probability that you want the thing to be yours. Note especially that the acts of occupancy ought to be so defined or determined … to avoid the suits that would arise if another frustrated your effort which you had spend on reducing something to that state in which it could be yours, without which, there is no one who does not understand, it could not have become the other’s.”


“What properly founds the right of the first occupant is that by seizing a thing that belongs to no one he lets it be known before all others his design to acquire the thing. If, however, one should manifest the intention to acquire a thing by some other act as significant as the taking of possession, as, for example, by the marks made on certain things, one can acquire property that way as well as by the taking of possession. Of course, he must be at the threshold of taking what he claims to have the intention of seizing. For it would be silly to pretend that an intention of uncertain effect would deprive other men of their rights. The boundless avarice of many men would thus render useless the right of others, which would be plainly contrary to God’s intention and would give rise to continual disputes and quarrels.”

“All members of a community have an equal right to the use of its common property. But the members of the community, as a body, may make such regulations as they think Wt concerning the manner of using it, provided such regulations do not violate the principle of equality in the enjoyment of it....

“The right of the first comer (*jus praeventionis*) should be faithfully observed in the use of common property which cannot be used by several persons at the same time....

“For example, if I am actually drawing water from a common or public well, another who comes after me may not push me aside in order to draw water himself, but must wait till I have finished; for in thus drawing water I am acting on my right and may not be troubled in it by anyone; a second comer, who has an equal right, may not exercise it to the impairment of mine, and in stopping me by his arrival he would be claiming a greater right than mine and violating the law of equality. The same rule should be observed with respect to the use of such common property as is consumed in the using. It belongs to the first person who takes actual steps to put it to use; a second comer has no right to deprive him of it. I go to a public forest and begin to cut down a tree; you come upon the scene and want the same tree; you may not take it away from me, for that would be to assert a right superior to mine, and our rights are equal. This rule is similar to that prescribed by the Law of Nature for the use of the fruits of the earth before the introduction of private ownership.”

Summary

1. The genre in which the author is writing is a good indicator of his views on the occupation of wild animals.
   a. If he is writing in the Roman law tradition, he will not give title to the animal to the huntsman who has not succeeded in depriving the animal of its natural liberty.
   b. On the other hand, those writing in the natural law tradition seem to have abandoned Pufendorf’s Hobbesian views about the occupation of wild animals sometime around the turn of the eighteenth century.
   c. Those seeking to provide a practical body of rules for the resolution of contemporary legal problems were caught in the middle.
   d. As a general matter, however, and except for the writers of the natural law school, the Noodt/Titius solution was rejected.
   e. For those seeking to develop a practical body of rules, the Noodt/Titius view of occupation raises obvious difficulties of implementation.
   f. The practical writers, except for Leyser, usually did not leave a huntsman in Post’s position without a remedy.

2. *Un altro modo di possedere* (‘another way of possessing’)?
   a. When the concept of *abus de droit* is found in the nineteenth century, it is as if something altogether new has developed. I’m not sure that it is new.
   b. But the fact is that neither Noodt nor Titius nor the writers of the natural law school put it this way.
   c. The range of possibly-feared consequences is broad, but none seems adequate to explain why this particular group came out the way it did.
   d. If there is nothing in the consequences that would explain why Noodt, Titius and the natural law school reached the result they wanted to reach on the basis of property rather than tort, is there something in the structure of their thought
that explains why they did not see the alternative road to the same conclusion?

e. My own pursuit of this question has led in a somewhat different direction, back to the Middle Ages and to the effect that medieval commentaries had on structuring legal thought long after they had ceased to be authoritative.

f. Now if I were asked a final and much more difficult question: why did Bartolus’s mind run along these lines, I would be hard pressed to come up with a simple answer.

Domat and Pothier

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

Joseph Pothier, 1699–1772: Pandectes de Justinien (1748); Traité des obligations (1761); from 1761 until after his death 19 traités on specific topics published

1. Jean Domat was born in 1625 and died in 1696. Louis XIV was king for most of his adult life. He was friend and intimate of Blaise Pascal and the Jansenists at Port Royal; he became a Jansenist and remained so all his life, though he was perhaps not so gloomy as some of the Jansenists. Domat sought to found law on ethical principles, as he says in his Treatise on the Laws (Traité des loix) that precedes the Lois civiles. He wrote a selection of laws from the Digest, a form of literature we’ll talk about more when we come to Pothier, and then his major work Lois civiles dans leur ordre naturel (‘the civil laws in their natural order’). Later he wrote four further books on public law. He was a practicing lawyer, king’s advocate at Clermont Ferrand. He is remembered as a systematizer. I want to say a word about his system before we get to the specifics. The striking thing about Domat’s system is its radical simplicity. All of private law is divided into two parts, engagements and successions. Engagements is broader than our word contract. It includes all interpersonal relationships whether formed by agreement or not, but the focus is on agreement. Hence, as is typical in French law, tort law is downplayed. Domat may be first person to have seen what Hohfeld later perceived that all law deals with relationships between persons. Property thus becomes an extraneous category. This was too radical for the codifiers as we will see when we talk about the Napoleonic Code, but its influence was felt. Domat’s work on public law is less successful. It begins with a very long book on government in general, and it is followed by a book on officers, also quite long. These are followed by very skimpy books on crimes and delicts and one on the ordo judiciarius, which is the most disappointing of all. They were written at the end of his life, and he was clearly running out of steam. The first two books might be worth more study than I have ever been able to give them.

2. Robert Joseph Pothier was born in 1699, three years after Domat’s death, and he died in 1772. His life was thus spent almost entirely in the reign of Louis XV. He was Conseiller au Présidal of Orléans, a judge of an important local court, for 50 yrs. He published the Pandectæ Justinianæ in novum ordinem digestæ in 1748, i.e., published virtually nothing until he was 49. The Pandectæ was a hugely successful work that earned Pothier the attention of Chancellor d’Aguesseau. Under d’Aguesseau’s patronage, Pothier became a professor of French law at Orléans in 1749. Starting in 1761, at the age of 62, he published nineteen treatises: obligations, sale, hire, maritime hire, partnership, loan, deposit, mandate, negotiorum gestio, pledge, contingent contracts, insurance, bottomry bonds, gaming contracts, marriage, community property, dower, property and possession. His printer couldn’t keep up with him; some of of these works were published posthumously. He was also
interested in theology, and in this regard, unlike Domat, he was orthodox (though in church government he has decidedly Gallican tendencies). I agree with Watson when he says that the natural law in Pothier owes as much to Thomas Aquinas as it does to the natural law school, although Pothier knew the work of Pufendorf, Thomasius and Wolff. Pothier as a general systematizer is not as well known as Domat. The reason for this is that by and large he followed the titles of the Digest and the Code, adding material, particularly in the commercial area, that was not covered or only briefly covered in the Roman law, with titles drawn from customary law and from mercantile and maritime law. He made no major contribution to the overall organization of private law. Whether something of interest is going on in P’s work on the question of organization is probably best seen when we get to his work on marriage.