

**PART XIX. DOMAT AND POTHIER**

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## A. JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER

Outline; Treatise of Laws c.3; Preliminary Book 3.1.11, Part 1.1.9 (introduction), 1.3.6.3, 1.3.7.1.7  
(Strahan trans. Cushing ed. Boston, 1st American ed., 1850, 2d ed. 1853)<sup>1</sup> 2 vols. (1st French ed. 1694) [Reference style modernized]

### TREATISE OF LAWS (1–107)

Ch. 1—Of the first principles of all laws

Ch. 2—A plan of society, on the foundation of the first two laws, by two kinds of engagements

[The two laws are the “two great commandments,” love of God and love of neighbor. The two kinds of engagements are linked to the second of the two laws, the first kind are those of marriage and kinship, the second all other relations between members of society.]

Ch. 3—Of the first kind of engagements

#### I. *Natural Engagements of Marriage and of Birth.*

THE engagement which marriage produces betwixt the husband and the wife, and that which birth makes between them and their children, forms a particular society in every family, in which God links the said persons more closely together, in order to engage them to a continual practice of the several duties of mutual love. It is with this view that he has not created all men, as he did the first; but that he hath made them to be born of the union which he has formed between the two sexes in marriage, and to be put into the world into a state subject to a thousand wants, where the help of both sexes is necessary to them for a long time. And it is from the manner in which God hath formed these two ties of marriage and birth, that *we* must discover the foundations of the laws which relate to them.

#### II. *Divine Institution of Marriage, and the several Principles of the Laws which depend on it.*

In order to form the union between man and woman, and to institute marriage, which was to be the source of the multiplication and union of mankind; and to give to the said union foundations proportionable to the characters of the love which as to be the bond of it; God created in the first place only man alone,<sup>2</sup> and then took out of him a second sex, and formed woman of one of the ribs of man,<sup>3</sup> to show, from the unity of their origin, that they make only one being; where the woman is taken out of man, and given to him by the hand of God<sup>4</sup> as a companion, and as a help meet for him,<sup>5</sup> and formed out of him.<sup>6</sup> It was in this manner, that he linked them together by this union, which is so strict, and so holy, and of which it is said, that it is God himself who hath joined them together,<sup>7</sup> and who has made them two to be one flesh.<sup>8</sup> He made man the head of this entire being;<sup>9</sup> and he established their union, by forbidding them to separate what he himself had joined.<sup>10</sup>

It is these mysterious ways by which God hath formed the engagement of marriage, which are the foundations, not only of laws which regulate all the duties of the husband and of the wife, but also of the

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<sup>1</sup> The second American ed. has the paragraphs numbered continuously throughout. I have added these paragraph numbers where I have reproduced a paragraph, but the page numbers in the outline come from the first American.

<sup>2</sup> Gn. 2:7.

<sup>3</sup> Gn. 2:18.

<sup>4</sup> Gn. 2:22.

<sup>5</sup> Gn. 2:18.

<sup>6</sup> Gn. 2:23.

<sup>7</sup> Mt. 19:6.

<sup>8</sup> Gn. 2:24; Mt. 19:6; Eph. 5:31; Mk. 10:8.

<sup>9</sup> 1 Cor. 11:3; Eph. 5:22, 23; Gn. 3:16; 1 Cor. 14:34.

<sup>10</sup> Mt. 19:6.

laws of the Church, and of the civil laws which concern marriage, and of the matters which depend on it, or which have any relation to it.

Thus, marriage being a tie formed by the hand of God, it ought to be celebrated in a manner becoming the holiness of the divine institution which hath established it. And it is a natural consequence of this divine order, that the marriage be preceded and accompanied by decency, by the reciprocal choice of the persons who engage in it, by the consent of parents, who are in many respects in the place of God; and that it be celebrated by the ministry of the Church, where this union ought to receive the divine benediction.

Thus, the husband and wife being given the one to the other by the hand of God, who unites them in one complete being, that cannot be separated; a marriage which has been once lawfully contracted, can never be dissolved.<sup>11</sup>

Thus, this union of persons in marriage is the foundation of civil society, which unites them in the use of their goods and of all other things.

Thus, the husband being, by divine appointment, the head of the wife, he has over her a power proportionable to the rank he has in their union. And this power is the foundation of the authority which the civil laws give to the husband, and of the effects of this authority in the matters where it hath its use.

Thus, marriage being instituted for the multiplying of mankind, by the union of the husband and wife, linked together in the manner in which God unites them; all manner of conjunction besides that of marriage is unlawful, and cannot give other than an illegitimate birth. And this truth is the foundation of the laws of religion, and of civil government, against unlawful conjunctions; and of the laws which regulate the state of children which issue from such unlawful conjunctions.

The tie of marriage, which unites the two sexes, is followed by that of birth, which unites to the husband and wife the children which are born of their marriage.

### III. *The Tie of Birth and Principles of the Laws which are the Consequences of it.*

It is in order to form this tie, that God hath established that man should receive his life from his parents, in the bosom of a mother; that his birth should be the fruit of the pains and labors of the said mother; that he should be born incapable of preserving this life into which he enters; that should continue in it a long time in a state of weakness, and stand in need of the help of his parents, in order to his subsisting, and being educated in it. And as it is by this birth that God forms the mutual love, which so strictly unites him, who, begetting his own likeness gives him life, with him who receives it; so he gives to the love of parents a character suited to condition of children in their birth, and to all the wants which are the consequences of this life which they have given them; that he may engage them, by the said love, to the duties of education, instruction, and all the other paternal duties. And gives to the love of children a character suited to the duties dependence, obedience, gratitude, and all the other filial duties to which they are engaged by the benefit of life, which they hold in such a manner of their parents, of whom God made them to be born, that he teaches us, that without them they would not have that life.<sup>12</sup> And this obliges them to render their parents all manner of assistance, and all manner of service in their wants, and especially in those of old age, and of weaknesses, infirmities, and necessities, which afford children occasion of paying to their parents duties which answer the first benefits which they received from them.

It is this order of birth, which, by forming the engagement between parents and children, is the foundation of all their duties, the extent whereof it is easy to discover by the character of these different engagements. And on these very principles depends all that the civil laws have regulated touching the effects of the paternal power, and of the mutual duties of parents towards children, and of children towards parents; according as they are matters that are subject to the regulation of policy, such as the rights which the laws and customs give to fathers for the government of their children, for the celebration of their marriages, for the administration and enjoyment of their estates, or which relate to the disobedience of children to their

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<sup>11</sup> Mt. 19:9.

<sup>12</sup> Ecc. 7:27, 28.

parents or to the injustice of parents, or of children, who refuse support to one another, and other matters of the like nature.

It is likewise upon this order, which God has made use of for giving life to children by their parents, that the laws are found which convey to children the estates of their parents after death for temporal goods being given to men for all the different necessities of life, and being only a consequence of that benefit; it is agreeable to the order of nature, that, after the death of the parents, the children should inherit their goods, as an accessory to the life which they have received from them.

The tie of birth, which unites fathers and mothers to their children, unites them likewise to those who are born and descended of their children. And this tie makes all the descendants to be considered as children, and all the ascendants as being in the rank of fathers or mothers.

It may be remarked on the difference of the characters of the love which unites the husband and the wife, and of that which unites parents and children, that it is the opposition of these different characters, which is the foundation of the laws which prohibit marriage between ascendants and descendants in all degrees, and between collateral in some degrees. And it is easy to perceive the reasons of such prohibition, by barely reflecting on what has been just now remarked in reference to these characters, on which it is not necessary to enlarge here.

#### IV. *The Ties of Kindred and Affinity, and their Principles.*

Marriage and birth, which unite so strictly the husband and wife, parents and children, form also two other sorts of natural ties, which are consequences of them. The first is, that of collateral relations, which is called kindred; and the second is that of allies by marriage, which is called alliance, or affinity.

Kindred unites the collateral relations, who are those persons whose birth hath its origin from one and the same common ascendant. They are called collaterals, because, whereas the ascendants and descendants are in a direct line from father to son, the collaterals have everyone their own line, which terminates in that of the common ascendant. Thus they are at the side of one another; and the foundation of their tie and kindred is, their common union to the same parents, from whom they derive their birth.

This is not the proper place to explain the degrees of kindred; it is a matter which makes a part of that of successions. And it sufficeth to remark here, that this union of kindred is the foundation of several laws; such as those which forbid marriage between persons who are near of kin; those which call them to successions, and to guardianships; those of the challenges of judges, and exceptions against witnesses, who are relations to the parties, and others of the like nature.

Affinity is the tie and relation which is made between the husband and all the kindred of the wife; and between the wife and all the kindred of the husband. The foundation of this tie is the strict union between the husband and the wife, which makes that those who are tied by kindred to one of the two, are of consequence tied to the other: and this affinity makes the husband consider the father and mother of his wife as being in the place of father and mother to himself: and her brothers, her sisters, and her other relations, as being to him in the stead of brothers, sisters, and relations: and the wife looks in the same manner upon the father and mother, and all the kindred of her husband, as having the same relation to herself.

This relation of affinity is the foundation of those laws which forbid marriage between persons that are allied in a direct line of ascendants and descendants, in all degrees; and between collateral allies, within the compass of certain degrees: and likewise of the laws which call allies to tutorships, of those which reject judges and witnesses who are allied to the parties, and of others of the like nature.

Ch. 4—Of the second kind of engagements

Ch. 5—Of some general rules which arise from engagements that have been mentioned in the preceding chapter, and which are so many principles of the civil law

Ch. 6—Of the nature of friendships and their use in society

Ch. 7—Of successions

Ch. 8—Of three sorts of troubles which disturb the order of society

Ch. 9—Of the state of society after the fall of man and how God makes it to subsist

Ch. 10—Of religion and policy, and of the ministry of the spiritual and temporal powers

Ch. 11—Of the nature and spirit of laws, and their different kinds

Ch. 12—Reflections on some remarks in the preceding chapters, which are a foundation of several rules touching the use and interpretation of laws

Ch. 13—A general idea of the subject-matters of all the laws: reasons for making choice of those which shall treated of in this book

Ch. 14—A plan of the matters contained in this book of the civil law in its natural order

#### THE CIVIL LAW

Preliminary Book: Of the rules of law in general, person, and things

Tit. 1—Of the rules of law in general (pp. 108–135)

Tit. 2—Of persons (135–149)

Tit. 3—Of things (149–60)

Section 1: Of the distinction of things by nature.

Para. 1. Things common to all.<sup>13</sup>

Para. 2. Things public.

Para. 3. Things belonging to towns or other places.

Para. 4. Distinction of immovables and movables.

Para. 5. Immovables.

Para. 6. Trees and buildings.

Para. 7. The hanging fruits are a part of the ground.

Para. 8. Accessories to buildings.

Para. 9. Movables.

Para. 10. Movables, living and dead.

Para. 11. [125] *Animals, wild and tame.*— Animals are of two sorts. One is of those that are tame, and serve for the ordinary use of men, and are in their power; such as horses, oxen, sheep, and others. The other sort is of those animals that live in their natural liberty, out of the power of man; such as the wild beasts, fowls, and fishes. And the animals of this second sort are applied to the use, and come into the power of men, by hunting and fishing, according as the use of these sports is permitted by the laws.<sup>14</sup>

Para. 12. Movable things that are consumed by use.

Section 2. Of the Distinctions of Things by the Civil Law

Part I: Of Engagements

Book I: Of voluntary and mutual engagements by covenants

Tit. 1—Of covenants in general (160–197)

Tit. 2—Of the contract of sale (197–252)

Tit. 3—Of exchange (252–6)

Tit. 4—Of hiring, letting to hire, and of the several kinds of leases (256–289)

Tit. 5—Of the loan of things to be restored in specie, and of a precarious loan (289–317)

Tit. 6—Of the loan of money, and other things to be restored in kind; and of usury (317–329)

Tit. 7—Of a deposit, and of sequestration (329–344)

Tit. 8—Of partnership (344–375)

Tit. 9—Of dowries, or marriage portions (375–400)

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<sup>13</sup> [Dt. 4:19; JI.2.1.1; D.41.1.2.1] It is to be remarked on this article and the two following that our laws differ from the Roman law in regulating the use of the seas, except in so far as concerns that natural use of them, in communication which all nations have with one another, by a free navigation over al the sea. Thus whereas the Roman law allowed every body indifferently to fish, both in the see and in the rivers [JI.2.1.2], in the same manner as it allowed hunting [JI.2.1.12], our laws prohibit them. And our ordinances have made several regulations concerning them; the origin of which is owing, among other causes, to the necessity of preventing the inconveniences of allowing a liberty of hunting and fishing to all sorts of persons. And we must observe in general, touching the use of the seas, seaports, rivers, highways, the walls and ditches of towns, and of other things of the like nature, that several regulations have been made in them by our ordinances; such as those that concern the admiralty, rivers, forest, hunting, fishing, and others of the like nature which do not belong to the matters that come within the compass of this design.

<sup>14</sup> [JI.2.1.12.] We must understand this according to the ordinances which relate to hunting and fishing.

[823.] *Two engagements in marriage.*— Marriage makes two sorts of engagements; one whereof is 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.<sup>15</sup>

[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;<sup>16</sup> institutions of heirs or executors by way of contract, and which are irrevocable;<sup>17</sup> 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, as also those of the institutions of heirs or executors by way of contract, and of the renunciations of daughters, 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. But we shall not insert among them some particular customs of the Roman law, although observed in some countries; as, for instance the privilege of the dowry before the creditors of the husband who were prior to the contract of marriage.

[828.] *The Foundation of the Rules of Dowries.*— The rules of dowries have their foundation in the natural principles of the bond of matrimony, by which the husband and wife make one body, of which the husband is the head. For it is an effect of this union, that the wife, putting herself under the power of the husband, subjects likewise to his dominion her goods, and which go to the use of the society, or partnership, which they form together.<sup>18</sup>

[829.] *Distinction of the Goods which are Part of the Dowry, and those which are called Paraphernal Goods.*— According to this principle, it would be natural for all the goods of the wife to be comprehended in her dowry, and that she should have none but what enter into this partnership, and of which the husband, who bears the charges of it, should have the full enjoyment. But custom has determined, that the husband

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<sup>15</sup> These two sorts of engagements are expressed and distinguished in the marriage of Tobias. Tobit vii. 13, 14.

<sup>16</sup> [C.6.20.3 (invalidating such covenants in Roman law)].

<sup>17</sup> [C.2.3.15; C.5.14.5].

<sup>18</sup> [C.5.14.8].

shall have for his wife's portion only the goods which are specified to be given on this account; and if the wife does not give as a marriage portion all her goods present and to come, but only certain goods, the dowry will be limited to the goods which are expressly given under this name; and the other goods, which are not specified, will be reckoned paraphernal goods.

[830.] *A Tacit Condition in Contracts of Marriage.*— We must observe this difference between the covenants in a contract of marriage, and those of other contracts; that whereas all other covenants bind the contracting parties irrevocably, and from the moment that the contract is formed, the covenants of the contract of marriage are in suspense till the marriage is solemnized; and imply this condition, that they shall not take place but in case the marriage be accomplished; and that they shall remain void if it is not accomplished.<sup>19</sup> But when the celebration of the marriage follows the contract, it gives the contract a retroactive effect, and it has its effect from the day of its date. Thus, the mortgage for the security of the dowry is acquired from the date of the contract; and before the celebration of the marriage.

[831.] *Remarks on the Privileges of Dowries.*— Some may perhaps take notice and find fault in reading this title, that nothing is said in it of some maxims of the Roman law in favor of dowries; such as those which say, in general, that the causes relating to the dowries are favorable, and that it is for the public interest that dowries be preserved;<sup>20</sup> that in doubtful cases judgment ought to be given for the dowry;<sup>21</sup> and in particular those maxims which give to dowries certain privileges, such as the privilege among creditors, and the preference even to those that have prior mortgages;<sup>22</sup> and that privilege which, in favor of dowries, validated the obligation of a woman who had bound herself for the dowry of another,<sup>23</sup> although by the Roman law women could not be bound for other persons. But as to these privileges, that of the preference of the dowry to the husband's creditors, even to those that have prior mortgages, is received only in some places, and everywhere else it is looked upon as an injustice. And the law which validates the obligations of a woman for another's dowry is useless after the edict of the month of August, 1606, which permits women to bind themselves for others, as has been remarked on the first article of the first section of the title of *Persons*.

[832.] And as for these general maxims, that the causes of dowries are favorable, that the public is interested in their preservation, and that in doubtful cases judgment ought to be given in favor of the dowry; since they do not terminate in any thing particular except to show that they are privileges of the Roman law, and seeing they may be very readily misapplied, it was not thought proper to set them down here as rules.

[833]. It is likewise necessary to observe, that in the Roman law there are other regulations in relation to the matter of dowries, which, although they be founded on natural equity, yet we have not thought fit to insert under this title. Thus, we have not put down this rule, that the husband being sued by the wife for the restitution of her marriage portion, or for other matters, or the wife sued by the husband for what she may be indebted to him, they ought not to be constrained with the same severity as debtors for other causes, and cannot be obliged to pay more than what they are able to do, without being reduced to want.<sup>24</sup> And the reason why we have not made an article for this rule is that in the Roman law it was a consequence of divorce, which was allowed among the Romans, and which is unlawful; and that according to our usage the wife having no action against her husband, nor the husband against the wife, except in the case of a separation from bed and board, or a separation only as to their goods, this rule has no relation either to the one or other of these two cases; and that, in fine, in all the cases where equity requires that the rigor of prosecutions at the instance of creditors should be mitigated, it is customary with us to leave the mitigation of this severity to the discretion of the judge, according to the circumstances. As to which it will be proper to see the twentieth article of the fourth section of *Partnership*.

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<sup>19</sup> [D.23.3.68, 10.4].

<sup>20</sup> [D.24.3.1; D.23.3.2].

<sup>21</sup> [D.23.3.70; D.50.17.85; C.4.29.25].

<sup>22</sup> [D.42.5.18.1; C.8.17.12].

<sup>23</sup> [C.4.29.25].

<sup>24</sup> [D.42.1.20; JI.4.6.37; C.5.13.1.7; D.24.3.14 i.f., 12; D.50.17.173].

[834.] We have also omitted to set down under this title that other rule of the Roman law, and which is likewise founded on a principle of equity, that the fruits of the dowry which are reaped the last year of the marriage ought to be divided between the husband and the wife, in proportion to the time that the marriage has lasted this last year.<sup>25</sup> By this rule, if a marriage had been contracted the first of July, before harvest, and had been dissolved by a divorce the first of November; the husband, who had gathered all the fruits of the year, for four months only that the marriage had lasted, was obliged to restore to the wife two thirds of the fruits. And this last year was reckoned to begin on the day of the year that the marriage was solemnized: or if the husband did not enter into possession of the lands which he had in marriage with his wife till after the solemnization of the marriage, this last year was reckoned to begin from the same day of the year that the husband entered into possession of his wife's lands.<sup>26</sup> But this rule, which in the case of divorce was necessary for the doing of justice both to the wife and to the husband, is not so necessary in the case of the dissolution of the marriage by the death of one or other of the parties. For whereas in the case of divorce it would have been very unjust, that a woman married just before the beginning of harvest, and divorced as soon as harvest was over, should be stripped of the revenue of her estate for the whole year; in the case of the dissolution of the marriage by the death of the husband or wife, the justice which may be due to either the one or other of them, or to their heirs or executor, is not limited precisely to this rule. And besides this way of dividing the fruits of the wife's dowry between the survivor of the married couple, and the heirs or executors of the deceased, our customs have established other ways altogether different. Thus, in some customs, the fruits of the wife's dowry for the last year go to the husband, subject to the burdens which the said customs make him liable to; and in others, the survivor gathers all the fruits that are hanging by the roots in the estate that is restored, with the burden of paying half the charge of tillage and seed; and in others, again, the fruits are divided into two equal shares. And these different usages have in general their equity founded in this, that those who marry do contract on the conditions of these customs, unless they derogate from them by express clauses. And in particular each usage is founded either upon the uncertainty of the event which may give some advantage to the person who shall survive, or upon other motives which render these partitions just and equitable.

Section 1. Of the nature of dowries or marriage portions

Section 2. Of the persons who give the dowry, and of their engagements

Section 3. Of the engagements of the husband with respect to the dowry, and of the restitution of the dowry

Section 4. Of the paraphernal goods

Section 5. Of the separation of goods between the husband and the wife

Tit. 10—Of donations that have their effect in the lifetime of the donor (400–409)

Tit. 11—Of usufruct (409–432)

Tit. 12—Of services (432–452)

Tit. 13—Of transactions (452–459)

Tit. 14—Of compromises (459–465)

Tit. 15—Of proxies, mandates, and commissions (465–481)

Tit. 16—Of persons who drive any public trade, of their factors and agents, and of bills of exchange (481–492)

Tit. 17—Of brokers, or drivers of bargains (492–497)

Tit. 18—Of the vices of covenants (497–520)

Book II: Of engagements which are formed without a covenant

Tit. 1—Of tutors

Tit. 2—Of curators

Tit. 3—Of syndics, directors and other administrators of companies and corporations (567–573)

Tit. 4—Of those who manage the affairs of others without their knowledge (573–582)

<sup>25</sup> [D.24.3.7.1, 7.9, 11; D.23.3.78.2; C.5.13.1.9].

<sup>26</sup> [D.24.3.5, 6].



- Tit. 5—Of those who chance to have any thing in common together, Without a covenant (582–589)  
 Tit. 6—Of those who have lands or tenements bordering upon one another (589–595)  
 Tit. 7—Of those who receive what is not their due, or who happen to have in their possession the thing of another, without a covenant (595–604)  
 Tit. 8—Of damages occasioned by faults which do not amount to a crime or offense (694–623)  
 Tit. 9—Of engagements which are formed by accidents (604–623)  
 Tit. 10—Of that which is done to defraud creditors (638–646)

Book III: Of the consequences which add to engagements, or which strengthen and corroborate them

- Tit. 1—Of pawns and mortgages, and of the privileges of creditors  
 Tit. 2—Of the separation of the goods of the deceased from those of the heir or executor, between their respective creditors (708–713)  
 Tit. 3—Of the solidity among two or more debtors and among two or more creditors (713–720)  
 Tit. 4—Of cautions or sureties (720–760)  
 Tit. 5—Of interest, costs, and damages, and restitution of fruits  
 Tit. 6—Of proofs and presumptions, and of an oath (794–845)

Section 1: Of proofs in general

Section 2: Of proofs by writing

Section 3: Of proofs by witnesses

[2034.] *The Subject-Matter of this Section.*— We do not speak here of the proof which witnesses make in contracts, in testaments, and in the other acts where the law requires the presence of some witnesses to confirm the truth of what is there transacted; for this kind of proof is comprehended in the proofs by writing, of which we have treated in the foregoing section. And in this section we mean to speak only of the proof that is made by the depositions of witnesses who are judicially examined, that the judge may learn from their mouths the truth of facts for which no written proofs can be produced, or where the proofs which may be alleged are not sufficient. Thus, for example, if a fair and honest possessor of an estate, who knows of no better right to it than his own, and yet has no title to produce, but has possessed it during the time necessary for prescription, is disturbed in his possession, and has no writings to prove it, or has only wherewithal to prove his possession for part of the time which he has enjoyed it; as if he has leases of some years, or some acquittances for quitrents which he has paid as possessor; he may produce witnesses to declare what they know of the said possession, and of its duration; and his adverse party may likewise on his part prove the contrary. Thus, one proves by witnesses all the other facts which it may be just and necessary to prove, such as accusations in crimes, and facts contested in civil matters, except such as the law does not allow to be proved by witnesses; as has been remarked at the end of the preamble to the foregoing section.

[2035.] There is this difference between the proof by witnesses, which is the subject-matter of this section, and the proofs which witnesses make in written acts; that in the said acts the witnesses are persons which one has the liberty to choose to be present at them, and they ought to be in the number regulated by law, and of the quality which it prescribes; whereas in the proofs which are to be treated of in this section, the witnesses are persons who happen by chance to have knowledge of the facts which one would prove, without having been chosen and called upon to see what passes, and to remember it. And this is the reason why, in informations in criminal prosecutions, and in trials concerning civil matters, the judges admit the depositions of witnesses who would not be allowed of as proper witnesses to written acts. Thus, for example, women, who cannot be witnesses in a testament or in a contract, are admitted to give evidence in criminal prosecutions, and trials in civil causes.

[2036.] *Examination of Witnesses ad futuram rei memoriam abolished in France.*— We shall put down nothing in the articles of this section touching that kind of proof by witnesses which was called examination of witnesses *ad futuram rei memoriam*, which was in use under the Roman law, and which was likewise observed in France before the ordinance of 1667, which abolished the use thereof.<sup>27</sup> But this remark is made

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<sup>27</sup> Ordinance of 1667, tit. 13.

here only to give the reader an idea of that sort of examination of witnesses which served to preserve their evidence to posterity, and to inform him that the same is abolished in France.

[2037.] This examination of witnesses, in order to preserve their testimony to futurity, was used in the cases where anyone foreseeing that he might have occasion for a proof by witnesses, and fearing lest they should die, or that other changes should happen which might deprive him of his proof before his lawsuit was so far advanced that he might be admitted to make his proof, or that the judge could examine his witnesses, he demanded leave of the judge to have them examined before the time, that their evidence might be thereby perpetuated to futurity.<sup>28</sup> But this precaution, which is attended with many inconveniences, has been judged useless likewise for other reasons. For those who may be in haste to make their proofs may take their measures accordingly; may make their demands, and allege their facts, in order to have the proof of them decreed, if it be necessary, without having recourse to a usage that is inconvenient and full of uncertainty.

[2038.] *The General Inquest about customs abolished in France.*— It may not be amiss to observe here, in passing, that the same ordinance of 1667 hath also abolished in France another kind of examination of witnesses, which was called *enquete par turbes*,<sup>29</sup> or a general inquest, and which was used in questions relating to the interpretation of some custom. The usage of these inquests was founded on this, that the particular dispositions of customs were considered as facts,<sup>30</sup> so that they received proof by witnesses of the usage and interpretation of some article of a custom. They called these inquests *par turbes*, because ten witnesses were only reckoned as one; and these witnesses were chosen from among the officers of the places, and the advocates, who were the likeliest persons to know what was the usage and practice as to the dispositions of their customs. But these inquests were attended with an infinite number of inconveniences, as may easily be perceived; and the superior judges have better ways to find out the sense and meaning of customs, and to interpret that which may require an explanation.

Para. 1

[2039.] *Witnesses, and their Evidences.*— Witnesses are persons who are summoned to appear in judgment, in order to declare what they know of the truth of the facts contested between the parties. And the declaration which they make of the matter is their evidence.<sup>31</sup>

Para. 2

[2040.] *Use of witnesses in all Matters.*— The use of evidences is infinite, according to the infinite number of events which may render the proof of a fact necessary, whether it be in civil matters or in criminal.<sup>32</sup>

Para. 3

[2041.] *Who may be a Witness.*— All persons of both sexes may be witnesses, if there be no exception against them regulated by some law.<sup>33</sup> Thus, for example, children and madmen cannot be admitted as witnesses, nor persons whose reputation has received some blemish, either by a sentence of condemnation in a court of justice, unless they be restored again to their good name, or by the infamy of their profession; nor those whom other causes may render incapable of giving evidence,<sup>34</sup> as shall be shown in the sequel of this section.

Para. 4

[2042.] *Two Qualities in Witnesses.*— The proofs which are drawn from evidences depend chiefly on two qualities that are necessary in the witnesses: probity,<sup>35</sup> which engages them to say nothing but the truth and

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<sup>28</sup> [D.9.2.40; D.37.10.3.5].

<sup>29</sup> Ordinance of 1667, tit. 13.

<sup>30</sup> See the eleventh chapter of the *Treatise of Laws*, no. 20, towards the end.

<sup>31</sup> [D.22.5.11].

<sup>32</sup> [D.22.5.1].

<sup>33</sup> [D.28.1.20.6; D.22.5.18].

<sup>34</sup> [D.22.5.1; D.22.5.3.5 i.f.; D.22.5.20].

<sup>35</sup> [D.22.5.2; C.4.20.5].

a steadiness in relating the circumstances of the fact, which may show the witnesses to have been careful and exact in observing and retaining them.<sup>36</sup> And it is for want of one or the other of these qualities that evidences are suspected and rejected. And this depends on the rules which follow.

Para. 5

2043. *Witnesses who are suspected.*— Whatever proves the want of probity in a witness is sufficient to make his evidence to be rejected. Thus, we do not receive the evidence of a person condemned by a court of justice for calumny, or forgery, or for having borne false witness, or for writing a defamatory libel, or for other crimes.<sup>37</sup> For these condemnations cast a blemish on the honor of the person, and make him forfeit the reputation of probity. And it would be the same thing, and that with much more reason, if it were proved that the witness had received money to give his evidence.<sup>38</sup>

Para. 6

[2044.] *Witnesses who are interested.*— If the witness has any interest in the fact concerning which he is desired to give evidence, he will be rejected.<sup>39</sup> For one cannot be sure that he will make a declaration contrary to his own interest.

Para. 7

[2045.] *Witnesses engaged in the same Interest with the Party.*— The same reason which serves for rejecting the testimony of persons interested in the facts that are to be proved makes the testimony likewise of the father in the cause of the son to be rejected, as also that of the son in the cause of the father. For the interest of the one touches the other, as his own proper interest. And although the father should offer to give evidence against his son, or the son against his father, they would not be admitted to do it. For this affectation and forwardness would render them suspected of having an intention either to favor, or to hurt.<sup>40</sup>

Para. 8

[2046.] *Witnesses who are Relations, or Allies.*— As we reject the testimony of persons who are interested in the facts which are to be proved, or who take part in the interest of those whom the said facts concern, so neither do we receive the evidence of those who are related by consanguinity, or by affinity, to the persons interested in the said facts. And if there should be any enmity between those persons and the witnesses who are their relations or allies, such witnesses ought to be rejected with greater reason. And they may on their part refuse to give their evidences, especially in criminal prosecutions. We may reckon in the number of allies, with respect to the use of this rule, those who are only so by spousals, the marriage not being as yet accomplished.<sup>41</sup> And we must understand consanguinity and affinity in the extent of the degrees regulated by law.<sup>42</sup>

Para. 9

[2047.] *Witnesses who are Friends.*— The ties made by strict friendships, or engagements of familiarity, may likewise render suspected the testimony of a friend in the cause of his friend.<sup>43</sup> And this depends on the prudence of the judge, according to the quality of the tie of friendship, and that of the facts and circumstances.

Para. 10

[2048.] *Witnesses who are Enemies.*— The enmities that are between witnesses and the persons against whom they depose are just causes for doubting of the fidelity of their testimony. For we ought to mistrust

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<sup>36</sup> [D.22.5.1].

<sup>37</sup> [D.22.5.13, 3.5, 15, 21].

<sup>38</sup> [D.22.5.3.5].

<sup>39</sup> [D.22.5.10; C.4.20.10].

<sup>40</sup> [D.22.5.9; C.4.20.6].

<sup>41</sup> [D.22.5.4, 5].

<sup>42</sup> In France, by the ordinance of 1667, tit. 22, art. 11, the testimony of relations and allies of the parties, even down to the children of second-consins inclusively, is rejected in civil matters, whether it be for or against them.

<sup>43</sup> [D.22.5.3; D.50.16.223.1].

that their passion may lead them to make a declaration prejudicial to the interest of their enemy. And unless their evidence were accompanied with some other proof, it would be suspicious. So that we ought to judge by the circumstances of the quality of the persons, of the causes and consequences of the enmity, and of what results from the other proofs, what regard ought to be had to the fact of enmity.<sup>44</sup>

Para. 11

[2049.] *Witnesses who are Domestics, and depend on the Party.*— The persons who have a dependence on the party who would make use of their testimony, such as menial servants, being suspected to favor the interest of their master, and to declare only what he desires, their evidence ought to be rejected.<sup>45</sup>

Para. 12

[2050.] *Witnesses who waver in their Depositions.*— It is not enough to establish an evidence beyond all exception, that the probity of the witness be not called in question; it is moreover necessary, that his declaration be steady and firm. For if he varies in his account, deposing circumstances and facts that are different, or even contrary; or if he waver in his deposition, and be himself in doubt of the fact which he relates; this uncertainty and these variations rendering his evidence uncertain, they will cause it to be rejected.<sup>46</sup>

Para. 13

[2051]. *There must be Two Witnesses to make a Proof.*— In all the cases where proof by witnesses may be received, it is necessary that there be two of them at least; and that number may suffice, except in cases where the law demands a greater. But one single witness, of what quality soever he may be, makes no proof.<sup>47</sup>

Para. 14

[2052]. *One may produce many Witnesses.*— Although two witnesses be sufficient to prove a fact, yet seeing this proof consists in the conformity of their depositions, and that it often happens that the declarations of two witnesses do not agree on all points, or that some essential circumstances are known only to one of the witnesses, the other being ignorant of them, and that likewise it may so fall out, that there may be some just objection against one of the witnesses, or even against them both; for these reasons a greater number of witnesses may be examined, and even several out of one and the same house, such as the father and children, that the evidence of the one may make up what is defective in the testimony of the others, and that all of them together may make up an entire proof of the truth. But the liberty of producing many witnesses ought to be restrained by the prudence of the judge, if the law has set no bounds to it.<sup>48</sup>

Para. 15

[2053.] *Several Views by which we are to judge of Proofs by Witnesses.*— It is necessary to add to all these rules, in relation to proofs by witnesses, that we ought to consider their condition their manners, their estate, their conduct, their integrity, their reputation: if their honor has received any blemish by a condemnation in a court of judicature: if they are in a condition to tell the truth without regard to the persons interested, or if it is to be feared that they are under some engagement, or have some inclination, to favor one of the parties, as if they are friends, or enemies, to one or other of them: if their poverty or wants expose them to the temptation of giving such testimony as may be agreeable to one of the parties, according as they have any thing to fear or hope for from him: if their testimony appears to be sincere, without affectation: if the depositions are conformable to one another, and not concerted: if the number of the witnesses, the conformity of their depositions, common fame, and the probability of the circumstances, confirm their evidence: if their variations, their disagreement, their contradictions, render them suspected: if the

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<sup>44</sup> [D.22.5.3; D.48.18.1.24, 1.25; cf. Nov. 90.7; C.4.20.17].

<sup>45</sup> [D.22.5.6, 24; D.4.20.3].

<sup>46</sup> [D.22.5.1, 2].

<sup>47</sup> [D.22.5.12; C.4.20.9.1].

<sup>48</sup> [D.22.5.1.2, 17]. By the ordinances of France it is prohibited to examine more than ten witnesses to each fact in civil matters. Ordinance of 1446, art. 32; of 1498, art. 13; of 1535, chap. 7, art. 4. Ordinance of 1667, tit. 22, art. 21.

consequence of the facts be such as may require a more exact consideration of what may render the witnesses suspected, as in criminal prosecutions; or if the facts be so slight that it is not necessary to be so exact in the inquiry, as if the matter were only a bare action of slander or defamation, in a quarrel between persons of a mean condition. Thus, the right judgment that is to be made of the regard which ought to be had to the depositions of witnesses under all these views depends on the rules which have been explained, and on the prudence of the judges, to make a right application of them, according to the quality of the facts and the circumstances.<sup>49</sup>

Para. 16

2054. *Witnesses against whom there lies no Exception may be mistaken.*— It is not ground enough, to be assured of the truth of the depositions of witnesses, that their integrity is well known; and therefore, seeing it may happen that the most intelligent and most sincere persons may have been deceived by others, or be themselves mistaken, either in the knowledge of the persons, or in some circumstances, or even in the facts, it is always prudent for the judge to consider well the depositions of all the witnesses, even of those who are most to be credited, and to see whether they agree with the other clear and certain proofs that may be had of the truth of the facts and circumstances. And in order to give to the evidence its just effect, it is necessary to gather the truth out of all that appears to be certain in all the proofs together.<sup>50</sup>

Para. 17

[2055.] *Witnesses may be compelled to give Evidence.*— The persons who are summoned to give evidence are obliged to come and declare what they know of the matter. For the consequence of discovering the truth of facts necessary for the administration of justice is what the public has an interest in. So that the judge may compel those who refuse to come and give their evidence, whether it be in civil matters, or in criminal.<sup>51</sup>

Para. 18

[2056.] *The Witnesses ought to be examined by the Judge.*— It is not enough, to give to the declaration of a witness the effect which it ought to have in justice, that the witness himself writes, or causes another to write, his evidence, and that he gives it or sends it to the judge; but it is necessary that he appear before the judge, and that the judge himself interrogate him, and put down his declaration in writing.<sup>52</sup>

Para. 19

[2057.] *And ought to be first sworn.*— Seeing it is to the judge, and even to justice itself, that the witness gives his evidence, his declaration ought to be preceded by an oath that he will speak the truth; that the respect which he owes to religion may engage him to give his testimony with all the fidelity and all the exactness that justice and truth may require. And if he has no knowledge of the facts about which he is interrogated, he must even swear that those facts are unknown to him.<sup>53</sup>

Para. 20

[2058.] *Excuses of Witnesses.* -If the witnesses have excuses which hinder them from coming to give their evidence, they may be discharged from coming. Thus, those persons whom sickness or absence, or any lawful impediment, disables from appearing before the judge, their appearance is dispensed with.<sup>54</sup> But if their depositions be necessary, the judge may go himself, and examine them in person, or may give commission for that purpose to another, according as the quality of the fact may require and the laws and usage allow of it.

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<sup>49</sup> [D.22.5.2, 3.1, 3.2, 21.3].

<sup>50</sup> [D.22.5.13 i.f.].

<sup>51</sup> [D.22.5.3 i.f.; C.4.20.16]. If the witness does not appear on the summons with which he is served, the judge condemns him in a fine, for which his goods may be attached and sold, and even his person may be imprisoned, in case he does not obey the summons. See the eighth article of the twenty-second title of the ordinance of 1667.

<sup>52</sup> D.22.5.3.3, 3.4.

<sup>53</sup> [C.4.20.9, 16]. See the ninth article of the twenty-second title of the ordinance of 1667.

<sup>54</sup> [D.22.5.8; 1.1]. See the following article.

## Para. 21

[2059.] *Witnesses who are excused by Reason of their Dignity.*— There are some persons whom their dignity exempts from appearing before the judge to give evidence; but in the cases where the testimony of such persons may be necessary, the judge must give proper directions therein, according to the different usages of places, or application must be made to the prince, if the quality of the fact and that of the witness may deserve it.<sup>55</sup>

## Para. 22

[2060.] *Letters of Request for the Examination of a Witness who lives out of the Jurisdiction of the Court.*— If it happen in a civil cause that a witness has his abode without the jurisdiction of the judge who ought to take his deposition, and that by reason of the too great distance, or of the indisposition of the witness, or for other causes, he cannot be examined but in the place where he lives; the judge who has cognizance of the cause may, if it is necessary, request the judge of the place where the witness resides to examine the said witness, and may give him a commission for that effect. But in criminal prosecutions the witnesses can be examined only by the judge who takes cognizance of the crime.<sup>56</sup>

## Para. 23

[2061.] *The Advocate of the Party cannot be a Witness.*— Whoever have been employed as advocates in a cause cannot be witnesses in it. For their testimony would be either suspected, if it were in favor of the person whose cause they had defended, or both uncivil and suspected, if it were against their client. And it is the same thing as to proctors and attorneys, and other persons who should happen to be under the same engagements.<sup>57</sup>

## Para. 24

[2062.] *The Expenses of the Witnesses paid by the Party who summons them.*— The expenses which the witnesses are at for their journey, and for their attendance to give their testimony, are repaid them by the party at whose instance they have been cited; and that by virtue of an order of the judge, and according as he shall tax them.<sup>58</sup>

## Para. 25

[2063.] *A False Witness is punished.*— If it happens that a witness can be convicted of having given false evidence, or of being guilty of some other misdemeanour, as if he has divulged the tenor of his deposition to the party accused, he may be punished for it according to the quality of the fact and the circumstances.<sup>59</sup>

Section 4. Of presumptions.

Section 5. Of the interrogation and confession of the parties

Section 6. Of an oath

Tit. 7—Of possession and prescription (845–892)

Section 1: Of the nature of possession

Para. 1. Definition of possession

Para. 2. Connection between possession and property

Para. 3. There are not two possessions in one and the same thing

Para. 4. What things may be possessed

Para. 5. A kind of possession of right

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<sup>55</sup> [C.4.20.16; D.22.5.21.1, 21.1 i.f.; D.12.2.15]. See the preceding article.

<sup>56</sup> [Nov. 90.5; C.4.21.18]. The judge who takes cognizance of the cause requests the judge of the place where the witness lives to take his deposition, and gives him a power to do it by a commission for that end. Cf. [Nov. 134.5].

Besides the consequence that is taken notice of in the last text, when the matter relates to the proof of a crime the necessity of confronting the witness with the criminal is another just motive why the witness ought to be examined by the judge before whom the trial is had.

<sup>57</sup> [D.22.5.25].

<sup>58</sup> [D.22.5.16].

<sup>59</sup> [C.4.20.11; C.4.20.16 i.f.].

Para. 6. Possession does not require a continual detention

Para. 7: Possession of living creatures. As we may possess living creatures, which it is not possible to have always in our power and custody, so we retain the possession of them whilst we shut them up, whilst we have them under the care of a keeper, or if, being made tame, they return home without a keeper, as bees to their hives, and pigeons to their dove-houses. But the creatures which escape out of our custody, and do not come back, are no longer in our possession, till we recover them again.<sup>60</sup>

Para. 8. The bare detention without some right in the thing is not a true possession.

Para. 9. One may possess by others

Para. 10. Precarious possession

Para. 11. Possession is either honest or knavish

Para. 12. A clandestine or surreptitious possession

Para. 13. The possessor is presumed to be the right owner

Para. 14. Detention which the owner cannot take away.

Para. 15. The possessor is maintained in his possession without a title if no title be produced against him

Para. 16. If two persons pretend to be possessors, he who has been in possession for the space of a year is preferred.

Para. 17. The question about possession is judged before that of property.

Para. 18. The demand of possession ought to be made within a year

Para. 19. If the possession be doubtful, judgment is given according to the titles or the thing is sequestered.

Section 2. Of the Connection between possession and property, and how one may acquire or lose the possession

Para. 1. The right to possess is acquired with the property.

Para. 2. Difference between acquiring the right to possess and acquiring the actual possession.

Para. 3. In some cases property may be acquired by the bare effect of possession.

Para. 4. In these cases possession is a title for the property

Para. 5. One acquires by possession what no other person has a right to.

Para. 6. As if one finds precious stones and other things of value

Para. 7. Property is acquired by hunting and fishing. Wild beasts, fowls, fishes, and every thing that is taken, either in hunting, fowling, or fishing, by those who have a right thereto, belongs to them as their property, by virtue of the seizure which they make of them.<sup>61</sup>

Para. 8. By captures from the enemy

Para. 9. If one finds that a thing that is relinquished or thrown away with intention to give it to whomsoever can catch it.

Para. 10. Or a thing that was lost, the owner whereof cannot be found

Para. 11. Or a treasure

Para. 12. What nature adds to a ground belongs to the master of the ground

Para. 13. The possession of the building is acquired to the master of the ground

Para. 14. It is the same thing in respect of what is planted

Para. 15. Possession of what is added to a movable

Para. 16. In what possession consists

Para. 17. Possession which one takes of his own accord without a preceding right

Para. 18. Possession which is only taken by delivery of the thing

Para. 19. In what consists the delivery which gives possession

<sup>60</sup> [D.41.1.3.2; D.41.2.3.15, 16, 13.]

<sup>61</sup> [JI.2.1.12; D.41.1.1.1.] It is to be remarked on this article that the liberty of hunting, flowling and fishing is not permitted to all persons, in all places indifferently. See the eleventh article fo the first section of the title *Of things*, and the remark on the first article of the same title.

- Para. 20. Delivery and taking of possession
- Para. 21. Delivery and taking possession of immovables
- Para. 22. Delivery and taking possession of things which consist in rights
- Para. 23. One can possess only a thing which is certain and determined
- Para. 24. How possession is preserved
- Para. 25. One retains the possession by other persons
- Para. 26. One may take possession either himself or by other persons
- Para. 27. The possessor succeeds to the right of his author
- Para. 28. One loses possession of what one alienates or relinquishes
- Para. 29. Things that are lost and those which are thrown into the sea in a danger of shipwreck are not relinquished
- Para. 30. One loses possession by the possession of another person
- Section 3. Of the effects of possession
- Section 4. Of the nature and use of prescription and of the manner in which it is acquired
- Section 5. Of the causes which hinder prescription
- Book IV: Of the consequences which annul or diminish engagements
- Tit. 1—Of payments (892–909)
- Tit. 2—Of compensations (909–915)
- Tit. 3—Of novations (915–918)
- Tit. 4—Of delegations (918–922)
- Tit. 5—Of the cession of goods and of discomfiture (922–931)
- Tit. 6—Of the rescission of contracts and restitution of things to their first estate (931–953)
- Part II: Of Successions
- The Preface (3–30)
- Book I: Of successions in general
- Tit. 1—Of heirs and executors in general (30–136)
- Tit. 2—Of heirs or executors with the benefit of an inventory (136–144)
- Tit. 3—In what manner a succession is acquired and how it is renounced (144–158)
- Tit. 4—Of partitions among coheirs (158–177)
- Book II: Of legal successions, or succession to intestates
- Tit. 1—In what manner children and other descendants succeed (177–206)
- Tit. 2—In what manner fathers, mothers, and other ascendants, succeed (206–233)
- Tit. 3—In what manner brothers, sisters, and other collaterals, succeed (233–246)
- Tit. 4—Of the collation of goods (246–260)
- Book III: Of testamentary successions Tit. 1—Of testaments (260–438)
- Tit. 2—Of an undutiful testament and of disherison (438–461)
- Tit. 3—Of the *legitim* or legal portion due to children or parents (461–476)
- Tit. 4—Of the dispositions of those who have married a second time (476–485)
- Book IV: Of legacies, and other dispositions made in view of death
- Tit. 1—Of codicils, and of donations in prospect of death (485–501)
- Tit. 2—Of legacies (501–586)
- Tit. 3—Of the Falcidian portion (586–621)
- Book V: Of substitutions and fiduciary bequests
- Tit. 1—Of vulgar substitutions (621–628)
- Tit. 2—Of pupillary substitution (628–647)
- Tit. 3—Of direct and fiduciary substitutions (647–676)
- Tit. 4—Of the Trebellianic portion (676–685)



## B. ROBERT JOSEPH POTHIER, PANDECTAE JUSTINIANEAE IN NOVUM ORDINEM DIGESTAE 23.2

*De ritu nuptiarum* (Paris, 1825) 2:367–87 (1st ed., 1748) [CD trans.]

### Title II: On the Rite of Nuptials

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

First Part: On the form of contracting nuptials.

This form consists in consent. We must see, therefore, whose consent is required for contracting nuptials. Then we will show that nothing other than this consent is required.

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

2. “Nuptials cannot exist unless all consent, that is those who are to come together and those in whose power they are.” [D.23.2.2].

Sec. 1: On the consent of the contracting parties

3. Since the consent of the contracting parties is especially required for the substance of the marriage, hence it follows: first “Feigned marriage is of no effect.” [D.23.2.30]. Hence it follows second the “Madness” of either party “does not allow the contracting of marriage, because consent is required.” [D.23.2.16.2] Note: “But it does not impede one rightly contracted.” *Id.*

4. Concerning the consent of the contracting parties observe that that consent is sufficient which is elicited by reverential fear. Hence a son “if at his father’s urging leads a wife whom he would not have led if it had been up to him, he nonetheless contracts marriage, which is not contracted among those who are unwilling. He is thought to have preferred this.” [D.23.2.22]. Nonetheless a son can dissent in this matter: “A son in power is not compelled to take a wife.”<sup>2</sup> [D.23.2.21] Hence Diocletian and Maximian: “No one can be compelled either to contract marriage at the beginning or to reconcile one that has been dissolved. Wherefore you understand that the power to contract and dissolve cannot be transferred of necessity.” [C.5.4.14] Nor is a freedwoman held to follow a patron in this matter: “A patron cannot take his unwilling freedwoman to wife.” [D.23.2.28] “Which matter Atteius Capito is said to have decreed in his consulship. This is to be observed unless the patron freed her so that he might marry her.” [D.23.2.29]<sup>3</sup>

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

5. This consent is required just as much as the consent of the contracting parties, as Diocletian and Maximian write: . . . .

6. Even if parental consent was obtained for the marriage and afterwards a divorce follows . . . a new parental consent is required . . . .

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

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<sup>1</sup> 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.

<sup>2</sup> A daughter, however, sins if she dissents from her father, unless the person is unworthy. See above [D.23.1] N.5.

<sup>3</sup> In this case if she breaks the faith of the pact under which she was manumitted and refuses to marry the patron she ought to be punished. But with what punishment? Can the patron for that reason send her back to servitude? See below [D.37.15] at the end. Certainly she will be subject to this penalty, that she cannot marry another. See below, Part 2, Sec. 2, sec. 3.

For the substance of a marriage neither instruments nor celebration nor bedding together is required.

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*.]

### C. ROBERT JOSEPH POTHIER, TREATISE ON THE CONTRACT OF MARRIAGE

para. 1–2, 11, 67, 69, 321–6, in *Oeuvres de Pothier* (Bugnet ed. Paris, 1890) 6:1–314  
(1st ed. 1768) 1:1–3, 14–15, 73, 74–6, 377–93 [CD trans.]<sup>1</sup>

*Preliminary Article.* 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 first 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 . . .<sup>2</sup> 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:

1. what is the contract of marriage, its different species among the Romans, and by what laws it is ruled;
2. what are the things that precede the contract of marriage.
3. who are the persons among whom it can or cannot be validly contracted;
4. how marriage is contracted and what ought to be observed in its celebration;

<sup>1</sup> The paragraphs in the first edition are numbered consecutively. I have also included the part, chapter, section (where applicable) and article and/or subsection numbers, in case the reader is seeking the text in an edition that does not have consecutive paragraph numbers.

<sup>2</sup> This ellipsis is in the original.

5. We will treat of the effects of marriage and of certain marriages which although validly contracted are nonetheless deprived of civil effects;

6. Of the destruction of marriages, of the dissolution, be it so far as the bond is concerned, or so far as habitation;

7. Of second marriages.

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. . . .

One can define marriage as a contract clothed in the forms that the laws have prescribed by which a man and a woman capable of making this contract with each other engage reciprocally one with the other to live their whole life together in the union that ought to be between spouses.

It follows from this definition that a marriage where one has not observed the formalities that the laws require for its validity or which is not contracted between persons that the laws render capable is not a true marriage. That is what we will see in detail in the rest of this treatise.

The union in which the parties engage mutually to live by the contract of marriage is principally a union of their spirits and of their wills. Carnal commerce is not of the essence of marriage. That of St. Joseph and the Blessed Virgin did not want of being a veritable marriage although they always conserved their virginity. . . .

[1.3.1] *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<sup>3</sup> 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.*<sup>4</sup>

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. . . .

[2.2.1] 67. The usage of having marriages preceded by the publication of banns is very old in the church. There is mention made of it in the decretal letter of Pope Innocent III to the bishop of Beauvais toward the beginning of the thirteenth century, where these words “according to the custom of the Gallican church” are

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<sup>3</sup> I doubt that Pothier invented this phrase, which resonates with much in Roman Catholic teaching on the topic. It is not, however, a quotation from the council of Trent.

<sup>4</sup> *nullum contractum, nullum conventum, lege contrahere prohibente.*

found in the collection edited by Antonio Augustín, but not in the that of Raymond of Peñafort, where the decretal is reported [X 4.1.27].<sup>5</sup>

Innocent III made an ordinance in the Lateran council to have this usage observed in the whole church. [X 4.3.3]<sup>6</sup> ...

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:<sup>7</sup>

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. This is what d’Héricourt<sup>8</sup> teaches in his *Ecclesiastical laws*, chapter “On marriage,” art. 1, no. 2, and many other authors. Bardet,<sup>9</sup> bk. 7, ch. 38, reports a judgment of the month of August, 1638, which declared that valid a marriage celebrated between parties who had reached the age of majority, without the publication of banns in advance. There is a similar judgment of 16 March 1691, rendered on the basis of conclusions by M. d’Aguesseau,<sup>10</sup> reported in vol. 5 of the *Journal des Audiences*,<sup>11</sup> although in the case in question the marriage had begun *ab illicitis*.<sup>12</sup>

But when a marriage is accused of clandestinity, if the publicity is not well proven, the lack of publication of banns is very strong evidence (*grand poids*) to have it declared clandestine, and, as a result, to deprive it of civil effects.

A priest who celebrates a marriage without having before him either the certificate of the proclamation of banns given by those who ought to publish them, or a dispensation from the banns given the bishop or by his vicar-general, can be prosecuted either before his (the bishop’s) official or before a secular judge, and can be punished by the official by canonical penalties and by the secular judge by fines or other penalties as the case requires. ...

[4.1.2.1.1] 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.

<sup>5</sup> Pothier is referring to the edition that Augustín made of the *Compilationes antiquae*, where this decretal appears in a somewhat fuller form as 4 Comp. 4.1.2.

<sup>6</sup> Above, VIII-20.

<sup>7</sup> Above, p. XVI-3.

<sup>8</sup> Louis d’Héricourt, 1687-1752, author of *Les Loix ecclésiastiques de France dans leur ordre naturel, et une analyse des livres du droit canonique conferez avec les usages de l’Eglise gallicane*. I have not seen the first edition. The second edition appeared in 1730, and there were a number of other editions during d’Héricourt’s lifetime.

<sup>9</sup> Pierre Bardet, 1591-1685, the compiler of a *Recueil d’arrests du Parlement de Paris* that was published in 1690.

<sup>10</sup> One thinks of Henri François d’Aguesseau, 1668-1751, later chancellor of Louis XV. One hesitates, however, because he would have been only 23 at the time. The Bibliothèque nationale website, however, lists *plaidoyers* of his from as early as 1691, so we probably have the right man.

<sup>11</sup> Of a number of possible editions of case reports of the *parlement* of Paris, the *Journal des principales audiences du parlement, 1622-1722* (Paris, 1757, 1751-4) is the one that is most likely being referred to.

<sup>12</sup> This means either that the parties started out by not being proper persons to marry (but became so) or that the marriage had begun in an illicit relationship. I rather suspect the latter, but have not checked the case.

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:<sup>13</sup>

Although it is not to be doubted that clandestine marriages made with the free consent of the contracting parties are valid and true marriages so long as the Church has not declared them invalid, and consequently that those persons are justly to be condemned, as the holy council does condemn them with anathema, who deny that they are true and valid, and those also who falsely assert that marriages contracted by children [minors] without the consent of the parents are invalid, nevertheless the holy Church of God has for very just reasons at all time detested and forbidden them.

The council, as M. Boileau<sup>14</sup> 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 (*ne laisseroient pas d'être valables*). 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, “they must have the consent of the parents” [JI.1.10pr]<sup>15</sup> and in [JI.1.10.12],<sup>16</sup> it is said “Alliances which infringe the rules here stated do not confer the status of husband and wife, nor is there in such case either wedlock or marriage or dowry.” The great privileges according by the emperors to soldiers did not dispense them from this rule: “A son-in-power in the army cannot contract a marriage without his father’s consent.” [D.23.2.35]<sup>17</sup>

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 Amphilocheus, 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.”<sup>18</sup> This was the doctrine of the church on this topic at the time of Isidorus Mercator, because in the decretal that he falsely attributes to Pope Evaristus and which is reported in the *Decretum* of Gratian [C.30 q.5 c.1]<sup>19</sup> he calls “marriages made without the consent of parents” “adulteries, concubinages, lusts or fornications.”

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

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<sup>13</sup> Above, p. XVI-2.

<sup>14</sup> The reference is to Jacques Boileau (1636-1716), *Traité des empéchemens du mariage* (Cologne, 1691). The only copy in the US would appear to be at Berkeley.

<sup>15</sup> Above, p. I-6.

<sup>16</sup> Above, p. I-7.

<sup>17</sup> Above, p. I-20.

<sup>18</sup> This canon, attributed to St. Basil, is found in a number of canonical collections of the Eastern Church. I have not found it in any Western collections. Basil’s *Opera omnia* were published in Paris by J. Garnier and P. Maran, in 1721-30. That is probably the source of Pothier’s Latin translation of the extract. <Modern ed. of the letters by Roy Defarrari in the Loeb series.>

<sup>19</sup> Cf. above, p. VI-28. It will be noted that the first of Pothier’s two quotations is not exact.

these words “so long as the Church has not declared them invalid.”<sup>20</sup> 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 to 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 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.

323. All these things presupposed our question reduces to a fact which is to be determined, if we have in France a law that declares null the marriages contracted by minors without the consent of their fathers, mothers, tutors or curators. ...

[Pothier then quotes from the *lex Alemannorum*, which he says that he found among the capitularies of King Dagobert (628–38) and from the capitulary of Benedict the Levite, which contains a reworked version of the decretal of Pseudo-Evaristus, and which Pothier attributes to the Carolingian kings.]

324. [Pothier next quotes extensively from the *ordonnance* of Henri II in 1556 (described above, p. XVI–3)].

325. This ordinance of Henri II was confirmed by that of Henri III at the estates of Blois, article 41.<sup>21</sup>

In article 40 it is said: “We enjoin cures, vicars or others to inquire carefully about the quality of those who propose to marry, and if they are children of families or are in the power of another, we forbid them strictly not to proceed to the celebration of said marriages, if the consent of the fathers, mothers, tutors, curators, does not appear to them, on the penalty of being punished *as promoters (fauteurs) of rape*.”<sup>22</sup>

The edict of Melun of the same king confirms article 40 of the *ordonnance* of Blois reported above.

326. Louis XII by his declaration of 26 November 1639<sup>23</sup> tells us that the penalties prescribed the ordinances of the kings his predecessors against marriages contracted by children of families without the consent of their parents having been unable to stop them, he judged it appropriate in order to repress them to add to them new penalties. In article 2, he says:<sup>24</sup>

The content of the edict of the year 1556 and that of articles 41 ... of the *ordonnance* of Blois shall be observed, and adding to it we ... have declared and declare that widows, sons, and daughters less than twenty five years, who shall have contracted marriage against the tenor of the aforesaid ordinances, to be deprived and to lose status by that fact alone, along with the children born of them and their heirs, unworthy and incapable of succession from their fathers, mothers and grandparents, and from all others direct and collateral, [deprived] as well of the rights and advantages which they can acquire by contracts of marriage and by testaments by the customs and laws of our realm, even of the right of *légitim*, and the dispositions that shall be made to the prejudice of this our ordinance, be it in favor of the persons so married or by them to the profit of the children born from these marriages, [will be] null, and of no effect and value. We wish that the things so given ... remain in this case acquired irrevocably by our fisc, so that we can dispose of them in favor of hospitals or other works.

Although these laws which we have just reported, in condemning marriages contracted by children without the consent of their father and mother appear to limit themselves to inflicting penalties on children who contract them and on those who take part in them and although none has declared in terms formal and precise that the marriages of minors contracted without the consent of their father and mother are null,

<sup>20</sup> Above, p. XVI–2.

<sup>21</sup> Above, p. XVI–3.

<sup>22</sup> *Ibid.* The emphasis is Pothier’s.

<sup>23</sup> Above, p. XVI–4.

<sup>24</sup> Above, p. XVI–5. The omissions are Pothier’s.

nonetheless if one considers the spirit of these laws one will discover easily that they regard as null and invalid all the marriages of minors contracted without the consent of their father and mother.

Article 40 of the *ordonnance* of Blois, reported above, in forbidding parish priests to proceed with the celebration of marriage of those who are children of families or in the power of another, if the consent of the father and mother, tutors or curators, is not apparent to them under penalty of being punished *as promoters of rape* leads to this conclusion. The ordinance wills that these parish priests by in this case prosecuted *as promoters of rape*, for this reason alone that they married a minor without the consent of his father and mother. It supposes therefore that a marriage of minor ought to pass as tainted with the vice of seduction for the sole reason that it was contracted without the consent of his father and mother, there being nothing but a great seduction that could bring a minor to neglect this duty. But if the marriage of a minor, for the sole reason that it is contracted without the consent of his father and mother, is regarded as tainted with the vice of seduction, it is a necessary consequence that it should for that reason alone be declared null and invalidly contracted, being contrary to the freedom of consent which is the essence of marriage and being a diriment impediment to marriage, above nos. 225 and 228.

This presumption of the vice of seduction in the marriage of minors that the ordinance makes to follow from the lack of consent of the father and mother is one of the number of presumptions that one calls in law, *presumptions of law*. They make in and of themselves a perfect proof and make it unnecessary to bring other [proofs] to bear.

One may well have need of other proofs in order to declare guilty of seduction the person whom the minor has espoused without the consent of his father and mother and in order to inflict penalties on that person, but one has no need of them in order to declare the marriage null. And this is why, as M. d'Aguesseau observes in his *plaidoyer* which will be cited below, one finds many judgments which have declared a marriage null, putting over to another court the extraordinary process (*en mettant hors de Cour sur l'extraordinaire*) against the person whom the minor has espoused and by whom he is said to have been suborned.

The reason [for this] is that in order that the marriage of a minor, contracted without the consent of his father and mother be regarded as tainted with the vice of seduction and, as a result, null, it is enough that there have been a seduction that is always presumed. But it is not necessary that it be the person whom the minor has espoused who is guilty of it. It makes no difference whence the seduction comes. Indeed, it happens frequently that it is reciprocal. Nonetheless, the marriage will still be regarded as tainted with the vice of seduction and, as a result, null. For the seduction, in order for it to be reciprocal, is nonetheless contrary to the liberty of consent that is of the essence of marriage.

The seduction in this case is considered only in the thing itself. One does not consider whence it came, even though it is the minor who married without the consent of his parents seduced himself by his passion, even though she who espoused him contributed to it only misfortune which she had to please him, seduction will nonetheless be presumed in this case and the marriage, as a result, regarded as null, as M. d'Aguesseau observed.

That which the *ordonnance* of Blois, art. 40, ordained about the publication of banns of marriage and about the manner of obtaining a dispensation, if one pays attention to the motives that it had for making these dispositions, serves also to convince [one] that the spirit of this ordinance was to annul marriages of minors made without the consent of their father and mother.

That article, which we have reported above, no. 69, Part II, says:<sup>25</sup> “To obviate the abuse and inconvenience which arise from clandestine marriages” we have ordained that our subjects “cannot validly contract marriage without the precedent proclamation of banns.” If one examines what was the principal motivation that the ordinance recites for having prescribed that formality of the publication of banns, one would perceive easily that its principal object in prescribing that formality and in prescribing it under penalty of nullity of the marriages, was to prevent minors from marrying without the knowledge of the

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<sup>25</sup> Above, p. XVI-3.

father and mother and without their consent. In effect,<sup>26</sup> the absence of publication of banns is not given any consideration in the marriage of those of the age of majority. The same is true with regard to the marriage of minors: the absence of publication of banns is not considered there when the father and mother do not complain about the marriage and when it was made with their consent. It is therefore apparent that the *ordonnance* of Blois, in prescribing this formality of the publication of banns, under penalty of nullity of the marriages, had not other principal purpose in mind other than to deny to minors the power validly to contract marriage without the consent of their fathers and mothers. That supposed, the *ordonnance* of Blois, in declaring null and not validly contracted marriages, when one had failed to observe a formality principally established to prevent minors from marrying without the knowledge and without the consent of their father and mother, did it not sufficiently make known that its spirit is that the marriages of minors contracted without the consent of their father and mother cannot subsist and that they are not validly contracted? Can one think, without absurdity, that the ordinance would have had more indulgence for the very evil that it willed to prevent and hinder than for the non-observance of a formality that it had established only to prevent and hinder it?

In order to convince one's self even more that the spirit of our laws is to regard as null the marriages of minors contracted without the consent of their father and mother one can draw an argument from the second disposition of article 40 of the *ordonnance* of Blois, reported above no. 78,<sup>27</sup> which provides that the dispensation of someone from the proclamations of banns can be granted only with the consent of the principal relatives of the contracting parties, and by consequence of their father and mother, and of the disposition of the declaration of 28 September 1639,<sup>28</sup> reported above, no. 76, which requires the consent of the father and mother, tutors and curators, in order to make a proclamation of the banns of marriage. If these laws require the consent of the father and mother of minors in order that their banns be validly published, if they require it for the dispensation from the banns, in order that they be validly obtained, is it not evident that the spirit of these laws is to require for even greater reason that consent of the father and mother to the marriage of minors in order that it be validly contracted? The marriage is something of much greater importance than the proclamation of the banns and the dispensations, and consent is being required for the proclamations of the banns and for the dispensations only in order to arrive at the end that the minors cannot validly contract marriage without the consent of their father and mother.

We have derived all that we have just said about the necessity of the consent of the father and mother for the validity of the marriage of minors from the *plaidoyer* of Monsieur d'Aguesseau, in the case of Melchior Fluéri against Mademoiselle de Rezac, which is the third volume of this work, and which is the thirtieth of his *plaidoyers*.<sup>29</sup> One must read it in its entirety. The *plaidoyer* of this great magistrate are made such admirable precision that one cannot take a word out of them, and one cannot make extracts from them without taking out their nerves. ... ]

## **D. ROBERT JOSEPH POTHIER, TREATISE ON THE RIGHT OF OWNERSHIP OF PROPERTY**

(Paris, 1772) [CD trans]

First Part: What is the right of ownership of property; the methods by which one acquires it, and by which one loses it.

Chapter 1: What is the right of ownership of property and in what it consists.

Chapter 2: How one acquires the ownership of property and how one loses it.

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<sup>26</sup> Pothier may be referring here to the interpretation of the statute in the cases described above in nos. 67 and 69.

<sup>27</sup> Above, p. XVI-3.

<sup>28</sup> This is a typo, or a "mind" on Pothier's part. The date of the declaration is 26 November 1639, as he says elsewhere in the book. The text is found above, p. XVI-4.

<sup>29</sup> If this is the Chancellor d'Aguesseau (above, note 10), then the reference is to *Œuvres de M. le chancelier d'Aguesseau: prononcés au parlement en qualité d'avocat général*, 23 vols. (Yverdon : 1759-1771).



Section 1: About occupation of things which do not belong to anyone.

Art. 1: What are the things which do not belong to anyone, of which the ownership of property can be acquired by means of occupation ...

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, 7) 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.

Art. 2: About hunting

§ 1: What were the principles of Roman law about hunting

[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 would decide the case of the trespassing huntsman in favor of the landowner. But Vinnius (a Dutch writer roughly contemporary with Voet) decides the case in favor of the huntsman, giving the landowner an *actio injuriarum*] because 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*.

§ 2: About the abrogation of the right which permits everyone to hunt. Who are the persons to whom by our French law the hunt is permitted and those to whom it is forbidden.

[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, it is said, 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.

§ 3: To whom the right of hunting belongs

§ 4: How those who have the right of hunting ought to use it

§ 5: Of the right which those who have the right to hunt have to prevent hunting [by others]

Art. 3: About fishing and birding

§ 1: About fishing

§ 2: About birding

Art. 4: About finding, about treasures, about wrecks, about the discovery of uninhabited countries ...

Navigators who in the long course of a voyage discover a land which is inhabited by no one can, upon establishing themselves there, acquire the ownership of property, *iure occupationis*, as of a thing that does not belong to anyone.

If the navigators take possession in the name of their prince, it will be for their prince that they will acquire that land.

But when a land is occupied, however wild the men who inhabit it appear to us, these men being the true proprietors, we cannot without injustice establish ourselves there against their will.

Art. 5. Concerning occupation in itself