

## CLASS OUTLINE — LECTURE 19

### THE GRANDES ORDONNANCES, THE DECREE TAMETSI AND THE ORDONNANCE OF BLOIS

#### The Road to Codification

The Homologation of Custom

The *Grandes Ordonnances*

The humanists – introduction of system

The institutes of national law

The Napoleonic Codes

#### The Grandes Ordonnances

*Ordonnance de Villers-Cotterets* (Francis I, Poyet, 1539) – general reform particularly in procedure for gracious acts.

*Ordonnance d'Orléans* (Charles IX, l'Hôpital, 1561) – inheritance and civil procedure.

*Ordonnance de Moulins* (Charles IX, l'Hôpital, 1566) – a kind of statute of Frauds.

*Ordonnance de Blois* (Henry III, 1579) – marriage.

*Ordonnance de 1629* (= *Code Michaud*) (Louis XIII, Michel de Marillac) – extension of feudal tenure.

*Ordonnance de 1667 sur la procédure civile* (= *Code Louis*) (Louis XIV, Colbert) – close to a codification.

*Ordonnance criminelle* (Louis XIV, Colbert, 1670) – less successful but along the same lines.

*Ordonnance du commerce* (= *Code Savary* or *Code Marchand*) (Louis XIV, Colbert and Savary, 1673) – general commercial code.

*Ordonnance sur le commerce de mer* (= *Code de la marine*) (Louis XIV, ?Colbert, 1681) – perhaps the most influential beyond the borders of France.

*Ordonnance de 1731 sur les donations* (Louis XV, D'Aguesseau).

*Ordonnance de 1735 sur les testaments* (Louis XV, D'Aguesseau).

*Ordonnance de 1747 sur les substitutions* (Louis XV, D'Aguesseau).

*Code civil* (Napoléon, 1804).

The *grandes ordonnances* begin with topics that are away from the core both of customary law and of Roman law: procedural matters and specific reforms, like the provision of the *ordonnance de Moulins* of 1566 that may have had some influence on the English Statute of Frauds of 1677. The early *grandes ordonnances* tend to be very long and to cover a wide variety of topics. The tag phrases that follow them on the outline simply give the most important topic covered, viewed with the advantage of hindsight.

The second half of the 17th century sees large ordinances that focus on particular topics. Commercial law is an obvious topic for codification, both because mercantilist principles tell you that the legislative background is important for promoting commerce and because commercial law in both Europe and England was until the 17th century in some measure independent both of local custom and of Roman law. There was a notion of custom among merchants. That custom had some features of the transnational, so that local juries did not have to be used when one came to the redaction of the custom. Only in the 18th

century does d'Aguesseau come to codify systematically areas that had long been treated by custom and by Roman law: gifts, wills, and the law of substitutions (entails).

One might focus on the personalities. Michel de l'Hôpital is one of the more attractive figures of 16th century France. A Catholic but a moderate, he espoused toleration for the Huguenots. Jean-Baptiste Colbert was Louis XIV's great mercantilist minister, a *bourgeois*, devoted to his king and to efficient administration. François d'Aguesseau was probably the best technical lawyer of the three (Colbert was not even trained as a lawyer). D'Aguesseau was firmly committed to the principles of rational law reform.



Portrait of Charles de Guise, the 'cardinal of Lorraine', 1524–1574, painted by El Greco c. 1571. Hangs in the Kunsthhaus in Zürich. Note the parrot in the upper left hand corner. 'Perroquet' in French, it is a symbol of eloquence; in Italian it is 'papagallo', which could mean 'French pope'.

### **The Decree Tametsi of the Council of Trent**

Council of Trent, sess. 24, c. 1, Decree *Tametsi*, Concerning the Reform of Matrimony (1563)

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. But while the holy council recognizes that by reason of man's disobedience those prohibitions are no longer of any avail, and considers the grave sins which arise from clandestine marriages, especially the sins of those who continue in the state of damnation, when having left the first wife with whom they contracted secretly, they publicly marry another and live her in continual adultery, and since the Church which does not judge what is hidden, cannot correct this evil unless a more efficacious remedy is applied, therefore, following in the footsteps of the holy Lateran Council celebrated under Innocent III, it commands that in the future, before a marriage is contracted, the pastor of the contracting parties shall publicly announce three times in the church, during the celebration of the mass on three successive festival days, between whom marriage is to be contracted; after which publications, if no legitimate impediment is revealed, the marriage may be proceeded with in the presence of the people, where the parish priest, after having questioned the man and woman and having heard their mutual consent, shall either say: "I join you together in matrimony, in the name of the Father, and of the Son, and of the Holy Ghost," or he may use other words, according to the accepted rite of each province.

But if at some time there should be a probable suspicion that a marriage might be maliciously hindered if so many publications precede it, then either one publication only may be made or the marriage may be celebrated forthwith in the presence of the parish priest and of two or three witnesses. Then before its consummation the publications shall be made in the church, so that if any impediments exist they may be the more easily discovered, unless the ordinary shall deem it advisable to dispense with the publications, which the holy council leaves to his prudence and judgment.

Those who shall attempt to contract marriage otherwise than in the presence of the parish priest or of another priest authorized by the parish priest or by the ordinary and in the presence of two or three witnesses, the holy council renders absolutely incapable of thus contracting marriage and declares such contracts invalid and null, as by the present decree it invalidates and annuls them. Moreover, it commands that the parish priest or another priest who shall have been present at a contract of this kind with less than the prescribed number of witnesses, also the witnesses who shall have been present without the parish priest or another priest, and also the contracting parties themselves, shall at the discretion of the ordinary be severely punished. Furthermore, the same holy council exhorts the betrothed parties not to live together in the same house until they have received the sacerdotal blessing in the church; and it decrees that the blessing is to be given by their own parish priest, and permission to impart it cannot be given except by the parish priest himself or by the ordinary, any custom, even though immemorial, which ought rather to be called a corruption, or any privilege notwithstanding.

But if any attempt to unite in marriage or bless the betrothed of another parish without the permission of their parish priest, he shall, even though he may plead that his action was based on a privilege or immemorial custom, remain ipso jure suspended until absolved by the ordinary of that parish priest who ought to have been present at the marriage or from whom the blessing ought to have been received. The parish priest shall have a book in which he shall record the names of the persons united in marriage and of the witnesses, and also the day on which and the place where the marriage was contracted, and this book he shall carefully preserve.

1. The last time that we examined marriage, we noted that the extraordinary rules that Alexander III had promulgated on the topic were running into difficulty. In the first place, there was the difficulty of proof of informal marriages, something that we saw in the case of *Dolling c. Smith* and which, we suggested, gave the wider community a role to play in what seems to have been envisaged by Alexander as a highly personal affair. At the 4th Lateran Council in 1215, the church had strongly encouraged couples to have their marriages blessed publicly after the publication of banns, but it had not repealed Alexander's rules. Secondly, Alexander's rules were encountering opposition in those portions of society where marital property was important. In particular, the Roman lawyers kept alive the tradition that parental consent was necessary for the validity of a marriage, and the Roman rules on dower and customary rules about community property were affecting, adversely it would seem particularly to women, the equality that seems to lie at the roots of Alexander's rules. We noticed this in the decisions of the Rota on the topic of material property, in Panormitanus's *consilia* on the statutes of two unnamed Italian cities about dowry, and we will see it next week in Guy Coquille's commentary on the custom of Nivernais.
2. While the evidence is by no means all in, it would seem that the French proved particularly resistant to Alexander's rules. There was nothing that the French could do about the law of the universal church that said that informal marriages were valid, but French local councils throughout the Middle Ages proclaimed that those who married without church blessing were automatically excommunicated. English local ecclesiastical legislation does not seem to have gone that far, nor, so far as it has been studied, does that of Germany. The reformers, too, were quick to attack Alexander's rules. For both Luther and Calvin they violated the fundamental principle of the authority of fathers in managing the affairs of their families, including the authority to determine whom their children were going to marry. When the Council of Trent came to consider marriage in 1563 an intense debate ensued. The delegates from France, led by the cardinal of Lorraine, had been instructed to press for two changes in the law: no marriage was to be valid unless publicly solemnized in the church after promulgation of banns and no marriage of a son or daughter subject to paternal power was to be valid. In addition to their traditional opposition to Alexander's rules there had recently been a runaway marriage in one of the leading families of France. The Italian cardinals, on the other hand, proved to be the most conservative. For them the validity of non-solemnized marriages was a matter of doctrine, like the Trinity, that could not be changed. To change the rules, they also argued, would be to concede too much to the reformers. The result was a

compromise that you have before you on p. XVI-2 of the *Materials*. It has four important elements:

- a. Alexander's rules were confirmed and anathemas proclaimed against those who held that they had been invalid.
- b. Alexander's rules were changed for the future. Marriages not solemnized before the parish priest and at least two witnesses were hereafter declared to be invalid. (The parish priest was also to proclaim the banns and keep a marriage register, but these are not made elements of validity). The way in which this change was justified was by making the parties incapable of marriage if they contracted otherwise. While Alexander's rules expressed a doctrine about the essence of marriage which the church was unwilling and perhaps incapable of changing, it was well known that the church had made rules and changed them about the capacity to marry. It had, for example, changed the rules about what near relatives could marry several times.
- c. Marriages of minors without parental consent were condemned, but they were not declared to be invalid. Indeed, the parish priest was expressly authorized to dispense with the promulgation of banns if he feared that force might be applied to the couple.
- d. Because the general promulgation of these rules in countries that were no longer Catholic would have led to the invalidation of Protestant marriages, at least in the eyes of the church, the Tridentine rules were expressly declared to take effect only when they were promulgated in the parish.

### **The Grandes Ordonnances on Marriage:**

#### **The ordonnance of Blois (1579, Henri III)**

40. To obviate the abuse and inconvenience which arise from clandestine marriages, we have ordained and ordain that our subjects of whatever estate, quality or condition they may be cannot validly contract marriage without the precedent proclamation of banns made on three different feast days with fitting interval – of which one cannot obtain a dispensation, except after the making of the first proclamation and that only for some urgent or legitimate cause and at the request of the principal and nearest common relatives of the contracting parties – after which banns they shall be espoused publicly. And so that there may be witness of the form which was observed at said marriages, four persons at least, worthy of faith, shall assist, of which a register will be made, everything under the penalties prescribed by the councils. We enjoin cures, vicars or others to inquire carefully about the quality of those who propose to marry, and if they are *filiifamilias* (*enfants de famille*) 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.

41. We wish that the *ordonnances* previously made against children contracting marriage without the consent of their fathers, mothers, tutors and curators be kept, even that one which permits disinheritance in this case.

42. And nonetheless, we wish that those who are found to have suborned a son or daughter younger than twenty-five years under pretext of marriage or other color, without the will, knowledge, grace and express consent of the fathers, mothers and of the tutors be punished by death, without hope of grace and pardon, notwithstanding all the consents that the said minors can allege afterwards that they gave to the said rape, at the time or subsequently. And likewise there shall be punished extraordinarily all those who shall have participated in the said rape and who shall have offered counsel, comfort and aid, in whatever manner it might be.

43. We forbid all tutors from agreeing or consenting to the marriage of their minors except with the advice and consent of their closest relatives, on pain of extraordinary punishment.

44. Likewise we forbid all notaries, under pain of corporal punishment, from enacting or receiving any promises of marriage by words of the present tense.

**Code Michaud** (1629, Louis XIII, Michel de Maurillac)

39. The *ordonnance* of Blois, concerning clandestine marriages shall be strictly observed, and adding to it we will that all marriages contracted contrary to the tenor of the said ordinance be declared not validly contracted, forbidding all parish priests and other priests both secular or regular, under penalty of an arbitrary fine, from celebrating any marriage of persons who are not their parishioners without the permission of their parish priests or of the diocesan bishop, notwithstanding all privileges to the contrary. And judges of the ecclesiastical courts will be bound to judge cases concerning such marriages in conformity with this article.

40. We prohibit all judges, even those of the court of the church, from in the future receiving any proof by witnesses and others other than by writing of the fact of marriage, except and excepting, [cases] between peasants [*personnes de village*], of low or vile condition, requiring, nonetheless, that the proof cannot be admitted except that of the closest relatives of one or the other party, and of the minimum number of six.

**Declaration Concerning The Formalities Of Marriage, The Qualities Required, The Crime Of Rape, Etc.** (26 November 1639, Louis XIII, Paul Séguier)

Louis, etc. Since marriages are the seminary of states, the source and origin of civil society, the basis of families, which compose the republic, which are used as the principles around which its policies are founded, and within which the natural reverence of children toward their parents is the bond of the lawful obedience of subjects to their sovereigns, the kings our predecessors have therefore determined that it is worthy of their concern to make laws concerning their [marriages'] public order, their external propriety, their honesty and their dignity. To this end they have prescribed that marriages be publicly celebrated in the face of the church, with all the proper solemnities and ceremonies that have been prescribed as essential by the holy councils, and by them declared to be not only necessary as a matter of command but also necessary for the sacrament. But in addition to the penalties laid down by the councils, some of our predecessors have allowed fathers and mothers to disinherit their children who contract clandestine marriages without their consent and to revoke each and every gift and advantage that they have made to them. But although this ordinance was founded on the first commandment of the second table, concerning the honor and reverence due to

parents, it has not been strong enough to stop the course of evil and disorder that has troubled the quiet of so many families and has flayed their honor by unequal alliances, alliances that are frequently shameful and infamous. This has given rise to other ordinances which require the proclamation of banns, the presence of the parish priest of the parties, and the presence of witnesses at the nuptial blessing, with penalties against parish priests, vicars and others who proceed to the celebration of the marriages of children of families without it being apparent to them that the fathers and mothers, tutors and curators have consented, under penalty of being punished as promoters of the crime of rape, just like the authors and accomplices of such unlawful marriages.

Nonetheless, whatever order that has been brought to bear up to now in order to reestablish the public honesty even of such important acts, the license of the age, the depravity of its morals have always prevailed over our ordinances, which are so holy and so salutary. Their strength and observation has often been relaxed by fathers and mothers who waive their particular offense, though they cannot waive that done to the public laws. For this reason, not being able to endure any more that our ordinances be so violated, not that the holiness of such a great sacrament, which is the mystical sign of the union of Christ with his church, be unworthily profaned, and seeing also, to our great regret, and to the prejudice of our state, that the majority of families in our realm remain troubled by subornation and carrying away of their children, who themselves find the ruin of their fortunes in these unlawful joinings, we have resolved to set up the severity of the laws in opposition to the frequency of these evils and to restrain by the terror of new penalties those whom neither the fear nor the reverence of divine and human laws can stop, having in this no purpose other than to sanctify marriage, to control the morals of our subjects, and to prevent the crime of rape from serving any more in the future from leading step by step to the formation of advantageous marriages.

For these reasons, having had deliberation with our council about this matter, and with the advice of it, and of our certain knowledge, full power and royal authority, we have laid down and ordained, and do lay down and ordain that which follows:

1. We will that article 40 of the *ordonnance* of Blois, concerning clandestine marriages, be strictly kept, and interpreting it, we ordain that the proclamation of banns be made by the parish priest of each of the contracting parties with the consent of the fathers, mothers, tutors, or curators, if they are children of families or in the power of another.

And that at the celebration of the marriage four witnesses worthy of faith shall assist, in addition to the parish priest who will receive the consent of the parties and join them in marriage following the form practiced in the church. We make very explicit prohibition to all priests, both secular and regular, not to celebrate any marriage except one between their true and ordinary parishioners, without the written permission of the parish priests of the parties or of the diocesan bishop, notwithstanding immemorial customs and privileges that can be alleged to the contrary. And we order that there will be made a good and faithful register, both of marriages and of the publication of the banns, or of dispensations, and of the permissions which shall have been granted.

2. The content of the edict of the year 1556 and that of articles 41, 42, 43, and 44 of the *ordonnance* of Blois shall be observed, and adding to it we ordain that the penalty of rape shall be continue to be incurred, notwithstanding the consent that may be thereafter obtained from the father, mother, tutor or curator, derogating expressly from the customs



that permit children to marry after the age of twenty years without the consent of their fathers. And 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*,<sup>1</sup> 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, legated or transported, on whatsoever pretext, remain in this case acquired irrevocably by our fisc, so that we can dispose of them in favor of hospitals or other works. We enjoin sons who are greater than thirty years of age and daughters who exceed twenty-five to require in writing the advice and counsel of the their fathers and mothers to marry, under penalty of being disinherited by them in accordance with the edict of 1556.<sup>2</sup>

<sup>1</sup> I am unclear whether this refers to legitimacy, in the sense that the children will be regarded as bastards, or to *légitim*, in the sense of a fixed minimum share in an inheritance. I suspect that it is the latter.

<sup>2</sup> There would seem to be a gap here in the provisions for men between the ages of twenty-five and thirty.

3. We declare, in conformance with the holy decrees and canonical constitutions that marriages made between widows, sons and daughters of whatever age and condition they may be and those who have ravished and carried them away are not validly contracted, nor by the passage of time nor by the consent of the persons ravished or of their fathers, mothers, tutors or curators can they be confirmed so long as the person ravished is in possession of ravisher. And despite the fact that under pretext of majority she<sup>3</sup> gives a new consent to marry with the ravisher after having been set at liberty, we declare her, together with the children born of such marriage, unworthy, incapable of *légitim*, and of all successions direct and collateral which could come to them, under whatever title it may be, in conformance with what we have ordained against persons ravished by subornation, and [we declare] the relatives who have assisted, given counsel, and favored the said marriages and their heirs incapable of succeeding directly or indirectly to the said widows, sons and daughters. We enjoin very firmly our general proctors and their substitutes to make all pursuits necessary against the ravishers and their accomplices, notwithstanding that there is no complaint about it by a civil party, and [we enjoin] our judges to punish the culpable with the penalty of death and confiscation of goods, having first taken from them the reparations from them that ought to be made, without it being possible that that penalty can be moderated. We forbid all our subjects of whatever quality and condition they may be, from giving favor or refuge to those so guilty, from retaining the persons carried away, under penalty of being punished as accomplices and they and their heirs must pay the reparations adjudged, jointly and severally (*solidairement*), and they must be deprived of their offices and governments if they have any, of which they incur deprivation by a single act of contravention of this prohibition.

<sup>3</sup> The referent here is *personne*, so it could be referring to both men and women.

The beginning of this provision accords with the mainstream of canonic authority and opinion on the topic. A person (normally a woman) who had been abducted could not validly consent to marriage while she was in the power of her abductor. Once she had

been released, however, she could so consent. What the *ordonnance* does is deprive a person who so consents from her inheritance right. It also authorizes the public prosecutor to pursue the abductor to the end of capital punishment, even if no one is complaining.

Section 4 attempts to make invalid any pardons that the king might be tempted to issue to allow those deprived of inheritance rights to inherit.

Section 5 declares that those who do not need parental consent and who marry clandestinely shall be penalized by having the children of such marriages incapable of inheritance.

Section 6 applies the same penalty to those who marry their mistresses on their death-bed and to those children procreated by someone who has been condemned to death.

7. We prohibit all judges, even those of the church, from receiving proof by witnesses of promises of marriage, nor otherwise than by writing, which shall be set down in the presence of four close relatives of one or the other of the parties, even if they are of base condition.

We will have occasion to come back to the French ordinances on marriage when we look at what Pothier has to say about them close to the end of the *ancien régime*. A number of concerns are pretty obvious: first, a concern about controlling marriage-choice of younger by the elders of the family; second, a concern about publicity, which may be a means of enforcing the first policy or which may be an independent concern; third an increasing willingness of the state to get involved in marriages at the expense of the jurisdiction of the church. (In this regard, however, we might note that the vagueness of the ordinances about the validity of the marriage may be deliberate. That is still thought to be a matter for the church, so the sanctions deal with the property consequences of marriage or are criminal.) France was not the only country where these concerns make their appearance in the early modern period. Indeed, they seem to be general across early modern Europe both Catholic and Protestant. There's a more general legal point that can be made out of this material. As we move from the *ordonnance* of Blois to that of 1639, the legislation becomes more comprehensive. It does not, however, even in 1639, cover the whole waterfront. None of the ordinances, for example, says that consent of the parties is required for the validity of a marriage. That is a basic principle of the *ius commune*, one on which both the Roman and the canon law were agreed. In these ordinances it is simply assumed. Judged by the standard of the 19th century, even the *ordonnance* of 1639 is not a 'true' codification.

### **Colbert on civil procedure, 1687**

Tit. 1: Observation of the ordinances

Tit. 2: Adjournments

Tit. 3: Delays upon citations and adjournments

Tit. 4: Presentations [of the parties before the court]

Tit. 5: Holidays and defaults in civil matters

Tit. 6: Fines for non-prosecution

Tit. 7: Delays for deliberation

Tit. 8: Sureties

Tit. 9: Dilatory exceptions and the abrogation of views and showings

- Tit. 10: Interrogatories about facts and articles
- Tit. 11: Delays and procedures in the court of Parlement, Great Council, court of Aides, in first instance and case[s] of appeal
- Tit. 12: Compulsory process and examination of documents
- Tit. 13: Abolition of inquest to examine in the future and inquest *par turbes*
- Tit. 14: Contestation in the case [*litis contestatio*]
- Tit. 15: Procedure in possessory actions about benefices and royal rights
- Tit. 16: The form of procedure before judges and consuls of merchants
- Tit. 17: Summary matters
- Tit. 18: Complaints [about violence] and restitution
- Tit. 19: Sequestrations, commissaries, guardians of fruits and movables
- Tit. 20: Facts which are subject to verbal or literal proofs
- Tit. 21: [Judicial] visitation of places, taxes of officers who go on commission, nomination and reports of experts
- Tit. 22: Inquests [selected articles in *Mats.* p. XVI–8]
- Tit. 23: Reproaches against witnesses [selected articles in *Mats.* p. XVI–8 to XVI–9]
- Tit. 24: Recusations of judges
- Tit. 25: *Prises à partie* [this seems to be technical term for the judge taking sides in a case by refusing to proceed]
- Tit. 26: The form for proceeding to judgment and to pronouncements
- Tit. 27: Execution of judgments
- Tit. 28: Receipt of property security
- Tit. 29: Rendering of accounts
- Tit. 30: Liquidation of fruits
- Tit. 31: Costs
- Tit. 32: The taxation and liquidation of damages and interest
- Tit. 33: Seizures and executions, and sales of goods, grain, beasts and movable things
- Tit. 34: Discharge of constraint by body [civil arrest for debt]
- Tit. 35: Civil requests [motions to reopen a judgment]

1. Extracts from Colbert's ordinance on civil procedure are contained in Chapter XVI of the Materials (p. XVI-7). The outline of the ordinance is basically the outline of the *ordo iudiciarius*. Here we have another example of the phenomenon that we noticed earlier of customary law being fitted into a Romano-canonic sausage skin. We should be careful, however, in considering how new this is. Romano-canonic procedure, or pieces of it, had been being used since the mid-13th century. Its use in the parlement of Paris is notable from at least the early 14th century. What may be involved here is more jamming the extraordinary variety of jurisdictions into a Romano-canonic mold. The ordinance was applicable even in the church courts.
2. Looked at from the point of view of a 20th or even a 19th century code, this one is transitional. It does cover the whole waterfront; notably missing are citation (which was the subject of an ordinance two years later), libel and appeal. Otherwise, we have the whole course of civil procedure. Curious is the bifurcation of the proof process, some of it being considered before *litis contestatio*, some of it afterwards. There is, however, a strong element of fix about it. Particularly notable are the provisions about delays, which occupies the greater part of the first 13 titles. Titles 15-19 are interesting in that they outline certain types of special procedures. Titles

20-23 contain the basics of proof. I have given you the basic provisions on proof by witnesses and all of reproaches to witnesses. If we compare what is going on here to what is going on legislatively in the kingdom of the two Sicilies we see that Maranta, who is found in the Materials at sec. XIIC (p. XII-19), and the kingdom are dealing with similar issues.

**Tit. 22: Inquests**

**art. 5: The witnesses will be cited to depose and the party to see them swear by ordinance of the judge, without a commission to the clerk [*greffe*].**

**Tit. 23: Reproaches against witnesses**

- art. 1: Reproaches against witnesses shall be circumstantial and pertinent and not in vague and general terms; otherwise they will be rejected.
  - art. 2: If it is alleged in the reproaches that the witnesses have been imprisoned, subject to decree, condemned or taken by justice, the facts will be regarded as calumny if they are not justified before the judgment of the process by the calendar of imprisonment, decrees, condemnations or other acts.
  - art. 3: He who has had the inquest made can, if it seems good to him, furnish answers to the reproaches, and the responses will be provided to the party, otherwise we forbid that they be considered; all this without delaying the judgment.
  - art. 4: Judges cannot appoint the parties to inform them about the matter of the reproaches unless they have examined the process [and determined] that the means of reproach are pertinent and reasonable.
  - art. 5: The reproaches of the witnesses will be judged before the process and if they are found pertinent and that they are sufficiently justified, the depositions will not be taken.
  - art. 6: We forbid proctors from furnishing any reproach against witnesses if the reproaches are not signed by the party, or if they cannot show a special written power given to them to propose them.
3. Title 23 is clearly directed against certain abuses in connection with the reproaching of witnesses. It condemns vague charges and charges that could be supported from an official record and are not. It requires that the answers to the reproaches must be furnished to the opposite party on penalty of their not being considered, that the answers must be furnished quickly, that the reproaches themselves must be determined in advance to be relevant, that they must be considered in advance of the depositions, and that they must be signed by the parties not by their proctors. All of this really assumes that there is a law about reproaches against witnesses, but that law is not stated in the ordinance. (I might also add that some of the reforms attempted here had been tried before and had not worked. This does not really represent a thorough reform of medieval witness practice.)
4. I wonder, however, whether we really aren't missing the point if we judge the ordinance by the standards of a 19th or 20th century code. It seems quite clear that there was no way in this world that one could make an exclusive ordinance about civil procedure, anymore than Guy Coquille, with whom we will deal next week can think about marital property exclusively in the terms of the custom of Nivernais or

in terms of the French customs generally. The law is still universal. Coquille will use material from his teacher Mariano Socini, who never left Italy, and *consilia* in the tradition of the *ius commune*, for example, those of Panormitanus, dealing with marital property in the Italian city-states. This material must be applied to the French situation. Dowry and community property are not the same thing, and the differences will be respected. But underlying this are broader principles: We cannot require a *deductio in domum*, because that would make us look silly in northern France, but we can require solemnization of the marriage in the face of the church and for similar, if not quite the same reasons, that the Italians will require a *deductio* for dotal purposes. Similarly, the basic principles of the *ordo* for examining witnesses can be found in any textbook of the *ius commune*. What needs to be done is to make sure that there is a system of general applicability that reforms some of the abuses that had crept into both those tribunals that followed the *ius commune* and those that did not.