OUTLINE — LECTURE 22

Pierson v. Post (continued)

'Policy' in *Pierson v. Post*

Tomkins (the majority opinion), Mats. p. XVIII–4:

"We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation."

Livingston (the dissent), Mats. p. XVIII–4:

"Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, 'with hounds and dogs to find, start, pursue, hunt, and chase', these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement."

Livingston therefore urges the adoption of the following statement of the law, Mats. p. XVIII–5:

" . . . [W]e are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of *Barbeyrac*, that property in animals *feræ naturæ*, may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered[,] an intention of converting to his own use."

Reasons given for a rule beyond the statement of the rule itself are frequently called at HLS 'policy'. Tomkins did not know it, but his policy has a quite respectable ancestry:

Diodor von Tuldenus, *Commentarius in quattuor libros Institutionum* 2.18 [?2.1.13] (1622) (ed. Louvain, 1702), Mats. p. XVIII–12:[1]

"Further, the laws ought to so provide that they not contain the seeds of perpetual litigation, which would happen if the wild animal were adjudged to him who so wounded that he could be captured; for this very thing, whether he could be captured, would be forever controverted. Nor could it be defined by a certain rule. Justinian therefore decided the controversy in this way so that his decision in one case not excite new controversies."

Christian Wolff, *Ius naturae methodo scientifica pertractatum* 2.2.174, 184 (1740–8, Frankfurt & Leipzig 1764) II:74, Mats. p. XVIII–13:[2]

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[1] This is the correct page number, but the previous page numbers are misnumbered. Start with XVIII–5 and move forward.

[2] Misnumbered XVIII–12.

"Note especially that the acts of occupancy ought to be so defined or determined . . . to avoid the suits that would arise if another frustrated your effort which you had spent on reducing something to that state in which it could be yours, without which, there is no one who does not understand, it could not have become the other's."

Jean-Jacques Burlamaqui attempts to answer the argument that any rule of occupation that does not require actual seizure is too indefinite for actual application by drawing the line on the other side of those who are on the threshold of actual capture:

Jean-Jacques Burlamaqui, *Principes du droit de la nature* 4.9.4 (1747) (Dupin ed., 1820) 3:182–3, Mats. p. XVIII–13:[3]

"What properly founds the right of the first occupant is that by seizing a thing that belongs to no one he lets it be known before all others his design to acquire the thing. If, however, one should manifest the intention to acquire a thing by some other act as significant as the taking of possession, as, for example, by the marks made on certain things, one can acquire property that way as well as by the taking of possession. Of course, he must be at the threshold of taking what he claims to have the intention of seizing."

None of our authors deals specifically with Livingston's policy. That is because they are dealing with wild animals in general, not those that are specifically regarded as vermin. Grotius, however, is quite clear, as is Pothier, whom we will get to below, that the rules of natural law on the topic of wild animals are not so much natural law that they cannot be changed; certainly exceptions can be made to natural law when there is good reason to do so. So the question about Livingston's approach is whether courts should do this or wait for the legislature to do it.

'Rules' vs. 'standards' in *Pierson v. Post*

There is another distinction between the two opinions that is frequently made at HLS. The majority adopts a 'rule'; Livingston urges a 'standard'. Those who are for rules instead of standards sometimes argue that rules are more efficient. They save courts' time.

A number of you had reactions to this. What's so great about efficiency?

Others saw a relationship of the problem of the case to the rise of the territorial nation-state. Can this case be used to break down the distinction between public and private law?

Bartolus and competing mill owners

In Hohfeld's anyalysis – and I think in Bartolus' too – rights always imply duties. If the lower riparian has built a mill he has a right that the upper riparian not cut off the head of the water that he is getting, and the upper riparian has a duty not to do so. But if the upper riparian has already built his mill the lower riparian has no right to stop him from using it so that he can build a mill too. In Hohfeld's terminology the upper riparian's use is privileged, the opposite of a duty. The issue is when does the upper riparian acquire this privilege, and Bartolus holds that he does so when he begins to construct his mill so long as he continues to construct.

[3] Misnumbered XVIII–12.

The case of Dominicans and the Franciscans in Bologna is different. The Dominicans had acquired the right (privilege in Hohfeld's terminology) to use water for cooking, but the commune later granted the Franciscans the same right because it was determined that there was enough water for both. I used this to illustrate a somewhat different point, that medieval property law did not encourage accumulation. This may be different from the possessive individualism that we see in the early modern period, though there are hints of the same idea in those who opposed possessive individualism like Noodt, Thomasius, Titius, and Leibniz, and it can be seen in some of the later natural lawyers who were influenced by Leibniz, particularly Wolff and Vattel.

Domat and Pothier

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

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

Domat is remembered as a systematizer. Let's say a word about his system before we get to the specifics. The striking thing about Domat's system is its radical simplicity. All of private law is divided into two parts, *engagements* and successions. *Engagements* is broader than our word 'engagements' and even broader than our word 'contract'. It includes all interpersonal relationships whether formed by agreement or not, but the focus is on agreement. Hence, as is typical in French law, the law of wrongs is downplayed. Domat may be first person to have seen what Hohfeld later perceived that all law deals with relationships between persons. Property thus becomes an extraneous category. This was too radical for the codifiers as we will see when we talk about the Napoleonic Code, but its influence was felt.

Pothier is not known as a systematizer. By and large he followed the titles of the *Digest* and the *Code*, adding material, particularly in the commercial area, that was not covered or only briefly covered in the Roman law, with titles drawn from customary law and from mercantile and maritime law. He made no major contribution to the overall organization of private law. Whether something of interest is going on in Pothier's work on the question of organization is probably best seen when we get to his work on marriage.

Domat and Pothier on marriage

Domat, ***The Civil Laws in their Natural Order* §§ 825–7**

[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.[1]

1. These two sorts of engagements are expressed and distinguished in the marriage of Tobias. Tobit vii. 13, 14.

[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;[2] institutions of heirs or executors by way of contract, and which are irrevocable;[3] 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*.

2. [C.6.20.3 (invalidating such covenants in Roman law)].

3. [C.2.3.15; C.5.14.5].

[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 . . . 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 an 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. . . .

Domat on the topic of marriage is interesting. He sharply distinguishes two engagements in marriage, one in the divine institution, which he expressly says is outside the scope of his book, the other in the engagement concerning goods, which he proceeds to treat with special emphasis on the Roman institution of dowry. The notion that the secular rules and the religious rules about marriage might have quite different consequences goes all the way back to Azo in the early 13th c., but Domat states it with a kind of precision that is unusual, not only unusual but perhaps courageous. He does not say so, but one might conclude from his discussion that the ordonnance of Blois and its follow-ons was invalid, at least insofar as it purported to invalidate certain canonically valid marriages.

Pothier, *Pandectes de Justinien* D.23.2

“Nuptials are the joining of male and female, and casting together of lots for a lifetime, the intersection point of divine and human law.”[4] [D.23.2] 1. Modestinus, Book 1 of Rules.

4. 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 "and 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.

First Part: On the form of contracting nuptials. . . .

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

Sec. 1: On the consent of the contracting parties

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

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

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 Barnabé Brisson (1531–1591), *De ritu nuptiarum*.]

Pothier is much fuller on the topic of marriage. (He has 3 treatments, one in the *Pandectes* and 2 in *Contrat de mariage*). Before we get to what he says about the rules, we ought to pause and consider the way he organizes them. The outline of the title in the *Pandectes* is quite clear. We deal first with the form of contracting nuptials. We ask first (article 1), whose consent is required and subsections deal with the consent of the parties and the consent of those in whose power they are. We then deal (article 2) with the question whether anything more than consent is required. Secondly we deal with the capacity to contract marriage. Similarly we consider first the requirements of citizenship and puberty, then people who are absolutely prohibited from contracting marriage, then those prohibited from contracting marriage with each other, and finally with the penalties

for incestuous and illicit marriages. This type of stuff has a long history in France. It clearly goes back to the systematizers of the 16th century. You may remember the names of François Conan, François Douaren, and Hugh Doneau all of whom made contributions to this effort to organize the Roman materials. Domat's selection of material from the *Digest* was probably Pothier's starting point, but he weaves his material together with considerable commentary that makes it much clearer than does Domat what he is making of it.

Pothier's discussion of the Roman rules on marriage owes much to the Dutch elegant jurisprudents and the French humanists. He is much more aware than previous authors in the tradition of practical law how much the Roman texts are formed by a Roman context that is no longer applicable. Hence his discussion of Modestinus's famous definition of marriage is informed by an understanding of the archaic Roman institution of marriage with *manus*, something that had really not been known until the 16th century. He also, like many Romanists before him, notices how strong the Romans are on the necessity of parental consent, and there is no reason that he can see why this rule should not be applicable in his own day.

Pothier, *Contract of Marriage* arts. 1–2, 11–12, 67, 69, 321–2

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 . . . 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: . . .

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. . . .

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 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.*

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.

67. The usage of having marriages preceded by the publication of banns is very old in the church. . . .

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

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:

> 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. . . .

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.

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 . . .

The council, as M. [Jacques] Boileau [1636-1716] 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 law 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. 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. . . . 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 Amphilochus, 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." . . .

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 these words "so long as the Church has not declared them invalid." Hence, the spirit of the council is that the church could render them null if at length it though 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 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 more 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.

326. . . . 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 and argument from the second disposition of article 40 of the *ordonnance* of Blois, reported above no. 78[5] 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,[6] 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 contact marriage without the consent of their father and mother.

5. *Materials*, p. XVI.

6. This is a typo, or a "mindo" on Pothier's part. The date of the declaration is 26 November 1639, as he says elsewhere in the book. The text is found in *Materials*, p. XVI.

When we come to Pothier's treatise on marriage, this concern with parental consent comes to the fore. But first he must deal with the problem of religious and secular. Marriage is divine in origin, Pothier tells us. The beginning of his treatise with Adam and Eve goes right back to the medieval theologians and canonists, as does his emphasis on the unity of spirits rather than the unity of bodies. He also, as does Domat, separates the property consequences of marriage from the marriage itself. Indeed, he devotes two separate treatises to the former. When he comes to the issue of secular power, however, he unites the two laws in a most medieval way. Law is law, whether it proceeds from secular or religious power, and while the positive law cannot change the essence of marriage it can prescribe the formalities and dictate who is and who is not capable of marriage. His reading of the ordonnance of Blois is broad. The statute does not apply where publicity has been had. On the other hand, when the ordonnance of 1639 that required parental consent for the promulgation of banns is read together with the ordonnance of Blois, there is no doubt in his mind that marriages without parental consent are void. The text is given above, and it's worth some analysis. What will happen to this when there is a radical secularization of the state can be seen in the Napoleonic code.

Domat on witnesses

Domat, ***The Civil Laws in their Natural Order*** **§§ 2034–2063**

You will notice (Mats. p. XIX–9 to XIX–14) that Domat takes some time to consider the problem of witnesses. In this he is unusual for authors of his period. What he has to say, however, is not particularly interesting. Very little that he says, except for a few references to Colbert's ordonnance on civil procedure, would have surprised Tancred. Indeed, the law seems to be in a kind of time-warp, incapable of moving beyond the achievements of the medieval proceduralists. On the question of discretion, which we have suggested is the key issue in this matter, Domat is less open to discretion than is Tancred. Notable in Domat's citations is the fact that he uses only citations to Roman law, pretending that the elaborate medieval learning that he reports had all been derived from Roman law. To a certain extent this is the result of his method. Pothier says nothing about witnesses at all in his treatises, though there is a title about witnesses in the Pandectes.

Domat and Pothier on wild animals

Domat, ***The Civil Laws in their Natural Order*** **§§ 125**

Para. 1. Things common to all.[7]

7. [Dt. 4:19 ("And when you look up to the heavens and see the sun, the moon, and the stars, all the host of heaven, do not be led astray and bow down to them and serve them, things that the Lord your God has allotted to all the peoples everywhere under heaven."); 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 sea 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.

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.[8]

8. [JI.2.1.12.] We must understand this according to the ordinances which relate to hunting and fishing.

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.[9]

9. [D.41.1.3.2; D.41.2.3.15, 16, 13.]

Domat says very little about wild animals. He clearly knows the Roman rules. He regards them as quite irrelevant. See the note numbered 7, above. Domat's para. 11 may be the source of the provision in the Napoleonic Code on the topic. Notice that the relative unimportance of property in his scheme of things means that he need not treat the occupation of wild animals as somehow constitutive of something very important. (He does come back to wild animals when he considers possession, 3.7.1.7, p. XIX–15.) The interesting thing is that when the Napoleonic Code comes back to property, it does not come back to wild animals. This tells us much about the positivistic bias of the code.

Pothier, *Treatise on the Right of Ownership of Property* summary by CD

Pothier on the topic of wild animals is interesting. His discussion of the topic is quite long, and it contains a number of surprises:

Like Locke, but with somewhat more emphasis on the religious, Pothier begins "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, 6]. 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."

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 intereprets 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, he tells us, would decide the question in favor of the property owner (as had Accursius 400 years earlier), but Vinnius (a Dutch writer roughly contemporary with Voet) decides the case in favor of the huntsman giving the landowner an *actio injuriarum*: "because," Pothier tells us, "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*’.”

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 hunstman 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, one says, 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 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.” The notion of the permission of the natural law goes back to the first glossators of canon law, when they were seeking to justify property. Though I cannot recall having this argument in medieval authors with regard to wild animals, a medieval jurist would certainly have understood it.

In his general discussion of occupation, Pothier turns very briefly to the question that had plagued the Spanish scholastics in the 16th century, the justification for the conquest of the new world. Like all of his predecessors he says that a seaman who discovers an uninhabited land may occupy it and claim it for his own. If he claims it in the name of the prince, property in it passes to the prince. “But when a land is occupied,” Pothier continues, “however wild [the French word also means ‘savage’] the men who inhabit it appear to us, these men being the true proprietors, we cannot without injustice establish ourselves there against their will.”

Domat and Pothier: Conclusion

I think I have said enough to suggest that while there is much in Domat and Pothier that could be used by a group who were interested in codifying French law, there is nothing in what they do that inevitably leads in the direction of codification. Domat is interested in system in the broad. Pothier is interested in it in the small, and not particularly interested in it in the broad. Both of them know their Roman law quite well. Domat's interest in natural law leads him in the direction of ethics and of system. He is not particularly interested in the scholarly debates of the natural lawyers, which were only beginning in his time. Nor is he interested in the debates of the historians, which were more of concern in his time. Pothier is interested in both. By and large, he uses his history well. Pothier is also interested more in the specifics of natural law. He seems to us broader, somewhat more humane than Domat, though that may tell us as much about the respective centuries in which they lived as it does about their respective personalities and beliefs. But my overall point is that both men are in the tradition of the *ius commune*. I do not think that a fair reading of either of them would allow one to predict the so-called 'exegetical school' of the French 19th century. One could perhaps see the German pandectists of whom we will talk in a future class. Perhaps one can see them coming more out of Domat than out of Pothier. Perhaps one of the most ironic disoveries of this course is that in some sense the middle ages ended in 18th century France, with a man who had enormous influence on the French civil code (there are whole sections of Pothier taking over into the code), but who, when we read him in context, appears much more medieval than does his predecessor of a century earlier.