PART XVII. THE INSTITUTES OF NATIONAL LAW

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A. GUY COQUILLE, INSTITUTION AU DROICT DES FRANCOIS

(1st ed., Paris, 1607) [CD trans. from Paris, 1608]

Titles

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 majority of the aforesaid customs except three cases in which the wife can go to court and contract without the authority of her husband. First if the wife is called to court for *injures* or other delicts. The second that the wife can contract and go to court without the authority of her husband if the woman is a public merchant, with a seal and with the permission or tolerance of her husband. The third case is if the wife is separated with regard to goods. [Further discussion omitted.]

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.[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. Bourbon, art. 223, is satisfied with words of the present [tense]. Orleans, art 186, Touraine, art. 230, like Paris, also Melun, art. 221, Bourges, art. 21, Troyes, art. 83, Laon, art. 17, Bretagne, art. 421, 446, 448, say that they are not common in conquests if they are not married for a year and a day, and if they are not married a year and a day the wife takes what she has brought it. Reims, art. 139, does not make married people common, but after the death of the husband it is the choice of the wife to partition in movables and conquests while making what she brought in in movables (for example, dowry) remain confused and mingled, or to take what she brought in and dower, or she takes the will of her husband, outside of her half, with the exception of her Sunday and holiday clothes, and Laon says the same, art. 21, with regard to clothes. This community between married persons (of which the effect is properly after the marriage is dissolved, because during the marriage the husband is master and lord of the movables and conquests, as will be said afterwards) operates in such a way that after the dissolution the movables and conquests are divided in half between the survivor and the heirs of the deceased, each paying a half of the debts. Certain provinces have an exception by which in the cases of noble married couples the survivor takes all the movables and the debts and movable credits and also must pay the debts and the taxes. Vitry, art. 74 and art. 104 says that the heirs ought to perform the will and imposes the condition that there are no children. Laon, art. 20, speaking of the surviving husband, and similarly Reims, art. 279, say that the surviving husband pays the debts. And Reims, art. 284, says that the survivor of two married nobles who takes the movables ought to pay the funeral expenses but is not held responsible for the legacies. But in other provinces, ?especially among commoners, the movables and conquests are divided in half and the debts are also paid by halves. Touraine, art. 307, imposes a nice and honest limitation that deserves to be general by which the survivor has in addition his daily and Sunday clothes, and if he is noble, he also has a

[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.

préciput of his arms and if he is lettered his books. And the reason for this is that he has a particular affection for such movables. And it is an emotional blow (*contre-coeur*) for the survivor to see them partitioned, and according to the reason of the Roman law that which is attributed to someone by particular affection is not transmitted to other persons unless they be heirs. [D.31.1.28 (not really on point); D.33.3.6 (closer).] And so far as other clothes are concerned, Touraine, in the aforesaid art. 307 and Laon, art. 21, say that the survivor can and ought to have them, offering recompense, but the expenses of the funeral and the taxes of the deceased, or the testamentary legacies, are not part of the community and the survivor ought not contribute to them, unless, as in some provinces, he takes all the movables, as has been said above. Thus says Nivernais, concerning the rights of married persons, art. 7. But Reims, art. 277, says that the husband who takes all the movables ought to have the wife buried. This corresponds to the Roman law. [D.11.7.16, .22 (on point if one accepts the analogy of dowry to community property.] Later on in the title about the state of persons and tutelage, we will speak of the situation of noble guardianship that the survivor of two married persons has on account of which he acquires the movables.

During the marriage the husband can by contract inter vivos dispose at his pleasure without the consent of his wife the movables, movable rights, and the conquests made during the marriage, but by the most recent ordinance he cannot dispose of more than his half. [The "ordinance" if such it was is not cited.] ... Almost all the said customs make an exception "to dispose inter vivos without fraud." ...

But the husband cannot alienate nor otherwise dispose of by contract importing alienation the assigned dower and the proper heritage of the woman without her consent. ... Sens, art. 274, and Auxerre, art. 194, add that he cannot dispose of the acquests of the wife made before the marriage. This is everywhere general for the conquests made during the marriage are made common movables of which the husband is lord and he could abstain to make the conquests. But the conquests made by the wife before their marriage do not concern the husband in any way. ...

The husband during the marriage can sue and be sued in personal and possessory actions of the wife without a mandate from her. And so far as real rights are concerned she can pursue them with the authority of her husband and if he refuses by authority of the justice. ...

Our custom of Nivernais in the said title on the rights of married persons, art. 12 and 13, and that of Burgundy, art. 36 and 37, have taken note of the assignments which husbands make to their wives for their dotal payments, which ought to come purely from the heritage proper to them, and have said that the wife is seised of the assignment made in particular, in order to enjoy it after the death of her husband. Nivernais says that both she and her heirs get the fruits [of this assignment]. Burgundy says that the widow gets the fruits but that her heirs ought to account for them at the time of the division. Nivernais makes the assignment redeemable within thirty years. And Bugundy says that [it is redeemable] at all times and whenever, notwithstanding the lapse of time. Because of this difference the fact results that Burgundy has held its assignments to be simple hypothecs with enjoyment of the hypothecated thing, the fruits of which take the place of the thing hypothecated, which the custom regards as true interest so far as the woman is concerned, who does not have the substance of her dowry and a true patrimony. And so far as the heirs of the woman, [Burgundy] has determined that it is not interest but is like [*ad instar*] fruits of an hypothecated thing, which are to be accounted for when the principal is returned. C.4.24[.3, citation to *lex* missing, but this is probably the one Coquille has in mind.] And Nivernais adjudges that these assignments import translation of property, so that the wife and her heirs take the fruits as of their own thing. But according the reason of common sense and politic usage, it seems to me that such assignments ought not take place, except when a widow or her heirs renounces the community with the husband, or when the movables and conquests of that community are not sufficient to reimburse the woman for her dotal payments. For the first purpose of such payments coming purely from the proper heritage is to use them in buying the heritage proper to the woman, and if they are so employed the assignment ceases. This is what is being spoken of in art. 32 of the custom of Nivernais. If the payments are not used to that effect, they remain in the mass of common goods or anything else subrogated in lieu of it which is the same as if the same payments were still existing in the said mass. [D.31.1.70.3, .71, .88pr; D.34.4.23.] Being in that mass they ought to be taken and given to the woman before any partition according to what is said in the 18th art. of the said title on the rights of married persons. And if we permit the widow who takes the community to take the assignment out of the heritage of

her husband, beyond her right to the community, she would take a third more than she brought in. The situation is this: the particular assignment is from the heritage proper to the husband and by contract of marriage is destined to be heritage of the wife. In the case where the husband does not employ the dotal payments to purchase the heritage for her, say if the payments of the wife coming purely from her heritage and assigned by the husband on his own heritage are 1000 *écus*, the wife taking the community would take half of the 1000 *écus* in the mass of the community where they have entered. And beyond that she would also take from the heritage of her husband and on her husband alone 1000 *écus*. That would be 1500 *écus* instead of 1000, an unreasonable sum, seeing that it does not appear that the husband wanted to give 500 *écus* to his wife, and a gift, which is in itself bad management, is not to be presumed if the will of the donor is not certain. [D.22.3.25.] Therefore the true intention of the contracting parties is to assure the woman her dowry and nothing else. Hence the custom of Bourbon and many other customs do not speak of assignments.

Ordinarily when the dowry of a woman is constituted solely in coins it is agreed that one part shall remain in its nature as movables to be mingled with and enter into the community of the husband. The other part is destined to come out in the nature of a heritage proper to the woman and it is customary here to insert a clause that the husband will be held to employ those coins to purchase a heritage proper for the wife. ...

These dotal payments, whether they remain in their nature as a movable or whether they come out in the nature of an inheritance, carry interest to the profit of the husband from the time when the term for paying them is expired or if there is no term certain, to be computed from the time when there is a judicial accounting. Thus says Nivernais, art. 20. This is founded in reason, for it is not usury but true interest as regards the husband since he supports the charges of the marriage by reason of X 5.19.16 [right on the usury point]. ...

Dotal payments that are destined to come out in the nature of heritage for the woman and are assigned or promised to be assigned are considered immovables and heritages for the wife, her heirs and those having cause. ...

If by marriage contract it is agreed that the married couple will pay their debts separately contracted before their marriage it is necessary in order to give such provision effect that there be an inventory made of the goods of each them before their marriage. In this case each remains quit of the debts of the other by offering the goods in the said inventory or their worth. ...

All qualifications (*contre-lettres*) made apart from and outside the presence of the parents who have assisted at the contract of marriage are null. ...

By new laws of France and by some customs gifts and advantages that widows having children of their first marriages wish to make their second husbands are restricted. Edict of King Francis, 2 July, 1560 ....

The custom is almost general in France, conforming to Roman law, that married people during their marriage cannot make gifts to each other, nor advantage them by inter vivos contracts. The reason of the Roman law is full of honor, so that it would not seem that friendship, concord and gracious treatment are for sale, and to make it known that true love is in the heart and not on the exterior. ...

If during the marriage a heritage is sold or a rent proper to one of the two married persons, or a rent proper to one of them is redeemed, the price of the sale or redemption is taken back from the community by the party to whom the rent or heritage belonged so long as there was no agreement or protestation to reemploy it. ...

If during the marriage one of the married couple marries off his child of another bed and pays dowry or does some other good, half of what has been handed over will be reimbursed after the marriage is dissolved to him of whom the child is not issue, unless the child has renounced rights to the profit of the married couple who paid the dowry. ...

If during the marriage, the couple, or one of them, redeems a rent with which the heritage of one of them was specially charged before the marriage, the customs are diverse. One possibility is that the rent remains simply extinct to the profit of him who began it, at the charge of recompensing the other for one half after

the marriage is dissolved. The other possibility is that the rent remains in former nature as a rent, in order to be a conquest. ...

If during the marriage a *retrait* is exercised by proximity of lineage or any heritage which was of the stock and line of one of the married couple is redeemed, the said heritage is proper to the person of the lineage at the charge of reimbursing within a year after the dissolution of the marriage the partner or his heir who made no gain. ...

A heritage acquired during the marriage from the proceeds of the sale of an ancient heritage of one or the other of the parties is proper to that party upon proof that the payment of the purchase was made with the same money that came from the sale or better by showing that the at the time of the alienation and at the time of the reuse the partners or one of them have affirmed before the judge that the alienation was made to use it for another heritage and that the acquisition was made from the proceeds of the sale. ...

When the husband is a bad manager and the wife fears that she will lose her dowry, the Roman law at various times introduced divers remedies to provide for the woman to conserve her dowry. [Citation omitted.] In customary France, there are other considerations, for women are common in goods with their husbands and to acquire that community ordinarily a part of their dowry is employed. In the said case of bad management, separation of goods between the husband and wife is employed, and this is heard before a lay judge because it is solely a question of goods, and if it were a question of separation of bed, the cognizance would belong the judge of the church. This separation of goods, in the situation where the couple agrees, ought to be authorized by the judge after summary cognizance of the case. ...

As has been said above, husband and wife are common in debts and credits and after the dissolution of the marriage the wife or her heirs are held to pay a half of the debts. According to the ancient customs one took that so strictly that the wife was held precisely to the half, without regard to the value of the goods that she received from the community. Therefore certain customs give the widow after the decease of their husbands to renounce the community, that is to say, to abandon the share that they have in the movables and conquests and make themselves free of the debts, upon taking an oath that they will put all the goods on display so that an inventory can be taken. And if they receive or hold back any goods, they lose the benefit of the renunciation. ... Other customs go further and have provided that the wife who has not expressly obliged herself is not held to the debts made by her husband for more than the amount that she or her heirs take from the community, provided that after the death of the husband a faithful inventory is made and that there is no fraud on the part of the wife or her heirs. ...

When the woman renounces the community, she takes her own heritage and her dower free of debts. ...

The majority of the customs deprive the widow of the benefit of renunciation or of not being bound for more than her share of the community, if she takes out or holds back from the community any goods, after the death of her husband or during his last illness. ...

The form and the time of the renunciation are not of the same sort. [But many seem to give widow forty days.] ...

Notwithstanding the renunciation, the widow is held to the debts that she owed before the marriage. ...

Concerning dower

What things are movables, conquests, or *propres*

Concerning gifts

Concerning the state of persons, tutelage and curatorship

Concerning the *retrait lignager*

Concerning wills

Concerning successions and heredities

Concerning prescriptions

Concerning executions on movable and immovable goods and persons, respites, cession of goods, hypothecs

Concerning contracts and agreements

Concerning bastards and aliens

Concerning seisin

Concerning *chaptel* of beasts [a kind of partnership in a herd]

B. ANTOINE LOISEL, INSTITUTES COUSTUMIERES OU MANUEL DE PLUSIEURS ET DIVERSES REGLES, SENTENCES & PROVERBES TANT ANCIENS QUE MODERNES DU DROICT COUSTUMIER ET PLUS ORDINAIRE DE LA FRANCE

(Paris, 1608) [CD trans.]

Titles

Book I
1. Concerning persons
2. Concerning marriage
3. Concerning dowers
4. Concerning avowry, guardianship, bail, guard, tutelage, curatorship
5. Concerning account

Book II
1. Concerning the quality and condition of things
2. Concerning lordship and justice

    33. Justice is patrimonial.

    35. Fief, *ressort* [geographical judicial competence], and justice have nothing in common.

3. Concerning servitudes
4. Concerning testaments
5. Concerning successions and heirs
6. Concerning partition and hotchpot

Book III
1. Concerning agreements
2. Concerning mandates, proctors and intermeddlers
3. Concerning community
4. Concerning sale
5. Concerning *retraits*
6. Concerning leases
7. Concerning gages and hypothecs

Book IV
1. Concerning rents
2. Concerning *cens* [and similar charges]
3. Concerning fiefs
4. Concerning gifts
5. Concerning responses (a kind of surety)
6. Concerning payments

Book V
1. Concerning actions
2. Concerning bars and exceptions
3. Concerning prescriptions
4. Concerning possession, seisin, complaint of novelty, sequestration, *recreance* and *maintenue*

5. Concerning proofs and reproaches

Book VI
1. Concerning crimes and gages of battle
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C. GABRIEL ARGOU, INSTITUTION AU DROIT FRANCOIS

(1st ed. 1692, 10th ed. 1717) [CD trans.]

Book I. The estate of persons
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4. Paternal power
5. Emancipation
6. Noble and bourgeois guardianship
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Book II. Things
1. The division of things
2. Fiefs
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4. *Cens* and seigneurial rights
5. Rights of justice

[The 1753 edition adds at the beginning: "All justice, royal or seigneurial comes from the king, and is dependent on him mediately or immediately."] The justice of lords is patrimonial in France. It gives many rights to those who possess it, but some of these right 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 such rights, of which escheat is most important.]

6. Honorific rights
7. Servitudes and the reports of experts [procedure to determine the state of rights in land]
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