HISTORY OF MARRIAGE LAW

Professor Donahue

Fall, 2014

Reading Group: History of Marriage Law

Fall, 2014 **Professor Donahue**

Selected Mondays, 3:00 p.m. - 5:00 p.m.

UUUUDescription: 1 classroom credit. Selected readings on the history of marriage law from the ancient world up to (but not including) the 20th century. Where we focus depends on the interests of the group. We could focus entirely on the ancient world or entirely on the Middle Ages, or we could survey. Well have an organizational meeting in the first week of classes and then six two-hour sessions designed to end early in November.

As a result of the organizational meeting, we decided to spend four sessions on the Ancient World and two on the Middle Ages. That meant that we had to cut down on the material from the Hebrew Bible. I dropped the reading from Tobias, and left out the strories of the marriages of the patriarchs from Genesis. Though the stories are still there, and not very long; they may help you with the background, but they are not specifically assigned.) We also agreed on the meeting dates listed below. There may be changes in detail. For example, I included less material that is 'straight' Roman law on October 20 and substituted some material on the interpretation the Roman texts in the Middle Ages, but this is the basic outline. All readings are in the attached materials.

Tentative Syllabus:

September 08 – Organizational Meeting

Mon., Sep. 22 – Marriage in the Hebrew Bible. The Torah. Genesis 1–2; Exodus 22:16–17; Leviticus 18; Deuteronomy 22:13–28; Deuteronomy 24:15. (Materials, pp. 8–12.); The Prophets: Hosea 1–2; Malachai 2:11–16 (Materials, pp. 18–20). The Writings. Ruth 3:1–4.13; Psalm 128 (Materials, pp. 16–18, 20).

Mon., Sep. 29 – Marriage in the New Testament. Mark 10:2–12; Luke 16:18; Matthew 5:31–32; Matthew 19:3–12; 1 Corinthians 7; Ephesians 5:21–6:9. (Materials , pp. 22–24).

Mon., Oct. 6 – Marriage in Roman Law 1. Gaius, Institutes, bk. 1 (extracts); Justinian, Institutes, bk. 1 (extracts); Medieval Glosses on Justinian's Institutes. (Materials , pp. 25–37, 74-76.)

(October 13 is a holiday.)

Mon., Oct. 20 – Marriage in Roman Law 2. Digest, 23.2; Code, 5.4; Medieval Glosses on the Digest. (Materials, pp. 38–49, 76–78.)

Mon., Oct. 27 – Marriage Law in the Early Middle Ages. Aethelbert's 'Code'; The Collection in 74 Titles. (Materials, pp. 50–59.)

Mon., Nov. 3 – Marriage Law in the High Middle Ages. Gratian on Marriage; *Veniens ad Nos*; Dolling c. Smith; *Tametsi*. (Materials, pp. 58–69, 75–76, 94–98, 113–114.) What does it all add up to?

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CHRONOLOGY

Roman Legal History

Period	*Description*	*Politics*	*Sources of Law*
500--250 BC	Archaic	City State	XII Tables
250 BC--1	Pre-Classical	Urban Empire	Statutes/Cases
1--250 AD	Classical	Principate	Cases
250--500 AD	Post-Classical	Dominate	Imperial Constitutions
550 AD	Justinian	Byzantine	Code

Continental Legal History

Period	*Description*	*Politics*	*Roman*	*Canon*	*Customary/National*
450--1100	Early Middle Ages	Barbarian Invasions Feudalism	Romano-barbarian Codes	Collections	Barbarian Codes
1100--1250	High Middle Ages	Feudal monarchy	CJC-glossators	Gratian-decretists Decretals-decretalists	Coutumiers
1250--1500	Later Middle Ages	National monarchy	CJC-commentators Consilia	Decretalists-> encyclopedic jurists Consilia	Coutumiers and statutes
1450--1550	Renaissance	Absolutism	Humanists	Councils Consilia	Codification of custom reception
1550--1750	Early Modern	Absolute monarchy	Natural law	Papal bureaucracy Handbooks	“Institutes” and statutes
1700--1900	Modern	Revolution	Pandectists Historical School	Codification	Codification

TOPIC 1. THE HEBREW BIBLE

A. GENESIS 1–2

In the beginning when God created[1]; the heavens and the earth, **2** the earth was a formless void and darkness covered the face of the deep, while a wind from God[2] swept over the face of the waters. **3** Then God said, "Let there be light"; and there was light. **4** And God saw that the light was good; and God separated the light from the darkness. **5** God called the light Day, and the darkness he called Night. And there was evening and there was morning, the first day.

6 And God said, "Let there be a dome in the midst of the waters, and let it separate the waters from the waters." **7** So God made the dome and separated the waters that were under the dome from the waters that were above the dome. And it was so. **8** God called the dome Sky. And there was evening and there was morning, the second day.

9 And God said, "Let the waters under the sky be gathered together into one place, and let the dry land appear." And it was so. **10** God called the dry land Earth, and the waters that were gathered together he called Seas. And God saw that it was good. **11** Then God said, "Let the earth put forth vegetation: plants yielding seed, and fruit trees of every kind on earth that bear fruit with the seed in it." And it was so. **12** The earth brought forth vegetation: plants yielding seed of every kind, and trees of every kind bearing fruit with the seed in it. And God saw that it was good. **13** And there was evening and there was morning, the third day.

14 And God said, "Let there be lights in the dome of the sky to separate the day from the night; and let them be for signs and for seasons and for days and years, **15** and let them be lights in the dome of the sky to give light upon the earth." And it was so. **16** God made the two great lights--the greater light to rule the day and the lesser light to rule the night--and the stars. **17** God set them in the dome of the sky to give light upon the earth, **18** to rule over the day and over the night, and to separate the light from the darkness. And God saw that it was good. **19** And there was evening and there was morning, the fourth day.

20 And God said, "Let the waters bring forth swarms of living creatures, and let birds fly above the earth across the dome of the sky." **21** So God created the great sea monsters and every living creature that moves, of every kind, with which the waters swarm, and every winged bird of every kind. And God saw that it was good. **22** God blessed them, saying, "Be fruitful and multiply and fill the waters in the seas, and let birds multiply on the earth." **23** And there was evening and there was morning, the fifth day.

24 And God said, "Let the earth bring forth living creatures of every kind: cattle and creeping things and wild animals of the earth of every kind." And it was so. **25** God made the wild animals of the earth of every kind, and the cattle of every kind, and everything that creeps upon the ground of every kind. And God saw that it was good.

26 Then God said, "Let us make humankind[3] in our image, according to our likeness; and let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the wild animals of the earth,[4] and over every creeping thing that creeps upon the earth."

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[1] Or *when God began to create* or *In the beginning God created*

[2] Or *while the spirit of God* or *while a mighty wind*

[3] Heb *adam*

27 So God created humankind[5] in his image,
in the image of God he created them;[6]
male and female he created them.

28 God blessed them, and God said to them, "Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth." **29** God said, "See, I have given you every plant yielding seed that is upon the face of all the earth, and every tree with seed in its fruit; you shall have them for food. **30** And to every beast of the earth, and to every bird of the air, and to everything that creeps on the earth, everything that has the breath of life, I have given every green plant for food." And it was so. **31** God saw everything that he had made, and indeed, it was very good. And there was evening and there was morning, the sixth day.

2 1 Thus the heavens and the earth were finished, and all their multitude. **2** And on the seventh day God finished the work that he had done, and he rested on the seventh day from all the work that he had done. **3** So God blessed the seventh day and hallowed it, because on it God rested from all the work that he had done in creation.

4 These are the generations of the heavens and the earth when they were created.

In the day that the Lord[7] God made the earth and the heavens, **5** when no plant of the field was yet in the earth and no herb of the field had yet sprung up--for the Lord God had not caused it to rain upon the earth, and there was no one to till the ground; **6** but a stream would rise from the earth, and water the whole face of the ground-- **7** then the Lord God formed man from the dust of the ground,[8] and breathed into his nostrils the breath of life; and the man became a living being. **8** And the Lord God planted a garden in Eden, in the east; and there he put the man whom he had formed. **9** Out of the ground the Lord God made to grow every tree that is pleasant to the sight and good for food, the tree of life also in the midst of the garden, and the tree of the knowledge of good and evil.

10 A river flows out of Eden to water the garden, and from there it divides and becomes four branches. **11** The name of the first is Pishon; it is the one that flows around the whole land of Havilah, where there is gold; **12** and the gold of that land is good; bdellium and onyx stone are there. **13** The name of the second river is Gihon; it is the one that flows around the whole land of Cush. **14** The name of the third river is Tigris, which flows east of Assyria. And the fourth river is the Euphrates.

15 The Lord God took the man and put him in the garden of Eden to till it and keep it. **16** And the Lord God commanded the man, "You may freely eat of every tree of the garden; **17** but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall die."

18 Then the Lord God said, "It is not good that the man should be alone; I will make him a helper as his partner." **19** So out of the ground the Lord God formed every animal of the field and every bird of the air, and brought them to the man to see what he would call them; and whatever the man called every living creature, that was its name. **20** The man gave names to all cattle, and to the birds of the air, and to every animal of the field; but for the man[9] there was not found a helper as his partner. **21** So the Lord God caused a deep sleep to fall upon the man, and he slept; then he took one of his ribs and closed up its place with flesh. **22** And the rib that the Lord God had taken from the man he made into a woman and brought her to the man. **23** Then the man said,

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[4] Syr: Heb *and over all the earth*

[5] Heb *adam*

[6] Heb *him*

[7] Heb YHWH, as in other places where "Lord" is spelled with capital letters (see also Exod 3.14-15 with notes).

[8] Or *formed a man* (Heb *adam*) *of dust from the ground* (Heb *adamah*)

[9] Or *for Adam*

"This at last is bone of my bones
and flesh of my flesh;
this one shall be called Woman,[10]
for out of Man[11] this one was taken."

24 Therefore a man leaves his father and his mother and clings to his wife, and they become one flesh. **25** And the man and his wife were both naked, and were not ashamed.

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[10] Heb *ishshah*

[11] Heb *ish*

B. GENESIS 24

1 Now Abraham was old, well advanced in years; and the Lord had blessed Abraham in all things. **2** Abraham said to his servant, the oldest of his house, who had charge of all that he had, "Put your hand under my thigh **3** and I will make you swear by the Lord, the God of heaven and earth, that you will not get a wife for my son from the daughters of the Canaanites, among whom I live, **4** but will go to my country and to my kindred and get a wife for my son Isaac." **5** The servant said to him, "Perhaps the woman may not be willing to follow me to this land; must I then take your son back to the land from which you came?" **6** Abraham said to him, "See to it that you do not take my son back there. **7** The Lord, the God of heaven, who took me from my father's house and from the land of my birth, and who spoke to me and swore to me, 'To your offspring I will give this land,' he will send his angel before you, and you shall take a wife for my son from there. **8** But if the woman is not willing to follow you, then you will be free from this oath of mine; only you must not take my son back there." **9** So the servant put his hand under the thigh of Abraham his master and swore to him concerning this matter.

10 Then the servant took ten of his master's camels and departed, taking all kinds of choice gifts from his master; and he set out and went to Aram-naharaim, to the city of Nahor. **11** He made the camels kneel down outside the city by the well of water; it was toward evening, the time when women go out to draw water. **12** And he said, "O Lord, God of my master Abraham, please grant me success today and show steadfast love to my master Abraham. **13** I am standing here by the spring of water, and the daughters of the townspeople are coming out to draw water. **14** Let the girl to whom I shall say, 'Please offer your jar that I may drink,' and who shall say, 'Drink, and I will water your camels'--let her be the one whom you have appointed for your servant Isaac. By this I shall know that you have shown steadfast love to my master."

15 Before he had finished speaking, there was Rebekah, who was born to Bethuel son of Milcah, the wife of Nahor, Abraham's brother, coming out with her water jar on her shoulder. **16** The girl was very fair to look upon, a virgin, whom no man had known. She went down to the spring, filled her jar, and came up. **17** Then the servant ran to meet her and said, "Please let me sip a little water from your jar." **18** "Drink, my lord," she said, and quickly lowered her jar upon her hand and gave him a drink. **19** When she had finished giving him a drink, she said, "I will draw for your camels also, until they have finished drinking." **20** So she quickly emptied her jar into the trough and ran again to the well to draw, and she drew for all his camels. **21** The man gazed at her in silence to learn whether or not the Lord had made his journey successful.

22 When the camels had finished drinking, the man took a gold nose-ring weighing a half shekel, and two bracelets for her arms weighing ten gold shekels, **23** and said, "Tell me whose daughter you are. Is there room in your father's house for us to spend the night?" **24** She said to him, "I am the daughter of Bethuel son of Milcah, whom she bore to Nahor." **25** She added, "We have plenty of straw and fodder and a place to spend the night." **26** The man bowed his head and worshiped the Lord **27** and said, "Blessed be the Lord, the God of my master Abraham, who has not forsaken his steadfast love and his faithfulness toward my master. As for me, the Lord has led me on the way to the house of my master's kin."

28 Then the girl ran and told her mother's household about these things. **29** Rebekah had a brother whose name was Laban; and Laban ran out to the man, to the spring. **30** As soon as he had seen the nose-ring, and

the bracelets on his sister's arms, and when he heard the words of his sister Rebekah, "Thus the man spoke to me," he went to the man; and there he was, standing by the camels at the spring. **31** He said, "Come in, O blessed of the Lord. Why do you stand outside when I have prepared the house and a place for the camels?" **32** So the man came into the house; and Laban unloaded the camels, and gave him straw and fodder for the camels, and water to wash his feet and the feet of the men who were with him. **33** Then food was set before him to eat; but he said, "I will not eat until I have told my errand." He said, "Speak on."

34 So he said, "I am Abraham's servant. **35** The Lord has greatly blessed my master, and he has become wealthy; he has given him flocks and herds, silver and gold, male and female slaves, camels and donkeys. **36** And Sarah my master's wife bore a son to my master when she was old; and he has given him all that he has. **37** My master made me swear, saying, 'You shall not take a wife for my son from the daughters of the Canaanites, in whose land I live; **38** but you shall go to my father's house, to my kindred, and get a wife for my son.' **39** I said to my master, 'Perhaps the woman will not follow me.' **40** But he said to me, 'The Lord, before whom I walk, will send his angel with you and make your way successful. You shall get a wife for my son from my kindred, from my father's house. **41** Then you will be free from my oath, when you come to my kindred; even if they will not give her to you, you will be free from my oath.'

42 "I came today to the spring, and said, 'O Lord, the God of my master Abraham, if now you will only make successful the way I am going! **43** I am standing here by the spring of water; let the young woman who comes out to draw, to whom I shall say, "Please give me a little water from your jar to drink," **44** and who will say to me, "Drink, and I will draw for your camels also"--let her be the woman whom the Lord has appointed for my master's son.'

45 "Before I had finished speaking in my heart, there was Rebekah coming out with her water jar on her shoulder; and she went down to the spring, and drew. I said to her, 'Please let me drink.' **46** She quickly let down her jar from her shoulder, and said, 'Drink, and I will also water your camels.' So I drank, and she also watered the camels. **47** Then I asked her, 'Whose daughter are you?' She said, 'The daughter of Bethuel, Nahor's son, whom Milcah bore to him.' So I put the ring on her nose, and the bracelets on her arms. **48** Then I bowed my head and worshiped the Lord, and blessed the Lord, the God of my master Abraham, who had led me by the right way to obtain the daughter of my master's kinsman for his son. **49** Now then, if you will deal loyally and truly with my master, tell me; and if not, tell me, so that I may turn either to the right hand or to the left."

50 Then Laban and Bethuel answered, "The thing comes from the Lord; we cannot speak to you anything bad or good. **51** Look, Rebekah is before you, take her and go, and let her be the wife of your master's son, as the Lord has spoken."

52 When Abraham's servant heard their words, he bowed himself to the ground before the Lord. **53** And the servant brought out jewelry of silver and of gold, and garments, and gave them to Rebekah; he also gave to her brother and to her mother costly ornaments. **54** Then he and the men who were with him ate and drank, and they spent the night there. When they rose in the morning, he said, "Send me back to my master." **55** Her brother and her mother said, "Let the girl remain with us a while, at least ten days; after that she may go." **56** But he said to them, "Do not delay me, since the Lord has made my journey successful; let me go that I may go to my master." **57** They said, "We will call the girl, and ask her." **58** And they called Rebekah, and said to her, "Will you go with this man?" She said, "I will." **59** So they sent away their sister Rebekah and her nurse along with Abraham's servant and his men. **60** And they blessed Rebekah and said to her,

> "May you, our sister, become
> thousands of myriads;
> may your offspring gain possession
> of the gates of their foes."

61 Then Rebekah and her maids rose up, mounted the camels, and followed the man; thus the servant took Rebekah, and went his way.

62 Now Isaac had come from[1] Beer-lahai-roi, and was settled in the Negeb. **63** Isaac went out in the evening to walk[2] in the field; and looking up, he saw camels coming. **64** And Rebekah looked up, and when she saw Isaac, she slipped quickly from the camel, **65** and said to the servant, "Who is the man over there, walking in the field to meet us?" The servant said, "It is my master." So she took her veil and covered herself. **66** And the servant told Isaac all the things that he had done. **67** Then Isaac brought her into his mother Sarah's tent. He took Rebekah, and she became his wife; and he loved her. So Isaac was comforted after his mother's death.

[1] Syr Tg: Heb *from coming to*

[2] Meaning of Heb word is uncertain

C. GENESIS 29–30

1 Then Jacob went on his journey, and came to the land of the people of the east. **2** As he looked, he saw a well in the field and three flocks of sheep lying there beside it; for out of that well the flocks were watered. The stone on the well's mouth was large, **3** and when all the flocks were gathered there, the shepherds would roll the stone from the mouth of the well, and water the sheep, and put the stone back in its place on the mouth of the well.

4 Jacob said to them, "My brothers, where do you come from?" They said, "We are from Haran." **5** He said to them, "Do you know Laban son of Nahor?" They said, "We do." **6** He said to them, "Is it well with him?" "Yes," they replied, "and here is his daughter Rachel, coming with the sheep." **7** He said, "Look, it is still broad daylight; it is not time for the animals to be gathered together. Water the sheep, and go, pasture them." **8** But they said, "We cannot until all the flocks are gathered together, and the stone is rolled from the mouth of the well; then we water the sheep."

9 While he was still speaking with them, Rachel came with her father's sheep; for she kept them. **10** Now when Jacob saw Rachel, the daughter of his mother's brother Laban, and the sheep of his mother's brother Laban, Jacob went up and rolled the stone from the well's mouth, and watered the flock of his mother's brother Laban. **11** Then Jacob kissed Rachel, and wept aloud. **12** And Jacob told Rachel that he was her father's kinsman, and that he was Rebekah's son; and she ran and told her father.

13 When Laban heard the news about his sister's son Jacob, he ran to meet him; he embraced him and kissed him, and brought him to his house. Jacob[1] told Laban all these things, **14** and Laban said to him, "Surely you are my bone and my flesh!" And he stayed with him a month.

15 Then Laban said to Jacob, "Because you are my kinsman, should you therefore serve me for nothing? Tell me, what shall your wages be?" **16** Now Laban had two daughters; the name of the elder was Leah, and the name of the younger was Rachel. **17** Leah's eyes were lovely,[2] and Rachel was graceful and beautiful. **18** Jacob loved Rachel; so he said, "I will serve you seven years for your younger daughter Rachel." **19** Laban said, "It is better that I give her to you than that I should give her to any other man; stay with me." **20** So Jacob served seven years for Rachel, and they seemed to him but a few days because of the love he had for her.

21 Then Jacob said to Laban, "Give me my wife that I may go in to her, for my time is completed." **22** So Laban gathered together all the people of the place, and made a feast. **23** But in the evening he took his daughter Leah and brought her to Jacob; and he went in to her. **24** (Laban gave his maid Zilpah to his daughter Leah to be her maid.) **25** When morning came, it was Leah! And Jacob said to Laban, "What is this you have done to me? Did I not serve with you for Rachel? Why then have you deceived me?" **26** Laban

[1] Heb *He*

[2] Meaning of Heb uncertain

said, “This is not done in our country--giving the younger before the firstborn. **27** Complete the week of this one, and we will give you the other also in return for serving me another seven years.” **28** Jacob did so, and completed her week; then Laban gave him his daughter Rachel as a wife. **29** (Laban gave his maid Bilhah to his daughter Rachel to be her maid.) **30** So Jacob went in to Rachel also, and he loved Rachel more than Leah. He served Laban[3] for another seven years.

31 When the Lord saw that Leah was unloved, he opened her womb; but Rachel was barren. **32** Leah conceived and bore a son, and she named him Reuben;[4] for she said, “Because the Lord has looked on my affliction; surely now my husband will love me.” **33** She conceived again and bore a son, and said, “Because the Lord has heard[5] that I am hated, he has given me this son also”; and she named him Simeon. **34** Again she conceived and bore a son, and said, “Now this time my husband will be joined[6] to me, because I have borne him three sons”; therefore he was named Levi. **35** She conceived again and bore a son, and said, “This time I will praise[7] the Lord”; therefore she named him Judah; then she ceased bearing.

30 **1** When Rachel saw that she bore Jacob no children, she envied her sister; and she said to Jacob, “Give me children, or I shall die!” **2** Jacob became very angry with Rachel and said, “Am I in the place of God, who has withheld from you the fruit of the womb?” **3** Then she said, “Here is my maid Bilhah; go in to her, that she may bear upon my knees and that I too may have children through her.” **4** So she gave him her maid Bilhah as a wife; and Jacob went in to her. **5** And Bilhah conceived and bore Jacob a son. **6** Then Rachel said, “God has judged me, and has also heard my voice and given me a son”; therefore she named him Dan.[8] **7** Rachel’s maid Bilhah conceived again and bore Jacob a second son. **8** Then Rachel said, “With mighty wrestlings I have wrestled[9] with my sister, and have prevailed”; so she named him Naphtali.

9 When Leah saw that she had ceased bearing children, she took her maid Zilpah and gave her to Jacob as a wife. **10** Then Leah’s maid Zilpah bore Jacob a son. **11** And Leah said, “Good fortune!” so she named him Gad.[10] **12** Leah’s maid Zilpah bore Jacob a second son. **13** And Leah said, “Happy am I! For the women will call me happy”; so she named him Asher.[11]

14 In the days of wheat harvest Reuben went and found mandrakes in the field, and brought them to his mother Leah. Then Rachel said to Leah, “Please give me some of your son’s mandrakes.” **15** But she said to her, “Is it a small matter that you have taken away my husband? Would you take away my son’s mandrakes also?” Rachel said, “Then he may lie with you tonight for your son’s mandrakes.” **16** When Jacob came from the field in the evening, Leah went out to meet him, and said, “You must come in to me; for I have hired you with my son’s mandrakes.” So he lay with her that night. **17** And God heeded Leah, and she conceived and bore Jacob a fifth son. **18** Leah said, “God has given me my hire[12] because I gave my maid to my husband”; so she named him Issachar. **19** And Leah conceived again, and she bore Jacob a sixth son. **20** Then Leah said, “God has endowed me with a good dowry; now my husband will honor[13] me, because I have borne him six sons”; so she named him Zebulun. **21** Afterwards she bore a daughter, and named her Dinah.

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[3] Heb *him*

[4] That is *See, a son*

[5] Heb *shama*

[6] Heb *lawah*

[7] Heb *hodah*

[8] That is *He judged*

[9] Heb *niphtal*

[10] That is *Fortune*

[11] That is *Happy*

[12] Heb *sakar*

[13] Heb *zabal*

22 Then God remembered Rachel, and God heeded her and opened her womb. **23** She conceived and bore a son, and said, "God has taken away my reproach"; **24** and she named him Joseph,[14] saying, "May the Lord add to me another son!"

25 When Rachel had borne Joseph, Jacob said to Laban, "Send me away, that I may go to my own home and country. **26** Give me my wives and my children for whom I have served you, and let me go; for you know very well the service I have given you." **27** But Laban said to him, "If you will allow me to say so, I have learned by divination that the Lord has blessed me because of you; **28** name your wages, and I will give it." **29** Jacob said to him, "You yourself know how I have served you, and how your cattle have fared with me. **30** For you had little before I came, and it has increased abundantly; and the Lord has blessed you wherever I turned. But now when shall I provide for my own household also?" **31** He said, "What shall I give you?" Jacob said, "You shall not give me anything; if you will do this for me, I will again feed your flock and keep it: **32** let me pass through all your flock today, removing from it every speckled and spotted sheep and every black lamb, and the spotted and speckled among the goats; and such shall be my wages. **33** So my honesty will answer for me later, when you come to look into my wages with you. Every one that is not speckled and spotted among the goats and black among the lambs, if found with me, shall be counted stolen." **34** Laban said, "Good! Let it be as you have said." **35** But that day Laban removed the male goats that were striped and spotted, and all the female goats that were speckled and spotted, every one that had white on it, and every lamb that was black, and put them in charge of his sons; **36** and he set a distance of three days' journey between himself and Jacob, while Jacob was pasturing the rest of Laban's flock.

37 Then Jacob took fresh rods of poplar and almond and plane, and peeled white streaks in them, exposing the white of the rods. **38** He set the rods that he had peeled in front of the flocks in the troughs, that is, the watering places, where the flocks came to drink. And since they bred when they came to drink, **39** the flocks bred in front of the rods, and so the flocks produced young that were striped, speckled, and spotted. **40** Jacob separated the lambs, and set the faces of the flocks toward the striped and the completely black animals in the flock of Laban; and he put his own droves apart, and did not put them with Laban's flock. **41** Whenever the stronger of the flock were breeding, Jacob laid the rods in the troughs before the eyes of the flock, that they might breed among the rods, **42** but for the feebler of the flock he did not lay them there; so the feebler were Laban's, and the stronger Jacob's. **43** Thus the man grew exceedingly rich, and had large flocks, and male and female slaves, and camels and donkeys.

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[14] That is *He adds*

D. THE MOSAIC LAW

a. Exodus 22:16–17

When a man seduces a virgin who is not engaged to be married, and lies with her, he shall give the bride-price for her and make her his wife. **17** But if her father refuses to give her to him, he shall pay an amount equal to the bride-price for virgins.

b. Leviticus 18

1 The Lord spoke to Moses, saying:

2 Speak to the people of Israel and say to them: I am the Lord your God. **3** You shall not do as they do in the land of Egypt, where you lived, and you shall not do as they do in the land of Canaan, to which I am bringing you. You shall not follow their statutes. **4** My ordinances you shall observe and my statutes you shall keep, following them: I am the Lord your God. **5** You shall keep my statutes and my ordinances; by doing so one shall live: I am the Lord.

6 None of you shall approach anyone near of kin to uncover nakedness: I am the Lord. **7** You shall not uncover the nakedness of your father, which is the nakedness of your mother; she is your mother, you shall not uncover her nakedness. **8** You shall not uncover the nakedness of your father's wife; it is the nakedness

of your father. **9** You shall not uncover the nakedness of your sister, your father's daughter or your mother's daughter, whether born at home or born abroad. **10** You shall not uncover the nakedness of your son's daughter or of your daughter's daughter, for their nakedness is your own nakedness. **11** You shall not uncover the nakedness of your father's wife's daughter, begotten by your father, since she is your sister. **12** You shall not uncover the nakedness of your father's sister; she is your father's flesh. **13** You shall not uncover the nakedness of your mother's sister, for she is your mother's flesh. **14** You shall not uncover the nakedness of your father's brother, that is, you shall not approach his wife; she is your aunt. **15** You shall not uncover the nakedness of your daughter-in-law: she is your son's wife; you shall not uncover her nakedness.

16 You shall not uncover the nakedness of your brother's wife; it is your brother's nakedness. **17** You shall not uncover the nakedness of a woman and her daughter, and you shall not take[1] her son's daughter or her daughter's daughter to uncover her nakedness; they are your[2] flesh; it is depravity. **18** And you shall not take[3] a woman as a rival to her sister, uncovering her nakedness while her sister is still alive.

19 You shall not approach a woman to uncover her nakedness while she is in her menstrual uncleanness. **20** You shall not have sexual relations with your kinsman's wife, and defile yourself with her. **21** You shall not give any of your offspring to sacrifice them[4] to Molech, and so profane the name of your God: I am the Lord. **22** You shall not lie with a male as with a woman; it is an abomination. **23** You shall not have sexual relations with any animal and defile yourself with it, nor shall any woman give herself to an animal to have sexual relations with it: it is perversion.

24 Do not defile yourselves in any of these ways, for by all these practices the nations I am casting out before you have defiled themselves. **25** Thus the land became defiled; and I punished it for its iniquity, and the land vomited out its inhabitants. **26** But you shall keep my statutes and my ordinances and commit none of these abominations, either the citizen or the alien who resides among you **27** (for the inhabitants of the land, who were before you, committed all of these abominations, and the land became defiled); **28** otherwise the land will vomit you out for defiling it, as it vomited out the nation that was before you. **29** For whoever commits any of these abominations shall be cut off from their people. **30** So keep my charge not to commit any of these abominations that were done before you, and not to defile yourselves by them: I am the Lord your God.

c. Deuteronomy 22:13–28

13 Suppose a man marries a woman, but after going in to her, he dislikes her **14** and makes up charges against her, slandering her by saying, "I married this woman; but when I lay with her, I did not find evidence of her virginity." **15** The father of the young woman and her mother shall then submit the evidence of the young woman's virginity to the elders of the city at the gate. **16** The father of the young woman shall say to the elders: "I gave my daughter in marriage to this man but he dislikes her; **17** now he has made up charges against her, saying, 'I did not find evidence of your daughter's virginity.' But here is the evidence of my daughter's virginity." Then they shall spread out the cloth before the elders of the town. **18** The elders of that town shall take the man and punish him; **19** they shall fine him one hundred shekels of silver (which they shall give to the young woman's father) because he has slandered a virgin of Israel. She shall remain his wife; he shall not be permitted to divorce her as long as he lives.

20 If, however, this charge is true, that evidence of the young woman's virginity was not found, **21** then they shall bring the young woman out to the entrance of her father's house and the men of her town shall stone her to death, because she committed a disgraceful act in Israel by prostituting herself in her father's house. So you shall purge the evil from your midst.

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[1] Or *marry*

[2] Gk: Heb lacks *your*

[3] Or *marry*

[4] Heb *to pass them over*

22 If a man is caught lying with the wife of another man, both of them shall die, the man who lay with the woman as well as the woman. So you shall purge the evil from Israel.

23 If there is a young woman, a virgin already engaged to be married, and a man meets her in the town and lies with her, **24** you shall bring both of them to the gate of that town and stone them to death, the young woman because she did not cry for help in the town and the man because he violated his neighbor's wife. So you shall purge the evil from your midst.

25 But if the man meets the engaged woman in the open country, and the man seizes her and lies with her, then only the man who lay with her shall die. **26** You shall do nothing to the young woman; the young woman has not committed an offense punishable by death, because this case is like that of someone who attacks and murders a neighbor. **27** Since he found her in the open country, the engaged woman may have cried for help, but there was no one to rescue her.

22 28 If a man meets a virgin who is not engaged, and seizes her and lies with her, and they are caught in the act, **29** the man who lay with her shall give fifty shekels of silver to the young woman's father, and she shall become his wife. Because he violated her he shall not be permitted to divorce her as long as he lives.

30 [5]A man shall not marry his father's wife, thereby violating his father's rights.[6]

d. Deuteronomy 24:1–5

1 Suppose a man enters into marriage with a woman, but she does not please him because he finds something objectionable about her, and so he writes her a certificate of divorce, puts it in her hand, and sends her out of his house; she then leaves his house **2** and goes off to become another man's wife. **3** Then suppose the second man dislikes her, writes her a bill of divorce, puts it in her hand, and sends her out of his house (or the second man who married her dies); **4** her first husband, who sent her away, is not permitted to take her again to be his wife after she has been defiled; for that would be abhorrent to the Lord, and you shall not bring guilt on the land that the Lord your God is giving you as a possession.

5 When a man is newly married, he shall not go out with the army or be charged with any related duty. He shall be free at home one year, to be happy with the wife whom he has married.

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[5] Ch 23.1 in Heb

[6] Heb *uncovering his father's skirt*

E. RUTH 3:1–4.13

3 1 Naomi her mother-in-law said to her, "My daughter, I need to seek some security for you, so that it may be well with you. **2** Now here is our kinsman Boaz, with whose young women you have been working. See, he is winnowing barley tonight at the threshing floor. **3** Now wash and anoint yourself, and put on your best clothes and go down to the threshing floor; but do not make yourself known to the man until he has finished eating and drinking. **4** When he lies down, observe the place where he lies; then, go and uncover his feet and lie down; and he will tell you what to do." **5** She said to her, "All that you tell me I will do."

6 So she went down to the threshing floor and did just as her mother-in-law had instructed her. **7** When Boaz had eaten and drunk, and he was in a contented mood, he went to lie down at the end of the heap of grain. Then she came stealthily and uncovered his feet, and lay down. **8** At midnight the man was startled, and turned over, and there, lying at his feet, was a woman! **9** He said, "Who are you?" And she answered, "I am Ruth, your servant; spread your cloak over your servant, for you are next-of-kin."[1] **10** He said, "May you

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[1] Or *one with the right to redeem*

be blessed by the Lord, my daughter; this last instance of your loyalty is better than the first; you have not gone after young men, whether poor or rich. **11** And now, my daughter, do not be afraid, I will do for you all that you ask, for all the assembly of my people know that you are a worthy woman. **12** But now, though it is true that I am a near kinsman, there is another kinsman more closely related than I. **13** Remain this night, and in the morning, if he will act as next-of-kin[2] for you, good; let him do it. If he is not willing to act as next-of-kin[3] for you, then, as the Lord lives, I will act as next-of-kin[4] for you. Lie down until the morning." **14** So she lay at his feet until morning, but got up before one person could recognize another; for he said, "It must not be known that the woman came to the threshing floor." **15** Then he said, "Bring the cloak you are wearing and hold it out." So she held it, and he measured out six measures of barley, and put it on her back; then he went into the city. **16** She came to her mother-in-law, who said, "How did things go with you,[5] my daughter?" Then she told her all that the man had done for her, **17** saying, "He gave me these six measures of barley, for he said, 'Do not go back to your mother-in-law empty-handed.'" **18** She replied, "Wait, my daughter, until you learn how the matter turns out, for the man will not rest, but will settle the matter today."

4 **1** No sooner had Boaz gone up to the gate and sat down there than the next-of-kin,[6] of whom Boaz had spoken, came passing by. So Boaz said, "Come over, friend; sit down here." And he went over and sat down. **2** Then Boaz took ten men of the elders of the city, and said, "Sit down here"; so they sat down. **3** He then said to the next-of-kin,[7] "Naomi, who has come back from the country of Moab, is selling the parcel of land that belonged to our kinsman Elimelech. **4** So I thought I would tell you of it, and say: Buy it in the presence of those sitting here, and in the presence of the elders of my people. If you will redeem it, redeem it; but if you will not, tell me, so that I may know; for there is no one prior to you to redeem it, and I come after you." So he said, "I will redeem it." **5** Then Boaz said, "The day you acquire the field from the hand of Naomi, you are also acquiring Ruth[8] the Moabite, the widow of the dead man, to maintain the dead man's name on his inheritance." **6** At this, the next-of-kin[9] said, "I cannot redeem it for myself without damaging my own inheritance. Take my right of redemption yourself, for I cannot redeem it."

7 Now this was the custom in former times in Israel concerning redeeming and exchanging: to confirm a transaction, the one took off a sandal and gave it to the other; this was the manner of attesting in Israel. **8** So when the next-of-kin[10] said to Boaz, "Acquire it for yourself," he took off his sandal. **9** Then Boaz said to the elders and all the people, "Today you are witnesses that I have acquired from the hand of Naomi all that belonged to Elimelech and all that belonged to Chilion and Mahlon. **10** I have also acquired Ruth the Moabite, the wife of Mahlon, to be my wife, to maintain the dead man's name on his inheritance, in order that the name of the dead may not be cut off from his kindred and from the gate of his native place; today you are witnesses." **11** Then all the people who were at the gate, along with the elders, said, "We are witnesses. May the Lord make the woman who is coming into your house like Rachel and Leah, who together built up the house of Israel. May you produce children in Ephrathah and bestow a name in Bethlehem; **12** and, through the children that the Lord will give you by this young woman, may your house be like the house of Perez, whom Tamar bore to Judah."

13 So Boaz took Ruth and she became his wife. When they came together, the Lord made her conceive, and she bore a son.

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[2] Or *one with the right to redeem*

[3] Or *one with the right to redeem*

[4] Or *one with the right to redeem*

[5] Or *"Who are you,*

[6] Or *one with the right to redeem*

[7] Or *one with the right to redeem*

[8] OLVg: Heb *from the hand of Naomi and from Ruth*

[9] Or *one with the right to redeem*

[10] Or *one with the right to redeem*

F. HOSEA 1–2

1 1 The word of the Lord that came to Hosea son of Beeri, in the days of Kings Uzziah, Jotham, Ahaz, and Hezekiah of Judah, and in the days of King Jeroboam son of Joash of Israel.

2 When the Lord first spoke through Hosea, the Lord said to Hosea, "Go, take for yourself a wife of whoredom and have children of whoredom, for the land commits great whoredom by forsaking the Lord." **3** So he went and took Gomer daughter of Diblaim, and she conceived and bore him a son.

4 And the Lord said to him, "Name him Jezreel;[1] for in a little while I will punish the house of Jehu for the blood of Jezreel, and I will put an end to the kingdom of the house of Israel. **5** On that day I will break the bow of Israel in the valley of Jezreel."

6 She conceived again and bore a daughter. Then the Lord said to him, "Name her Lo-ruhamah,[2] for I will no longer have pity on the house of Israel or forgive them. **7** But I will have pity on the house of Judah, and I will save them by the Lord their God; I will not save them by bow, or by sword, or by war, or by horses, or by horsemen."

8 When she had weaned Lo-ruhamah, she conceived and bore a son. **9** Then the Lord said, "Name him Lo-ammi,[3] for you are not my people and I am not your God."[4]

10[5] Yet the number of the people of Israel shall be like the sand of the sea, which can be neither measured nor numbered; and in the place where it was said to them, "You are not my people," it shall be said to them, "Children of the living God." **11** The people of Judah and the people of Israel shall be gathered together, and they shall appoint for themselves one head; and they shall take possession of[6] the land, for great shall be the day of Jezreel.

2 1 [7]Say to your brother,[8] Ammi,[9] and to your sister,[10] Ruhamah.[11]
2 Plead with your mother, plead—
for she is not my wife,
and I am not her husband--
that she put away her whoring from her face,
and her adultery from between her breasts,
3 or I will strip her naked
and expose her as in the day she was born,
and make her like a wilderness,
and turn her into a parched land,
and kill her with thirst.
4 Upon her children also I will have no pity,
because they are children of whoredom.
5 For their mother has played the whore;

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[1] That is *God sows*

[2] That is *Not pitied*

[3] That is *Not my people*

[4] Heb *I am not yours*

[5] Ch 2.1 in Heb

[6] Heb *rise up from*

[7] Ch 2.3 in Heb

[8] Gk: Heb *brothers*

[9] That is *My people*

[10] Gk Vg: Heb *sisters*

[11] That is *Pitied*

she who conceived them has acted shamefully.
For she said, “I will go after my lovers;
they give me my bread and my water,
my wool and my flax, my oil and my drink.”
6 Therefore I will hedge up her[12] way with thorns;
and I will build a wall against her,
so that she cannot find her paths.
7 She shall pursue her lovers,
but not overtake them;
and she shall seek them,
but shall not find them.
Then she shall say, “I will go
and return to my first husband,
for it was better with me then than now.”
8 She did not know
that it was I who gave her
the grain, the wine, and the oil,
and who lavished upon her silver
and gold that they used for Baal.
9 Therefore I will take back
my grain in its time,
and my wine in its season;
and I will take away my wool and my flax,
which were to cover her nakedness.
10 Now I will uncover her shame
in the sight of her lovers,
and no one shall rescue her out of my hand.
11 I will put an end to all her mirth,
her festivals, her new moons, her sabbaths,
and all her appointed festivals.
12 I will lay waste her vines and her fig trees,
of which she said,
“These are my pay,
which my lovers have given me.”
I will make them a forest,
and the wild animals shall devour them.
13 I will punish her for the festival days of the Baals,
when she offered incense to them
and decked herself with her ring and jewelry,
and went after her lovers,
and forgot me, says the Lord.

14 Therefore, I will now allure her,
and bring her into the wilderness,
and speak tenderly to her.
15 From there I will give her her vineyards,
and make the Valley of Achor a door of hope.
There she shall respond as in the days of her youth,
as at the time when she came out of the land of Egypt.

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[12] Gk Syr: Heb *your*

16 On that day, says the Lord, you will call me, “My husband,” and no longer will you call me, “My Baal.”[13] **17** For I will remove the names of the Baals from her mouth, and they shall be mentioned by name no more. **18** I will make for you[14] a covenant on that day with the wild animals, the birds of the air, and the creeping things of the ground; and I will abolish[15] the bow, the sword, and war from the land; and I will make you lie down in safety. **19** And I will take you for my wife forever; I will take you for my wife in righteousness and in justice, in steadfast love, and in mercy.[16] **20** I will take you for my wife in faithfulness; and you shall know the Lord.

21 On that day I will answer, says the Lord,
I will answer the heavens
and they shall answer the earth;
22 and the earth shall answer the grain, the wine, and the oil,
and they shall answer Jezreel;[17]
23 and I will sow him[18] for myself in the land.
And I will have pity on Lo-ruhamah,[19]
and I will say to Lo-ammi,[20] “You are my people”;
and he shall say, “You are my God.”

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[13] That is, *“My master”*

[14] Heb *them*

[15] Heb *break*

[16] [The image of Israel as the bride of the Lord also appears in Is. 54.4f; 62:4f; Je. 2:2, 3:20; Ez. 16, 23.]

[17] That is *God sows*

[18] Cn: Heb *her*

[19] That is *Not pitied*

[20] That is *Not my people*

G. MALACHAI 2:11–17

11. Judah has been faithless, and abomination has been committed in Israel and in Jerusalem; for Judah has profaned the sanctuary of the LORD, which he loves, and has married the daughter of a foreign god.

12. May the LORD cut off from the tents of Jacob anyone who does this-- any to witness or answer, or to bring an offering to the LORD of hosts.

13. And this you do as well: You cover the LORD's altar with tears, with weeping and groaning because he no longer regards the offering or accepts it with favor at your hand.

14. You ask, "Why does he not?" Because the LORD was a witness between you and the wife of your youth, to whom you have been faithless, though she is your companion and your wife by covenant.

15. Did not one God make her? Both flesh and spirit are his. And what does the one God desire? Godly offspring. So look to yourselves, and do not let anyone be faithless to the wife of his youth.

16. For I hate divorce, says the LORD, the God of Israel, and covering one's garment with violence, says the LORD of hosts. So take heed to yourselves and do not be faithless.

17. You have wearied the LORD with your words. Yet you say, "How have we wearied him?" By saying, "All who do evil are good in the sight of the LORD, and he delights in them." Or by asking, "Where is the God of justice?"

H. PSALM 128

A Song of Ascents.

1 Happy is everyone who fears the Lord,
who walks in his ways.

2 You shall eat the fruit of the labor of your hands;
you shall be happy, and it shall go well with you.

3 Your wife will be like a fruitful vine
within your house;
your children will be like olive shoots
around your table.

4 Thus shall the man be blessed
who fears the Lord.

5 The Lord bless you from Zion.
May you see the prosperity of Jerusalem
all the days of your life.

6 May you see your children’s children.
Peace be upon Israel!

TOPIC 2. THE NEW TESTAMENT

Mk. 10:2–12, Lk. 16:18, Mt. 5:31–32, Mt. 19:3–12, 1 Cor. 7, Ep. 5:21–6:9
in *Jerusalem Bible*, *New Testament* (1966),† pp. 78, 120, 22, 45–6, 297–9, 336 [Footnotes omitted.]

a. Mark 10:2–12

[2]Some Pharisees approached him and asked, 'Is it against the law for a man to divorce his wife?' They were testing him. [3]He answered them, "What did Moses command you?"[4] "Moses allowed us" they said "to draw up a writ of dismissal and so to divorce." [5]Then Jesus said to them, "It was because you were so unteachable that he wrote this commandment for you. But from the beginning of creation *God made them male and female*. [Gn 1:27] [6]*This is why a man must leave father and mother*, [8]*and the two become one body*. [Gn 2:24] They are no longer two, therefore, but one body. [9]So then, what God has united, man must not divide." [10]Back in the house the disciples questioned him again about this, [11]and he said to them, "The man who divorces his wife and marries another is guilty of adultery against her. [12]And if a woman divorces her husband and marries another she is guilty of adultery too."

b. Luke 16:18

[18]"Everyone who divorces his wife and marries another is guilty of adultery, and the man who marries a woman divorced by her husband commits adultery."

c. Matthew 5:31–32

[31]"It has also been said: *Anyone who divorces his wife must give her a writ of dismissal*. [Dt 24:1] [32]But I say this to you: everyone who divorces his wife, except for the case of fornication, makes her an adulteress; and anyone who marries a divorced woman commits adultery."

d. Matthew 19:3–12

[3]Some Pharisees approached him, and to test him they said, "Is it against the Law for a man to divorce his wife on any pretext whatever?" [4]He answered, "Have you not read that the creator from the beginning *made them male and female* [Gn 1:27] [5]and that he said: *This is why a man must leave his father and mother, and cling to his wife, and the two become one body*? [Gn 2:24] [6]They are no longer two, therefore, but one body. So then, what God has united, man must not divide."

[7]They said to him, "Then why did Moses command that a writ of dismissal should be given in cases of divorce?' [8]"It was because you were so unteachable' he said "that Moses allowed you to divorce your wives, but it was not like this from the beginning. [9]Now I say this to you: the man who divorces his wife—I am not speaking of fornication—and marries another, is guilty of adultery."

[10]The disciples said to him, "If that is how things are between husband and wife, it is not advisable to marry." [11]But he replied, "It is not everyone who can accept what I have said, but only those to whom it is granted. [12]There are eunuchs born that way from their mother's womb, there are eunuchs made so by men and there are eunuchs who have made themselves that way for the sake of the kingdom. Let anyone accept this who can."

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e. 1 Corinthians 7

[1]Now for the questions about which you wrote. Yes, it is a good than for a man not to touch a woman; [2]but since sex is always a danger, let each man have his own wife and each woman her own husband. [3]The husband must give his wife what she has a right to expect, and so too the wife to the husband. [4]The wife has not rights over her own body; it is the husband who has them. In the same way, the husband has no rights over his body; the wife has them. [5]Do not refuse each other except by mutual consent, and then only for an agreed time, to leave yourselves free for prayer; then come together again in case Satan should take advantage of your weakness to tempt you. [6]This is a suggestion, not a rule: [7]I should like everyone to be like me, but everybody has his own particular gifts from God, one with a gift for one thing and another with a gift for the opposite.

[8]There is something I want to add for the sake of widows and those who are not married: it is a good thing for them to stay as they are, like me, [9]but if they cannot control the sexual urges, they should get married, since it is better to be married than to be tortured.

[10]For the married I have something to say, and this is not from me but from the Lord: a wife must not leave her husband—[11]or if she does leave him, she must either remain unmarried or else make it up with her husband—nor must a husband send his wife away.

[12]The rest is from me and not from the Lord. If a brother has a wife who is an unbeliever, and she is content to live with him, he must not send her away; [13]and if a woman has an unbeliever for a husband, and he is content to live with her, she must not leave him. [14]This is because the unbelieving husband is made one with the saints through his wife, and an unbelieving wife is made one with the saints through her husband. If this is not so, your children would be unclean, whereas in fact they are holy. [15]However, if the unbelieving partner does not consent, they may separate; in these circumstances, the brother or sister is not tied; God has called you to a life of peace. [16]If you are a wife, it may be your part to save your husband, for all you know; if a husband, for all you know, it may be your part to save your wife.

[17]For the rest, what each one has is the Lord has given him and he should continue as he was when God's call reached him. This is the ruling that I gave in all the churches. [18]If anyone had already been circumcised at the of his call, he need not disguise it, and anyone who was uncircumcised at the time of his call need not be circumcised; [19]because to be circumcised or uncircumcised means nothing: what does matter is to keep the commandments of God. [20]Let everyone stay as he was at the time of his call. [21]If, when you were called, you were a slave, do not let this bother you; but if you should have the chance of being free accept it. [22]A slave, when he is called in the Lord, becomes the Lord's freedman, and a freedman called in the Lord becomes Christ's slave. [23]You have been bought and paid for; do not be slaves of other men. [24]Each one of you, my brothers, should stay as he was before God at the time of his call.

[25]About remaining celibate, I have no directions from the Lord but give my own opinion as one who, by the Lord's mercy, has stayed faithful. [26]Well then, I believe that in these present times of stress this is right: that it is good for a man to stay as he is. [27]If you are tied to a wife, do not look for freedom; if you are free of a wife, then do not look for one. [28]But if you marry, it is no sin, and it is not a sin for a young girl to get married. They will have their troubles, though, in their married life, and I should like to spare you that.

[29]Brothers, this is what I mean: our time is growing short. Those who have wives should live as thought they had none, [30]and those who mourn should live as though they had nothing to mourn for; those who are enjoying life should live as though there were nothing to laugh about; those who life is buying things should live as though they had nothing of their own; [31]and those who have to deal with the world should not become engrossed in it. I say this because the world as we know it is passing away.

[32]I would like to see you free from all worry. An unmarried man can devote himself to the Lord's affairs, all he need worry about is pleasing the Lord; [33]but a married man has to bother about the world's affairs and devote himself to pleasing his wife: [34]he is torn two ways. In the same way an unmarried woman, like a young girl, can devote herself to the Lord's affairs; all she need worry about is being holy in body and spirit. The married woman, on the other hand, has to worry about he world's affairs and devote herself to pleasing

her husband. [35]I say this only to help you, not to put a halter round your necks, but simply to make sure that everything is as it should be, and that you give your undivided attention to the Lord.

[36]Still, if there is anyone who feels that it would not be fair to his daughter to let her grow too old for marriage, and that he should do something about it, he is free to do as he likes: he is not sinning if there is a marriage. [37]On the other hand, if someone has firmly made his mind up, without any compulsion and in complete freedom of choice, to keep his daughter as she is, he will be doing a good thing. [38]In other words, the man who sees that his daughter is married has done a good thing but the man who keeps his daughter unmarried has done something even better.

[39]A wife is tied as long as her husband is alive. But if the husband dies, she is free to marry anybody she likes, on it must be in the Lord. [40]She would be happier in my opinion if she stayed as she is—and I too have the Spirit of God, I think.

f. Ephesians 5:21–6:9

[21]Give way to one another in obedience to Christ. [22]Wives should regard their husbands as they regard the Lord, [23]since as Christ is the head of the Church and saves the whole body, so is a husband the head of his wife; [24]and as the Church submits to Christ, so should wives to their husbands in everything. [25]Husbands should love their wives just as Christ loved the Church and sacrificed himself for her [26]to make her holy. He made her clean by washing her in water with a form of words [27]so that when he took her to himself she would be glorious, with no speck or wrinkle or anything like that, but holy and faultless. [28]In the same way, husbands must love their wives as they love their own bodies; for a man to love his wife is for him to love himself. [29]A man never hates his body, but he feeds it and looks after it; and that is the way Christ treats the Church, [30]because it is his body—and we are its living parts. [31]*For this reason, a man must leave his father and mother and be joined to his wife, and the two will become one body.* [Gn 2:24] [32]This mystery has many implications; but I am saying it applies to Christ and the Church. [33]To sum up; you too, each one of you, must love his wife as he loves himself; and let every wife respect her husband.

6 [1]Children, be obedient to your parents in the Lord—that is your duty. [2]The first commandment that has a promise attached to it is: *Honour your father and mother*, [3]and the promise is: *and you will prosper and have long life in the land*. [Ex 20:12] [4]And parents, never drive your children to resentment but in bringing them up correct them and guide them as the Lord does.

[5]Slaves be obedient to your masters in this world, with deep respect and sincere loyalty, as you are obedient to Christ: [6]not only when you are under their eye, as if you had only to please men, but because you are slaves of Christ and wholeheartedly do the will of God. [7]Work hard and willingly, but do it for the sake of the Lord and not for the sake of men. [8]You can be sure that everyone, whether a slave or a free man, will be properly rewarded by the Lord for whatever work he has done well. [9]And those of you who are employers, treat your slaves in the same spirit; do without threats, remembering that they and you have the same Master in heaven and he is not impressed by one person more than by another.

TOPIC 3. ROMAN LAW

A. GAIUS, *INSTITUTES* 1 (SELECTIONS)

a. Book I (Introduction)

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 1–7, pp. [odd nos.] 2-5 [footnotes omitted][†]

BOOK I

1. Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius ciuile* (civil law) as being the special law of that *ciuitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of mankind. This distinction we shall apply in detail at the proper places.

2. The laws of the Roman people consist of *leges* (comitial enactments), plebiscites, senatusconsults, imperial constitutions, edicts of those possessing the right to issue them, and answers of the learned. **3.** A *lex* is a command and ordinance of the *populus*. A plebiscite is a command or ordinance of the *plebs*. The *plebs* differs from the *populus* in that the term *populus* designates all citizens including patricians, while the term *plebs* designates all citizens excepting patricians. Hence in former times the patricians used to maintain that they were not bound by plebiscites, these having been made without their authorization. But later a *L. Hortensia* was passed, which provided that plebiscites should bind the entire *populus*. Thereby plebiscites were equated to *leges*. **4.** A senatusconsult is a command and ordinance of the senate; it has the force of *lex*, though this has been questioned. **5.** An imperial constitution is what the emperor by decree, edict, or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his *imperium* (sovereign power) through a *lex*. **6.** The right of issuing edicts is possessed by magistrates of the Roman people. Very extensive law is contained in the edicts of the two praetors, the urban and the peregrine, whose jurisdiction is possessed in the provinces by the provincial governors; also in the edicts of the curule aediles, whose jurisdiction is possessed in the provinces of the Roman people by quaestors; no quaestors are sent to the provinces of Caesar, and consequently the aedilician edict is not published there. **7.** The answers of the learned are the decisions and opinions of those who are authorized to lay down the law. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is at liberty to follow whichever decision he pleases. This is declared by a rescript of the late emperor Hadrian.

b. Book I (Of Persons: Slave and Free)

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 8–12, pp. [odd nos.] 5–6 [footnotes omitted]

8. The whole of the law observed by us relates either to persons or to things or to actions. Let us first consider persons.

[†] Such footnotes as are there are by CD and explain omissions in the text. Bracketed ellipses […] mean that text that does exist in Gaius has been omitted in the interest of producing a more easily readable assignment.

9. The primary distinction in the law of persons is this, that all men are either free or slaves. **10.** Next, free men are either *ingenui* (freeborn) or *libertini* (freedmen). **11.** *Ingenui* are those born free, *libertini* those manumitted from lawful slavery. **12.** Next, of freedmen there are three classes: they are either Roman citizens or Latins or in the category of *dediticii*. Let us consider each class separately, and first *dediticii*. …

c. Book I (Of Persons: *Sui iuris* and *alieni iuris*)

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 48–65, 97–141, pp. [odd nos.] 17–21, 33–47 [footnotes omitted]

48. Next comes another division in the law of persons. For some persons are *sui iuris* (independent) and others are *alieni iuris* (dependant on another). **49.** Again, of those *alieni iuris* some are in *potestas*, others in *manus*, and others in *mancipium*. **50.** Let us consider first persons *alieni iuris*; for, knowing those, we shall at the same time know who are *sui iuris*. **51.** And first let us consider persons in another's *potestas.*

52. S1aves are in the *potestas* of their masters. This *potestas* is *iuris gentium*, for it is observable that among all nations alike masters have power of life and death over their slaves, and whatever is acquired through a slave is acquired for his master. **53.** But at the present day neither Roman citizens nor any other persons subject to the rule of the Roman people are allowed to treat their slaves with excessive and causeless harshness. For by a constitution of the late emperor Antoninus it is laid down that one who without cause kills his own slave is as much amenable to justice as one who kills another's. And even excessive severity on the part of masters is restrained by a constitution of the same emperor; for, on being consulted by certain provincial governors as to slaves who take refuge at the temples of the gods or the statues of the emperors, he ordained that masters whose harshness is found to be unbearable are to be forced to sell their slaves. Both enactments are just, for we ought not to abuse our lawful right—the principle under which prodigals are interdicted from administering their own property. **54.** But whereas among Roman citizens there is double ownership (for a slave may belong to a master by bonitary or by Quiritary title, or by both), a slave is held to he in the *potestas* of the master who has the bonitary title to him, even though he have not also the Quiritary. For one who has the bare Quiritary title to a slave is not considered to have *potestas* over him.

55. .Also in our *potestas* are the children whom we beget in *iustae nuptiae* (civil marriage). This right is peculiar to Roman citizens; for scarcely any other men have over their sons a power such as we have. The late emperor Hadrian declared as much in the edict he issued concerning those who petitioned him for citizenship for themselves and their children. I am not forgetting that the Galatians regard children as being in the *potestas* of their parents.

56. Thus Roman citizens have their children in their *potestas* if they take to wife Roman women, or even Latin or peregrine women with whom they have *conubium* (power to contract civil marriage). For, as the effect of *conubium* is that the children take the same status as their father, the result is that the children are not only Roman citizens, but are also in their father's *potestas.* **57.** Hence it is the practice by imperial constitution to grant to certain veterans *conubium* with the first Latin or peregrine women whom they take to wife after their discharge; children born of such a marriage become Roman citizens and in the *potestas* of their parents.

58. It is not, however, every woman whom we may take to wife, but there are some whom we must abstain from marrying. **59.** For no marriage can be contracted, and there is no *conubium*, between persons standing to each other in the relation of ascendant and descendant, for instance between father and daughter, mother and son, grandfather and granddaughter, grandmother and grandson. Persons so related who form a union are considered to have contracted a wicked and incestuous marriage. This principle is so strict that, though the relation of ascendant and descendant have come about only through adoption, they cannot he joined in matrimony; nay, even if the adoption has been dissolved, the legal position remains unaltered. Hence I cannot take to wife a woman who has come into the position of a daughter or granddaughter to me by adoption, even though I have subsequently emancipated her. **60.** Between persons collaterally related similar, but less stringent, rules obtain. **61.** Between brother and sister, whether born of the same two parents or having only one parent in common, marriage is of course forbidden. But where a woman has become my sister by adoption, though, so long as the adoption stands, there can clearly be no marriage between me and her, yet after the adoption has been dissolved by her emancipation I may take her to wife;

or again, if I myself have been emancipated, there will be no impediment to our marriage. **62.** A man may lawfully marry his brother's daughter, a practice first introduced after the late emperor Claudius married Agrippina, his brother's daughter. But to marry one's sister's daughter is unlawful. These rules are declared by imperial constitutions. **63.** Also, I may not marry my aunt, paternal or maternal, nor yet a woman who has been my mother-in-law or daughter-in-law, or my stepdaughter or stepmother. We say 'has been' because, if the marriage through which the affinity has arisen still subsists, there is another reason why she cannot become my wife, namely that a woman cannot have two husbands at the same time nor a man two wives. **64.** Accordingly, one who has contracted a wicked and incestuous marriage is considered to have neither wife nor children. Hence the offspring of such a union are considered to have a mother, but no father; consequently they are not in his *potestas*, but are in the position of children whom their mother has conceived in promiscuous intercourse, these likewise being considered to have no father, since even his identity is uncertain. Hence they are termed spurious children, a word derived either from the Greek word σποράδην describing the nature of their conception, or from *sine patre* owing to their being fatherless.

65. It happens sometimes that children who do not come under the paternal *potestas* at birth are subsequently brought under it. [An elaborate discussion of mixed marriages (citizen with non-citizen) is omitted. …]

97. Not only are the children of our bodies in our *potestas* according as we have stated, but also those whom we adopt. **98.** Adoption takes place in two ways, either by authority of the people or by the *imperium* of a magistrate, such as a praetor. **99.** By authority of the people we adopt those who are *sui iuris*. This kind of adoption is called adrogation because both the adopter is asked, that is interrogated, whether he wishes to have the person whom he is about to adopt as his lawful son, and he who is being adopted is asked whether he suffers this to take place, and the people are asked whether they sanction its taking place. By the *imperium* of a magistrate we adopt those who are in the *potestas* of their parents, whether they stand in the first degree of descent, as a son or daughter, or in a remoter degree, as a grandson or granddaughter, great-grandson or great-granddaughter. **100.** The former kind of adoption, that by authority of the people, can be performed nowhere but at Rome, whereas the latter kind is regularly performed in the provinces before the provincial governors. **101.** Further, females cannot be adopted by authority of the people, for this opinion has prevailed; but before a praetor or, in the provinces, before the proconsul or legate, females are regularly adopted. **102.** Also, adoption by authority of the people of a person below puberty has at one time been forbidden and at another time been allowed. At the present day, under an epistle addressed by the excellent emperor Antoninus to the pontiffs, it is allowed, if an adequate motive for it appears, subject to certain conditions. But before a praetor or, in a province, before the proconsul or legate, we can adopt a person of any age. **103.** On the other hand, it is common to both kinds of adoption that those who are incapable of procreation, such as the naturally impotent, can adopt. **104.** But women cannot adopt by any method, for they do not hold even the children of their bodies in their *potestas*. **105.** Also, whether the adoption has been by authority of the people or before a praetor or a provincial governor, the adopter may give the person adopted in adoption to another. **106.** Also common to both kinds of adoption is the dispute whether a younger can adopt an older person. **107.** Peculiar to adoption by authority of the people is that, if a person having children in his *potestas* gives himself in adrogation, not only is he himself subjected to the adrogator's *potestas*, but his children also come under the same *potestas*, as grandchildren.

108. Let us proceed to consider persons who are in *manu* (hand, marital power), which is another right peculiar to Roman citizens. **109.** Now, while both males and females are found in *potestas*, only females can come under *manus*. **110.** Of old, women passed into *manus* in three ways, by *usus*, *confarreatio*, and *coemptio*. **111.** A woman used to pass into *manus* by *usus* if she cohabited with her husband for a year without interruption, being as it were acquired by a usucapion of one year and so passing into her husband's family and ranking as a daughter. Hence it was provided by the Twelve Tables that any woman wishing not to come under her husband's *manus* in this way should stay away from him for three nights in each year and thus interrupt the *usus* of each year. But the whole of this institution has been in part abolished by statutes and in part obliterated by simple disuse. **112.** Entry of a woman into *manus* by *confarreatio is* effected by a kind of sacrifice offered to Jupiter Farreus, in which a spelt cake is employed, whence the name *confarreatio*. In the performance of this ceremony a number of acts and things are done, accompanied by

special formal words, in the presence of 10 witnesses. This institution still exists at the present day. For the higher flamens, that is those of Jupiter, Mars, and Quirinus, and also the *rex sacrorum*, can only be chosen from those born of parents married by *confarreatio*; indeed, no person can hold the priesthood without being himself so married. **113.** Entry of a woman into *manus* by *coemptio* takes the form of a mancipation, that is a sort of imaginary sale: in the presence of not less than 5 witnesses, being Roman citizens above puberty, and of a scale-holder, the woman is bought by him into whose *manus* she is passing. **114.** It is, however, possible for a woman to make *coemptio* not only with her husband, but also with a stranger; in other words, *coemptio* may be performed for either matrimonial or fiduciary purposes. A woman who makes a *coemptio* with her husband with the object of ranking as a daughter in his household is said to have made a *coemptio* for matrimonial purposes, whilst one who makes, whether with her husband or a stranger, a *coemptio* for some other object, such as that of evading a tutorship, is said to have done so for fiduciary purposes. **115.** What happens is as follows: a woman wishing to get rid of her existing tutors and to get another makes a *coemptio* with the *auctoritas* of her existing tutors; after that she is remancipated by her *coemptionator* to the person of her own choice and, having been manumitted *uindicta* by him, comes to have as her tutor the man by whom she has been manumitted. This person is called a fiduciary tutor, as will appear below. **115a.** Formerly too fiduciary *coemptio* used to be performed for the purpose of making a will. This was at a time when women, with certain exceptions, had not the right to make a will unless they had made a *coemptio* and had been remancipated and manumitted. But the senate on the authority of the late emperor Hadrian has dispensed from this requirement of a *coemptio*. **115b.** …[1] but if a woman makes a fiduciary *coemptio* with her husband, she nevertheless acquires the position of his daughter. For it is the accepted view that, if for any reason whatever a wife be in her husband's *manus*, she acquires a daughter's rights.

116. We have still to explain what persons are in *mancipio* (bondage). **117.** All children, male or female, who are in a parent's *potestas* can be mancipated by him in just the same manner as slaves. **118.** The same holds good of persons in *manus*: women can be mancipated in the same manner by their *coemptionatores*; indeed, although only a woman married to her *coemptionator* ranks as a daughter in his household, nevertheless a woman not married to him, and consequently not ranking as his daughter, can be mancipated by him. **118a.** For the most part women are mancipated by their parents or *coemptionatores* only when the latter desire to release them from their power, as will appear more clearly below. **119.** Now mancipation, as we have already said, is a sort of imaginary sale, and it too is an institution peculiar to Roman citizens. It is performed as follows: in the presence of not less than 5 Roman citizens of full age and also of a sixth person, having the same qualifications, known as the *libripens* (scale-holder), to hold a bronze scale, the party who is taking by the mancipation, holding a bronze ingot, says: 'I declare that this slave is mine by Quiritary right, and be he purchased to me with this bronze ingot and bronze scale.' He then strikes the scale with the ingot and gives it as a symbolic price to him from whom he is receiving by the mancipation. **120.** It is thus that both servile and free persons are mancipated, as also such animals as are *mancipi* (mancipable), namely oxen, horses, mules, and asses; lands also, whether built or unbuilt on, are mancipated in the same way, if they are *mancipi*, as are Italic lands. **121.** The mancipation of lands differs from that of other things in this point only, that persons, servile and free, and animals that are *mancipi* cannot be mancipated unless they are present—indeed, the taker by the mancipation must grasp the thing which is being mancipated to him, which is why the ceremony is called *mancipatio*, the thing being taken with the hand—whereas lands are regularly mancipated at a distance. **122.** The bronze ingot and scale are used because formerly only bronze money was in use; thus there were *asses*, double-*asses*, half- and; quarter-*asses*, but neither gold nor silver money was current, as we may gather from the law of the Twelve Tables. The value of these pieces was reckoned not by counting but by weighing. Thus for the ancients the *as* was a pound and the double-*as* two pounds (the word *dupondius*, which is still in use, means *duo pondo*), and the half- and quarter-*as* meant a proportionate fraction of a pound's weight. Consequently in early times a man paying, money did not count, but weighed it out, and hence slaves entrusted with the administration of cash were, as they still are, called dispensers. **123.** If it be asked why a woman who has made a *coemptio* differs

[1] The reading of §§ 115a–115b is uncertain, and something is missing here.

in status from persons who have been mancipated, the answer is that by making a *coemptio*, she is not reduced to a servile status, whereas persons, male or female, who have been mancipated by their parents or their *coemptionatores* are placed in the position of slaves, and so much so that they can receive an inheritance or a legacy from their holder *in mancipio* only if by the same will they are at the same time declared free, as is the law in the case of slaves. The reason of the difference is plain: the same words are used by the persons who receive them by mancipation from their parents or *coemptionatores* as in the case of slaves, whereas in *coemptio* it is otherwise.

124. Let us now consider how persons subject to another's power are freed therefrom.

125. First let us treat of those who are in *potestas*. **126.** How slaves are freed from *potestas* can be learnt from our previous exposition of their manumission. **127.** Persons in a parent's *potestas* become *sui iuris* on his death. But here we must distinguish: when a father dies, his sons and daughters; always become *sui iuris*, but when a grandfather dies, the grandsons and granddaughters do not always become *sui iuris*, but only if after their grandfather's death they will not relapse into their father's *potestas*. Thus, if at their grandfather's death their father is both alive and in the *potestas* of his father, they fall on the grandfather's death under their father's *potestas*; but if at that moment their father either is dead or has left his father's *potestas*, then, since they cannot fall under their father's *potestas*, they become *sui iuris*. **128.** Again, since one who for some crime has been interdicted from fire and water under the *L. Cornelia* loses Roman citizenship, it follows that, he being thus removed from the category of Roman citizens, his children cease to be in his *potestas* exactly as if he had died; for it is against principle that a man of peregrine status should have a Roman citizen in his *potestas*. For the like reason, if one who is in parental *potestas* is interdicted from fire and water, he ceases to be in his parent's *potestas*, because it is equally against principle that a man of peregrine status should be in the parental *potestas* of a Roman citizen. **129.** But where a parent has been taken prisoner by the enemy, though he becomes the slave of the enemy, his children's status is nevertheless in suspense owing to the *ius postliminii*, whereby those captured by the enemy, if they come back, recover all their anterior rights. Thus, if the parent returns, he will have his children in *potestas*; if, however, he dies in captivity, the children will be *sui iuris*, though whether as from the time of his death or from that of his capture is a doubtful point. Also, if a son or grandson is himself captured by the enemy, his parent's *potestas* must similarly in virtue of the *ius postliminii* be said to be in suspense. **130.** Furthermore, a male child passes out of parental *potestas* on being inaugurated *flamen* of Jupiter, and a female child on being taken as a Vestal virgin. **131.** In former times also, when the Roman people used to plant colonies in Latin districts, one who with his parent's sanction had enrolled himself in a Latin colony ceased to be in his parent's *potestas*, because he became a citizen of another State.

132. Further, children cease to be in parental *potestas* by emancipation. Now a son passes out of parental *potestas* by three mancipations, but all other children, male or female, leave it by a single mancipation. For the law of the Twelve Tab1es speaks of three mancipations only in the case of a son, its terms being these: 'if a father sells his son three times, the son shall be free of the father'. The procedure is as follows: the father mancipates the son to a third party; the latter manumits the son *uindicta*; thereupon he reverts to his father's *potestas*; the father mancipates him again, it may be to the same person or to another (the practice is to mancipate him to the same person), and that person then manumits him *uindicta* as before; thereby he returns once more into his father's *potestas*; the father mancipates him for the third time to the same or to another person (the practice is that he be mancipated to the same person), and by this mancipation he ceases to be in his father's *potestas*, even though he has not as yet been manumitted, but is still in *mancipii causa*. …[2] **133.** Note that one who holds in his *potestas* a son and a grandson by that son has full discretion either to release the son from *potestas* while retaining the grandson in *potestas*, or to keep the son in *potestas* while releasing the grandson, or to make them both *sui iuris*. The same is to be taken to apply to a great-grandson.

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[2] An entire page is illegible. It probably dealt with the third manumission necessary to make the son *sui iuris* and went on to consider the emancipation of daughters and grandchildren. § 133 is also a conjectural restoration from D.1.7.28, JI.1.12.7.

134. Further, parents cease to hold in their *potestas* those children whom they have given in adoption to others. In the case of son three mancipations are performed, with two intervening manumissions, exactly as is the practice when a father is releasing his son from *potestas* in order that he may become *sui iuris*; next, either he is remancipated to his father and it is from the father that the adopter claims him as his son before the praetor, who, if the father makes no counterclaim, adjudges the son to the claimant, or else he is not remancipated to his father, but the adopter claims him from the person with whom he is under the third mancipation. Remancipation to the father is, however, more convenient. In the case of all other children, male or female, a single mancipation suffices, and they may or may not be remancipated to the parent. In the provinces the same proceedings are gone through before the provincial governor. **135.** A child begotten by a son after that son has been mancipated once or twice is nevertheless, even if born after its father's third mancipation, in the grandfather's *potestas*, and consequently can be emancipated or given in adoption by the grandfather. But a child begotten by a son who is under his third mancipation is not born in the grandfather's *potestas*. According to Labeo he is *in mancipio* to the same person as his father; but the rule now observed is that, so long as the father remains *in mancipio*, the child's status is in suspense, and that, if the father is manumitted from *mancipium*, the child falls into the father's *potestas*, but if the father dies whilst *in mancipio*, he becomes *sui iuris*. **135a.** The same naturally holds of a child begotten by a grandson who has been mancipated once, but has not yet been manumitted. For, as we said above, in the case of a grandson a single mancipation has the same effect as three mancipations in the case of a son.

136. Also, women cease to be in their father's *potestas* by passing into *manus*. But in the case of the confarreate marriage of the wife of a *f1amen* of Jupiter a senatusconsult passed on the proposal of Maximus and Tubero has provided that she is to be considered to be in *manus* only for sacral purposes, while for all other purposes she is to be treated as though she had not entered *manus*. On the other hand, a woman who enters *manus* by *coemptio* is freed from her father's *potestas*, and it makes no difference whether she be in her husband's or a stranger's *manus*, although only women who are in their husband's *manus* rank as daughters.

137. Women cease to be in *manus* in the same ways as those by which daughters are freed from their father's *potestas*. Thus, just as daughters pass out of their father's *potestas* by a single mancipation, so women in *manus* cease by a single mancipation to be in *manus*, and if manumitted from that mancipation become *sui iuris*. **137a.** Between a woman who has made a *coemptio* with a stranger and one who has done so with her husband there is, however, this difference, that the former can compel her *coemptionator* to remancipate her to the person of her choice, whereas the latter can no more compel her husband to do this than a daughter can compel her father. But, whilst a daughter, even if adoptive, is absolutely incapable of compelling her father, a woman in the *manus* of her husband can, if she has sent him notice of divorce, compel him to release her, just as though she had never been his wife.

138. Persons in *mancipio*, since they rank as slaves, become *sui iuris* if manumitted by *uindicta*, census, or will. **139.** In this case, however, the *L. Aelia Sentia* does not apply, so that no inquiry is made into the ages of the manumitter and manumitted, nor whether the manumitter has a patron or a creditor. Neither does the numerica1 scale laid down by the *L. Fufia Caninia* apply to these persons. **140.** More than this, it is possible for them to obtain liberty by the census even against the will of their holder *in mancipio*, with the exception of one whom his father has mancipated with a proviso for remancipation to himself; for in that case the father is considered in a sense to reserve his *potestas*, in virtue of the fact that he recovers him by mancipation. Nor, we are told, does a person acquire liberty by the census against the will of his holder *in mancipio* if his father gave him in mancipation on account of his wrongful act, for example if he (the father) was condemned for theft on his account and surrendered him by mancipation to the plaintiff; for in that case the plaintiff holds him in lieu of money. **141.** Be it noted finally that we are not allowed to behave insultingly to those whom we hold *in mancipio*; if we do, we shall be legally liable for the insult. And further, a man is not detained long in this status, which for the most part is created only for a moment, as :a matter of form, except, of course, where a man is mancipated on account of wrongdoing.

d. Book I (Of Persons: *Tutela*)

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 142–200, pp. [odd nos.] 49–63 [footnotes omitted]

142. Now let us pass to another classification of persons who are neither in *potestas* nor in *manus* nor in *mancipium*, some are under *tutela* or under *curatio*, others under neither. Let us therefore see which are under *tutela* and which under *curatio*; so we shall know the others, who are under neither. **143.** First then of those who are in *tutela*.

144. Parents are allowed to appoint by will tutors to the children whom they hold in *potestas*, to males below the age of puberty, to females of whatever age, even if they be married. For the early lawyers held that women even of full age should be in *tutela* on account of their instability of judgment. **145.** Thus, if by his will a man has appointed a tutor to his son and daughter and both reach puberty, whereas the son ceases to have a tutor, the daughter none the less remains under *tutela*; for it is only by the *ius liberorum* (as mother of several children) that women are freed from *tutela* by the *L. Iulia et Papia Poppaea*. From this statement, however, we except Vestal virgins, whom even the early lawyers out of respect for their priestly office desired to be free from *tutela*; and so again it was provided by the law of the Twelve Tables. **146.** To grandsons and granddaughters we can appoint tutors by will only if they do not eventually lapse at our death into the *potestas* of their father. Thus, if my son is in my *potestas* at the time of my death, my grandsons by him cannot receive a tutor under my will, in spite of their having been in my *potestas*, for the simple reason that on my death they will he in their father's *potestas*. **147.** Just as in a number of other cases posthumous children are treated as if already born, so in the present case it is settled that tutors can he appointed by will to posthumous children no less than to those already born, provided that in the given circumstances they would, if born in the testator's lifetime, come under his *potestas*. Such children we can also institute as our heirs, whereas we may not institute stranger posthumous children. **148.** To a wife in one's *manus* one can appoint a tutor exactly as to a daughter, and to a daughter-in-law in one's son's *manus* exactly as to a granddaughter. **149.** The most correct form of appointing a tutor is: 'I give Lucius Titius as tutor to my children' or 'to my wife'; but it is also considered a correct appointment if the will reads: 'Let Lucius Titius be tutor to my children' or 'to my wife'. **150.** In the case, however, of a wife in *manus* option of tutor is admitted, that is to say the will may allow her to choose whom she likes for her tutor. The form is: 'I give my wife Titia the option of a tutor'; this permits her to choose a tutor for all purposes or, it may be, for only one or two. **151.** The option given may be unlimited or limited. **152.** An unlimited option is commonly given in the form just stated; a limited option thus: 'I give my wife Titia the option of a tutor not more than once' or 'not more than twice'. **153.** Between these two options there is a wide difference: a woman having an unlimited option is able to choose a tutor once, twice, thrice, or oftener, whereas one having a limited option can do so only up to the number of times granted—once or twice, as the case may be, and not oftener. **154.** Tutors appointed by name in a will are called *datiui*, those selected under an option *optivi*.

155. Those to whom no tutor has been appointed by will have under the law of the Twelve Tables their agnates as tutors; these are called *legitimi*. **156.** Agnates are those akin to each other through persons of the male sex, being as it were cognates on the father's side, for instance one's brother by the same father, his son and his grandson by that son, or again one's paternal uncle, his son, and his grandson by that son. Those connected through persons of the female sex are not agnates, but cognates related only by natural law. Accordingly, between a mother's brother and her son there is not agnation, but cognation; again, the son of my father's or my mother's sister is not my agnate, but my cognate, and of course my relation to him is the same, since children follow their father's, not their mother's, family. **157.** In former times, under the law of the Twelve Tables, women as well as males had their agnates for tutors, but the subsequent *L. Claudia* has abolished the *tutela* of agnates so far as women are concerned, with the result that a male below puberty has as tutor his brother, if of full age, or his paternal uncle, whereas a woman cannot have a tutor of this kind. **158.** *By capitis deminutio* the tie of agnation is ended, but that of cognition is unaffected, because considerations of civil law can destroy civil but not natural rights. **159.** *Capitis deminutio is* a change of previous status; it occurs in three ways, there being *capitis deminutio maxima*, *minor* (also called *media*), and *minima*. **160.** There is *capitis deminutio maxima* when a man loses both citizenship and freedom at the same time. This happens to those who evade inscription in the census, whom the regulations for the census

order to be sold. A similar legal provision …[3] who in contravention of that *lex* take up residence in the city of Rome. Another case is that of a woman who under the *SC. Claudianum* becomes enslaved to the owner of a slave with whom she has cohabited against the will and warning of that owner. **161.** There is *capitis deminutio, minor* or *media* when citizenship is lost but freedom is retained, as happens to one interdicted from fire and water. **162.** There is *capitis deminutio minima* when, though both citizenship and freedom are retained, there is a change of status, as happens to those who are adopted or who mate a *coemptio,* and to those given in mancipation and manumitted from it, so much so that a man undergoes *capitis deminutio* every time that he is mancipated or manumitted. **163.** Now, the right of agnation is destroyed not only by *capitis deminutio maxima* and *minor*, but also by *capitis deminutio minima*. Thus, if of two children a father has emancipated one, after the father's death neither can be the other's tutor by right of agnation. **164.** But though a *tutela* goes to agnates, it does not go to all of them at the same time, but only to those standing in the nearest degree. …[4]

165. By the law of the Twelve Tables also the *tutela* of freedmen below puberty and of freedwomen belongs to their patrons and their patrons' children. This *tutela* likewise is styled *legitima,* not that there is any express provision concerning it in the *lex,* but because it has become accepted by interpretation exactly as though it had been introduced by the *lex* in so many words. For from the fact that the statute ordained that succession to freedmen and freedwomen dying intestate should go to their patrons and their patrons' children, the early lawyers inferred that the intention of the statute was that *tutela* over them should go to the same persons, seeing that it had ordained that agnates whom it called to succession should also be tutors. **166.** On the analogy of the *tutela* of patrons yet another *tutela* has become accepted, which also is styled *legitima*. For if one mancipates to another one's son, grandson, or great-grandson who is below puberty, or one's daughter, granddaughter, or great-granddaughter whether of full age or not, with a proviso for remancipation to oneself, and when they have been remancipated manumits them, one will be their *legitimus tutor*.

166a. There are other *tutelae* that are called *fiduciariae,* namely those that come to us through our having manumitted a free person mancipated to us by a parent or *coemptionator*. **167.** But *tutela* over Latin freedwomen and over Latin freedmen below puberty does not in all cases go to their manumitters and their children, but to those to whom before their manumission they belonged by Quiritary title. Therefore, if a female slave is yours by Quiritary title but mine by bonitary, manumission by me alone and not by you can make her a Latin, and her estate goes to me. Her tutela, however, falls to you; for so the *L. Iunia* provides. But if she has been made a Latin by one who owns her by both bonitary and Quiritary title, then both her estate and her *tutela* go to him.

168. *Tutela* over women is allowed to be ceded *in iure* to another by agnates, patrons, and manumitters of free persons, but *tutela* over male wards is not allowed to be ceded, because, being terminated when the ward reaches puberty, it is not considered burdensome. **169.** The person to whom a *tutela is* ceded is called a *cessicius tutor*. **170.** If this tutor dies or undergoes *capitis deminutio,* the *tutela* reverts to the tutor who ceded it. Likewise, if he who ceded it himself dies or undergoes *capitis deminutio,* the *tutela* departs from the *cessicius* and reverts to him who stands in the next degree after the ceder in regard to that *tutela*. **171.** So far, however, as agnates are concerned no question of tutela *cessicia* arises at the present day, since agnatic *tutela* over women has been abolished by the *L. Claudia*. **172.** But some have held that fiduciary tutors also have no right of ceding their tutela, inasmuch as they have subjected themselves to the burden by their own act; but even if that view be accepted, the same should not be said in the case of a parent who has mancipated a daughter, granddaughter, or great-granddaughter to a third party with a proviso for remancipation to himself and who has manumitted her after such remancipation, since he is regarded as a *legitimus tutor* and should he accorded no less respect than a patron.

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[3] One and a half lines illegible.

[4] Seventeen lines are virtually illegible. The topic was probably the *legitima tutela* of *gentiles* (cf. GI.3.17) and probably another topic as well.

173. Furthermore, by a *senatusconsultum* women are allowed to apply for another tutor in place of a tutor who is absent; thereupon the previous tutor is retired. It does not matter how far away he is. **174.** But by an express exception a freedwoman is not allowed to apply for another tutor in place of her absent patron. **175.** We place on the same footing as a patron a parent who, by manumitting a daughter, granddaughter, or great-granddaughter after her remancipation to himself, has acquired *legitima tutela* over her. His children, however, are accounted fiduciary tutors, whereas a patron's children acquire the same kind of *tutela* as their parent had. **176.** But sometimes a woman is allowed to apply for another tutor in place of even an absent patron, for instance in order to accept an inheritance. **177.** The same has been decreed by the senate where a patron's son is himself a ward. **178.** For by the *L. Iulia de maritandis ordinibus* (regulating the marriages of the orders) a woman in the *legitima tutela* of a ward may apply to the urban praetor for a tutor for the purpose of creating a *dos* (dowry). **179.** Of course a patron's son becomes tutor of his father's freedwoman even if he be below puberty, though he is unable to give *auctoritas* in any matter, seeing that he himself is not allowed to do any act without his own tutor's *auctoritas*. **180.** Again, a woman in the *legitima tutela* of a lunatic or a dumb man is allowed by the senatusconsult to apply for a tutor for the purpose of creating a *dos*. 18I. In the above cases it is clear that the *tutela* of a patron or a patron's son remains unimpaired. **182.** The senate has further decreed that if the tutor of a male or female ward be removed from his tutela as suspect, or be excused from office on some lawful ground, another tutor shall be appointed in his place; whereupon the previous tutor loses his *tutela*. **183.** The practice in all these cases is the same at Rome and in the provinces, namely that application for a tutor should be made at Rome to the praetor and in the provinces to the provincial governor.

184. In earlier times, when the *legis actiones* were in use, a tutor used to be appointed if there was to be a *legis actio* between a tutor and his ward, whether a woman or a male under puberty. For, inasmuch as the tutor could not himself give *auctoritas* in a matter in which he was himself interested, another tutor used to be appointed, in order that the *legis actio* might be carried through with his *auctoritas*. He was called a *praetorius tutor*, because appointed by the urban praetor. Some hold that since the abolition of the *legis actiones* this case of appointment of a tutor has gone out of use, but another view is that it is still available if the proceedings in view be by *iudicium legitimum.*

185. If a person has no tutor at all, one is appointed for him, at Rome by the praetor and a majority of the tribunes of the *plebs* under the *L. Atilia*, who is called *Atilianus tutor*, and in the provinces by the provincial governors under the *L. Iulia et Titia*. **186.** Accordingly, where a tutor has been appointed by a will subject to a condition or as from a certain date, a tutor can be appointed pending the realization of the condition or the arrival of the date. Again, where the testamentary appointment is absolute, a tutor may be applied for under the *leges* mentioned during such time as no one has qualified as heir; the tutor appointed ceases to be tutor as soon as someone becomes tutor under the will. **187.** Application for a tutor should also be made under the same *leges* if a tutor has been captured by the enemy; this appointed tutor ceases to be tutor if the captive tutor returns to Roman territory; for *iure postliminii* he recovers his *tutela* on his return.

188. From all this it is evident how many species or varieties of *tutela* there are. But to inquire into the number of *genera* between which these species are distributed would involve a long discussion, this being a point on which the older lawyers have been exceedingly doubtful. For our part, having dealt with the matter very carefully in our commentary on the Edict and in our books *ex Quinto Mucio*, we omit the whole discussion. It is enough to observe that some, for instance Quintus Mucius, have said that there are five genera, others, for instance Servius Sulpicius, that there are three, others, for instance Labeo, that there are two, while others have held that there are as many genera as there are species.

189. That persons below puberty should he under guardianship occurs by the law of every State, it being consonant with natural reason that a person of immature age should be governed by the guardianship of another person; indeed, there can hardly be any State in which parents are not allowed to appoint guardians to their children below puberty by their will, though, as we have remarked, it seems that only Roman citizens have their children in their *potestas*. **190.** But hardly any valid argument seems to exist in favour of women of full age being in *tutela*. That which is commonly accepted, namely that they are very liable to be deceived owing to their instabi1ity of judgment and that therefore in fairness they should he governed by the *auctoritas* of tutors, seems more specious than true. For women of full age conduct their own affairs, the

interposition of their tutor's *auctoritas* in certain cases being a mere matter of form; indeed, often a tutor is compelled by the praetor to give *auctoritas* even against his will. **191.** This is why no action on the *tutela* lies at the suit of a woman against her tutor. In contrast, where tutors manage the affairs of a male or female ward below age, they are held to account to their wards on their attaining, full age by the *tutelae iudicium*. **192.** It must, however, he allowed that the *legitima tutela* of a patron or a parent is of some real efficacy, in that such guardians are not compelled to give *auctoritas* for the making of a will, the alienation of *res mancipi*, or the incurring of obligations, except where a strong reason for alienating *res mancipi* or incurring obligations exists. A11 this is provided in the interest of the tutors themselves, in order that, being entitled to the inheritance of their wards should these die intestate, they may not he excluded from it by a will nor receive it rendered less lucrative by the alienation of the more valuable property or by debts incurred. **193.** Among peregrines women are not in *tutela* in the same way as with us; still, in general, they are in a sort of *tutela:* a law of the Bithynians, for example, ordains that if a woman enters into any transaction, it must be authorized by her husband or full-grown son.

194. Freeborn women are released from *tutela* in right of three children, freedwomen in right of four if they are in the *legitima tutela* of their patron or his children, but otherwise, if they have tutors of another sort, such as *Atiliani* or *fiduciarii,* in right of three children. **195.** A freedwoman may have a tutor of another sort in various ways; thus, if she has been manumitted by a woman, she must apply, for a tutor under the *L. Atilia* or, in a province, under the *L. Iulia et Titia*, since she cannot be in the *tutela* of her patroness. **195a.** Again if, having been manumitted by a male and having with his *auctoritas* made a *coemptio,* she has then been remancipated and manumitted, she ceases to have her patron for tutor and now has him by whom she has been (secondly) manumitted, who is called a *fiduciarius tutor*. **195b.** Again, if her patron or his son has given himself in adoption, a freedwoman must apply for a tutor under the *L. Atilia* or *Iulia et Titia*. **195c**. A freedwoman must make a similar application under these *leges* if her patron dies leaving no issue of the male sex in the family. **196.** Males, on the other hand, are released from *tutela* when they reach puberty. Sabinus, Cassius, and the rest of our teachers consider that a boy reaches puberty when he shows the fact by his physical development, that is when he is capable of procreation, but in the case of those who cannot so develop, such as the naturally impotent, they hold that the normal age of puberty must be taken. The authorities of the other school consider that puberty must be judged simply by age, that is, they hold a boy to have reached puberty when he has reached the age of 14. …[5]

197. *… has reached an age at which he is capable of looking after his own affairs, a practice which, as we have pointed out above, is observed among peregrine peoples.* ***198.*** *On the same grounds curators are likewise appointed in the provinces by their governors.*

199. Against the destruction or wasting by tutors and curators of the property of their wards or of those in their *curatio* the praetor requires both tutors and curators to give security. **200.** But not in every case. For neither are tutors appointed by will obliged to give security, their trustworthiness and diligence having been approved by the testator himself, nor, for the most part, are curators whose office does not devolve on them by statute, but who are appointed by a consul, praetor, or provincial governor, they of course having been selected as sufficiently trustworthy.

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[5] A whole page is illegible in the ms. The sense may be given in Ulp. 11.28. Further discussion of the termination of *tutela* is missing (cf. JI.1.22) and all but the end of the treatment of *curatio*. Cf. JI.1.23, Ulp. 12, Epit.1.8.

B. JUSTINIAN'S *INSTITUTES*

Contents, 1.3, 1.8pr, 1.9–10
J.B. Moyle trans. (Oxford, 1911) [Some emendations by CD.]

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XIV. Of real contracts, or the modes in which obligations are contracted by delivery
XV. Of verbal obligation
XVI. Of stipulations in which there are two creditors or two debtors
XVII. Of stipulations made by slaves
XVIII. Of the different kinds of stipulations
XIX. Of invalid stipulations
XX. Of fidejussors or sureties
XXI. Of literal obligation
XXII. Of obligation by consent
XXIII. Of purchase and sale
XXIV. Of letting and hiring
XXV. Of partnership
XXVI. Of agency
XXVII. Of quasi-contractual obligations
XXVIII. Of persons through whom we can acquire obligations
XXIX. Of the modes in which obligations are discharged

BOOK IV.

Title I. Of obligations arising from delict
II. Of robbery
III. Of the lex Aquilia
IV. Of injuries
V. Of quasi-delictal obligations
VI. Of actions
VII. Of contracts made with persons in power
VIII. Of noxal actions
IX. Of pauperies, or damage done by quadrupeds
X. Of persons through whom we can bring an action
XI. Of security
XII. Of actions perpetual and temporal, and which may be brought by and against heirs
XIII. Of exceptions
XIV. Of replications
XV. Of interdicts
XVI. Of the penalties for reckless litigation
XVII. Of the duties of a judge

XVIII. Of public prosecutions

BOOK I

…

TITLE III OF THE LAW OF PERSONS

In the law of persons, then, the first division is into free men and slaves. ...

TITLE VIII OF PERSONS INDEPENDENT OR DEPENDENT

Another division of the law relating to persons classifies them as either independent or dependent. Those again who are dependent are in the power either of parents or of masters. Let us first then consider those who are dependent, for by learning who these are we shall at the same time learn who are independent. ...

TITLE IX OF PATERNAL POWER

Our children whom we have begotten in lawful wedlock are in our power. **1**. Wedlock or matrimony is the union of male and female, involving the habitual intercourse of daily life. **2**. The power which we have over our children is peculiar to Roman citizens, and is found in no other nation. **3**. The offspring then of you and your wife is in your power, and so too is that of your son and his wife, that is to say, your grandson and granddaughter, and so on. But the offspring of your daughter is not in your power, but in that of its own father.

TITLE X OF MARRIAGE

Roman citizens are joined together in lawful wedlock when they are united according to law, the man having reached years of puberty and the woman being of a marriageable age, whether they be independent or dependent: provided that, in the latter case, they must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law. Hence the question has arisen, can the daughter or son of a lunatic lawfully contract marriage? and as the doubt still remained with regard to the son, we decided that, like the daughter, the son of a lunatic might marry even without the intervention of his father, according to the mode prescribed by our constitution.

1. It is not every woman that can be taken to wife: for marriage with certain classes of persons is forbidden. Thus, persons related as ascendant and descendant are incapable of lawfully intermarrying; for instance, father and daughter, grandfather and granddaughter, mother and son, grandmother and grandson, and so on *ad infinitum*; and the union of such persons is called criminal and incestuous. And so absolute is the rule, that persons related as ascendant and descendant merely by adoption are so utterly prohibited from intermarriage that dissolution of the adoption does not dissolve the prohibition: so that an adoptive daughter or granddaughter cannot be taken to wife even after emancipation.

2. Collateral relations also are subject to similar prohibitions, but not so stringent. Brother and sister indeed are prohibited from intermarriage, whether they are both of the same father and mother, or have only one parent in common: but though an adoptive sister cannot, during the subsistence of the adoption, become a man's wife, yet if the adoption is dissolved by her emancipation, or if the man is emancipated, there is no impediment to their intermarriage. Consequently, if a man wished to adopt his son-in-law, he ought first to emancipate his daughter: and if he wished to adopt his daughter-in-law, he ought first to emancipate his son. **3**. A man may not marry his brother's or his sister's daughter, or even his or her granddaughter, though she is in the fourth degree; for when we may not marry a person's daughter, we may not marry the granddaughter either. But there seems to be no obstacle to a man's marrying the daughter of a woman whom his father has adopted, for she is no relation of his by either natural or civil law. **4**. The children of two brothers or sisters, or of a brother and sister, may lawfully intermarry. **5**. Again, a man may not marry his father's sister, even though the tie be merely adoptive, or his mother's sister: for they are considered to stand in the relation of ascendants. For the same reason too a man may not marry his great-aunt either paternal or maternal. **6**. Certain marriages again are prohibited on the ground of affinity, or the tie between a man or his wife and the kin of the other respectively. For instance, a man may not marry his wife's daughter or his son's wife, for both are to him in the position of daughters. By wife's daughter or son's wife

we must be understood to mean persons who have been thus related to us; for if a woman is still your daughter-in-law, that is, is still married to your son, you cannot marry her for another reason, namely, because she cannot be the wife of two persons at once. So too if a woman is still your stepdaughter, that is, if her mother is still married to you, you cannot marry her for the same reason, namely, because a man cannot have two wives at the same time. **7**. Again, it is forbidden for a man to marry his wife's mother or his father's wife, because to him they are in the position of a mother, though in this case too our statement applies only after the relationship has finally terminated; otherwise, if a woman is still your stepmother, that is, is married to your father, the common rule of law prevents her from marrying you, because a woman cannot have two husbands at the same time: and if she is still your wife's mother, that is, if her daughter is still married to you, you cannot marry her because you cannot have two wives at the same time. **8**. But a son of the husband by another wife, and a daughter of the wife by another husband, and vice versa, can lawfully intermarry, even though they have a brother or sister born of the second marriage. **9**. If a woman who has been divorced from you has a daughter by a second husband, she is not your stepdaughter, but Julian is of opinion that you ought not to marry her, on the ground that though your son's betrothed is not your daughter-in-law, nor your father's betrothed your stepmother, yet it is more decent and more in accordance with what is right to abstain from intermarrying with them. **10**. It is certain that the rules relating to the prohibited degrees of marriage apply to slaves: supposing, for instance, that a father and daughter, or a brother and sister, acquired freedom by manumission. **11**. There are also other persons who for various reasons are forbidden to intermarry, a list of whom we have permitted to be inserted in the books of the Digest or Pandects collected from the older law.

12. 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. Consequently children born of such a connexion are not in their father's power, but as regards the latter are in the position of children born of promiscuous intercourse, who, their paternity being uncertain, are deemed to have no father at all, and who are called bastards, either from the Greek word denoting illicit intercourse, or because they are fatherless. Consequently, on the dissolution of such a connexion there can be no claim for return of dowry. Persons who contract prohibited marriages are subjected to penalties set forth in our sacred constitutions.

13. Sometimes it happens that children who are not born in their father's power are subsequently brought under it. Such for instance is the case of a natural son made subject to his father's power by being inscribed a member of the curia; and so too is that of a child of a free woman with whom his father cohabited, though he could have lawfully married her, who is subjected to the power of his father by the subsequent execution of a dowry deed according to the terms of our constitution: and the same boon is in effect bestowed by that enactment on children subsequently born of the same marriage. ...

C. DIGEST 23.2 (ON THE RITE OF NUPTIALS)

[ed. T. Mommsen and P. Krueger, trans. A. Watson, *The Digest of Justinian* (Philadelphia, 1985), pp. 2:657–68])

2 FORMATION OF MARRIAGE

1. MODESTINUS, *Rules*, book 1: Marriage is the union of a man and a woman, a partnership for life involving divine as well as human law.

2. PAUL, *Edict*, book 85: Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are.

3. PAUL, *Sabinus*, book 1: According to Pomponius, if I have a grandson by one son and a granddaughter by another who are both in my power, my authority alone will be enough to allow them to marry, and this is correct.

4. POMPONIUS, *Sabinus*, book 3: A girl who was less than twelve years old when she married will not be a lawful wife until she reaches that age while living with her husband.

5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she is absent, she cannot be married by letter

or by messenger because she must be led to her husband's house, not her own, since the former is, as it were, the domicile of the marriage.

6. ULPIAN, *Sabinus*, book 85: Finally according to Cinna, where a man married a woman in her absence, and on his way back from dinner by the side of the Tiber, he died, it was held that she ought to mourn for him as his wife.

7. PAUL, *Lex Falcidia*, sole book: So it is possible here for a virgin to have a dowry and an action for dowry.

8. POMPONIUS, *Sabinus*, book 5: A freedman cannot marry his mother or sister where they too have been freed, because this rule is founded on morality, not law.

9. ULPIAN, *Sabinus*, book 26: If a grandson wishes to marry and the grandfather is insane, his father's consent will be absolutely necessary, but if his father is insane and his grandfather sane, the grandfather's consent will suffice. **1**. A man whose father has been captured by the enemy can marry, if he does not return within three years.

10. PAUL, *Edict*, book 85: There is justifiable doubt about what to do where a father is absent, so that it is not known where he is or whether he is still alive. If three years have passed from the time when it was known for sure where the father was and whether he was alive or not, his children of either sex will not be prevented from contracting a lawful marriage.

11. JULIAN, *Digest*, book 62: Where the son of a man who is in enemy hands, or otherwise absent, marries before his father has been in captivity or absent for three years, or if his daughter gets married, I think that both marriages will be valid, provided the son or daughter marries someone the father will be sure not to repudiate.

12. ULPIAN, *Sabinus*, book 26: If, on being repudiated by me, my wife marries Seius, whom I subsequently adrogate, the marriage is not incestuous. **1**. There can be no marriage between me and a woman betrothed to my father, although she cannot really be called my stepmother. **2**. On the other hand, a woman betrothed to me cannot marry my father, although she cannot really be called his daughter-in-law. **3**. If my wife after a divorce marries someone else and has a daughter, according to Julian, although she is not my stepdaughter, I ought not to marry her. **4**. I can marry my adopted sister's daughter, because she is not related to me by blood, since no one becomes an uncle by adoption. Only legitimate adoptions, that is, those involving agnatic rights, create such relationships. On the same principle, I can marry my adoptive father's sister, as long as they did not have the same father.

13. ULPIAN, *Sabinus*, book 84: If a patroness is so degraded that she thinks that marriage with her own freedman is honorable, it should not be prohibited by the judge who is investigating the matter.

14. PAUL, *Edict*, book 85: Where an adopted son has been emancipated, he cannot marry his adoptive father's wife, since she is in the position of a stepmother. **1**. Similarly, if someone adopts a son, he will not be able to marry his wife, who is in the position of a daughter-in-law, even after the son is emancipated, because she was once his daughter-in-law. **2**. Blood relationship between slaves must be considered in connection with this rule. So on manumission a man cannot marry his own mother, and the rule is the same for a sister and a sister's daughter. On the other hand, it must be said that a father cannot marry his daughter, if they have been manumitted, even where it is doubtful whether he is her father. So a natural father cannot marry his daughter who was born out of wedlock, because natural law and decency must be taken into consideration in marriage, and it is indecent to make a daughter into your wife. **3**. The same rule which applied to blood relationship between slaves must also be observed in cases of relationship by marriage between slaves. So, for example, I cannot marry a woman who lived with my father while they were slaves just as if she were my stepmother, and conversely, a father cannot marry the woman who lived with his son while they were slaves, just as if she were his daughter-in-law. Nor can anyone marry the mother of a woman he lived with in slavery, just as if she were his mother-in-law; for since blood relationship between slaves is recognized, why not relationship by marriage as well? But in doubtful cases it is more certain and more decent not to marry in these circumstances. **4**. Now let us see how the terms "stepmother," "stepdaughter," "mother-in-law," and "daughter-in-law" are to be understood, so that we can

see who it is that we cannot marry. Some take a stepmother to be a father's wife, a daughter-in-law a son's wife, and a stepdaughter a wife's daughter by another husband. But it is better to say here that a man cannot marry his grandfather's or great-grandfather's wife. So there are two or more stepmothers whom he cannot marry. This is not surprising, since someone who has been adopted cannot marry either his natural or his adoptive father's wife. If my father has several wives, I cannot marry any of them. So the term "mother-in-law," and "daughter-in-law" are to be understood, so that we can see who it is that we cannot marry. Some take a stepmother to be a father's wife; a daughter-in-law, a son's wife; and a stepdaughter, a wife's daughter by another husband. But it is better to say here that a man cannot marry his grandfather's or great-grandfather's wife. So there are two or more stepmothers whom he cannot marry. This is not surprising, since someone who has been adopted cannot marry either his natural or his adoptive father's wife. If my father has several wives, I cannot marry any of them. So the term "mother-in-law" includes not just my wife's mother but also her grandmother and great-grandmother, so that I cannot marry either of them. Again, the term "daughter-in-law" includes not only a son's wife but also the wife of a grandson or great-grandson, although some call these people "grand-daughters-in-law." "Step-daughter" means not just my wife's daughter but also her granddaughter and great-granddaughter; I cannot marry any of them. Augustus decided that I cannot marry the mother of someone who was betrothed to me, since she was once my mother-in-law.

15. PAPINIAN, *Replies*, book 4: A man cannot marry the former wife of his stepson, nor can a woman marry someone who was once her stepdaughter's husband.

16. PAUL, *Edict*, book 35: An oration of the deified Marcus provides that if a senator's daughter marries a freedman, the marriage will be void, and this was followed by a *senatus consultum*, to the same effect. **1**. Where a grandson marries, his father must also consent; but if a granddaughter gets married, the consent and authority of the grandfather will suffice. **2**. Insanity prevents marriage being contracted, because consent is required; but once validly contracted, it does not invalidate the marriage.

17. GAIUS, *Provincial Edict*, book 11: When the relationship of brother and sister arises because of adoption, it is an impediment to marriage while the adoption lasts. So I will be able to marry a girl whom my father adopted and then emancipated. Similarly, if she is kept in his power and I am emancipated, we can be married. **1**. It is advisable, then, for someone who wishes to adopt his son-in-law to emancipate his daughter-in-law and for someone who wishes to adopt his daughter-in-law to emancipate his son. **2**. We are not allowed to marry our paternal or maternal aunts or paternal or maternal great-aunts although paternal and maternal great-aunts are related in the fourth degree. Again, we are not allowed to marry a paternal aunt or great-aunt, even though they are related to us by adoption.

18. JULIAN, *Digest*, book 16: Marriage between these persons is not held to be valid unless their relatives consent.

19. MARCIAN, *Institutes*, book 16: By chapter thirty-five of the *lex Julia*, people who wrongfully prevent children in their power from marrying, or who refuse to provide a dowry for them in accordance with the *constitutio* of the deified Severus and Antoninus, can be forced by proconsuls and provincial governors to arrange marriages and provide dowries for them. Those who do not try to arrange marriages are held to prevent them.

20. PAUL, *Oration of the Deified Severus and Commodus*, sole book: Note that it is not one of a curator's functions to see that his ward is married or not, because his duties only relate to transacting business for her. A rescript of Severus and Antoninus stated this in the following words: "It is a curator's duty to administer his ward's affairs, but she can marry or not as she pleases."

21. TERENTIUS CLEMENS, *Lex Julia et Papia*, book 3: A son-in-power cannot be compelled to marry.

22. CELSUS, *Digest*, book 15: Where he marries someone because his father forces him to do so and he would not have married her if the choice had been his, the marriage will nevertheless be valid, because marriage cannot take place without the consent of the parties; he is held to have chosen this course of action.

23. CELSUS, *Digest*, book 80: The *lex Papia* provides that all freeborn men, apart from senators and their children, can marry freedwomen.

24. MODESTINUS, *Rules*, book 1: Living with a freewoman implies marriage, not concubinage, as long as she does not make money out of prostitution.

25. MODESTINUS, *Rules*, book 2: An emancipated son can marry without his father's consent, and any son he has will be his heir.

26. MODESTINUS, *Replies*, book 5: He replied that women accused of adultery cannot marry during the lifetime of their husbands, even before conviction.

27. ULPIAN, *Lex Julia et Papia*, book 3: If a man of senatorial rank purports to marry a freedwoman, though she does not become his legal wife in the meantime, she is in a position to become his wife if he loses his rank.

28. MARCIAN, *Institutes*, book 10: A patron cannot marry his freedwoman against her will.

29. ULPIAN, *Lex Julia et Papia*, book 8: And Ateius Capito is said to have decreed this when he was consul. Note, however, that this rule does not apply where the patron manumitted her in order to marry her.

30. GAIUS, *Lex Julia et Papia*, book 2: A pretended marriage has no effect.

31. ULPIAN, *Lex Julia et Papia*, book 6: Where a senator is given imperial permission to marry a freedwoman, she will be his lawful wife.

32. MARCELLUS, *Lex Julia et Papia*, book 1: Note that although a freedman, who was adrogated by someone who was born free, acquires the rights of a freeborn person in that family, as a freedman he is still barred from senatorial marriage.

33. MARCELLUS, *Lex Julia et Papia*, book 3: Many take the view that when the same woman goes back to he same man, it is the same marriage. I agree, provided they are reconciled before much time has elapsed, and neither one has married someone else in the meantime, and above all, if the husband has not returned the dowry.

34. PAPINIAN, *Replies*, book 4: A general commission to find a husband for a daughter-in-power is not a sufficient ground for marriage. So it is necessary for the person selected to meet the father and for him to consent in order for the marriage to be contracted. **1**. Where a man has accused his wife of adultery, in the capacity of a husband, there is nothing to stop him marrying again after the annulment. But if he does not accuse her in the capacity of a husband, their marriage will be held valid. **2**. Marriage can be contracted between stepchildren, even if they have a common brother, the child of their parents' new marriage. **3**. Where a senator's daughter is married to a freedman, this lapse on her father's part does not make her a wife, since children should not be deprived of their rank because of their father's offenses.

36. PAPINTAN, *Replies*, book 6: A son-in-power in the army cannot contract a marriage without his father's consent.

36. PAUL, *Questions*, book 5: A tutor or a curator cannot marry an adult woman in his care, unless she was betrothed to or intended for him by her father, or where the marriage takes place in accordance with a condition in his will.

37. PAUL, *Replies*, book 7: The freedman of a girl's curator ought to be prevented from marrying her.

38. PAUL, *Views*, book 2: Where someone holds office in a province, he cannot marry a woman who was born there or lives there, although betrothal is not forbidden. But if, after he has laid down his office, the woman refuses to marry him, she can do so, as long as she returns any earnest she received. **1**. A person holding office in a province can marry a woman to whom he was previously betrothed, and the dowry will not be confiscated. **2**. Someone involved in provincial administration is allowed to arrange marriages for his daughters there, and provide dowries for them.

[Fragments 39–68 are omitted.]

NOTES

The following table lists the fragments in D.23.2 according to their "Masses" in Bluhme's theory of the composition of the *Digest*. D.23.2 contains two runs through the piles: Sabinian, Edictal, Papinianic and Edictal,

Sabinian, Papinianic. Fragments that are out of order are starred (*). There follows a list of jurists quoted, legislation mentioned, and miscellaneous matters about the title..

1. *D. 23.2. (On the rite of nuptials)*—According to Bluhme's "Masses"

[Ad Sab = Ad Sabinum; Ad leg. I & P = Ad legem Iuliam et Papiam]

Ed * 1. Modestinus, Regulae, 1
Sab * 2. Paul, Ad edictum, 35
| 3. Paul, Ad Sabinum, 1
| 4. Pomponius, Ad Sab, 3
| 5. Pomponius, Ad Sab, 4
\|/ * 6. Ulpian, Ad Sab, 35
Pap * 7. Paul, Ad legem Falcidiam 4
Sab 8. Pomponius, Ad Sab, 5
| 9. Ulpian, Ad Sab, 26
| * 10. Paul, Ad edictum, 35
| * 11. Julian, Digesta, 62
| 12. Ulpian, Ad Sab, 26
| 13. Ulpian, Ad Sab, 34
| 14. Paul, Ad edictum, 35
Pap * 15. Papinian, Responsa, 4
\|/
Sab 16. Paul, Ad edictum, 35
| 17. Gaius, Ad edictum provin-
| ciale, 11
| 18. Julian, Digesta, 16
| 19. Marcianus, Institutiones, 16
| 20. Paul, Ad orationem divorum
\|/ Severe & Commode
Ed * 21. Terentius Clemens, Ad legem
| Iuliam et Papiam, 3
| 22. Celsus, Digesta, 15
|
| 23. Celsus, Digesta, 30
| 24. Modestinus, Regulae, 1
| 25. Modestinus, Regulae, 2
|
| 26. Modestinus, Responsa, 26
\|/ 27. Ulpian, Ad leg. I & P, 3
Sab * 28. Marcianus, Institutiones, 10
Ed 29. Ulpian, Ad leg. I & P, 3
| 30. Gaius, Ad leg. I & P, 2
| 31. Ulpian, Ad leg. I & P, 6
| 32. Marcellus, Ad leg. I & P, 1
\|/ 33. Marcellus, Ad leg. I & P, 3

Pap 34. Papinian, Responsa, 4
| 35. Papinian, Responsa, 6
| 36. Paul, Quaestiones, 5
| 37. Paul, Responsa, 7
\|/ 38. Paul, Sententiae, 2
Ed 39. Paul, Ad Plautium, 6
| 40. Pomponius, Ex Plautio,
| 41. Marcellus, Digesta, 26
| 42. Modestinus, De ritu nuptiarum
| 43. Ulpian, Ad leg. I & P, 1
| 44. Paul, Ad leg. I & P, 1
| 45. Ulpian, Ad leg. I & P, 3
| 46. Gaius, Ad leg. I & P, 8
| * 47. Paul, Ad leg. I & P, 2
| 48. Terentius Clemens, Ad. legem
| Iuliam et Papiam, 8
| 49. Marcellus, Ad leg. I & P, 1
| 50. Marcellus, Ad leg. I & P, 3
\|/ 51. Licinnius Rufinus, Regulae, 1
Sab 52. Paul, Ad Sab, 6
| 53. Gaius, Ad ed. prov., 11
| * 54. Osceola, Regulae, 1
| 55. Gaius, Ad ed. prov., 11
| 56. Ulpian, Disputations, 3
| 57. Marcianus, Institutiones, 2
| 57a. Marcianus, Notae ad Papinian,
| De Adulteriis, 2
| 58. Marcianus, Regulae, 4
| 59. Paul, De Assignatione liberatorum
| 60. Paul, Ad orationem
\|/ divorum Antonini et Commodi
Pap 61. Papinian, Quaestiones, 32
| 62. Papinian, Responsa 4
| 63. Papinian, Definitions, 1
| 64. Callistratus, Quaestiones, 2
| 65. Paul, Responsa, 7
| 66. Paul, Sententiae, 2
| 67. Tryphoninus, Disputationes, 9
\|/ 68. Paul, Ad SC. Turpillianum

2. *Jurists quoted*:

a. Celsus (junior), Hadrianic jurist, choleric and a great definer, head of the Proculeans.
b. Julian, great jurist of the Hadrianic period, consolidated the edict c. 138.
c. Pomponius, probably an academic jurist, roughly contemporary with Gaius (mid-2a c.).
d. Gaius, already discussed.
e. Marcellus, Antonine jurist (2d half of 2d c.), member of the imperial *consilium*.
f. Scaevola (not to be confused with Q. Mucius, the Republican jurist), chief legal adviser to Marcus Aurelius, *praefectus vigilium* in 175, gave many responses of great brevity.
g. Terentius Clemens, uncertain, this is his only known work, prob. 2d c.
h. Papinian, great Severan jurist, praetorian prefect murdered in 212 (?).
i. Callistratus, a Greek, wrote on the *extraordinaria cognitio*, contemporary of Papinian.
j. Tryphoninus, contemporary of Papinian and member of Severus's *consilium*.
k. Paul, perhaps praetorian prefect under Alexander Severus, encyclopedic jurist with a waspish style. l. Ulpian, encyclopedic jurist, praetorian prefect murdered in 223 (?).
m. Licinnius Rufus, contemporary of Paul and Ulpian of whom little is known.

n. Marcianus, younger contemporary of Paul and Ulpian, known only from his works.
o. Modestinus, the last of the classical jurists, *praefectus vigilium* under Alexander Severus, only classical jurist to write in Greek, died c. 244.

3. *Legislation Mentioned*:

a. *Lex Falcidia* — 40 B.C. — limited the amount which a testator could give away by legacy to the disherision of his heir.
b. *Lex Iulia de maritandis ordinibus* (18 B.C.); *Lex Papia Poppaea* (9 A.D.) — important Augustan legislation designed to encourage child-bearing among the aristocracy.
c. *SC. Turpillianum* (61 A.D.) — designed to prevent private accusers from withdrawing from criminal proceedings (*tergiversatio*).
d. *Oratio* [a late classical name for an SC, introduced by an *oratio principis*] *divorum Antonini et Commodi* — Marcus Aurelius (sole imp. 169-80) and Commodus (imp. 180-92), the *oratio* prohibited marriage between a tutor and his ward [both D. 23.2.20 and D. 23.2.60 concern this *oratio*].

4. *Miscellaneous*:

a. Cinna (in D.23.2.6) — Republican jurist of 1st half 1st c. B.C., pupil of Servius Sulpicius Rufus.
b. Plautius — jurist of the 1st c. A.D.
c. *Adsignatio libertorum* — the assignment by a patron of his right of patronage over his freedmen.
d. Paul's *Sententiae* (D.23.2.38, .60) is the only work extracted here which has survived independent of the *Digest*. Unfortunately, what has survived is not Paul's work but either extracts from a genuinely Pauline work or a compilation from Paul's works, made, in either case, in the late 3d or 4th c.

D. CODE 5.4 (CONCERNING MARRIAGE)

[in S.P. Scott trans., *The Civil Law* 13:146-55.[1]

TITLE IV. CONCERNING MARRIAGE.

1. *The Emperors Severus and Antoninus to Porcius.* [(Septimius) Severus and Antoninus (Caracalla), A.D. 199.]

When a question arises with reference to the marriage of a young girl, and the guardian, the mother, and the relatives cannot agree as to the selection of a husband, the decision of the Governor of the province must be obtained.

2. *The Same to Trophima.* [198 X 207.]

If your father consented to your marriage, it makes no difference, so far as you are concerned, if he did not sign the marriage contract.

3. *The Same to Valeria.* [The Same(?), 196.]

You can, before a competent judge, accuse a freedman who has dared to marry his patroness, or the daughter, the wife, the granddaughter, or the great-granddaughter of his patron, in order that a decision may be rendered in accordance with the customs of the present times, which very properly regard an union of this kind as odious.

4. *The Emperor Alexander to Perpetuus.* [(Severus) Alexander, 228.]

Children cannot marry the concubines of their ascendants, for the reason that an act of this kind when committed by them is not praiseworthy, and indicates a lack of filial duty. Those who violate this law are guilty of the crime of fornication.

5. *The Same to Maxima.* [222 X 235.]

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[1] Probably because he was more interested in the second life of Roman law rather than in the classical law, Scott translated the "vulgate" edition of the *Code*, the one used by the medieval glossators and practitioners of the *mos italicus* in the early modern period. In what follows, I have corrected the ascriptions of the extracts from *Code* in square brackets following the translated catch-line and have noted where the Vulgate edition includes material that is not in the original text.

If (as you allege) your husband's father, under whose power he was, having learned of your marriage, did not oppose it, you should not fear that he will not recognize his grandson.

6. *The Emperor Gordian to Valeria.* [239.]

When, contrary to the command of the Emperor, a marriage with an official has taken place in a province with the consent of the woman, still, if she remains of the same mind after the man has relinquished his employment, the marriage becomes legal, and hence any children who have been conceived and born of it are legitimate, as is set forth in the opinion of the most learned Paulus.

7. *The Same to Aper.* [240.]

If (as you state) after a complaint has been made to you by your daughter against her husband, the marriage was dissolved, and the parties again became united without your consent, the marriage is

illegitimate, as it was contracted without the consent of the father, under whose control the woman was, and therefore, as your daughter does not claim her dowry, you will not be prevented from bringing suit to recover it.

8. *The Same to Romanus.* [241.]

In questions relating to marriage, neither the authority of the curator (which only extends to the administration of the property of the minor) nor that of the blood-relatives or connections can be interposed, but the will of the person whose marriage in question should be considered.

9. *The Emperor Probus to Fortunatus.* [276 X 281.]

When, with the knowledge of your neighbors or others, you keep your wife at home for the purpose of having children, and a daughter is born of this marriage, although neither the nuptial contract nor the birth certificate of the daughter may have been published, the fact of the marriage and the legitimate birth of your daughter are none the less established on that account.

10. *The Emperors Diocletian and Maximian, and the Caesars, to Paulina.* [293 X 305. Ceasars=Maximian and Constantine.]

As you allege that you did not attain to the rank of an illustrious woman because your father was a senator, but for the reason that you contracted marriage with a member of the Senate, you will lose the exalted position which you obtained from your first husband, and be reduced to your former status, if you should subsequently marry a man of inferior degree.

11. *The Same Emperors and Caesars to Alexander.* [293 X 305.]

If your wife is detained by her parents without her consent, and Our friend the Governor of the province is notified of the fact, he will grant your request, and having caused the woman to be produced, you can consult her wishes in the matter.

12. *The Same Emperors and Caesars to Sabinus.* [The Same (?), 285.]

The policy of the law does not permit that even a son under paternal control shall be compelled to marry against his consent. Therefore if you observe the ordinary legal precepts, you will not be prevented from marrying the wife whom you may choose, if you desire to do so, provided, however, that your father consents to the marriage.

13. *The Same Emperors and Caesars to Onesimus.* [293 X 305.]

Instruments drawn up for the proof of marriage are not suitable for that purpose when the ceremony does not take place and they contain what is not true; but where no instruments have been drawn up, a marriage which has been contracted with the requisite formalities is not void, since by the failure to reduce the contract to writing, the other evidence of its solemnization is not invalidated.

14. *The Same Emperors and Caesars to Titius.* [293 X 305.]

No one can be compelled either to contract marriage in the beginning, or to renew it after it has once been dissolved. Therefore you understand that the unrestrained power of dissolving and contracting marriage cannot be rendered a matter of necessity.

15. *The Same Emperors and Caesars to Tatian.* [293 X 305.]

Anyone who has manumitted a slave is not forbidden to marry her, if he does not belong to one of those classes of persons especially prohibited from doing so; and it is absolutely certain that legitimate children can be born to a father by such a marriage.

Extract from Novel 78, Chapter III. Latin Text. [Not in original.]

By the new law, however, no rank prevents anyone from marrying his freedwoman, provided dotal instruments are drawn up with reference to the marriage.

16. *The Same Emperors and Caesars to Rhodonus.* [293 X 305.]

It is proper that a father who exposed his daughter, who was taken by you and brought up at your expense, and under your care, should consent for her to be married to your son. If, however, he refuses to give his consent, he should be compelled to do so only in case he indemnifies you for the maintenance which you provided for his daughter.

17. *The Same Emperors and Caesars.* [295.]

No one shall be permitted to contract marriage with his daughter, his granddaughter, or his great-granddaughter, his mother, his grandmother, or his great-grandmother; and, in the collateral line, with his paternal or maternal aunt, his sister, the daughter of his sister, or her granddaughter; nor with the daughter of his brother, or his granddaughter; and among connections by marriage, with his step daughter, his stepmother, his daughter-in-law, his mother-in-law, or any other persons prohibited by ancient law, with whom We desire that all persons shall abstain from contracting marriage.

18. *The Emperors Valentinian, Valens, and Gratian to the Senate.* [371.]

Widows under the age of twenty-five, even though they may have obtained the freedom of emancipation, still cannot marry a second time without the consent of their fathers. If, however, in the choice of a husband, the desire of the woman is opposed to that of her father, and other relatives, it is established (just as has already been decreed with reference to the marriage of virgins), that judicial authority should be interposed for the purpose of examination, and if the parties are equal in family, and in morals, he shall be considered preferable whom the woman has selected for herself. But in order to prevent those who are nearest in degree to the succession of widows, from hindering the latter from contracting honorable marriage, where any suspicion of this kind arises, We desire that authority of the courts should be invoked to prevent her estate from descending to them, if death should occur.

Given on the seventeenth of the *Kalends* of August, during the Consulate of Gratian, Consul for the second time, and Probus, 371.

19. *The Emperors Arcadius and Honorius to Eutychianus, Praetorian Prefect.* [405.]

Marriage between first cousins is permitted by this salutary law, so that the former one having been annulled, and the temptation to calumny having been restrained, marriage between such cousins shall be considered lawful, whether they are the children of two brothers, or of two sisters, or of brother and sister; and any children by such a marriage shall be legitimate and can become the heirs of their parents.

Given during the Consulate of Stilicho, Consul for the second time, and Anthemius, 405.

20. *The Emperors Honorius and Theodosius to Theodore, Praetorian Prefect.* [Theodosius II, 408 X 409.]

The wishes of the father are to be considered in case of the marriage of daughters under paternal control. Where, however, a girl is her own mistress, and is under twenty-five years of age, the consent of her father

must be obtained. Where she is deprived of the aid of her father, the consent of her mother and her kindred, as well as of herself, will be necessary.

If, however, having lost both her parents, she has been placed under the protection of a curator, and a dispute should arise between several honorable candidates for marriage, SO that it may be doubtful to which one it would be advantageous for the girl to be united, and she, through modesty, is unwilling to express her preference in the presence of her relatives, the judge is authorized to decide to which suitor it is best that she be married.

21. *The Emperors Theodosius and Valentintan to Basses, Praetorian Prefect.* [Theodosius II and Valentinian, 426.]

We grant free permission to soldiers, from those of no military rank up to that of protector, to contract marriage with freeborn women, without any of the usual formalities.

22. *The Same to Hierius, Praetorian Prefect.* [428.]

If the instruments relating to an ante-nuptial contract or a dowry are lacking, and the ceremony and other formalities associated with marriage have been omitted, let no one think that, on account of this neglect, marriage which has otherwise been legally performed is not valid; or that on this account children born of it can be deprived of their rights as legitimate; for among persons of equal standing, whose union is not prevented by any law, matrimonial union will take place by their own consent and the testimony of their friends.

Given at Constantinople, on the tenth of the *Kalends* of March, during the Consulate of Felix and Taurus, 428.

23. *The Emperor Justinian to Demosthenes, Praetorian Prefect.* [Justin (N.B.), 520 X 523.]

Believing that it is a peculiar duty of Imperial beneficence at all times not only to consider the convenience of Our subjects, but also to attempt to supply their needs, We have determined that the errors of women on account of which, through the weakness of their sex, they have chosen to be guilty off dishonorable conduct, should be corrected by a display of proper moderation, and that they should by no means be deprived of the hope of an improvement of status, so that, taking this into consideration, they may the more readily abandon the improvident and disgraceful choice of life which they have made.

For We believe that the benevolence of God, and His exceeding clemency towards the human race, should be imitated by Us (as far as Our nature will permit), who is always willing to pardon the sins daily committed by man, accept Our repentance, and bring us to a better condition. Hence, We should seem to be unworthy of pardon Ourselves were We to fail to act in this manner with reference to those subject to Our empire.

(1) Therefore, as it would be unjust for slaves, to whom their liberty has been given, to be raised by Imperial indulgence to the status of men who are born free, and, by the effect of an Imperial privilege of this kind, be placed in the same position as if they had never been slaves, but were freeborn; and that women who had de voted themselves to theatrical performances, and, afterwards having become disgusted with this degraded status, abandoned their infamous occupation and obtained better repute, should have no hope of obtaining any benefit from the Emperor, who had the power to place them in the condition in which they could have remained, if they had never been guilty of dishonorable acts, We, by the present most merciful law, grant them this Imperial benefit under the condition that where, having deserted their evil and disgraceful condition, they embrace a more proper life, and conduct themselves honorably, they shall be permitted to petition Us to grant them Our Divine permission to contract legal marriage when they are unquestionably worthy of it. Those who may be united with them need be under no apprehension, nor think that such marriages are void by the provisions of former laws; but, on the other hand, they shall remain valid, and be considered just as if the women had never previously led dishonorable lives, whether their husbands are invested with office, or, for some other reason, are prohibited from marrying women of the stage, provided, however, that the marriage can be proved by dotal contracts reduced to writing. For women

of this kind having been purified from all blemishes, any as it were, restored to the condition in which they were born, We desire that no disgraceful epithet be applied to them, and that no difference shall exist between them and those who have never committed a similar breach of morality.

(2) Children born of a marriage of this kind shall be legitimate, and the proper heirs of their father, even though he may have other lawful heirs by a former marriage; so that such children may also, without any obstacle, be able to acquire the estates of their parents, either *ab tntestato*, or under the terms of a will.

(3) If, however, women of this description, after an Imperial Rescript has been granted them in accordance with their request, should defer contracting marriage, We order that their reputations shall, nevertheless, remain intact, as in the case of all others who may desire to transfer their property to anyone; and that they shall be competent to receive anything bequeathed to them, in accordance with law, or an estate which may descend to them on the ground of intestacy.

Extract from Novel 51. Latin Text. [Not in original.]

These privileges shall be granted them, even if they may have sworn that they will continue in their former profession, because it is expressly stated by the laws that an oath to perform an unlawful act must not be observed, and that the penalty for perjury, if any exists, shall be inflicted upon him who exacts an oath of this description.

End of extract. The text of the Code follows.

(4) We also decree that such of these women as have obtained a privilege from the Emperor shad occupy the same position as those who have obtained some other benefit which was not bestowed by the sovereign, but was acquired by them as a voluntary donation before their marriage; for, by a concession of this kind, every other stigma on account of which women are forbidden to contract lawful marriage with certain men is absolutely removed.

(5) To this We add that when the daughters of women of this kind are born after the purification of their mother from the disgrace of her former life, they shall not be considered as the children of females belonging to the stage, or be subject to the laws which forbid certain men to marry such women. Where, however, they were born before that time, they shad be permitted to petition the Emperor for a Rescript, which should be granted without any opposition, by means of which they. may be permitted to marry, just as if they were not the daughters of actresses; and those men shall not be prohibited from marrying them who are forbidden to take as wives girls belonging to the stage, either on account of their own rank, or for some other reason; provided, however, that in every instance, dotal instruments in writing are executed by the parties concerned.

(6) If, however, a girl born of a theatrical mother, who practiced her profession until the time of her death, should, after her mother’s decease, petition for Imperial indulgence, and obtain it, she shall be freed from the blemish of her mother’s reputation, and herself be granted permission to marry; and she also can without the fear of former laws be united in matrimony with those who not long ago were prohibited from marrying the daughter of an actress.

(7) Moreover, We have thought that what was prescribed by former laws (although this was somewhat obscure) should be abolished, namely, that a marriage contracted between persons of unequal rank shall not be considered valid, unless dotal instruments with reference to it were executed. When, however, this does not take place, such marriages shall still be absolutely valid, without any distinction of persons, provided the women are free and freeborn, and that no suspicion of any criminal or incestuous union arises, for We, under an circumstances, annul criminal and incestuous unions, as well as those which were especially prohibited

by the provisions of former laws; with the exception, however, of such as We authorize by the present decree, and direct shall be considered legal, in accordance with the rights of marriage.[2]

Extract from Novel 117, Chapter IV. Latin Text. [Not in original.]

Those who are invested with exalted dignity, up to persons styled illustrious, cannot legally contract matrimony, unless dotal instruments have been drawn up in writing, although marriages previously contracted will stand. Barbarians are excepted from this rule, but all others can legally marry under the inducement of affection alone.

End of extract. The text of the Code follows.

(8) Therefore these matters having been settled in this manner, by this general law which must hereafter be observed, We order that any such unions which have subsequently been made shall be regulated in accordance with the aforesaid provisions; so that where any one has married a wife of this kind during Our reign (as has already been stated), and has children by her, they shall be legitimate, and be entitled to succeed to their father ab intestate, as well as under a will, and the wife, as well as any children hereafter born of her, shall also be considered legitimate.

24. *The Same to the Senate.* [Justinian, 530.]

We order that if anyone should, in any agreement whatsoever, whether it is drawn up for the purpose of giving something, or for lye performance of some act, or for not giving anything, or for the non-performance of some act, either refer to the time of his marriage or merely mention the marriage itself, the condition of the contract shall not be understood to have been complied with, or not to have been dispensed with, unless the ceremony of marriage actually takes place; and that the age at which marriage can be solemnized, which in the case of a female is after she has completed her twelfth year, and in case of a male after he has completed his fourteenth year, should not be considered, but the time when the marriage was performed shall only be taken into account; for in this way an disputes arising from the ancient law are disposed of, and the immense number of volumes on this subject are reduced to very few.

25. *The Same to Julian, Praetorian Prefect.* [530.]

The question was discussed by the ancients whether the children of insane parents, under whose control they were, could marry. Almost all the legal authorities admitted that the daughter of an insane person could marry, for they thought it was sufficient if the father did not object, but it was doubted whether a son could do so. Ulpian refers to a Constitution of the Emperor Marcus, which does not mention lunatics, but in general terms alludes to children of persons of weak minds, whether they are males or females, who contract marriage; and he states that they can do so without applying to the Emperor.

Another doubt arises from this constitution, that is to say, whether what it provides, with reference to persons of weak minds, should also apply to those who are insane; and whether the children of lunatics are also entitled to relief, just as those of a person of feeble intellect. Therefore, for the purpose of disposing of these doubts and difficulties, We order that whatever appears to be lacking in the Constitution of the Divine Marcus shall be supplied by the following provision, that is to say, that not only the children of a person of weak intellect, but also those of one who is insane, of either sex, can legally contract marriage; and that the dowry, as well as the ante-nuptial donation, shall be furnished by their curators. The amount of the dowry, as well as that of the ante-nuptial donation, must, in this Imperial City, be determined by the estimate of the most excellent Urban Prefect, and in the provinces by that of the illustrious Governors, or by the bishops of the various dioceses; and the curator of the person who has lost his mind or has become insane should be present, as well as those highest in rank in their families, so that nothing may arise in a case of this kind, either in this Imperial City, or in the provinces, to cause any loss of the property of said insane person, or of

[2] These laws were unquestionably promulgated in a vain attempt to render the Empress Theodora, who had been an actress, and whose vices had been the scandal of the Empire, respectable. [SPS.]

him of enfeebled intellect; and these proceedings shall be undertaken gratuitously, so that a human misfortune of this description may not be aggravated by any expense.

26. *The Same to Julian, Praetorian Prefect.* [530.]

If anyone should grant freedom to his foster-daughter, and marry her, a doubt arose among the ancients whether a marriage of this kind should be considered lawful or not. Therefore We, desiring to resolve this long-existing doubt, decree that such a marriage is not prohibited, for if these marriages have their origin in affection, and We find nothing impious or contrary to law in such a union, why should We think that they ought not to be allowed? No man can be found who is so wicked as to afterwards marry a girl whom, in the first place, he treated as his daughter; but it should be believed that he did not originally bring her up as his daughter, but gave her her freedom, and afterwards deemed her worthy to be married to him. A woman should, by all means, be prevented from marrying her godfather who received her in baptism whether she is his foster-child or not, as nothing else can be so productive of paternal affection and just prohibition of marriage as a tie of this kind, by means of which, through the mediation of God, the souls of the parties in question are united.

27. *The Same to John, Praetorian Prefect.* [531 X 532.]

We order that marriages which take place between men and women who are more or less than fifty or sixty years of age, and which are prohibited by the *Lex Julia et Papia*, cannot be prevented in any way, or on either side, where the men consent.

28. *The Same to John, Praetorian Prefect.* [531 X 532.]

Where a man has a wife who is a freedwoman, and afterwards becomes illustrious by being raised to the dignity of Senator, the question is raised by Ulpian whether the marriage is dissolved by his promotion, because the *Lex Papia* does not permit marriages to exist between senators and freedwomen. Hence We, following the judgment of God, do not permit that, in one and the same marriage, the happiness of the husband should become the misfortune of his wife, so that his wife may be debased to the extent that he is elevated, and indeed that she should absolutely be lost to him; therefore, as severity of this kind ought not to exist in our times, and the marriage should stand, and the wife rise with her husband and share his distinction, the marriage shall remain valid, and shall be, to no extent, affected by an occurrence of this description.

In like manner, where the daughter of a private person marries a freedman, and her father is afterwards raised to the senatorial dignity, the cruel provision of the Papian Law is silent on this point, and the marriage celebrated between the daughter of one who has become a senator and a freedman must not be dissolved on this account, so that the prosperity of the father-in-law may not be attained without the loss of his son-in-law; for it is better that the harshness of the Papian Law should be mitigated in both instances, rather than, by observing it, the marriages of men should be annulled, not on account of any vice of the wife or the husband, but because of the good fortune of both, for, as this defect proceeds from one source, the result is that it is removed by one law.

[One more extract is found in the original edition of the *Code* by Justinian, in Greek, published in 529.

TOPIC 4. "BARBARIAN CODES"

A. ÆTHELBERHT'S "CODE"

in THE LAWS OF THE EARLIEST ENGLISH KINGS 4–17, 175–79
(F. Attenborough ed. & trans., 1922; repr. 1963) [footnotes renumbered and integrated]

These[1] are the decrees which King Ethelberht established in the lifetime of Augustine.

1. [Theft of] God's property and the Church's shall be compensated twelve fold; a bishop's property eleven fold; a priest's property nine fold; a deacon's property six fold; a clerk's property three fold. Breach of the peace shall be compensated doubly when it affects a church or a meeting place.

2. If the king calls his lieges[2] to him, and anyone molests them there, he shall pay double compensation, and 50 shillings to the king.

3. If the king is feasting at anyone's house, and any sort of offence is committed there, twofold compensation shall be paid.

4. If a freeman robs the king, he shall pay back a nine fold[3] amount.

5. If one man slays another on the king's premises, he shall pay[4] 50 shillings compensation.[5]

6. If a man slays a free man, he shall pay 50 shillings to the king for infraction of his seignorial rights.[6]

7. If [he] slays a smith in the king's service, or a messenger[7] belonging to the king, he shall pay an ordinary wergeld.[8]

8. The king's *mundbyrd*[9] shall be 50 shillings.

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[1] The introductory words, like those of [cap. 1], are obviously a later addition, made at some time after Augustine's death, the date of which is not certain—except that it took place on May 26th. Liebermann (notes, *ad loc.*) gives the year as 604; the *Saxon Chron.* (F) records it under ann. 614, while continental authorities (*Ann.Monas.*) assign it to 612. Augustine settled at Canterbury in 597.

[2] The word (*leudes*) was used in the same sense among the Franks.

[3] It is remarkable that the compensation due to the king is less than that due to a bishop (cf. cap. 1).

[4] To the king (Liebermann).

[5] Presumably as breach of the king's *mundbyrd* (cf. cap. 2, 8).

[6] *To drihtinbeage*. Payment due to a lord for the loss of one of his men, and probably to be identified with the later *manbot* (see Ine, cap. 70. 76). Liebermann takes it as a fine due to the king for infraction of his sovereignty (*zum Herrschengeld*). He hesitates to believe that the king was the personal lord of every freeman. But it must not be assumed that conditions in Kent were the same as in Wessex; and the natural meaning of *dryhten* is 'personal lord' rather than king.

[7] The precise meaning of *laadrincmanna* is uncertain, as the word does not occur elsewhere; cf. *ladmann*, 'guide.'

[8] The payment here specified is not, apparently, a wergeld proper but a sum equivalent to the wergeld of an ordinary freemen, i.e. 100 shillings (cf. cap. 21 below), and double the compensation specified under cap. 6, owing to the fact that these are specially skilled servants. Liebermann suggests that the men referred to were of unfree birth, but were awarded a freeman's wergeld owing to their position in the king's service. But the context seems to me rather to suggest that this is a case of *manbot* (as in cap. 6) and that it was additional to any sum which was to be paid to the relatives as wergeld. We may refer to Wulfgar *Wendla leod*, who is described as King Hroðgar's *ar ond ombiht* in *Beowulf*, *v*. 336. The word *leod* would seem to indicate that he was a person of some position (cf. *v.* 331)—clearly not a slave.

9. If a freeman robs a freeman, he shall pay a three fold compensation, and the king shall take the fine, or[10] all [the man's] goods.

10. If a man lies with a maiden belonging to the king, he shall pay 50 shillings[11] compensation.

11. If she is a grinding slave, he shall pay 25 shillings compensation. [If she is of the] third [class], [he shall pay] 12 shillings compensation.

12. 20 shillings shall be paid for killing a *fedesl*[12] belonging to the king.

13. If one man slays another on the premises of a nobleman,[13] he shall pay 12 shillings[14] compensation.

14. If a man lies with a nobleman's serving maid, he shall pay 12 shillings compensation.

15. A commoner's[15] *mundbyrd*[16] shall be 6 shillings.

16. If a man lies with a commoner's serving maid, he shall pay 6 shillings compensation; [if he lies] with a slave of the second class, [he shall pay] 50 sceattas[17] [compensation]; if with one of the third class, 30 sceattas.

17. If a man is the first to make [forcible] entry into another man's premises, he shall pay 6 shillings compensation. He who comes next shall pay 3 shillings compensation; and afterwards each one shall pay a shilling.

18. If one man supplies another with weapons when a quarrel is taking place, no injury however being inflicted,[18] he [the lender] shall pay 6 shillings compensation.

19. If highway robbery is perpetrated [with the aid of those weapons], [the lender] shall pay 6 shillings compensation.

20. If the man[19] is slain, [the lender of the weapons] shall pay 20 shillings compensation.

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[9] *Mundbyrd*. Literally 'protection'—then the amount to be paid for violation of protection (or guardianship).

[10] Liebermann takes *and* here as *or* (cf. cap. 87 below; Ine, cap. 27), since it would be pointless to exact a fine, where total confiscation was involved. He suggests that the choice between the two alternatives was determined by the gravity of the offence.

[11] Presumably the king's *mundbyrd* (cf. cap. 8).

[12] Liebermann translates 'Königskostgänger,' and refers to H. and E. cap. 15, and *Ethelwerd's Chronicle* 878 (*famuli qui regio pastu utebantur*). But the word *fedesl* occurs elsewhere only as a translation of *altilis*.

[13] The word *eorl* appears to be equivalent to *eorlcundman* in H. and E. cap. 1 (cf. *gesið* and *gesiðcundman* in Ine, cap. 60). Note that there is no evidence for different grades of nobility in Kent (cf. H. and E. cap. 1).

Apart from the laws of Æthelberht the word *eorl*, though frequent in poetry, scarcely occurs in prose except, (1) in such phrases as *ge eorl ge ceorl*, (2) as the translation of the Scandinavian *jarl* (from the time of Alfred onwards).

[14] The sum of 12 shillings specified in cap. 13 and 14 probably denotes the nobleman's *mundbyrd*.

[15] It is difficult to find a satisfactory modern equivalent for the word *ceorl*, which denotes 'freeman' as distinct from 'noble.' 'Commoner' is less open to objection in the Kentish laws than in those of Wessex; but on the whole it seems preferable to 'peasant,' in both senses, although the latter would perhaps give a truer impression in general of the class specified.

[16] For *mundbyrd*, see cap. 8, note 1 above.

[17] It is evident, especially from cap. 72 as compared with cap. 54 and 66, that 20 sceattas make a Kentish shilling.

The sceatt was the predecessor of the penny and was apparently intended to be of the same standard (21 grs.)—at all events, there is no clear evidence for any other standard. The Kentish shilling was consequently a (Roman) ounce of silver and therefore four times the value of the later West Saxon shilling, and five times that of the Mercian shilling. There are some very early gold coins in existence, which may have been Kentish shillings, but we do not know whether they were in circulation at this time. These—or some of them at least—are of the same standard as the Roman *solidus* and the *mancus* of later times (70 grs.), and consequently represent a ratio of only 6:1 in the relative value of gold and silver.

[18] Liebermann takes the words, *⁊ man nænig yfel ne gedeþ* as referring to the lender, *i.e.* the lender takes no part in the fray, but this involves giving a different interpretation to *yfel gedon* from that which it bears in cap. 2 (cf. also H. and E. cap. 13. 15).

21. If one man slays another, the ordinary[20] wergeld to be paid as compensation shall be 100 shillings.

22. If one man slays another, he shall pay 20 shillings[21] before the grave is closed, and the whole of the wergeld within 40 days.

23. If a homicide departs[22] from the country,[23] his relatives shall pay half the wergeld.

24. If a man lays bonds on a freeman, he shall pay 20 shillings compensation.

25. If a man slays the dependant[24] of a commoner, he shall pay [the commoner] 6 shillings[25] compensation.

26. If he slays a *læt*[26] of the best class, he shall pay 80 shillings; if he slays one of the second class, he shall pay 60 shillings; [for slaying one of] the third class, he shall pay 40 shillings.

27. If a freeman breaks the fence round [another man's] enclosure, he shall pay 6 shillings[27] compensation.

28. If any property be seized therein, the man shall pay a three fold compensation.

29. If a freeman makes his way into[28] a fenced enclosure, he shall pay 4 shillings compensation.

30. If one man slays another, he shall pay the wergeld with his own money and property (i e. livestock or other goods) which whatever its nature must be free from blemish [or damage].

31. If [one] freeman lies with the wife of [another] freeman, he shall pay [the husband] his [or her][29] wergeld, and procure a second wife with his own money, and bring her to the other man's home.

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[19] The man robbed, in cap. 19; presumably also the man with whom the borrower of the weapons is quarrelling. Liebermann suggests that *þone* may be used for *þonne*, which would make the statement general: 'If however a man is slain (by the borrowed weapons), etc.' The rarity of *þonne* elsewhere in these laws is somewhat against Liebermann's view; for a similar use of the demonstrative, cf. cap. 28 below; for the whole passage cf. Alf. cap. 19 § 1.

[20] The *medume leodgeld* is obviously that of a freeman, as in cap. 7 (cf. H. and E cap. 3, as compared with H. and E cap. 1 and cap. 26 below).

[21] Cf. the document *Be Wergilde*, § 4. This is probably the payment known elsewhere as *healsfang* (see Wiht. cap. 11 and note).

[22] *i.e.* 'escapes.'

[23] *i.e.* presumably from Kent.

[24] The word *hlafæta* ('breadeater') only occurs here. For the formation, we may compare *Hlaford*.

[25] Cf. cap. 15 above.

[26] The word *læt* does not occur except here. It is obviously identical with the term *litus, latus, lazzus* of the continental laws. The latter term denotes a class which is found among nearly all continental Teutonic peoples intermediate between freemen and slaves, and consisting presumably of freedmen and their descendants, and perhaps also of subject populations. There is no trace of such a class in the other Anglo-Saxon kingdoms, where apparently manumitted slaves became equivalent to freemen in regard to wergeld, etc. We may however compare the *liesing* of A. and G. cap. 2 (Norse *leysingi*), and the wergelds of the Welsh population in Ine, cap. 23 § 3, 24 § 2, 32. For the rights of a lord in Kent over a manumitted slave, see Wiht. cap. 8. Nothing is known as to the qualification of the various classes of *lætas*. For similar classes in Norway see Seebohm's *Tribal Custom in Anglo-Saxon Law*, pp. 240–259, 260–267.

[27] Alf. cap. 40; Ine, cap. 45. The payment is presumably that which would be required when the offence was committed by one freeman against another, and amounts to breach of the latter's *mundbyrd* (cf cap. 15 above).

[28] Presumably, ordinary trespass by one person, as against cap. 17 above, and cap. 32 below.

[29] The word *his* is ambiguous. Schmid and other scholars understand the word to refer to the wife's wergeld, in favour of which may be compared the Lex Baioariorum, cap. VIII, 1. 10: *Si quis cum uxore alterius concubuerit libera, ... cum weragildo illius uxoris contra maritum componat*. Liebermann takes *his* to refer to the wergeld of the adulterer, and urges that otherwise the neuter *his* would not be used, but the changes of gender in cap. 11 and cap. 83 cited by him are hardly conclusive parallels, since in both cases the pronoun *hio* occurs in a new sentence.

It would seem that the injured husband in Kent was not difficult to please, unless we are to suppose, with Liebermann, that his consent in regard to the choice of the lady was secured beforehand—but the law, at all events, gives no hint of such a stipulation.

32. If anyone damages[30] the enclosure[31] of a dwelling, he shall pay according to its value.

33. For seizing a man by the hair, 50 sceattas shall be paid as compensation.

34. If a bone is laid bare, 3 shillings shall be paid as compensation.

35. If a bone is damaged, 4 shillings shall be paid as compensation.

36. If the outer covering of the skull[32] is broken, 10 shillings shall be paid as compensation.

37. If both are broken, 20 shillings shall be paid as compensation.

38. If a shoulder is disabled, 30 shillings shall be paid as compensation.

39. If the hearing of either ear is destroyed, 25 shillings shall be paid as compensation.

40. If an ear is struck off, 12 shillings shall be paid as compensation.

41. If an ear is pierced, 3 shillings shall be paid as compensation.

42. If an ear is lacerated, 6 shillings shall be paid as compensation.

43. If an eye is knocked out, 50 shillings shall be paid as compensation.

44. If the mouth or an eye is disfigured, 12 shillings shall be paid as compensation.

45. If the nose is pierced, 9 shillings shall be paid as compensation.

46. If it is one cheek,[33] 3 shillings shall be paid as compensation.

47. If both are pierced, 6 shillings shall be paid as compensation.

48. If the nose is lacerated otherwise [than by piercing], 6 shillings shall be paid as compensation, for each laceration.

49. If it[34] is pierced, 6 shillings shall be paid as compensation.

50. He who smashes a chin bone, shall pay for it with 20 shillings.

51. For each of the 4 front teeth, 6 shillings [shall be paid as compensation]; for each of the teeth which stand next to these, 4 shillings [shall be paid as compensation]; then for each tooth which stands next to them, 3 shillings [shall be paid as compensation]; and beyond that 1 shilling [shall be paid as compensation] for each tooth.

52. If the power of speech is injured, 12 shillings [shall be paid as compensation].
§ 1. If a collar bone is injured, 6 shillings shall be paid as compensation.

53. He who pierces an arm shall pay 6 shillings compensation.
§ 1. If an arm is broken, 6 shillings shall be paid as compensation.

54. If a thumb is struck off, 20 shillings [shall be paid as compensation].
§ 1. If a thumb nail is knocked off, 3 shillings shall be paid as compensation.
§ 2. If a man strikes off a forefinger, he shall pay 9 shillings compensation.
§ 3. If a man strikes off a middle finger, he shall pay 4 shillings compensation.

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[30] Lit. 'pierces.'

[31] See Liebermann's note *ad loc*. I do not feel any confidence as to the translation of this passage.

[32] According to Liebermann, the *dura mater*; 'both' in cap. 37 refers to the *dura mater* and the *pia mater*.

[33] *sc*. 'that is pierced.'

[34] This law can hardly refer to the piercing of the nose, since this has already been mentioned in cap. 45 above, with a compensation of 9 shillings. Liebermann suggests that the word *þrotu* ('throat') has been omitted before *ðirel*.

§ 4. If a man strikes off a ‘ring finger,’ he shall pay 6 shillings compensation.
§ 5. If a man strikes off a little finger, he shall pay 11 shillings compensation.

55. For the nails of each [of the above-mentioned fingers], 1 shilling [shall be paid as compensation].

56. For the slightest disfigurement, 3 shillings, and for a greater 6 shillings [shall be paid as compensation].

57. If one man strikes another on the nose with his fist, 3 shillings [shall be paid as compensation].

58. If it leaves a bruise, 1 shilling [shall be paid as compensation].

§ 1. If the blow is received with uplifted hand, a shilling shall be paid.

59. If it leaves a black bruise [showing] outside the clothes, 30 sceattas shall be paid as compensation.

60. If it [the bruise] is under the clothes, 20 sceattas shall be paid as compensation for each [bruise].

61. If the belly is wounded, 12 shillings shall be paid as compensation.
§ 1. If it be pierced through, 20 shillings shall be paid as compensation.

62. If a man receives medical treatment, 30 shillings shall be paid as compensation.

63. If a man is severely (?) wounded,[35] 30 shillings shall be paid as compensation.

64. If anyone destroys the generative organ, he shall pay for it with three times the wergeld.
§ 1. If he pierces it right through, he shall pay 6 shillings compensation.
§ 2. If he pierces it partially, he shall pay 6 shillings compensation.

65. If a thigh is broken, 12 shillings shall be paid as compensation.
§ 1. If he becomes lame, the settlement of the matter may be left to friends.[36]

66. If a rib is broken, 3 shillings shall be paid as compensation.

67. If a thigh is pierced right through, 6 shillings compensation shall be paid for each stab [of this kind].
§ 1. For a stab over an inch [deep],[37] 1 shilling; for a stab between 2 and 3 inches [deep], 2 shillings; for a stab over 3 inches [deep], 8 shillings [shall be paid as compensation].

68. If a sinew is wounded, 3 shillings shall be paid as compensation.

69. If a foot is struck off, 50 shillings shall be paid for it.

70. If the big toe is struck off, 10 shillings shall be paid for it.

71. For each of the other toes, [a sum] equal to half that laid down for the corresponding fingers shall be paid.

72. If the nail of the big toe is knocked off, 30 sceattas shall be paid as compensation.
§ 1. 10 sceattas shall be paid as compensation for the loss of each of the other toenails.

73. If a freeborn[38] woman, with long hair, misconducts herself, she[39] shall pay 30 shillings as compensation.

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[35] The meaning of *cearwund* is quite uncertain. Schmid translates ‘Wenn jemand bettwund ist’; Liebermann, ‘Wenn jemand schwer(?) verwundet ist.’

[36] Probably, the relatives of both parties, as suggested by Liebermann.

[37] *Gyfe ofer ynce*; sc. *man inbestinð*, as in cap. 64 § 2 above. Liebermann understands the reference to be to a stab an inch long, and compares the law to Alf. cap. 46; but, in the latter case, there is no mention of a stab. *Gyfe* is apparently a mistake for *Gyf*.

[38] The precise significance of *locbore* is uncertain. The usual interpretation is that the long hair denotes the freeborn woman opposed to the slave.

[39] Liebermann understands as the subject of *gebete* not the woman, but the man with whom she misconducts herself.

74. Compensation [for injury] to be paid to[40] an unmarried woman, shall be on the same scale as that paid to a freeman.

75. The compensation to be paid for violation of the *mund*[41] of a widow of the best class, [that is, of a widow] of the nobility, shall be 50 shillings.

§ 1. For violation of the *mund* of a widow of the second class, 20 shillings; of the third class, 12 shillings; of the fourth class, 6 shillings.

76. If a man takes a widow who does not [of right] belong to him, double the value of the *mund* shall be paid.

77. If a man buys a maiden, the bargain shall stand, if there is no dishonesty.

§ 1. If however there is dishonesty, she shall be taken back to her home, and the money shall be returned to him.

78. If she bears a living child, she shall have half the goods left by her husband, if he dies first.

79. If she wishes to depart with her children, she shall have half the goods.

80. If the husband wishes to keep [the children], she shall have a share of the goods equal to a child's.

81. If she does not bear a child, [her] father's relatives shall have her goods, and the "morning gift."[42]

82. If a man forcibly carries off a maiden, [he shall pay] 50 shillings to her owner, and afterwards buy from the owner his consent.[43]

83. If she is betrothed, at a price, to another man, 20 shillings shall be paid[44] as compensation.

84. If she is brought back, 35 shillings shall be paid,[45] and 15 shillings to the king.

85. If a man lies with the woman of a servant,[46] during the life-time of the husband, he shall pay a twofold compensation.

86. If one servant slays another, who has committed no offence, he shall pay his full value.

87. If the eye and[47] foot of a servant are destroyed [by blows] his full value shall be paid.

88. If a man lays bonds on another man's servant, he shall pay 6 shillings compensation.

89. The sum to be paid for[48] robbing a slave on the highway shall be 3 shillings.

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[40] Or possibly, the compensation to be paid *by* an unmarried woman (cf. *mægþbot*, B. and T.).

[41] The meaning of *mund* is not clear. But from cap. 76 below it would seem that the *mund* belongs, not to the widow herself, but to a person responsible for her (*mundbora*)—*i.e.*, that it is a value of guardianship, though the sums are higher than we should expect in view of cap. 8 and cap. 15 above. It is conceivable that *mund* may be used here in the sense of Norse *mundr* and may mean the marriage price of a widow. In that case, however, *gebete* must have been inserted by mistake.

[42] The gift made by the bridegroom to the bride after the wedding (cf. II Can. cap. 73). Henr. [11 § 13a]. 70 § 22. Among wealthy people, it often took the form of a gift of land; cf. Harmer, *Historical Documents*, p. 31.

[43] Liebermann understands *þam agende* to mean the person who possesses right of guardianship over the girl. It seems clear from the context that a free girl (not a slave) is meant. See also Pollock and Maitland, *History of English Law*, II. p. 363.

[44] *sc*. to the bridegroom, in addition to what is specified in cap. 82 above.

[45] Presumably to the guardian or 'owner.'

[46] Liebermann (see II. p. 690) thinks there is probably no difference in meaning between *esne* in cap. 85–88, and *þeow* in cap. 89. 90, and compares Wiht. cap. 9. 10, with *ib*. cap. 13 ff. The original meaning of *esne* appears to have been 'harvester' (cf. Gothic *asans*, 'harvest'), and in general the word seems to have a wider meaning than *þeow* (cf. *þeuwne esne*, Wiht. cap. 23). The title to Ine, cap. 29, certainly uses þeow as synonymous with *esne*, while in Alf. cap. 43 we find the phrase *butan þeowum monnum ⁊ esnewyrhtan*. It seems to me not impossible that in the Kentish Laws *esne* may mean a half-free servant, presumably of the *læt* class.

[47] Liebermann translates *and* as meaning 'or' (cf. cap. 9 above, Ine, cap. 27, etc.).

90. If a slave steals, he shall pay twice the value [of the stolen goods], as compensation.

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[48] Liebermann understands the law to mean ‘robbery by a slave.’

B. LATER ANGLO-SAXON MATERIAL ON MARRIAGE

[Not yet ready. I’ll hand out this material in class.]

110. Ps.-Damasus, ep. 3.11 (H 503; JK †243). Cf. Ans. 3.46; Grat. C.5 q.2 c.1.

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TOPIC 5. CANONICAL COLLECTIONS

THE COLLECTION IN 74 TITLES

A. TITLE 62: ON LAWFUL MARRIAGES

271. CHAPTER I

Evaristus to all bishops.

A marriage cannot otherwise be legitimate unless the wife is sought from those who have lordship over the woman and by whom she is protected; and she is espoused by her nearest kin and lawfully dowered; and she is sacerdotally blessed at the proper time with prayers and offerings by a priest; and, accompanied by bridesmaids and escorted by those closest to her, she is solemnly given and received at a suitable time. Let them spend two or three days in prayer and preserve their chastity, so that good offspring might be produced, and they may please the Lord and beget not bastard sons, but lawful and legitimate heirs. Therefore, most beloved sons, know that marriages performed in this manner are lawful; but have no doubt that unions made otherwise are not marriages, but are adulteries, concubinages, lusts or fornications rather than lawful marriages, unless full consent is given and lawful vows are made.

271. Ps.-Evaristus, ep. 1.2 (H 87–88; JK †20). Ans. 10.2; Bon. 10.51. Cf. Grat. C.30 q.5 c.1.

B. TITLE 63: ON MARRIAGES FOR SOME REASON SEPARATED

272.

Bishop Leo to Bishop Nicetas of Aquileia.

The scourge of war and the terrible onslaughts of hostility have so disrupted some marriages that wives have been left all alone when their husbands were taken prisoners of war, and because they came to believe that their husbands were either dead or that they would never be released from their captivity, they entered another union because of their own need and anxiety. If ever any of those who were considered dead return, we should of necessity believe that the unions of their lawful marriages should be restored and, after the evils which the hostility brought have been removed, each should have what he lawfully had. However, no one should be judged culpable and considered an intruder into another's right if he married the wife of a husband who was thought no longer to exist. If, however, wives are so enraptured with love for their second husbands, that they prefer to live with them rather than return to their lawful union, they are rightly to be censured so that I they are deprived of ecclesiastical fellowship until they return to their lawful union.

272. Leo I, ep. 159.1–4 (PL 54.1136A-1137B; JK 536) with omissions; from Ps.-Isid. ep. 59 (M 866D-867C; H 621 from Hisp.). Ans. 10.22. Cf. Grat. 34. q.1 c.1.

C. TITLE 64: THAT MARRIAGES MUST NOT BE DISSOLVED FOR THE SAKE OF RELIGION

273. CHAPTER CCXXXVII

Gregory to the Patrician Theotista.[1]

There are some who say that marriages ought to be dissolved for the sake of religion. Truly, it must be known that even if human law permitted this,[2] nevertheless divine law prohibited it. For the Truth himself says, "What God joined let no man separate."[3] He also says, "A man is not allowed to put away his wife, except by reason of fornication."[4] Who, therefore, would contradict this heavenly legislator? We know that it is written, "They shall be two in one flesh."[5] If, therefore, husband and wife are one flesh and for the sake of religion the husband dismisses his wife or the wife her husband, leaving them to remain in this world or even to move to an illicit union, what is this religious conversion when one and the same flesh[6] in part moves to continence and in part remains in pollution? If they both agree to lead a life of continence, who would dare fault them? But if the wife does not follow the continence which the husband seeks, or the husband refuses what the wife seeks, the union may not legally be broken, because it is written, "The wife does not have the power of her body but the husband; and similarly the husband does not have the power of his body but the wife."[7]

273. Greg. I. Reg. 11.27 (MGH *Epp*. 2.294.18–27, 295.11–14; JE 1817) with many omissions; cf. Ps.-Isid. ep. 4 (M 1117C/D, 1118a; H 744–745 from ed. Maur.). Ans. 10.18. Cf. Grat. C.27 q.2 c.19.

274. LIKEWISE ABOUT THE SAME MATTER, CHAPTER XLIII

Gregory to the Notary Adrian of Palermo.

The woman Agathosa has complained that her husband was converted to the monastery of the Abbot Urbino against her will. Therefore, we order your honour to conduct a diligent inquiry, lest perchance he was converted by her wish or she herself promised to change. And if he learns this was so, let him both arrange for the husband to remain in the monastery and compel the wife to change as she promised. If, indeed, it is none of these, and you find that the aforesaid woman did not commit any crime of fornication on account of which it is lawful to dismiss a wife, in order that his conversion should not be an occasion of damnation to the wife left in the world, we wish you to return her husband to her even if he has already been tonsured, dismissing all excuses, because although the secular law orders that a marriage can be dissolved for the sake of conversion, even if one party is unwilling, nevertheless the divine law does not permit this to happen. Except for fornication it in no way allows a husband to dismiss the wife[8] because after the consummation of marriage husband and wife are made one body, which cannot be partly converted and partly remain in this world.

274. Greg. I, *Reg*. 11.30 (MGH *Epp*. 2.300.20–301.5; JE 1820) from John the Deacon, *Life of Greg*. 4.41 (PL 75.2O3C-2O4A). Ans. 10.19. Cf. Grat. C.27 q.2 c.21.

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[1] See the fuller version of the letter given in Gratian's *Decreta* C.27 q.2 c.19, below § 8A.

[2] The reference may be to Novel 22.5 and/or 117.10; cf. Novel 117.12.

[3] Matt. 19:6.

[4] Matt. 5:32.

[5] Matt. 19:5.

[6] Gilchrist adds 'both' here, without warrant in the Latin text.

[7] 1 Cor. 7:4.

[8] Matt. 5:32.

275. LIKEWISE ABOUT THE SAME MATTER, CHAPTER XLIII

Gregory to Felix, bishop of Siponto.

It has come to our attention that your nephew Felix seduced the daughter of Evangelus your deacon. If this is true, although he ought to be punished with the full force of the law, we want the rigour of the law to be somewhat relaxed, in this way, that is, that either he should take the woman he seduced as his wife or, if he considers that he must refuse this, he should be severely and corporally punished and excommunicated, and put away in a monastery where he should do penance and from which he shall have no right to depart without permission.

275. Greg. I, *Reg*. 3.42 (MGH *Epp*. 1.199.10–16; JE 1246) from John the Deacon, *Life of Greg*. 4.40 (PL.75.203C). Ans. 10.36; Ivo Decr. 8.29.

TOPIC 6. GRATIAN AND PETER LOMBARD

A. GRATIAN OF BOLOGNA, CONCORDANCE OF DISCORDANT CANONS
CAUSA 27, quaestio 2 (c. 1140)

in E. Friedberg (ed), *Corpus Juris Canonici* (Leipzig, 1879; repr. Graz, 1959) 1:1046, 1062–78 [CD trans.]

[*Note*: Some what follows is clearly legal, some of it only vaguely legal. As you go through these materials you should attempt to place these in their context. Who is the author? For what audience was he writing? What is the value of the material as law?

After you have answered the background questions, you should attempt to get "the big picture." What are Gratian and Peter Lombard saying about the formation of marriage? How do their views differ? Why do they differ?

Pay particular attention to the way in which each author uses his authorities. You should make some effort to find out who the authors of the authorities were. How does each go about reconciling inconsistencies? How to the argument of the following rules upon which both agree: (a) espoused parties may choose the monastic life without the consent of their spouses but married parties may not? (b) a bigamist or one who marries a widow cannot become a priest?

What role does the problem of marriage of Mary and Joseph play in the controversy?

Who had the best of the argument (a) logically? (b) on the basis of authority? (c) on the basis of policy?

Did Alexander III buy the Lombard's view entirely? If not, why not? If so, why so?]

CASE 27

A certain man who has taken the vow of chastity espoused [*desponsavit*] a wife; she, renouncing the previous match, betook herself to another and married him; he seeks after her to whom he was previously espoused.

The first question is whether there can be marriage between those who have taken a vow of chastity?

Second, is it permitted for one who is espoused to leave the one to whom she is espoused and marry another?

[On the first question, Gratian produces a large number of contradictory canons. If there is to be any hope of reconciling them, some sort of distinction must be found. The distinction that Gratian uses for his

ultimate resolution is that between simple and solemn vows. The former do not invalidate the marriage; the latter do. (This resolution became that of the classical canon law.)] ...

Part 1. **Gratian**: The second question follows in which we seek to discover whether a girl espoused to another man can renounce the previous match and transfer her vows to another. First, we shall see whether they are married, second whether they can depart from each other. That they are married is easily shown by the definition of marriage and by the authority of many. For matrimony or nuptials are joining of man and woman holding firm to an undivided mode of life. Among them [the couple in the hypothetical case], moreover, was a joining which required an undivided mode of life, for there was between them consent which is the efficient cause of matrimony according to the statement of Isidore [of Seville; cf. *Etymologies* 9.7, a very free quotation; but the statement is a commonplace, ultimately deriving from D.50.17.30.], "consent makes matrimony." Again John Chrysostom on Matthew [an anonymous author of a collection of homilies on Matthew, Homily 32]:

[**Canon 1**.] Coitus does not make a marriage, but will does. And therefore the separation of body does not dissolve it but [separation] of will. Therefore, he who dismisses his wife and does not take another is still a husband. For even if he is separated in body, nonetheless he is still joined in will. When therefore he has taken another woman, than he has fully dismissed [the first]. Therefore he who dismisses [his wife] does not commit adultery, but he who marries another.

[**Canon 2**.] Again, Pope Nicholas [I, Response to the Bulgarians, c.3]:

According to the laws, consent alone between the parties suffices when the question is whether parties are married. If that alone is lacking, anything else, even if accompanied by coitus, is frustrated.

[**Gratian**:] Since therefore consent, which alone makes marriage, intervened between this couple, it appears that they were married. But it is asked, what sort of consent makes marriage? The consent of cohabitation? The consent of sexual intercourse? Both? If the consent of cohabitation made a marriage, then a brother could contract marriage with his sister. If the consent of sexual intercourse [made a marriage, then] there was no marriage between Mary and Joseph. For Mary had sworn that she would keep herself a virgin. For this reason she said to the angel, "How can this be since I know not man? [Lk. 2:34]." That is to say, since I have determined that I will not be known [by a man]. For if she had not known a man up to that point, it would not have been necessary to ask how she could have a son, but [it was necessary] because she had determined that she would not be known. § 1. If therefore contrary to her determination she had consented to sexual intercourse, who would have been guilty of having violated her vow of virginity in her mind, if not yet in her body. It would be shameful [*nefas*] to think that of her, but, as Augustine says:

[There follows a passage [canon 3] a pastiche of quotations and paraphrases from St. Augustine (principally from his *De virginitate*) that generally support the point.] ... **Gratian**: Again, they [the couple in the hypothetical case] are also proved by authority to be married. For Ambrose says in his book on virgins [c. 6]:

Canon 5: *The conjugal pact not the deflowering of virginity makes a marriage.*

When the marriage begins, the name marriage is taken. The deflowering of virginity does not make a marriage, but the conjugal pact. Therefore, there is marriage when a virgin is joined [*iungitur*] to a man, not when she is known by the man.

Canon 6. *From the first faith of espousals they are called married.*

Again Isidore, [*Etymologies*, 9.7.]

Husband and wife [*coniuges*] are quite rightly called from the first faith of espousals even there is yet no conjugal lying together between them.

[There follow two canons added after Gratian's time.] ...

Canon 9. *Concerning the same thing.*

Again, Augustine *On the Good of Marriage* [1.11].

A married person is called from the first faith of espousal, which knows no bedding nor will ever know, nor does the name married person fail or will it be false where there has never nor will ever be any carnal mingling. § 1. For this reason both parents of Christ merited to be called a faithful couple, not only his mother but also his father, as he the spouse of his mother, and both in mind but not flesh.

Canon 10. *The triple good of marriage was in the parents of Christ*.

Again, in the same.

Every good of marriage was fulfilled in the parents of Christ, faith, sacrament, and offspring. We acknowledge the Lord himself to have been offspring; faith, because there was no adultery; sacrament, because there was no divorce. Only marital bedding was not there, because that cannot be in the flesh of sin without shameful concupiscence of the flesh, which arises out of sin, without which he was to come willed to be conceived without sin.

Gratian. Again in Leviticus [Dt. 22:25], the Lord commands Moses saying: "If anyone oppresses another's espoused in the field, let him die the death, because he has violated the wife of another." § 1. Again in the laws of the princes [i.e., Roman law], the espoused in commanded to mourn the death of her espoused just like her husband [a reference probably to D.23.2.6]. Again, it is found in the canons [Tribur (895), c. 42]:

Canon 11. *A brother cannot marry his brother's wife after [the brother's] death.*

If someone has espoused someone, and has not been able to know her because death has intervened, his brother cannot take her as wife.

[**Canon 12**.] *Again Gregory to the emperor Maurice, concerning a certain count who took to wife the espoused of his dead nephew [probably Gregory II, 721]*.

Who takes the espoused girl of his next of kin as wife, let him be anathema, and all that consent in it, because according to the law of God he is judged worthy of death. § 1. For the practice of divine law is to call espoused married, as in the Gospel, "Take Mary your wife," and that in Deuteronomy "If anyone oppresses another's espoused in the field, let him die the death, because he has violated the wife of another," not she who is a wife but she who by her parents ought to become one. *And below.* § 2. Just as no Christian ought to have as wife no one of his own blood or whom a relative has, similarly also those of the blood of his wife.

Canon 13. *His wife having died, it is permissible for a man to marry another, so long as he does not marry someone who is divorced or espoused.*

Again Jerome [not Jerome, unidentified] ...

Canon 14. *After the death of a man no one of his blood shall take his spouse.*

Again, Gregory [not Gregory, probably a summary of the council of Tribur, above].

If anyone has espoused or pledged a wife, although he dies before he can take her as wife, nevertheless no one of his relatives may receive her in marriage; and if the deed is done, she shall be separated.

Canon 15. *Concerning the same. Again Pope Julius [probably the same]*.

Whoever has espoused or pledged a wife and is prevented by his death or other intervening causes from knowing her, neither his brother nor any of his relatives shall marry her at any time thereafter.

Part 2. **Gratian**: By all these authorities these people are shown to be married, but Augustine [not Augustine, probably a summary of the following canons] testifies to the contrary saying:

Canon 16: *There is no marriage among them whom mixing of the sexes does not couple.*

There is no doubt that a woman who has not had intercourse is not a married woman.

Canon 17: *That woman does not pertain to matrimony with whom the nuptial mystery is not celebrated.*

Again Pope Leo [to Rusticus, Ep. 107, 458–9].

Since the partnership of nuptials was so instituted from the beginning that it does not have in itself the sacrament of the nuptials of Christ and the Church unless there has been a mingling of the sexes, there is no doubt that that woman does not pertain to marriage in whom it is learned that there was not nuptial mystery.

[There follows a canon added after Gratian's time.] ...

Gratian. Again the Apostle teaches [1 Cor. 7:3] that a wife shall render the debt to her husband and the husband to her wife, unless perchance by consent they should devote themselves to prayer for a time. Whence it is given to understand that without the consent of the other it is not permissible for the one to take time off for prayer. § 1. Again, the man cannot take up the proposal of a better life [i.e., join a monastery] without the consent of his wife and vice versa. Whence Gregory writes to the patrician Theutista [Ep. 9.39, 601]:

Canon 19. *Marriages cannot be dissolved for the sake of religion.*

There are those who say marriage ought to be dissolved because of religion. Know you the truth, even if human law allows it,[1] nevertheless divine law prohibits it. For the Truth himself says, "What God joined let no man separate." [Matt. 19:6.] He also says, "A man is not allowed to put away his wife, except by reason of fornication." [Matt. 5:32.] Who, therefore, would contradict this heavenly legislator? We know that it is written, "They shall be two in one flesh." [Matt. 19:5.] If, therefore, husband and wife are one flesh and for the sake of religion the husband dismisses his wife or the wife her husband, leaving them to remain in this world or even to move to an illicit union, what is this religious conversion when one and the same flesh in part moves to continence and in part remains in pollution? If both should lead the celibate life who should venture to accuse them for this, when it is certain that the almighty God, who grants lesser things does not prohibit greater? In two ways the holy men used to abstain from things that are lawful: sometimes so that they might increase their merits with almighty God; and sometimes to wash away the faults of their previous life. Wherefore when good married people either desire to increase merit or to wipe away the faults of their previous lives, it is permissible that they bind themselves to continence and seek the better life. For we know many religious men who led celibate lives with their spouses and afterwards came under the rule of the Holy Church. If, however, the man seeks celibacy and the woman does not follow, or if the wife seeks it and the man objects, the marriage cannot be divided, for it is written: "The wife does not have power over her body but the husband; likewise the man does not have power over his body but the wife." [1 Cor. 7:4]

Canon 20. *A woman deputed to a monastery without the consent of her husband is not prohibited from returning to her consort.*

The same to Leo bishop of Catania [Ep. 3.34, 594]. ...

Canon 21. *He is to be compelled to return to his wife who without her consent took up the habit of a religious.*

The same to Hadrian, notary of Palermo [Ep. 9.44, 601]. ...

Canon 22. *Without the consent of his wife a man cannot take up the proposal of religion.*

Again from the 8th synod [actually from Basil on disputed rules, c. 12]. ...

Canon 23. *Unless the bishop is aware of it, a husband and wife cannot separate for the sake of religion.*

Again, from the synod of Pope Eugenius [II, in the Roman Synod c.36 (826), not a literal quotation] ...

Canon 24. *Without the will of his wife a man cannot keep continence.*

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[1] The reference may be to Novel 128.40.

Again Augustine concerning adulterous marriages [actually from apocryphal homily of John Chrysostom on Psalm 50].

If you abstain without the consent of your wife, you give her a license to commit fornication, and her sin will be imputed to your abstinence.

Canon 25. *A man is not to be received into a monastery unless his wife is converted.*

Again Gregory to the abbot of Urbino [Ep. 5.49, 596]. ...

Canon 26. *It is not permissible for a wife to make a vow of continence unless her husband chooses the same life.*

Again Pope Nicholas [I to king Charles, 867].

Queen Thieaberga wrote us that she wished to lay aside her regal dignity and intercourse and would content herself with a private life alone. We wrote her that she could not do it unless her husband Lothar chose the same life. § 1. For although it is written, "What God has joined, let not man put asunder" [Mt. 19:6], God, however, and not man separates, when by the instinct of divine love, marriages are dissolved by mutual consent of both. Otherwise, however, we forbid your mutual separation.

Gratian. See, those who are married cannot profess continence without the consent of the other. Espoused, however, even without consulting the those whom they have espoused are shown by examples and authority to be able to keep continence. As St. Jerome reports, Macharius, a most distinguished hermit of Christ, the marriage feast having been celebrated, was in the evening about to enter the bridal chamber, he fled the city and sought foreign shores and chose for himself the solitude of the hermit. § 1. Again St. Alexius, the son of the most distinguished Epiphanius, similarly called from the wedding by divine grace, deserted his espoused, and alone began to keep company with Christ. By these examples it is clear, that espoused can profess continence even without asking for the consent of their espoused. The same is proved by the authority of Pope Eusebius [actually from the Penitential of Theodore, c. 11], who says:

Canon 27. *An espoused girl is not prohibited from choosing a monastery.*

It is not permitted for the parents of an espoused girl to give her to another man, but it is permitted for them [?her, *sibi*] to choose a monastery.

Canon 28. *An espoused woman can choose a monastery without penalty.*

Again Gregory in the register [Ep. 6.20 to Fortunatus, 597].

The lawful decrees consider that an espoused woman, if she wishes to be converted, shall be completely free of any penalty.

Gratian: Since it does married parties no good to offer continence to God without each other's consent, and since (although a husband does not have power over his body but his wife has it) nonetheless espoused women may choose the monastic life and espoused men may with benefit take up the better life without seeking the consent of their espoused, it is apparent that there is no marriage between espoused parties. § 1. Again, since according to Augustine that woman does not pertain to matrimony with whom it is learned that there is no sexual intercourse. Again according to Leo she does not pertain to matrimony with whom it is learned that there was no nuptial mystery. It is apparent that between espoused there is no marriage. § 2. Again, Pope Nicholas teaches [actually the interpretation of Paul, *Sentences* 20.4.2] that those who are cut off by their enemies or deprived of their members are not to have their marriages dissolved on account of this. § 3. On the other hand, Pope Gregory [an unidentified canon] laid down about those who cannot render the debt to their wives by reason of frigidity, that both of them shall swear by the seventh hand of their neighbors, touching the holy relics, that they never were made one flesh by the joining sexual intercourse. Then the woman can contract second nuptials; the man, however, who is of a frigid nature, shall remain without hope of marriage. Whence the same [actually Rabanus to Heribald, 853] write to Venerius, the bishop of Carlitanus, saying:

Canon 29. *If the woman proves that she was never known by her husband, let her be separated.*

What you asked me about those who are joined in matrimony and cannot marry (*nubere*), if he can take another and she can take another, about these it is written: If a man and woman are joined and afterwards the woman says of the man that he cannot come together with her, if she can prove by a true judgment that this is true, let her take another.

Gratian: See, the impossibility of intercourse, if it arises after intercourse has occurred between the parties, does not dissolve the marriage, but if it arises before intercourse has occurred, then the woman is free to marry another. Whence it is apparent that the parties were not married otherwise they would not be permitted to depart from each other except on account of fornication, and if they departed they are obliged to remain unmarried or to reconcile themselves with each other. § 1. Again, if an espoused were a wife, upon the death of her spouse she would be a widow. If however she were a widow her husband could not rise to holy orders. For the husband of a widow, just like the man who has married twice, is prohibited from becoming a priest. Out of this kind of linking, however, no one is prohibited from holy orders. As Pope Pelagius [555 X 560, suspect] says: "There is nothing (so far as pertains to this article) in the canonical institutes that prevents him." It appears therefore that these were not married.[2] § 2. Again, if they were married, the departure from each other would be a divorce. But the separation of these Ambrose denies is a divorce, saying of the Blessed Mary whom Joseph espoused, and took her to his own [*Comm. in Luke* 2.1]: "Joseph never knew her. For if the just man had known her, he never would have allowed her to depart from him, nor would the Lord, who commanded a wife not to depart from her husband except for the reason of fornication, have been the author of divorce, commending her to John." See, the commendation of Mary to John and her withdrawal from Joseph is denied to be a divorce, because Joseph did not know her. Whence it is apparent that they were not married. If however the Blessed Mary whom Joseph espoused and took to his own is denied to have been married, how must less she who is simply espoused to be called married.

Canon 30. *He who pollutes his wife's sister may have neither of them.*

Again, from the council of Orléans [In fact, c.12 of the *Capitulary of Worms* (753)].

He who sleeps with two sisters, and one of them was previously his wife, may not have one of them, and they may never couple with this adulterer in marriage.

Gratian: That is, he may not render the debt to his own wife, whom he rendered unlawful for himself by knowing her sister. Nor, even after the death of his wife, may he or the adulterous sister couple with anyone in marriage. Of an espoused, however, the contrary is read in the council of Tribur [895].[3]

Canon 31. *Of him who has slept with the espoused of his brother.*

A certain man espoused a wife and endowed her, and when he was unable to have intercourse with her, his brother secretly knew her and rendered her pregnant. It was decreed that although she cannot be married [*nupta*] to her lawful husband, a brother cannot have the espoused of the his brother; but let the fornicator and fornicatrix undergo the penalty for their crime, but lawful marriages shall not be denied them.

[Canon 32 appears to have been added later.]

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[2] This example requires some explanation. The famous passage in *First Timothy*, 3:1–13, on the qualifications for bishops and deacons says that both should be "married only once." *Id*. 3:2, 12. The same is required of presbyters in the *Letter to Titus*, 1:5. An ancient canon prohibited the ordination not only of those who themselves married more than once but also those who had married widows. [Apostolic canons?] But, according to Gratian, Pope Pelagius (555 X 560) had held that marriage to a "widow" who had never had intercourse with her deceased husband did not render the new husband a "bigamist," ineligible for orders. The canon ascribed to Pelagius is suspect, because it first appears in Ivo of Chartres and cannot be traced behind him.

[3] The canon does, indeed, come from c. 41 of the council, although the council would seem to be repeating a ruling first found in Regino of Prüm, 2.246.

Gratian: If she whom the husband of her sister knew is perpetually prohibited from coupling, but this man who corrupted the espoused of his brother, having done penance is permitted to contract marriage, it is apparent that the espoused was not the wife of the brother. § 1. Again a woman dismissed by her husband by reason of fornication shall either be reconciled to him or remain unmarried during his lifetime. Of an espoused, however, the contrary is found in the first book of *Capitularies* [c.105 and book 7, c.183].

Canon 33. *If an espoused man does not wish to take his raped espoused, she may be permitted to marry another.*

Let the *raptor* be condemned to public penance. The *rapta*, however, if her espoused does not with to take her and she did not consent to the crime, shall not be denied license to marry another.

Canon 34. *Concerning the same.*

Again, from a council of Toledo [actually from the *Capitulary of Aix-la-Chapelle,* c.24 (817)].

It was decreed by the council that if a man took another's espoused by force, he should be punished with public penance and should remain without hope of marriage. If the woman did not consent to the same crime, she should not be denied the privilege of marrying another. But if after these things had happened the guilty parties had presumed to marry each other, both should be anathematized.

Part 3. **Gratian**: It appears therefore, that she is not a married since the privilege of marrying another is not denied to her who is espoused to a living man. How, therefore, according to Ambrose and the other fathers, are those espoused [*sponsae*] called married [*coniuges*] when by all these arguments they have just been shown not to be married? But it ought to be known that marriage is begun by espousal but is perfected by intercourse. For this reason there is marriage between those espoused, but it is begun [*coniugium initiatum*]; between those who have had intercourse there is complete marriage [*coniugium ratum*]. Whence Ambrose [cf. canon 5]:

Canon 35. *In espousals marriage is initiated.*

When marriage is begun, the name of marriage is taken, not when the woman is carnally known by the man.

Gratian: See, in espousal marriage is initiated not perfected.

Canon 36. *By the mingling of those joined marriage is perfected. Again Ambrose in book 1 on the Patriarchs [not in Ambrose, uncertain]*.

In every marriage there is understood to be a spiritual joining which the corporal mixture of those joined confirms and perfects.

Canon 37. *Marriage is initiated by the agreement of spousals and perfected by mingling.*

Again Jerome in Abadias [not in Jerome, uncertain].

"Wherefore they will fornicate with your daughters and your espoused will be adulteresses" [Ho. 4:13]. It is to be noted that for the daughters he speaks of a future fornication, and in the married adultery, which are initiated by spousal agreement and perfected by mingling of bodies.

Canon 38. *When an espoused woman is handed over and led to use, she is rightly called 'married'* [coniunx].

Again, Ambrose to Paternus [ep. 66].

If anyone has use of a woman espoused and handed over to him, it is called marriage.[4]

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[4] As the *Correctores* note, this passage is taken out of context and almost certainly does not mean what Gratian thinks it means.

Gratian: Why she is not handed over immediately after the nuptial pact, Augustine in fourth book *Of Confessions* [4.3] shows, saying:

Canon 39. *Why espoused are not handed over immediately after the pact.*

It was instituted that women espoused by a pact not be handed over immediately, lest the husband hold cheap what is given, whom the espoused man sighs for held back.

Gratian. According to this distinction the authority of Augustine is to be understood, "There is no doubt that that woman does not pertain to matrimony with whom it is learned that there was no mingling of the sexes." It is to be understood as dealing with perfected marriage, such that has within it the sacrament of Christ and the church. So also is that statement of Pope Leo to be understood. § 1. But this statement of Augustine is raised by way of objection: "Between Mary and Joseph there was perfect marriage."[5] But here perfect is not understood from the office but from those things that accompany marriage, to wit, faith, progeny and sacrament. The authority of Augustine proves that all these things were present between the parents of Christ. All these things therefore which are brought in for the purpose of not dividing a marriage are to be understood of its perfection which is initiated in the spousal joining but is perfected in the office of corporal mingling. Those things, however, which shows a separable marriage are understood of one that is initiated, which is not yet perfected by its office. § 2. It is possible to make another distinction. Espoused are so called by the custom of writing with regard to the hope of future things, not by the effect of present things. Whence Ambrose, when he says, "When marriage is initiated," does not add "then the matter and the effect," but "then the name of marriage is taken," showing that such persons have the name of marriage, not the matter or the effect. Again, Augustine when he speaks of the parents of the Lord says "they were married in mind not in the flesh, just as they also were parents [in the same way]."[6] Out of which it is given to understand that as Joseph is called the father of the Lord not by the effect of procreation but by the office and care of providing; similarly his [the Lord's] mother [reading *mater*] is called wife not by the effect of marriage but by submitting to those things necessary for it and by the affect of an undivided mind. Hence Augustine says, "Do not fear to take Mary your wife," he called her *coniunx* because she was a wife to be.[7] Hence also Bede on *Leviticus* [actually, Dt. 22:25, see above], "If anyone violates the espoused of another," says that an espoused is called wife, not because she then was but because she was going to be wife. Hence also Jerome on Matthew in the Gospel, "When she was espoused." [Mt. 1:16].

Canon 40. *By custom in scripture espoused women are called wives and espoused men husbands. ...*

Canon 41. *About the same*.

The same on Genesis. ...

Canon 42. *Mary is called wife by the custom of scripture when she was simply espoused.*

Again John Chrysostom on the same Gospel. ...

Canon 43. *The Lord would not have commended his mother to the disciple if Joseph had known her.*

The same on the ?the same. ...

Canon 44. *Mary is called wife of Joseph because she was thought to be about to be so by him.*

Again Origen in the same. ...

[The preceding texts that are omitted all come from respectable patristic authorities, and all make the point argued.]

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[5] This would seem to be a summary of C.27 q.2 c.3, but the word "perfect" is not found in that passage. (?)

[6] Apparently a summary of C.27 q.2 c.9.

[7] Apparently a reference to *id.* The quotation is from Mt.

Canon 45: *Joseph did not arrive at nuptials with Mary.*

Gregory in his homily on the Gospel "when it was late on that day".

Thus He permitted the disciple to remain in doubt, just as before His birth He wished Mary to have an espoused who nonetheless did not attain his nuptials. For it came about that the doubting apostle became a living witness of the true resurrection just as the man who was espoused of His mother became a guardian of her inviolate virginity.

Gratian: From all these things it appears that those espoused are called married by a hope of future things not by the fact of present things. How therefore, can they be called married from the time of the first oath of espousal, if that joining which they assert at the espousal may be denied? But, from the first oath of espousal, it may be called marriage, not because there is a marriage in the espousal, but because of the faith which they owe another because of the espousal that they afterwards will become married. In the same way sins are said to be forgiven by faith not because they are forgiven by faith before baptism but because faith is the cause by which we are cleansed from our sins in baptism. § 1. For this reason John Chrysostom says "Intercourse does not make matrimony, but will."[8] And Ambrose says "Not the deflowering of virginity but the conjugal pact makes matrimony."[9] This is to be understood as: intercourse without the will to contract matrimony and the deflowering of virginity without conjugal pact does not make matrimony, but the will to contract matrimony and the conjugal pact make it so that a woman in the deflowering of her virginity or in intercourse is said to be married to a man or to celebrate the nuptials. § 2. Again, Pope Siricius[10] calls the departing of espoused persons a marriage separation. But such parting is to a violation of a present marriage but a future one, one hoped for because of espousal. Thus, even the devil was said to have fallen from beatitude not that the beatitude which he then had but that beatitude for which he was made. Thus also, a man who by the merit of his life and his learning is elected as a priest or a bishop, if in the meantime he should deserve to be deprived of his election, is said to else the priestly or episcopal oil, not that which he has received, but that which he was elected to have. Therefore, by this authority, an espousal cannot be called a marriage. § 3. But granted that an espoused is not a wife, nonetheless it is asked whether she may renounce her prior condition. This is prohibited by the authority of the council of Ancyra [c.11 (314)] in which it is laid down as is written here.

Canon 46. *Espoused girls are to returned to their prior* [*spouses*] *if they are taken away from them* [raptae].

It was decided that espoused girls who afterwards are taken away [*raptas*] by others are to extracted and returned to those to whom they were espoused before, even if it is clear that force was brought to bear on them by their raptors.

Canon 47. *An espoused woman is to be deprived of communion if she does not desert her raptor and return to her espoused.*

John VIII [873 X 882] to the archbishop Rostan [of Arles].

Atto, the bearer of these presents, while he was faithfully performing in our service, complained that a certain man had taken away [*rapuisse*] a woman who was espoused to him. And therefore your brotherhood shall call together your suffragan bishops on our authority, and by unanimous sentence deprive of all communion the raptor if he does not return the espoused to [Atto] and the *rapta* if she refuses to go back to her original espoused.

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[8] Above, C.27 q.2 c.1.

[9] Above, C.27 q.2 c.5.

[10] This would seem to be a reference to C.27 q.2 c.50, below.

Gratian: But it is one thing to renounce a previous marriage contract and marry another; it is quite another thing to engage in illicit debauchery. Whence, Isidore, *Etymologies* [5.24].

Canon 48: *What is* raptus?

Raptus is illicit intercourse, so called from 'corrupt'; hence he who takes possession by *raptus*, is taking delight in *stuprum*.[11]

Gratian: This woman, however, [the one in the hypothetical case] was not *rapta* by another, but was shown to be espoused to another. Pope Gelasius [(492–6), probably genuine] forbids such a woman to be called *rapta*, saying:

Canon 49. Raptus *is admitted in those situations where a girl is abducted concerning whose nuptials nothing is shown to have been done.*

The law of the past emperors say that *raptus* is committed, where the girl, concerning whose previous nuptials nothing was done, seems to have been abducted.

Gratian: What joined to the end of the chapter, "even if it is clear that force was brought to bear on them by their *raptores*,"[12] was added because some *raptae* expose themselves to *raptus* and some are violently abducted. In whatever way they are *raptae*, they are to returned to their previous [espoused]. This woman [in the hypothetical], however, is counted not among those *raptae* but among the espoused, and therefore she is not to be taken away from this man [her current husband] and returned to the previous one. § 1. There follow other authorities in which she is prohibited from marrying a second man and is ordered to return to her prior vows. For Pope Siricius says to Himerius bishop of Tarragona [Ep. 1.4].

Canon 50. *It is not possible for someone to take the girl espoused to another.*

You asked about violation of wedlock, if someone could take into marriage a girl espoused to another. We anathematize such a marriage, and forbid in all ways that it happen, because that blessing which the priest imposes on one about to be married, would be taken among the faithful as an example of sacrilege if it were violated in any way.

Gratian: But by this authority Siricius prohibits a woman from going to second vows who has been led to her espouser's house and with her espoused has been veiled and blessed. The parting of such partners violates the blessing which the priest has placed on those about to be married. And therefore the marriage we are talking about in the instant case is not forbidden by this authority. §1. Again, that [statement] of Pope Eusebius,[13] "It is not permitted for the parents to hand over an espoused girl to another man," is likewise to be understood of one so espoused, that is, one veiled with her espoused and blessed. Again, the statement of Gregory is objected,[14] "A woman who is separated from her husband on the ground of frigidity [rightly, impotence] and married to another, if the man afterwards knows another woman, the [first] woman is to taken from her second [husband] and returned to the first." But this [objection] is to be solved in the same way, to wit, because she was blessed together with him.

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[11] A sexual crime, normally implying corruption of a virgin.

[12] See above, C.27 q.2 c.46.

[13] Above, C.27 q.2 c.27.

[14] In fact, by an unknown author; see C.33 q.1 c.2.

B. PETER LOMBARD, FOUR BOOKS OF SENTENCES 4.26–7 (c.1155)

[CD trans.]

Distinction 26

The Institution of and Reason for Marriage

Although the other sacraments began after sin and because of it, the sacrament of matrimony was instituted by God before sin, not as a remedy but as a position and duty [*officium*]. In the Bible [Genesis 2] after Adam was put to sleep, one of his ribs taken, and woman made like him rational in spirit, he said prophetically: "This is bone of my bones and flesh of my flesh; on account of this man shall leave his father and mother and cleave to his wife and the two shall be one flesh."

The Double Institution of Marriage

The institution of marriage is double. The first was in Paradise as a position and duty where there was an unstained bridal chamber and honorable nuptials; conception was without burning passion and birth was without pain. The second was outside of Paradise as a remedy to avoid unlawful emotion. The first was to multiply nature; the second to cut off nature and control vice. Even before sin God said: "Increase and multiply"; and He said it after sin when almost all men had been consumed in the flood. That marriage was instituted before sin as a position and duty and after sin was granted as a remedy, Augustine states when he says: "What is a position and duty for the well, is a remedy for the sick." The sickness of incontinence, which is in mortal flesh because of sin, is taken away by the honesty of nuptials lest flesh fall into the ruin of passionate acts. If the first men had not sinned, they and their successors would not have had drives of the flesh and the burning of lust, and just as any good work is noble, so their intercourse itself would have been good and noble. Since, however, the deadly law of concupiscence clings to our bodies because of sin without which there would be no intercourse, intercourse is evil and reprehensible unless excused by the good of marriage.

* * *

There were some heretics called Tatiani who hated marriage. They hated nuptials and said they were the same thing as fornication and other corruption. They did not receive into their number any married man or woman who practiced his marriage. That marriage is a good thing, however, is not only proved by the fact that God instituted it among our first parents but also by the fact that Christ was at the nuptials in Cana in Galilee and approved of them by making water into wine. Christ also forbade man to set aside his wife except by reason of fornication. St. Paul says, "a virgin does not sin if she marries." It is apparent therefore that marriage is a good thing; otherwise it would not be a sacrament, for a sacrament is a holy sign [*sacrum signum*].

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Distinction 27

The Efficient Cause of Matrimony

Next we consider what is marriage, what is its efficient cause, for what reason it ought to be contracted, what are the goods of marriage, and how intercourse is excused by them, and who are the lawful persons for matrimony. There are also many other things about matrimony which we include under this heading.

What is marriage? There is matrimony or nuptials, the matrimonial joining of man and woman, among proper persons maintaining indivisible intimacy. It is indivisible intimacy because without the consent of the other neither party can profess celibacy or abandon the other for a life of prayer, and while they are living, the marriage bond remains, they may not have intercourse with others, and each one treats the other as he does himself. Within this description is included the matrimony at least of proper and faithful persons.

Consent makes the marriage. The efficient cause of marriage is consent, not just any consent, but the expression of words not of the future but of the present tense. For if the parties agree for the future, saying:

I shall take you as my husband and I shall take you as my wife; this is not an effective agreement of marriage. If they agree mentally, but do not express it in words or by other definite signs, such consent will not make a marriage. However, if they say the words which nevertheless they do not mean in their hearts; if there is no compulsion or fraud, the binding power of the words with which they consented, saying: I take you as my husband and I take you as my wife, makes the marriage.

The authorities prove that consent alone makes the marriage. That consent makes the marriage is proved by the following testimony: Isidore says: "Consent makes the marriage." Pope Nicholas says: "When a marriage is questioned, consent of the parties according to law alone suffices, and if that alone is lacking, anything else, even if accompanied by intercourse, is frustrated." John Chrysostom says: "Intercourse does not make the marriage but will, and therefore physical separation does not dissolve it." Ambrose says: "The deflowering of virginity does not make a marriage, but rather the conjugal pact." From these it appears that consent, that is the conjugal pact, makes matrimony and from that time forth there is marriage, even if intercourse does not come before or afterwards.

When does the marriage begin? That the espousals in which the conjugal pact is expressed result in married parties, the evidence of the Saints shows: Ambrose says: "When the marriage begins, the name of marriage is adopted; when the woman is joined to the man there is marriage, not when she is carnally known by the man." Isidore: "The parties are called married from the first oath of espousal, even though there has as yet been no intercourse between them." Augustine: "She is called a wife from the first oath of espousal though she has not slept with her husband nor is about to. It is not swearing falsely nor lying to call it marriage where there is not, nor is about to be, any intercourse. Because of a faithful marriage Mary and Joseph deserve to be called the parents of Christ, not only his mother, but also his father, as the husband of his mother; this is a matter of the mind not of flesh." From this clearly it is to be inferred that from the time of voluntary marital consent (which alone makes the marriage) the espoused are truly married.

Some say there is not marriage before intercourse, but the parties are espoused. Some say nonetheless that a true marriage is not contracted before the handing over and intercourse, and that others not truly married before intercourse; but from the first oath of espousal a man and a woman are espoused, not husband and wife. Espoused parties are frequently called married not because they are but because they will be as they mutually promised. That is the gist of what these authorities say.

What is the reason for this view? Between the espousal and marriage much intervenes. The espoused are permitted before intercourse to choose the monastic life without the consent of their espoused, and if this happens, the other is permitted to marry another. It does married parties, on the other hand, no good to be chaste unless by common consent, nor can they enter the monastic life unless both agree to take a vow of chastity. That an espoused woman is permitted to choose the monastic life is shown by the sacred authorities. Pope Eusebius says: "While it is not permitted for the parents of an espoused girl to turn her over to another man, nonetheless she may choose the monastic life." Gregory says: "The decretals hold that if an espoused girl wishes to be converted (i.e. to enter a monastery) she should absolutely not be punished for this." Jerome tells of Macharius, a famous Christian hermit who, after the wedding feast, was about to go into the marriage room in the evening, but instead left the city, sought foreign lands, and chose the solitary life of a hermit. Likewise Saint Alexius was called from his nuptials by divine grace, left his espoused, and alone began to serve Christ. By these examples it is clear an espoused is allowed to profess celibacy without the consent of his espoused.

That husband or wife cannot profess celibacy without the other's consent. Married parties, however, cannot do this. A man may not choose the better life without the consent of his wife and vice versa. For this reason Gregory writes to the patrician Theotista: "There are those who say marriage ought to be dissolved because of religion. Know you the truth, even if human law allows it, nevertheless divine law prohibits it. If both should lead the celibate life who should venture to accuse them for this? For we have many religious men who lead celibate lives with their spouses and afterwards came under the rule of the Holy Church. If, however, the man seeks celibacy and the woman does not follow, or if the wife seeks it and the man objects, the marriage cannot be divided, for it is written: 'The wife does not have power over her body but the

husband; likewise the man does not have power over his body but the wife'." [There follow a number of other quotations to the same effect all of which are to be found in Gratian, C.27, q.2, c.21, 22, 23.] Augustine says: "If you abstain without the consent of your wife, you give her a license to commit fornication, and her sin will be imputed to your abstinence." Thus Nicholas observes: "Queen Thieaberga wrote us that she wished to lay aside her regal dignity and intercourse and would content herself with a private life alone. We wrote her that she could not do it unless her husband Lothar chose the same life." From this it is plain that it does married parties no good to profess continence or to take up the religious garb unless there is a common consent, and if they do it, the act ought to be revoked. But espoused persons can choose the monastic life without the common agreement. For this reason it seems that there has been no marriage between espoused parties.

[*The answer to Gratian's argument.*] Some assert that from the first oath of betrothal the parties are called married not because of the present fact but because of the hope of future things because from the oath which they swore to each other in the betrothal they will afterwards become married. The preceding authorities in which it is asserted that it is the contract which makes the marriage they want you to understand as saying that the consent or pact marriage makes the marriage not before sexual intercourse but in sexual intercourse. Just as the deflowering of virginity does not make a marriage unless it is preceded by the conjugal pact, so the conjugal pact does not make a marriage before intercourse. Therefore from the conjugal pact they are espoused before intercourse, in sexual intercourse they become married. For the conjugal pact is such that she who was espoused before now becomes a wife in intercourse.

The answer to the objections with a distinction. We respond thus to these objections: There are espousals in which the man and woman promise to contract marriage, but without present consent; there are also espousals in which they have present consent, that is, the conjugal pact which alone makes marriage. In that espousal where there is a promise to contract marriage, the parties become espoused, not married; these espoused may profess continence and choose the monastic life without the consent of the other. In that espousal in which there is present consent, marriage is contracted and from that first oath of espousal the parties are truly called married. Because of this difference in espousals the doctors speak variously about espoused parties.

The term espoused is used in many ways. Sometimes women are called espoused when there has been a present conjugal pact, and they are really married. Thus Gregory says: "If anyone has espoused or pledged a wife, although he dies before he can take her as wife, nevertheless no one of his relatives may receive her in marriage; and if the deed is done, she shall be separated." Pope Julius says: "Whoever has espoused or pledged a wife and is prevented by his death or other intervening causes from knowing her, neither his brother nor any of his relatives shall marry her at any time thereafter." Gregory says: "Whoever takes in marriage the espoused of a neighbor, let him be anathema and all who consent to it, because he is deemed worthy of death according to divine law. For it is the custom in the divine law that betrothed are called married, as in the Gospel: 'Take Mary, your wife;' and in Deuteronomy: 'He who takes the espoused of another in the field or in any place or leads her into his home shall die, because he violated the wife of his neighbor'; not that she was already a wife but by her parents ought to become a wife." From this we gather that certain espoused women are married before sex is involved. But someone might object that it is said at the end of the quotation "not that she was already a wife but ought to become a wife." This is not to be understood as saying that she was not truly a wife from that time when the conjugal pact intervened but rather that she had not yet been lead and there had been no wifely matter [*res uxoria*], sc. intercourse.

The term "espoused" is used in other ways. A woman is called espoused who is espoused to a man in such a way that present consent has not occurred, but future espousal. In this fashion this decree is to be understood: "If anyone takes [in the same sense as in Deuteronomy] the espoused of his son and afterwards the son marries her, let the father not have a wife nor the woman a husband, but let the son take another wife if he did not know of his father's crime." If she was his wife, if in the espousal there was a marital pact, then he would not be allowed to marry another. Moreover the punishment for an adulterer, not marrying, is inflicted rigorously so that others may fear it. The same council says: "Whoever espouses a wife and

provides a dower but has not been able to have sexual relations with her [this is apparently not a case of impossibility but simply a case which the espoused has had other, more pressing, matters], if his brother secretly corrupts her and renders her pregnant so that she cannot be married to the lawful man, nevertheless the brother cannot have the espoused of his brother; but if the adulterer and adulteress will sustain the punishment of fornication, licit marriage shall not be refused to them." This espousal should be understood as one in which there is no present consent of marriage, otherwise they would not be allowed to choose other marriages. In this fashion also this decree should be understood: "It was decreed by the council that if a man took another's espoused by force, he should be punished with public penance and should remain without hope of marriage. If the woman did not consent to the same crime, she should not be denied the privilege of marrying another." It seems that this was a betrothal without the pact of present marriage and therefore not a marriage because the woman was permitted to marry another even though her espoused was living. For there are future marriage pacts out of which the parties are called espoused but are not married, and there are present marriage pacts which make the espoused married. . . .

Why aren't the espoused united immediately? Concerning marriage pacts where there is only a future promise Augustine says: "It is an institution that the espoused are not immediately united, least the husband be given the bride cheaply for whom he would long if she were held back."

Which espoused women are widows if their espoused dies and which are not? Know you that an espoused woman who makes a pact only for the future is not a widow if her espoused dies because he was not her husband. Therefore if anyone marries her, he is not forbidden from taking Holy Orders because he has not married a widow. The husband of a widow, just like a man who has married twice, may not become a priest; no one may aspire to Holy Orders after such a joining.

He who marries the espoused of another can receive Holy Orders. In this manner is the saying of Pope Pelagius concerning those who marry the espoused of another (he being dead) to be understood: "There is nothing," he says, "so far as this article of the holy canons is concerned which prevents him being worthy of promotion to holy orders." If she had been the kind of espoused who had had present consent with her espoused, she would have been a widow when he died. The man who married such a widow could not receive holy orders. There is no doubt therefore that present consent alone makes a marriage and from that time forth the parties are truly called married. Therefore if anyone after such consent joins with another, even if intercourse follows, he should be called back to the previous partner.

TOPIC 7. DECRETALS OF ALEXANDER III AND INNOCENT III

A. ALEXANDER III (1159–1181)

[CD trans. (mostly)]

a. *Veniens ... B*

(before 1170), in W. Wiederhold, 'Papsturkunden in Florenz', *Nachrichten Akad. Göttingen* 3 (1901) 321–2, no. 17 (WH ____); P. Kehr, *Italia Pontificia* 3:404 (no. 40), 3:453 (no. 32); C. Donahue, 'The Dating of Alexander the Third's Marriage Decretals', ZRG (KA) 99(68) 82 n.9, 102 n.41).

Alexander, bishop, servant of the servants of God to his beloved sons G. the chief canon and the canons of Lucca greetings and apostolic blessing. Coming to the clemency of the apostolic see, B. the bearer of these presents not without blushing and shame proposed that when Guilla the woman had been lawfully espoused to L. and both were of full age, the aforesaid B. driven on by sin knew her. When the deed was published the *treugani* and consuls of Pisa seized him and compelled him by their force and threats to take

the aforesaid woman as wife. Wherefore, since it is unworthy and contrary to the sanction of the canons that the same woman be handed over to two men, we commend to your discretion by apostolic writing that you very carefully inquire into the truth of this matter, and if it is notorious or otherwise lawfully apparent to you, that the aforesaid L. previously received the aforesaid woman as his by espousal, as, for example, it is usually done with the pledge of a ring, you should totally absolve the same B. from her petition and impose on him a moderate and suitable penance for perjury. Otherwise, you should very strictly compel him, though it appears that he is in holy orders, to take the same woman as wife and treat her with marital affection.

— NOTES —

1. Unlike the other decretals in this section which are known from their inclusion in decretal collections, this one is an original and was not included in any known decretal collection.

2. What are the facts of this case?

3. What is the significance of the ring?

b. *Sicut Romana*

(2 June 1173 or 2 June 1174), 1 Comp. 4.4.5(7) (WH 944 (f); Donahue, *Marriage Decretals* at 83, 96, 103–4).

Alexander III to William, archbishop of Sens:

Further, if any man and woman contract marriage with equal consent and the man, the woman unknown, takes another as wife and knows her, he is to be compelled to dismiss the second and return to the first. For although some think differently and the church does not have the same custom, it nonetheless seems safer (*tutius*) that he ought to have the first rather than the second, since he ought not to be separated from the first without that judgment of the church after he contracted marriage with her by equal vow and consent. Indeed, although it is permitted for an espoused woman unknown by a man to become a nun, he cannot take another woman as wife.

c. *Ex litteris*

(5 Feb. 1175 X 5 Feb. 1181), X 4.16.2 (WH 439; Donahue, *Marriage Decretals* at 84, 105–6).

Alexander III to Bishops Richard of Winchester, Reginald of Bath, and Robert of Hereford:

From the letter of our venerable brother the archbishop of Canterbury, the legate of the Apostolic See, we have discovered that Gilbert of Saint-Leger espoused his daughter Maria who was absent at the time to a certain young man, R. by name, (and afterwards, the above-said R. in Maria's presence and with certain of her relatives as witnesses contracted, it is said, matrimony by words of the present tense [*per verba praesentis temporis*], and he bodily swore an oath that he, as husband, would have her as his proper wife from that time forward and, she, that she would reverently and without contradiction obey him as her proper husband. Nothing was lacking except the celebration of the solemnity in the face of the church. Because it was the season of Lent the handing over [*mancipari*] could not take place.)

Afterwards some got suspicious that the above-said R. wanted to break his vows and take up others. The matter was brought to examination of the above-said archbishop who prohibited under threat of anathema, as we understand from his letter, the man from taking up other vows before the matter was fully brought to light. But he, contemptuous of the prohibition which had been laid down, took to wife solemnly in the face of the church the daughter of V., Matilda by name. (Afterwards the two women and the man being brought before the archbishop, the above-said R. publicly confessed that he had contracted marriage with Maria, as it is described above, and that the afterwards had taken the other one misled by wicked suggestion. Maria, on her part, continuously asserted that her father did not stir up the quarrel of his own will. She asserted that except for the oath of contracting marriage, there was nothing binding between herself and the above-said R., and that she was not bound to the oath since he had not kept the oath when he left her for another.) Since, however, she had asked that the above-said R. be restored to her as her proper husband and since the archbishop wished to know about the first marriage because the women said that there was an impediment of

consanguinity, for which reason the vice of incest was feared as much as that of adultery, the above-said Maria appealed to the Holy See and asked that her appeal be heard before the feast of the Circumcision [January 1]. Deferring to this appeal the archbishop laid a very strict interdict upon Maria upon peril of her soul and threat of excommunication that she not marry anyone until this cause be brought to its proper end either before us or before judges delegate from the Holy See. She, nonetheless, trusting in the remedy of her appeal married another, by the name of V. Called before the archbishop on this account, she refused to appear because of the appeal which she had taken.

Since it does not appear to us that the matter will be resolved in the absence of the parties, we commit this matter to your experience, in which we trust deeply, and we command you that you bring the parties before you and inquire diligently as to the truth. If nothing stands in the way except the* consent which is alleged to have passed between the above-said R. and Maria, you should judge that the second marriage is to be held inviolate, and the obstacle of the appeal should be removed. Although no one ought to go to other vows against the interdict of the church, it is nonetheless not fitting that on account of that alone, the sacrament of wedlock be dissolved. Other penance, nonetheless, ought to be imposed on those who did this contrary to the prohibition of the Church.

— NOTES —

1. When this decretal was reduced to the official text by Raymond of Peñafort, he omitted many of the facts including the matter enclosed in parentheses. He also added the word "future" at the point indicated in the text with an asterisk. Why?

2. If both Maria and R. want to marry someone else, why is there a case here at all?

3. What sanctions were available to enforce both the mesne rulings and the ultimate judgment in this case?

d. *Licet praeter solitum*

(prob. 1169 X 1179, phps. 1176 or 1177), X 4.4.3 (WH 620 (a and b); Donahue, *Marriage Decretals* at 84, 96, 105–6, 119).

Alexander III to Romualdus, archbishop of Salerno:

Although we are engaged more than usual, indeed much more than usual, in various matters of business so that it is not easy for us to answer any consultations, nevertheless on account of that particular regard we have towards to you and on account of fraternal love, we are compelled to reveal to you, although we are concerned with other matters, in this letter what we think concerning those things about which you have wisely decided to ask us. You asked us whether when an oath having been sworn or not, a proper present agreement is made between a man and a woman, or if he has married another and has intercourse with her whether she ought to be separated from him.

About this matter we respond thus to your inquiry: if a proper present agreement is made between man and woman (observing the customary solemnities, that is, before a priest or before an official in the presence of suitable witnesses, as is still done in some places,) that the one receives the other unto himself by expressing the customary words of mutual consent, saying to the other "I receive you as mine" and the other saying "I receive you as mine," whether accompanied by an oath or not, that man is not permitted to marry another woman. And if he does marry another woman, even if intercourse follows, she ought to be separated form him, and he ought to be compelled by constraint of the church to return to the first. Although some have felt one way and some another on this matter, this is the way the matter was at one time resolved by some of our predecessors.

[The same letter continues in another decretal, X 3.32.2:]

Indeed it is licit for one party after proper present consent [*consensum legitimum de praesenti*] to choose the monastic life even if the other party is unwilling, just as certain saints were called from married life, so long as the parties have not had intercourse. It is also licit for the remaining party, if he does not wish to follow the advice that he remain continent, to go to other marriage vows, since, when they are not both made one flesh, it is sufficient that one can go to God and the other remain in the world.

— NOTES —

1. If marriages are made by consent, why is the priest of the official with witnesses necessary?

2. If present consent makes a marriage, why may those who have not had intercourse abandon the marriage to enter the religious life leaving the other partner with a cold bed, while those who have had intercourse may not?

3. How does the form of this decretal differ from *Veniens ... B* (C1) and *Sicut Romana* (C2)?

4. Where does the reference to "one flesh" come from? Why does Alexander use it?

5. Why did Raymond of Peñafort leave out the matter in parentheses?

e. *Significasti*

(1159 X 1181), 1 Comp. 4.4.6(8) (WH 954 (e and f) Donahue, *Marriage Decretals* at 84–5, 86, 107, 110, 119).

Alexander III to the Bishop of Norwich:

We understand from your letter that a certain man and woman at the command of their lord mutually received each other, no priest being present, and no such ceremony being performed as the English church is wont to employ, and then that before any physical union, another man solemnly married the said woman and knew her. We believe we ought to respond thus to your prudence that if the first man and the woman received each other by mutual consent directed to time present, saying the one to the other, 'I receive you as mine (*meum*),' and 'I receive you as mine (*meam*)' then, albeit there was no carnal knowledge, the woman ought to be restored to the first man, for after such consent she could not and ought not to marry another. If however there was no such consent by such words as aforesaid, and no sexual union preceded by a consent *de futuro*, then the woman must be left to the second man who subsequently received her and knew her, and she must be absolved from the suit of their first man; and if he has given faith or sworn an oath [to marry the woman], then a penance must be set him for the breach of his faith or of his oath. But in case either of the parties shall have appealed, then, unless an appeal is excluded by the terms of the commission, you are to defer to that appeal.

— NOTES —

1. If the translation here seems more fluent, the translator is not Donahue but the great F.W. Maitland. F. Pollock and F. Maitland, *History of English Law* 2d ed. (Cambridge, Eng. 1898) 2:371.

2. How does the holding of this decretal differ from *Veniens ... B* (C1) and *Ex litteris* (C3)? From *Licet praeter solitum* (C4)?

3. Do you see possibilities for abuse in this theory of marriage?

f. *Sollicitudini*

(1166 X 1181), 1 Comp. 4.5.4(6) (WH 991(a); Donahue, *Marriage Decretals* at 83, 103).

Alexander III to bishop Gerard of Padua

It falls upon the care of the apostolic see that if any doubts or difficulties are brought to our audience, we ought to resolve and clarify them. We reply therefore in this letter to the matter about which your love asked us: what is to be observed and held about a woman who is espoused to one man and afterwards to another, and is known by the second. Although the custom of some churches has it that she ought to remain with the second, it seems more fitting (*convenientius*) that if the man and woman have reached the age appropriate for marriage, and the woman is so espoused that the man receives her as his wife and the woman him as her husband, even if after she is espoused and known by another, she ought to be returned to the first.

g. *Veniens ad nos*

(1176 X 1181) X 4.1.15 (WH 1071; Donahue, *Marriage Decretals* at 86, 111).

Alexander III to the Bishop of Norwich:

A certain William appealed to us, showed in his brief that he received in his house a certain woman by whom he had children and to whom he swore before many people that he would take her as wife. In the

meantime, however, spending the night at the house of a neighbor, he slept with the neighbor's daughter that night. The girl's father finding them in the same bed at the same time compelled him to espouse her with present words. Recently, William standing in our presence, asks us to which woman he ought to adhere. Since he could not inform us whether he had intercourse with the first woman after he had given his oath, we therefore order you to examine into the matter carefully, and if you find that he had intercourse with the first woman after he had promised he would marry her, then you should compel him to remain with her. Otherwise, you ought to compel him to marry the second one unless he was compelled by a fear which could turn a steadfast man.

— NOTES —

1. Although the language is unfamiliar, the problem is not (the device normally used to accomplish the ends of the host was not invented for another 400 years). What does this decretal add to our knowledge of the problems with the consensual theory of marriage?

2. Is this decretal inconsistent with *Significasti* (C5)?

h. *Quod nobis*

(18 Oct. 1170 X 19 Sep. 1171), X 4.3.1 (WH 819; Donahue, *Marriage Decretals* at 91, 103).

Alexander III to the bishop of Beauvais:

What you have indicated to us in your letter, that we ought to dispense concerning clandestine marriages, we do not see what dispensation ought to be made about them. For if marriages are so secretly contracted that no lawful proof appears about them, those who have contracted them are in no way to be compelled by the church. Truly, if the contracting parties wish to make it public, unless a reasonable and lawful cause prevents, they (the marriages) are to be accepted and approved by the church as if they were contracted in the sight of the church from the beginning.

B. INNOCENT III (1198–1216)

a. *Tuae nobis*

(1206), X 4.2.14.

Innocent III to the bishop of Halberstadt (?):

Your letter shown before us stated that a certain nobleman espoused his daughter, who was about twelve years old, to another nobleman, who pledged himself to her there being mutual consent. but the wedding was postponed for a while, and the father of the girl died. The father being rid of human matter, the girl's uncle coupled the above said girl with another .... Since we cannot determine for sure in the matters expressed above what age the girl was when she was espoused, since it is said that she was "around twelve" and whether at that time prudence made up for age in her, we reply to your brotherhood that if the girl was of marriageable age and if lawful present consent intervened between them, there is no doubt that lawful marriage was contracted between the, even if intercourse did not follow. If, however, the girl was not of marriageable age when the oft-said man espoused her and prudence did not make up for age in her, there is not doubt that there was no marriage contracted between them but espousals, although the girl was pledged by the man. Wherefore, if she contracted marriage with him according to the first type, she cannot validly make a conjugal pact with another so long as he lives. But if espousals only, according to the second type, were contracted, the marriage contracted between her and another ought to be deemed lawful, so long as another canon does not stand in the way.

b. *Cum inhibitio*

(1215), X 4.3.3.

Innocent III in the general council.[1]

Although the prohibition of the conjugal bond has been revoked in the last three degrees, in other degrees we want it strictly observed.[2] Wherefore, following in the footsteps of our predecessors, we strictly forbid clandestine marriages, also forbidding any priest from presuming to participate in them. Therefore, extending generally to all places the custom of some places, we decree that when marriages are to be contracted, they shall be proclaimed publicly in the church by the priests, and that an appropriate time be set within which anyone who wishes to and can may bring forward a lawful impediment. Regardless of whether this happens, the same priests shall investigate whether any impediment exists. When a probable conjecture appears against the joining, let the contract expressly be forbidden until it can clearly be established by documentary evidence what ought to be done about it.

If anyone presumes to enter into this kind of clandestine or interdicted marriage in the forbidden degrees of kinship, even if unknowingly, the progeny born of such marriage shall be deemed illegitimate, having no assistance from the ignorance of their parents, even though those who so contract seem not to be privy to the knowledge or rather pretend ignorance. Similarly, offspring shall be deemed illegitimate if both parents, knowing of a lawful impediment, despite all interdict, presume to contract in the face of the church.

Clearly any parish priest who fails to prohibit such unions or any regular priest [i.e., a member of a religious order] who presumes to become involved with them ought to be suspended from office for three years and should be more severely punished if the gravity of the fault demands it. And also let a fitting penance be imposed on those who enter into such marriages even if in a permitted degree [of kinship]. Moreover, if anyone maliciously interposes an impediment to a lawful joining, let him not escape ecclesiastical sanction.

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[1] This is the 51st canon of the Fourth Lateran Council. The translation here is from G. Alberigo *et al*, ed., *Conciliorum oecumenicorum decreta* (3d. ed. 1972) 258, but the version given in the *Liber Extra* does not differ in substance. The prohibition of clandestine marriage and the concomitant requirement of the publication of banns was repeated, sometimes in the form of the decree of the Lateran Council,, sometimes in a locally composed form, in over thirty pieces of English conciliar legislation and episcopal decrees between 1200 and 1342. Similar legislation may be found in France and in other areas as well.

[2] Lateran IV, c.50, had reduced the degrees of kinship within which marriage was prohibited from seven to four, *i.e.*, previously marriage had been prohibited among sixth cousins and anyone more closely related; the Council reduced it to third cousins.

C. EXTRACTS FROM CIVILIAN GLOSSATORS ON MARRIAGE

a. Justinian's *Institutes* 1.10pr–1.11 with the Accursian gloss

In P. Torelli ed., *Corpus Iuris Civilis cum glossa magna Accursii Florentini: Institutionum Iustiniani Augusti Libri IV* (Bologna, s.d.).[1] [Trans. Moyle and CD with citation form modernized.]

Roman citizens[2] are joined together in lawful wedlock when they are united according to law,[3] the man having reached years of puberty,[4] and the woman being of marriageable age,[5] whether they be independent[6]

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[1] The only modern critical edition of the Accursian gloss, of which, unfortunately, only the first book of the *Institutes* was published.

[2] That is, free men, as [J.I.1.5.3]. Slaves therefore do not make marriage but 'shacking up' [*contubernium*] as here and in [C.5.5.3] and [Nov. 22.10]. But it is otherwise by the law of the canons, which prevails, as in [Nov. 131.1] where it is said that the canons are to be kept as laws. Ac.

or dependent: provided that, in the latter case, they must have the consent of the parents in whose power they respectively are,[7] the necessity of which, and even of its being given[8] before the marriage takes place, is recognized no less by natural reason[9] than by law.[10] Hence the question[11] has arisen, can[12] the daughter or son of a lunatic lawfully contract marriage? and as the doubt still remained with regard to the son,[13] [our decision[14] by which][15], like the daughter, the son of a lunatic[16] might marry even without the intervention of his father, according to the mode[17] prescribed by our constitution. . . .

. . . There are also other persons who for various reasons are forbidden to intermarry, a list of whom we have permitted to be [enumerated][18] in the books of the Digest or Pandects collected from the older law.

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[3] That is below, throughout this title [J.I.1.10], and throughout [D.23.2 and C.5.4], as we gather in the great gloss, and below [J.I.1.10.11]. Ac.

[4] That is, above fourteen years, as below [J.I.1.22.pr]. Ac.

[5] Above twelve years, as below [J.I.1.22.pr], but in espousals 7 years suffice, as [in D.23.1.14]. But today are not fifteen years necessary for matrimony, as in [Nov.100.2.pr]? I reply: that law puts the custom and normal occurrence among men. Again, what if someone is found sufficient for matrimony before that time? It seems that she can marry, as [in D.36.2.30], as if 'by the happy passport of usage' [D.45.1.137.2]. But on the contrary, I say that she [?he] can indeed be punished by the *lex Julia* on adultery and sexual offenses, as [in D.48.5.6.pr], first response, and [D.25.7.1.4] favors this conclusion. If, however, someone takes someone de facto, then she will be a wife when she comes of age, as in [D.23.2.4]. Ac.

[6] Sc. those who are sui iuris, whatever age they are. So too women are independent, and sons or daughters are in power, whatever age they are, as in [D.1.6.4]. Ac.

[7] What then of the emancipated? It seems the same, as [in C.5.4.18], but that is a counsel not a precept. That they can is said in [D.37.4.3.5] and [D.23.2.25]. Ac.

[8] Otherwise, it is not valid, as [in D.1.5.11]; he is deemed, however, to consent unless he expressly forbids it, as [in D.23.1.7.1]. Ac.

[9] Because it is obvious, as [in D.1.1.2]. Ac.

[10] Because he is in power by the civil law of the Romans, as above [J.I.1.9.2]. Ac.

[11] Because consent of the father is required. Ac.

[12] Since the father cannot consent, as [in D.29.7.2.3]. Ac.

[13] For it was easily granted [reading *concessum*] concerning the daughter, because there is much hotter blood in her, as in [Nov.2.3]; or, more truly, on account of the weakness [*fragilitas*] of the sex: argument below [J.I.2.8.pr], but the first [reason] does not please. Ac.

[14] That is the sentence or law, as [in C.5.4.25]. Ac.

[15] Decision. Ac.

[16] The same too if the father were captured and absent for three years, or if it is not known whether he is living or not, as [in D.23.2.9.1, .10]. Ac.

[17] Sc. with the authority of the curator of the father and dowry being given according to the size of the patrimony of the father, as [in C.5.4.25]. But by the law of the canons the consent of those whose matrimony is at stake suffices; but this perhaps is understood for others, not for children in power, or I believe that this is corrected because it is also an honest thing like going into a monastery, as [in Nov.123.41]. Ac.

[18] There can be enumerated fourteen ways with those which we have in this title. First is by reason of slavery, as above [J.I.1.10.pr] and [C.5.5.3]. The second is by reason of age, like males younger than 14 years and women younger than 12, as above [J.I.1.10.pr]. The third is by reason of blood, which is divided into three: ascendants,

descendants and collaterals, as above [J.I.1.10.1, 2, 3, 4]. The fourth is by reason of adoption, as above [J.I.1.10.1, 2], at the end of both sections. The fifth is by reason of affinity, present, past or future, as above [J.I.1.10.6, 7, 9]. The sixth is by reason of matrimony, for if he has one woman he is not permitted to have another at the same time; if he does, he is infamous, as above [J.I.1.10.6, 7] and [C.9.9.18]. The seventh is through the *senatusconsultum* which prohibits [marriage] between a tutor and a curator and their sons and a woman who was once their child or adult ward or that of their father, as [in C.5.6.1]. The eighth is by the *lex Julia et Papia*, sc. between senators and their children, and freedwomen or others of low condition, as [in D.23.2.23] and [C.5.4.28], which chapter today is corrected as in [Nov.78.3]. The ninth way is between a governor and one put under him, by reason of jurisdiction, as [in C.5.4.6] and [C.5.7.1]. The tenth is by constitution of the prince, as with her whom someone has taken from the sacred font, as [in C.5.4.26 *in fi.*], which is observed also of the godmother, although that is not so provided in our law. The eleventh is by reason of honesty, as above [J.I.1.10.9] and [D.23.2.12]. There is also a twelfth, by reason of orders annexed, as with clerks in holy orders, as in [Nov.6.5] and in [Nov.123.14]. There is also a thirteenth, as in monks, conversi, nuns, although they are not in holy orders, as in [Nov.5.8] and in [Nov.22.5]. There is also a fourteenth, as in a ravished woman who marries her own ravisher, as [in Nov.143]. Ac.

b. Extracts from the Ordinary Gloss on D.23.2.5–.7.

[CD trans.][1]

D.23.2.5: *Rubric*: Words of the future tense having been proffered lead to matrimony if the woman is led to the house of the man; otherwise if the man goes to the house of the wife. This notable law says this. Bartolus.

D.23.2.5: *Casus*: The woman Berta was my wife by words of the future tense; I sent a letter for her, and she came to my house. She is now presumed [to be my] wife. But if she sent for me and I went to her house, she is not presumed [to be my] wife. For an espoused woman frequently goes to the house of her espoused as wife, but the man does not go to the house of his espoused as husband. He proves the first [point] by a quite like [case], for a certain Cinna contracted with Berta espousals of the future tense. At length he sent for her and she went to the house of her espoused, and the spouse had dinner and left by chance separately and fell into the river and perished. It is asked if he is to be mourned by her as husband. And he says yes. She is therefore wife by presumption of law and nonetheless she is a virgin. It says this with the two following laws. Vivianus.

5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter[2] or by messenger, if she is led to his house. But where she is absent,[3] she cannot[4] be married by

[1] The rubric is found at the head of D.23.2.5; the *casus* and the glosses indicated by a word on the inner margin; the glosses indicated by a star are on the outer margin of *Corpus Juris Civilis cum Glossis* (Lyon 1604).

[2] *by means of a letter*—Understand of the husband. And the sense *of this law is that a man can lead a wife by his messenger of by letters.* A woman, however, cannot marry by her own messenger. For it is necessary that she be led into the house of the husband, and by that fact she is presumed** to have been made wife, if it does not appear clearly other wise. A husband,*** however, is not said to be made by the fact alone, that he has gone to the espoused's house, since laws are fitted to those things which happen more often, according to R[offredus Beneventanus ?, probably Rogerius], as above, [D.1.3.5.]

* A man can lead a wife by or through a letter. [Godefroy]

** She is presumed to have been made wife who after espousals of the future tense has been lead into the house of the man. [Godefroy]

*** Someone is not presumed to be a husband by a leading into the house of the espoused woman. [Godefroy]

letter or by messenger because she must be led[5] to her husband's house, not her own, since the former is, as it were, the domicile of the marriage.

6. ULPIAN, *Sabinus*, book 85: Finally according to Cinna, where a man married a woman in her absence,[6] and on his way back from dinner[7] by the side of the Tiber, he died, it was held[8] that she ought to mourn for him as his wife.

7. PAUL, *Lex Falcidia*, sole book: So it is possible here for a virgin to have a dowry and an action for dowry.

Notes on Further Civilian Material on Marriage

In addition to glosses, which are given above following the extract from the *Digest*, the glossators of the twelfth and thirteenth century also wrote in a number of other forms of literature. There follows some glossatorial material on marriage derived from works other than glosses.

a. *Summae on the Code*:

Summa Trecensis 5.4.4, 6; 7.32.9–11 (ed. Hermann Fitting, *Summa Codicis des Irnerius* (Berlin 1894), pp. 140, 238–9) (the work of a *gosianus*, perhaps the youthful Rogerius, c. 1150):

Some marriages are permitted and some prohibited. [Cf. JI.1.10] ... In those which are permitted solemnity is required in the contracting and the retaining and the dissolving. ...

In nuptials, nonetheless, neither writing nor pomp nor even dowry is required, for marriages are not united by dowry but by affect [cf. C.5.4.22, where the key word is *consensu* not *affectu*]. The other things are signs or appendages of the nuptials to be contracted. There are, however, persons who are compelled to make instruments [of marriage], such as senators and illustrious persons. Other people contract marriages by affect alone. ...

Placentinus, *Summa Codicis* 5.4.2, 7 (Mainz 1536, repr. Turin 1962), pp. 194, 196:

... And certainly nuptials are a joining of souls and (understand not out of necessity) of bodies. For it is not the deflowering of virginity that makes marriage but the conjugal pact. And coition does not institute marriage but consent alone. ... For the interpreters of the law held that even a man, perhaps he was going to school at Rome, who returning from a feast, not the wedding feast, fell into the Tiber, his wife having been

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[3] *remains absent*—Understand from the house of the husband and her own. Azo.

[4] *cannot*—That she be a wife before she has come to the house of the man, although he goes to the house of the wife.

[5] *she must be brought*—Understand that the bringing may be adequate testimony of the nuptials.*

* By leading or handing over to the house of the man after espousals of the future tense, marriage is presumed, as here and D.35.1.15 v° *ducta*; see more about this in [Josephus] Mascardus [d. 1588], *On conclusive proofs*, lib. 2, p. 1031.

[6] *absent**—For by his friends he had her led to his house, as above preceding law.

* *absent*—Thus in the *Florentinus*. There are those who think that "woman who is absent" is the more correct reading. [Godefroy]

[7] *from a banquet*—Held in the house of the man according to the first [law].

[8] *it is held*—Even if his body does not appear, as D.3.2.25. ["If anyone falls in battle, he will be mourned even if his body doesn't appear."] Accursius.

led to his house, say at Tybule, by the man's messenger, is to be mourned by that woman, and in this case the woman, though a virgin, has her dowry and the dotal action. ... [A reference to D.23.2.5, above.]

Nuptials, however, are contracted by consent, as has been said, there intervening, nonetheless, the leading of the wife, to wit, into the house of the husband. And this is normal. Sometimes, however, abnormally, the husband is led by the wife, as [C.5.18.3]. why is it said, then, that marriage is contracted by consent alone? Certainly this "alone" is not said so as to take away the leading which according to the laws is required of necessity for the consummation of the marriage but is said so as to take away dowry, dower, pomp, and writing, all of which are accidents of nuptials.

b. *Brocardia, notabilia*:

Bulgarus, *De diversis regulis iuris antiqui* (D.50.17) (Wilhelm C. Beckhaus ed., *Bulgari de diversis regulis iuris commentarius* (1856, repr. Frankfurt, 1967) pp. 29–30:

Marriage is not made by bedding together, etc. [but consent makes it.] [D.35.1.15 = D.50.17.30]. Rather marriage is made be affection following a leading (*ductio*). For a woman who is led by an absent but willing man becomes a wife and must mourn him when he has fallen into the Tiber and died (while he happens to be returning from a feast), before she had intercourse with him. [No citation, but the reference is to D.23.2.5, above.]

c. *Epitomes, abbreviations, vocabularies*:

Vocabularium "Affinitas est personarum regularitas" 87, (BIMAE 2:136) [probably 12th c.]:

Marriage is the joining of man and woman, with some solemnities added

TOPIC 8. CUSTOMARY LAW

A. COUTUME DE TOURAINE-ANJOU

ed. P. Viollet, in *Les Établissements de Saint Louis* 3 (Paris: Renouard, 1883) 3–104 [CD trans.][1]

[The editor dates the custom in 1246. It survives in two 14th-century mss., but it also forms the heart of a mid-13th-century treatise known as *Les Établissements de Saint Louis* from which the rubrics are taken. All the rubrics are given, interspersed with chapters that are relevant to our concerns.]

1. Of the gift of a gentleman to his children and how they ought to partition if their father dies without assigning to them.

2. Of making partitions.

3. Of partitions made for *fraresche* among sisters.

4. Of the marriage gift at the door of the church and to keep it for his life since his heir has cried and bawled.

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[1] A full translation by F. Akehurst [FA], *The Etablissements de Saint Louis: Thirteenth-Century Law Texts from Tours, Orléans, and Paris*, (Philadelphia, 1996) has been compared.

A gentleman keeps for his life that which has been given him at the door of the church in marriage, after the death of his wife, even though he has no heir, because he had one who cried and bawled, so long as his wife was given to him as a maid; for if she were a widow or if she were not a maid, he will keep nothing of it.

5. Of a foolish gentlewoman.

6. Of the partition had as eldest.

If a gentlewoman is heir of land and her ancestors are dead and she has heirs and she wishes to take dower in the land of her husband, that is the third part, her oldest son will thus take the third part of hers.

7. Of purchases and conquests.

Gentlewomen have but a third in dower from the land of their husbands, but their husbands can give them their purchases and acquests to do with what they will, and if fathers have made a purchase in fee, the eldest son will have it upon rendering the sum that his father put on it.

8. Of paying the debts of her lord [husband].

9. Of the right of gentlewomen and keeping their dower in good estate.

Gentlewomen ought to have the house of their husbands after their death, until he who ought to have the return of the land makes an appropriate lodging for her. And she ought to keep it in good estate, and if she does not so keep it, he can oust her by right, because it was her fault that the manor was worsened. And still she will be held to amend the damages, and if she cannot amend, he can oust her from the land by right and keep it in his hand, for she has contempt for the dower; she ought to lose it by right. And she ought to keep it all in good estate, vines and fruit trees, if she has them in her dower, without cutting or mistreating them.

10. Of keeping the wardship in good estate until the heir be of age.

11. Of plea of land.

A gentlewoman can well plead for her dower in the court of the king or in the court of him in whose castelry it will be or in the court of holy Church; it is her choice. And so can a gentleman for his marriage which has been given him at the door of the church.

12. Of the gift of a knight in marriage.

If a gentleman marries his son, he ought to make over to him a third of his land, and also when he becomes a knight; but he does not make him a part of that which has been given to him at the door of the church in marriage, because his wife is not heir of the land. And if he has a wife who is an heiress of land, he will make to him thus a third of the land of his mother.

13. Of partitioning the escheats of a grandfather and grandmother.

14. Of escheats of brothers.

15. Of repurchase of parage.

16. Of taking villainage.

17. Of partitioning baronies.

18. Of the high justice of barony, of murder, rape and abortion.

19. Of summoning and forbanning a malfeasor and of the coming then of the forbann and making ravage.

Of suspicion and summons for justice in the lay court.

20. Of hot melee.

21. Of assurance required in lay court and of truce broken.

22. Of stealing a beast or horse and of losing one’s members by one’s misdeed.

23. Of high justice by reason of treason within the family.

24. Of the justice of the vassal.

25. Of women who have company with robbers or murderers.

26. Of consenting to murderers or to robbers.

27. Of the company of murderers.

28. Of punishing the suspected by office of the provost.

29. Of the evil-doing of women and of those accustomed to it.

30. Of willing homicide without doing more.

31. Of threatening and refusing assurance before justice and of the request to the sovereign by justice, doing right to the parties.

32. Of the justice of a vassal.

33. Of releasing a robber and of his purging himself of suspicion.

34. Of requiring one's court and its obedience, doing right, and leading by the hand a justiciable man into one's court legally.

35. Of taking and following a murderer or robber.

36. Of paragers.

37. Of tenure in parage.

38. Of showing the lineage to the lord and of tenure in parage without rendering the steed of service.

39. How a man ought to behave himself toward his lord when he perceives that he is going to lose his inheritance.

40. Of showing one's fee before one's liege lord.

41. Of cutting in the forest.

42. Of laying hands on one's lord by evil spite and of defending one's lineage by one's right before one's right liege lord without losing one's fee.

43. Of summoning one's man to go fight against the king.

44. Of taking back one's gage from one's lord and of falsifying measures and of fishing in a lake and of taking and of hunting rabbits in warrens and of lying with a woman by force.

If a man . . . fishes in [his lord's] lake, insulting him; or if he steals his rabbits in his warren; or if he lies with his wife or his daughter, provided she be a maid, he loses his fee, provided that it be proven of him.

45. Of deflowering a woman by force who is in wardship or guardianship.

46. Of denying right and the judgment of one's court to one's liege man and to another's.

47. Of legally making guard or castle to one's liege lord.

48. Of the movables of gentlemen when they lose their own.

49. Of complaint made of one's lord in the court of the king without making amends to one's lord.

50. Of showings made by justice.

51. Of the prince's right.

52. Of a robber and of a murderer.

53. Of a gentleman's franchise.

54. Of franchising a sergeant.

55. Of summoning men to go to the king's palace.

56. Of taking to the lord the issues of the land for redemption and of redemption when a lady marries.

No lady makes redemption if she does not [re]marry; but if she marries her husband makes redemption to the lord of him whose wife she was. And if the lord does not like what is offered, he can only take the issues of her fee for one year. And if there are woods which the lady had begun to sell and which her lord otherwise assented that she could sell, by right and by reason of the redemption the husband can sell them at the same price at which they had begun to be sold, but he cannot make greater market than had been made before.

57. Of the surety given for suspicion of marriage to one's liege lord and of doing honor and the proof on behalf of the unmarried lady made by her relatives.

When a lady remains a widow and she has a daughter, and she (the lady) is getting old, and her lord comes to her, to whom she was liege lady, and requires her: "Lady, I wish that you give surety that you not marry your daughter without my counsel, nor without the counsel of the lineage of her father; for she is the daughter of my liege man, and because of that, I do not wish that she be outcounselled." ; it is fitting that the lady give him surety for it by right. And when the maid is of age to marry, if the lady finds someone who asks her of her, she ought to go to her lord and to the lineage on the side of the girl's father and speak to them in this manner: "Sir, someone is asking me to give my daughter, and I do not wish to give her without your counsel, nor ought I. Now give me good and lawful counsel, for such a man asks her of me (and she ought to name him)." And if the lord says, "I do not wish that he have her, because such a man asks her of me, who is more rich and more gentle than he of whom you speak, and he will take her willingly (and he ought to name her)", and if the lineage on the father's side says, "We know someone still more rich and gentle than any of those whom you have named to us (and it ought to name him)", them they ought to look to the best of the three and the most profitable for the young lady. And he who is said to be the best of the three ought to exceed the others so that no one could rightfully misunderstand it. And if the lady marries her without the counsel of the lord and without the counsel of the lineage on the side of the father, as she ought to have, she will lose her movable. And the lord can distrain her by faith or by pledges, if necessary, before she leaves her fee or her faith; and she should swear to tell truly about her movable even before she loses them by judgment; and when they have all been taken away from her, there ought to remain to her a dress for every day and a dress for adornment, and suitable jewels for adornment, if she has them, and her bed and her carriage, and her war horse which suffices for her affairs, since she has no husband, and her palfrey, if she has one.

58. Of keeping the heritage without diminution and of the gift of a gentleman.

59. Of novel disseisin and of keeping things safely, doing right to the parties, and of rendering costs and damages.

60. Of postponement by justice.

61. Of requiring one's man and of entering in faith of the lord without any default.

62. Of the thing adjudged in judgment.

63. Of rendering damages.

64. Of wrong done and default of justice.

65. Of the right of a baron (*ber*) to be judged by his peers.

66. Of the privilege of a knight.

67. Of the age of guardianship without making reply and of proving one's age.

68. Of counting one's lineage and of showing it to the lord.

69. Of service in parage.

70. Of tenure in parage without rendering service to one’s lord.
Of keeping guardianship in good state without doing homage to the lord.

71. Of false judgment and of tenure for good and for legal.

72. Of requiring one’s right from the king.

73. How one ought to demand amendment of judgment and of requiring the same day.

74. Of appealing one’s lord of false judgment.

75. Of battle between a knight and a villein.

76. Of breach of prison.

77. Of the cognizance of clerks and of rendering crusaders to holy Church.

78. Of punishing heretics and miscreants.

79. Of combating usurers.

80, 81. Of the stranger and of the man who kills himself.

82. Of the man who dies unconfessed.

83. Of discovery of fortune.

84. Of having one’s warranty of stolen goods.

85. Of rendering costs and expenses about a matter adjudged.

86. Of seisin breached and of refusing oath.

87. Of taking and keeping a villein’s pasture.

88. Of heritage tallageable to a gentleman.

89. Of a stranger.

90. Of the escheat of bastards.

91. Of the sale of the heritage of bastards.

92. Of bastards and of lands at terrage.

93. Of measuring lands at cens.

94. Of service wronged and of taking for default of men.

95. Of the essoin of sickness and of establishing one’s son as proctor for one’s self.

96. Of the plaintiff and of the evil-doing term pendant.

97. Of appealing a man of murder and of treason, without rendering and without renouncing, and of making equal seizure.

98. On divers misdeeds and of divers contents.

99. Of requiring a party by justice, doing right.

100. Of millers and mills.

101. How one ought to use a part of a mill.

102. Of the right of the vassal and the baron.

103. Of milling at a mill by ban.

104. Of justicing generally by barons the fees which are enclosed in their castleries and of making homage and obeisance of fees.

105. Of the right of the prince for his debt acknowledged and proved.

106. Of the gift of the king to a man, to him and to his heir born of legal marriage.

107. Of gift between husband and wife.

[Gifts by wives are generally prohibited, exception being made for a third of her inheritance at marriage, at death, when she is sick, or when she has no male heir.]

108. Of the gift of marriage.

If it comes about that any gentle man marries his daughter, and the father comes to the door of the church, or the mother if she has no father, or her brothers, or anyone who has power to marry her, and the father or any of those whom we have mentioned above comes to the door of the church and says: "Sir, I give you this young lady and so much of may land, to you both and to your heirs issuing from you two." If it is such that they have heirs, and the lord [husband] dies, and the woman takes another lord and has heirs, and the woman dies and the children of the latter husband say to the oldest of the first husband: "Partition the land of our mother", and the eldest says, "I do not want you to have anything, for it was given to my father and to my mother and to the heirs which would issue of the two, and this I am quite ready to prove", and if the younger say that they do not believe the older, he should bring people who were at the marriage, at least three respectable men [*preudes homes*] or four who will swear on the health of their hand that the marriage was given to the father and the mother, and they should name them, and to them and to their heirs which would issue from the two, in their view and knowledge, and thus it will remain to the eldest. And if it cannot be proven, a third part will remain to the younger of the other husband, and the elder will hold it in parage. ...

109. Of the gift of faith for fraresche to one's brother and of making two obeisances for one fee.

110. Of bail in fee and of bailing the wardship of a child in a hand suspect for the perils which could come to it.

111. How a man ought to guarantee his pledge and of requiring one's principal debtor before the pledge.

112. Of appealing a man of default and of losing seisin after showing.

113. Of the essoin of sickness and of being appealed in the court of the sovereign.

114. How one renders damage for one's beast, doing right.

115. Of the deed of the father that belongs to the heir and of proving his debt.

116. Of forcing excommunicates to come to amendment and of punishment afterwards.

117. Of *arra* of marriage.

118. Of gift to religion in dead hand.

119. Of the warranty in parage and of doing service to one's lord.

120. Of running water.

121. Of plaint in court baron of a man of the king.

122. Of Jews.

123. Of knighthood.

124. How one ought to render ransom of service to one's lord.

125. Of partition among brothers of the descent from the father and mother.

126. Of keeping dower in good state and of pleading.

127. Of parts bounded by justice and of doing justice one's self.

128. Of partitioning fraresche.

129. Of escheat without an heir.

If any man and his wife buy land together, the one who lives longer keeps the purchases and the conquests. And thus if they have not heir, and the woman dies first, the man keeps the purchases for his life just as the woman does if she lives longer than the man. And when they are both dead, the purchases return, half to the lineage of the woman and the other half to the lineage of the man.

130. Of the bail of a customer.

131. Of falsifying judgment.

132. Of the marriage of a poor woman and a rich man.

If a man who has great movable takes a woman who has nothing, and the man dies, without their having any heir, the woman will have half of the movable. And if a quite rich woman takes a quite poor man and she dies, he will have half of the movable. And thus one can understand that the movable are common [*communal*]. And if it is thus that when the rich man has taken the poor woman and she has an heir of him and the man dies and she takes another lord and they have an heir, and he dies and the mother dies, and the child of the first and of the second husband wish to partition the movable between them, the child of the first husband should have of all the movable that shall be found extant, be they barrels or vessels or bedclothes or beasts or chests which were of the first husband, one half by himself, and the other half by reason of the mother should be divided between the first and second; in such manner the children of the first [read *second*?] father will have half of the movable and the other half will be divided between the first and latter by reason of the mother as we have said above. But the profits of land will be common because they have gained them together; and one will make account and each one will have as much as the others. And thus there will be partition made between the first and latter of the movable which the woman has gained after the death of the father and with the latter lord; and all together they will each have in it one as much as the others.

133. Of foolish children.

134. Of demanding another's heritage without return.

135. Of the age of people in villeinage.

136. Of faith in villeinage.

137. Of tolls trespassed.

138. Of trespassing one's toll and being arrested outside the boundaries.

139. Of the merchant on water.

140. Of false measure and of false cloth.

141. Of the judgment of false merchandise of cloth.

142. Of the married woman merchant and of the response of a married woman merchant.

143. Of appealing an unlawful man and woman also.

144. Of having warranty for a term.

145. Of laying hands on one's lord by evil spite.

146. Of beating the justice or the provost or the sergeant.

147. Of breaching the seisin of one's lord and of fishing in his lakes.

148. Of seisin.

149. Of sales.

150, 151. Of the return to the lineage (*retrait de lignage*) and of challenging sales within a year and day by *retrait.*

152. Of offering money before the justice for *retrait* and of making amendment after the offer.

153. Of having one's things put on *retrait* at one's proof.

154. Of the taking by the lord by default of the lineage.

155. Of calling back one's heritage without rendering any sales.

156. Of swearing legal costs and legal things put on *retrait.*

157. Of respite of sales made by justice.

158. Of *retrait* between brothers and sisters.

159. Of rendering one's dues at a certain day.

160. Of taking terrage by the lord for his profit.

161. Of appealing a man of murder or of treason.

162. Of lost bees and of following them without losing the view by oath.

163. Of a woman's having right to dower and of keeping fixed the deed of an ordinary judge and of something that is done by the power of her husband and by force.

164. Of battle between brothers.

165. Of changing champions in battle for murder on the ground of apparent mutilation.

B. PHILIPPE DE BEAUMANOIR, COUTUMES DE BEAUVAISIS

ed. A. Salmon, 2 vols. (Paris, 1900; repr. Paris: Pichard, 1970) [CD trans.][1]

[The work of Philippe de Rémi, sire de Beaumanoir, courtier, poet (perhaps), and royal bailiff of the customary jurisdiction of Clermont en Beauvaisis. The work is dated in 1283. It is divided into seventy rather long chapters. The numbering of the paragraphs is modern. What follows gives the tables of the chapters from paragraph [10] interspersed with some of the more interesting paragraphs.]

[10] Let everyone know that in this book are contained seventy chapters which speak of the matters which follow:

c.1 speaks of the office of bailiffs, who they ought to be and how they ought to behave themselves in their office.

c.2 speaks of summonses and summoners, and of those who do not obey summonses, and how one ought to summon.

c.3 speaks of essoins and of countermands [fifteen-day adjournments] that can be made by custom.

c.4 speaks of proctors and of those put in others' places, and who can make a proctor, and which proxies are valid and which not, and how proctors ought to perform in their office.

c.5 speaks of advocates, how they ought to be received and how they ought to behave themselves in their office, and which can be excluded.

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[1] A full translation by F. Akehurst, *The Coutumes de Beauvaisis* of Philippe de Beaumanoir (Philadelphia, 1992), has been compared.

c.6 speaks of complaints, how one ought to formulate one's complaint before justice, and of requests and denunciations; and in which cases drunkenness or ignorance can excuse; and of the oath of truth.

c.7 speaks of the defenses which defendants can put against the petitions that have been made against them, what the clerks call exceptions; and of replications and of denials.

c.8 speaks of those who come too late to make their complaint, and of what time peaceable tenure suffices in a complaint for a movable, and of what time for an inheritance.

c.9 speaks of cases for which there are days of view and how one ought to except in a lay court and how view ought to be shown, and that witnesses may have a day for consultation if they ask for it.

c.10 speaks of the cases in which the counts of Clermont are not held to render court to their men, so that one waits for cognizance by reason of sovereignty.

c.11 speaks of the cases in which the cognizance pertains to holy church and in which to court lay, and in which cases the one ought to assist the other, and of the difference between a holy place and a religious place, and in what cases holy church cannot warrant, and of the seizure of clerks.

c.12 speaks of testaments, which are valid and which not; and what one can leave in testament, and how one ought to contest a testament or diminish it; and that one sustains them for the profit of souls; and how executors ought to behave with regard to executions, and the form for making a testament.

c.13 speaks of dowers, how they ought to be delivered to women, and how they ought to keep them, and how they ought to partition after the death of their lords [husbands].

c.14 speaks of descent and of collateral escheat and of partition of inheritances; and of hotchpot [*raporter*]; and of gifts that cannot be allowed; and of doing homage.

[487] A knight and lady during their marriage, bought a fief in the inheritance of the knight; they had children. After the mother died, the children sought half of the fief by reason of the acquest of their mother, and the knight who was their father, within a year and a day from the death of the mother, retrieved it [*le retraist*] from his children for money, and the lord from whom the fief was held demanded two homages from the fief: one by reason of the half which he [the knight] had in his own right by his purchase, and the other by reason of the other half which he retrieved from his children for money. And the knight replied that he ought have but one homage, for the children had no right of inheritance in it, since he wanted to have it back for money, and since he is the man of the whole fief and no one took anything except him, he was not obliged to do two homages; and on this point they were at issue.

[488] It was adjudged that he ought have but one homage. But it is true that if the children had taken half by reason of the conquest of their mother, that the father had not had *retrait* by money, he would have had two homages for it.

c.15 speaks of bails and of ward of underage children, and of the difference between bail and ward; and at what time a child has reached majority under the custom of Beauvaisis.

c.16 speaks of underage children, how and in what case they can lose or gain; and how they can revoke a transaction when they are deceived; and how their ages can be proved; and how partition can be made against them.

c.17 speaks of tutors who are bailed to underage children to guard and to administer their needs.

c.18 speaks of which heirs are legal to hold inheritances and which can be excluded for bastardy and how bastardy can be proven; and which marriages are good and which not.

[598] Sometimes it happens that two gentle persons who are married separate by their will and with the permission of holy church for no evil reason; as when they wish to vow chastity or enter religion. But this separation cannot be made without the agreement of the two parties, for the man cannot do it without the agreement of the woman nor the woman without the agreement of her husband; and if they have children, they do not cease for this reason to be legal, nor for this reason to come to succeed their father and mother.

[599] Those who it is certain are bastards and adulterine can in no way be legal so far as coming to the descent of inheritances of the father and mother. But those who are only bastards can be made legal heirs by being placed under the veil at the espousals, as we have said below. Adulterines are those who are engendered in married women by another other than their lords, the married man. Therefore if it happens that a man has a child in adultery of a woman who has a husband and the husband dies and the man who is living takes her to wife, the children which are born after the marriage or who were engendered or born when she was a widow can be made legal, but those who were engendered or born in adultery when she had another husband cannot be made legal for succession to the father nor to the mother. But we have seen those who by the apostolic grace became clerks or hold goods of holy church, but in these things the lay courts are not to mingle, for the administration of holy church pertains to the apostolic see and to prelates.

[600] One ought not doubt that when a man has company with a woman outside of the bond of marriage, and he marries her when the children are born or when she is pregnant, if the children are placed under the cloth—which cloth it is the custom to place over those who marry solemnly in holy church—they are not legal until they are put with the father and mother making the marriage; and after that, the children are not bastards but are heirs and can inherit as if they were legal children born in marriage. And by this grace which holy church and custom accords to all sorts of children, it frequently happens that fathers marry mothers for pity of the children, so that less evil is done them.

c.19 speaks of the degrees of kinship [*lignages*] by which everyone can know how nearly or how farly they are related to each other, for that can be necessary for war or for forcible recovery of inheritances.

c.20 speaks of those who hold inheritances or other things in good faith, how they ought to be kept from harm and how those who wrongfully and for bad cause hold another's property ought to be punished, and how certain partitions cannot be made in any case.

c.21 speaks of partnership [*compagnie*] and how partnership is made by custom and how one can lose or gain in partnership, and how partnership is fails; and how one can get a child out of bail.

[621] Many gains and many losses arise often by partnership which ought to be called partnership according to our custom, and for this reason one ought to take care with whom he places himself in partnership and whom he receives as partner. And these partnerships of which we wish to speak are those which by the partnership the property is partitioned when the partnership fails, and such partnerships are formed in several ways. ...

[622] Everyone knows that partnership is made by marriage, because as soon as marriages are made the goods of the one and the other are common by virtue of the marriage. But the truth is that so long as they live together the man is the administrator [*mainburnisseres*] of it, and the woman must allow and obey insofar as concerns their movable and the profits of their inheritances; so much so that the woman may see the entire loss of it, so much must she suffer the will of her lord. But the truth is that the underpinning [*tresfons*] of the inheritance on the side of the woman the husband cannot sell without the permission and will of the woman, nor his own either unless she renounces her dower that she will not take her dower if she survives him. And of the partition that ought to be made of the partnership of marriage when marriages fail, we spoke of them in the chapter that speaks of dower, and we pass over it here.

[623] The second way in which partnerships are made is by merchandise ... .

[624] The third way in which partnerships are made is by agreement ... .

[625] The fourth way by which partnership is made is the most dangerous and in which I have seen more people deceived; for partnership is made according to our custom simply by staying together at one bread and at one pot a year and day when the movable of each are mingled together. ...

[628] The fifth way of partnership is made between commoners [*gens de pooste*] when a man or a woman marries two or three or more times, and there are children of each marriage, and the children of the first marriage stay with their step-father or step-mother without leaving and without a fixed agreement to

hold of them; in such a case they can lose or gain by reason of partnership with their father and their step-mother or their mother and their step-father. ...

c.22 speaks of the other kind of partnership, which one calls partnerships of inheritance, which ones can be partitioned and which ones not, and how one ought to behave in all partnerships.

c.23 speaks of which things are movable and which things are inheritance according to the custom of Beauvaisis.

c.24 speaks of which things are custom and which things are usage, and of the difference between custom and usage and what usage is valid and what not; and of leaving land at *cens* [a kind of rent-charge]; and of buildings.

c.25 speaks of roads, of what width they ought to be and how they ought to be maintained without damage or diminution, and to whom the justice of them pertains, and of the passage of pilgrims and merchants; and of that which is found at roads and of crossings and of other common easements.

c.26 speaks of measures and of weights, and how one ought to weigh and measure and how those who badly measure ought to be punished.

c.27 speaks of esplees that can come to lords of inheritances which move from them as if they were repurchases or sales, and of the taking of inheritances.

c.28 speaks of how one ought to provide one's lord with the steed of service by reason of fief and of the harm to them who do not provide as they ought.

c.29 speaks of the services that are done by rent [*louier*] or by command or by will, and of accounts to sergeants and of the other services that one ought to do by reason of fief; and demanding back arrears when one has paid too much.

c.30 speaks of misdeeds and what vengeance ought to be taken for each misdeed, and what fines are at will; and of banns; and of banished and false witnesses; and how gage ought to be guarded, and of conspiracies [*alliances*], and in what case one is released on one's oath, and of what one is held to render to another for harm, and of taking by another seignory, and of those who are appealed or imprisoned for a case of crime, and of those who lead away the wife or daughter of another; of *lais dis* [? spoken poems, i.e., magic chants] and of melees.

[935] Everyone thinks that if he is taken in present misdeed, taking rabbits or other large wild beasts in someone else's ancient warren, that he cannot be hanged, but that they can be if they are taken by night, for it appears that they came with the intention of taking away [*par courage d'embler*]. But if they come by day, as sport leads some to do stupid things, they can get away with a fine of money: that is to say, 60 lb. for gentlemen and 60 s. for commoners. And just as we have said for warrens, we say for fish that are in enclosures or vivaria. And by this we can see that they are put in the position of those who are taken for thieves when they do the deed at night and not when they when the deed is done by day ... .

c.31 speaks of open thefts and those that are in doubt, and how thefts are proven.

c.32 speaks of novel disseisin and of force, and of new trouble, and how one ought to behave about it; and of the obedience that middle-status men [*ostes*] owe to their lord.

c.33 says that that which is done by force or by trickery or by too great fear ought not be maintained.

c.34 speaks of agreements, which are to be kept and which not; and of markets and farms; and of the things that are obligated without agreement; and how payment is proven without witnesses and what force is and of frauds.

c.35 speaks of obliging one's self by writing and how one ought to keep them and how one can speak against them, and of the form of making writings.

c.36 speaks of things that are bailed to ward and how one ought to keep them and render to those who bailed them.

c.37 speaks of things that are loaned and how one who has borrowed can use them.

c.38 speaks of things bailed for rent and of farms and of gaging.

c.39 speaks of proofs and false witnesses, of negation and affirmation [*espurgement*], and of the danger which is threatened, and of speaking against witnesses, and what cases can fail in proof.

c.40 speaks of inquisitors and auditors; and of appraisals, and of examining witnesses and of the difference between an appraisal and an inquest, and of contesting witnesses.

c.41 speaks of arbiters and of the power which they have and which are valid and which not, and how arbitrations fail, and of what cases on can put to arbitration.

c.42 speaks of penalties that are stipulated, in which cases they are to be paid and in which not, and of the difference between a bodily penalty and a monetary penalty.

c.43 speaks of pledges and how and in what manner one ought to deliver one's pledges and of the damages which one ought to render in court lay, and who can pledge; and which days everyone ought to have.

c.44 speaks of seizures [reclamations, *rescousses*], of inheritances and of exchanges; and that fraud [*barat*] will not be allowed.

c.45 speaks of avowals and disavowals and of servitudes and franchises; and of the danger of disavowing, and how one ought to pursue those who disavow.

[1452] We have spoken of two estates, to wit, gentlemen and commoners, and the third estate is that of serfs. And this type of person are not all of one condition, but there are many conditions of servitude. For some sorts of serfs are so subject to their lords that their lords can take whatever they have in life or death, and keep their bodies in prison whenever it pleases them, rightly or wrongly, and are not held to reply for it to anyone except God. And the others maintain themselves more freely [*debonairement*], for as long as they live their lords cannot require anything of them if they do no wrong, except their, *cens*, rents and returns which they are accustomed to pay for their servitude. And when they die or when they marry free women whatever they have escheats to their lords, movable and inheritances; for if they marry out [*formarient*], they must fine at the will of their lord. And if they die, they have no heir other than their lord, and the child of the serf has nothing in it if he does not buy it again from the lord as if it were another's property. And this latter custom of which we have spoken applies among the serfs of Beauvaisis, that of dead hand and formarriage, quite generally; and of the other conditions among serfs in other places we had better keep silent, because our book concerns the customs of Beauvaisis.

c.46 speaks of the ward of churches and how one ought to punish those who do wrong to them; and of the two esplees, on temporal and the other spiritual; and what harm a church can have from disavowing its lord's right.

c.47 speaks of how fiefs can be alienated from and return to their lords according to the custom of Beauvaisis and that the tenant take care not to partition against custom.

c.48 speaks of how a commoner [*homme de pooste]* can hold a fief in faith and homage and how he ought to do service for it.

c.49 speaks of *établissements* and to what extent or which custom should not be kept by reason of future necessity.

c.50 speaks of the men of good towns and their rights and how they ought to be regarded and justiced so that they can live in peace.

c.51 speaks of for what reasons a lord may take and keep in his hands and how they ought to work it to the profit of their subjects and keep their right in it.

c.52 speaks of forbidden things and seizures which are made for misdeeds or for harms, and how one ought to take and work the seizure and of inheritances sold by force and of sales.

c.53 speaks of replevin [*recreance*] and in what case one ought to make replevin and what not and how replevin ought to be sought and how it ought to be made in cases in which it is required.

c.54 speaks of how one ought to pay the creditors and keep [the immovables] from harm; and the manner of taking [a debtor's goods] in houses; and for what case and how one ought to set guard over another's [good's] and who the guards ought to be.

c.55 speaks of reclamation, which are made rightly and which wrongly and how the lord ought to work them.

c.56 speaks of those who ought not hold inheritance and what one ought to do with the foolish and the mad; and of the ward of poor houses and hospitals and to whom the ward and the justice belong.

c.57 speaks of the ill-will between husband and wife who are married, how the lord ought to behave with regard to it, and for what causes it is permissible to separate on from the other.

[1626] We see that often ill-will arises between husband and wife who are together by marriage, so that they cannot endure to remain together, and there is not reason for separating the marriage so that they can remarry. Nevertheless, they hate each other so much that they do not wish to remain together, and sometimes it is by the blows of one, and sometimes by the blows of both. And when such a state of affairs comes about, cognizance belongs to holy church, if a plea is brought there. But nevertheless, sometimes women have come to us to require that they be given their common goods for their life and sustenance, and sometimes the husband does not agree, because he says that he is lord of the things and that it is not by his blows that the woman is not with him. And because such complaints come every day into the lay court, we will treat in this chapter of what one ought to do according to our custom with such request.

[The chapter is too long to translate in full, but it makes it clear that the court had a quite well developed fault-based jurisprudence for determining whether a separation of goods should be made.]

[1639] When marriages are separated between husband and wife for reasonable cause witnessed by holy church, on ought to know that if there were acquests while they were together each one ought to take one half; and if they have movable, each one ought to take a half; and of the inheritances, each one ought to take his own. If they have children who have passed seven years, the fathers ought to have ward of half of the children; if there is only one, he has it if he wishes and the mother ought to provide half its nourishment; and if the children are under seven years, the ward ought to be bailed to the mother, and the father ought to pay half their reasonable sustenance. And all such cases when they arise ought to be supervised by the estimation of lawful judges.

c.58 speaks of high and low justice, and of the cases that pertain to one justice and to the other; and of those who go armed by another's justice; and that peace is not to be allowed in a case of evil; and that the sovereign can take the forfeitures of their subjects.

c.59 speaks of wars and how war is done by custom and how it fails and how one can aid one's self of the right of war.

c.60 speaks of truces and assurances and which can be put aside and of the danger of breaking them.

c.61 speaks of appeals, and how one ought to form one's appeal and of what case one can appeal and of pursuit of appeal; and of banns; and in what arms one fights.

c.62 speaks of appeals that are made for default of right and how one ought to summon one's lord before one has a good appeal against him for default of right.

c.63 speaks of which defenses can avail for those how are appealed to nullify the gages and of the cases for which gage is not to be received.

c.64 speaks of the presentations which ought to be made on a plea of gages in arms and in words, and of the oaths, and of things that follow until the end of the battle.

c.65 speaks of the delays that custom gives and of the respites that men can take before they can or ought to render judgment.

c.66 speaks of refusing the judges and in which cases one sole witness is believed and that the lord shall have vigorously and put in execution what is adjudged and passed without appeal.

c.67 speaks of judgments and of the manner of making judgments, and how one ought to judge, and who can judge and how lords ought to send to know the right that their men do, and how one can falsify a judgment, and how the sergeants ought to be sent to render account.

c.68 speaks of usury and termor, and how one can defend by reason of usury against usurers.

c.69 speaks of accidents that came by mischance, in which cases pity and mercy ought more to have place than rigorous justice.

c.70 speaks of outrageous gifts which by reason ought not to be held and of those that are to be held, which one cannot nor ought to challenge.

TOPIC 9. MEDIEVAL AND EARLY MODERN CASES

A. WILLIAM SMITH c. ALICE DOLLING

Court of Canterbury, 1271–72) in N. Adams & C. Donahue, eds.,
Select Cases from the Ecclesiastical Courts of the Province of Canterbury (Selden Soc'y no. 95, 1981) 127–38 [CD trans.]

[Alice Dolling of Winterbourne Stoke (Wilts) complained to the official of the bishop of Salisbury that a certain William Smith had married her and should be adjudged her husband. The case was heard by the official in the consistory court, and he gave sentence for the plaintiff. William appealed to the Court of Canterbury. We have the *processus* sent to the higher court by the official of Salisbury, giving a brief summary of the proceedings, depositions of witnesses, and the original sentence. We also have various entries from the rolls of acta of the Court, and a separate document which contains the report of the examiners of the Court who examine the *processus* from Salisbury. The final entry in the case contains the definitive sentence reversing the judgment of the lower court. Translated below are the original *processus* (no. 1) and the examiners' report (no. 4).]

No. 1

Processus before the official of Salisbury, 10 July, 1271 — 11 May, 1272

A.D. 1271, Friday after the feast of the translation of St. Thomas, martyr [10 July], Alice of Winterbourne Stoke appeared against William Smith saying against him that he contracted marriage with her, wherefore she asked that he be adjudged her husband by sentence; she says this, etc. The man, joining issue, denies the contract; the parties sworn to tell the truth say the same thing as before. The reception and examination of witnesses is committed to the dean of Amesbury.

Thursday next after the feast of St. Peter in chains [30 July], the parties appeared personally and the woman asked for a second production and got it.

Wednesday next after the feast of St. Matthew the apostle [23 September], the parties appeared personally; the woman renounced further production; the attestations were published with the consent of the parties; the parties were given a copy; a day was given for sentencing if it was clear. The woman constituted her brother Roger her proctor in the acts to hear the definitive sentence.

Monday next after the feast of the apostles Simon and Jude [26 October], the parties appeared personally; the man under interrogation confessed in court that he had carnal knowledge of the said Alice a half a year ago. The same man proposed an exception in the following form: "Before you, sir judge, I, William of Winterbourne Stoke, peremptorily excepting propose against the witnesses of Alice Dolling that they depose falsely because from the ninth hour of the day on which her witnesses depose that I contracted marriage with her until the first hour of the subsequent day I was continuously at Bulford, so that it would have been impossible for me at the hour about which the witnesses depose to have contracted marriage at Winterbourne Stoke. And this I offer to prove." The reception of the witnesses produced by the man on his exception and their examination is committed to the dean of Amesbury.

Wednesday next before the feast of St. Edmund, king and martyr [28 October], the parties appeared personally; the woman made a replication of presence; let the woman produce her witnesses before the rectors of Berwick and Orcheston, however many she wishes to produce before the next consistory; let the man also produce however many witnesses he wishes to produce about his absence before the said dean and the chaplain of Amesbury before the next consistory.

Tuesday after the feast of St. Lucy the virgin [15 December, 1271], the parties appeared personally; the woman excepting proposed that it was not her fault that her witnesses had not been examined and asked that they be admitted in court; they were sworn, their examination committed to the dean of Amesbury and Richard de Rodbourne, and the way of further production precluded for her. On the same day the attestations both on absence and presence were published with the consent of the parties; copies of the attestations were offered to and obtained by the parties, and a day was given for doing what law shall dictate.

Wednesday next after the octave of St. Hilary [27 January, 1271/2], the parties appeared personally, and when there had been some dispute among the parties about the attestations of the parties, a day was given for sentencing if it was clear.

The day after St. Scholastica the virgin [11 February, 1271/2] the parties appeared personally. It was decreed that the aforesaid W. produce in the next consistory all his witnesses whom he had previously produced on his exception so that it might be inquired more fully about the continuity of absence.

Production of Alice Dolling on the principal

Celia daughter of Richard Long sworn and carefully examined about the contract of marriage between William Smith of Stoke Winterbourne and Alice Dolling says that she saw and was present when the said William gave his faith in the hand of the said Alice by these words: "I William will have you Alice as wife so long as we both live, and thereto I give you my faith." And she replied, "And I Alice will have you as husband, and thereto I give you my faith." Asked about the hour, she says it was at the hour of sunset. Asked about the place, she says in the house of John le Ankere before the bed of the said women, Celia and Alice, on the west side of the house. Asked if they were standing or sitting, she says sitting. Asked about their clothes, she says that the man was dressed in a black tunic of Irish, an overtunic of russet, and a hood of the same color, and the woman was dressed in a tunic of white and a blue hood, and on her feet she had strapped shoes. Asked how she knows this, she says that she was present in the house when all this happened. Asked why the said William came there, she says to have carnal intercourse with her if he could. Asked if she ever saw them having intercourse, she says no, but she saw them naked in one bed. Asked who were present at the said contract, she says the contracting parties, she herself, Margaret, her sister, and no more.

Margaret, sister of the said Celia, sworn and carefully examined about the aforesaid contract says that she saw and was present when the said William gave his faith to the said Alice by these words: "I William will have you Alice as wife as long as we shall live, and thereto I give you my faith." And she

replied, "And I Alice will have you William as husband by such a pact." About the year, the day, the hour and the place, she agrees with the said Celia, her cowitness. Asked about their clothing, she says that the man was wearing a gray tunic of Irish cloth, and an overtunic of gray and a hood of gray. About the clothes of the woman she agrees with her cowitness. About her knowledge, she agrees with the said Celia. Asked why the said W. came there, she says that she does not know, unless it was to have carnal intercourse with her. Concerning those in the house, she agrees with the said Celia. Asked if she ever saw them having intercourse, she says no, nor did she see them together in one bed.

Margaret daughter of Michael sworn and carefully examined about the marriage contract between William Smith of Stoke Winterbourne and Alice Dolling, says that on St. Stephen martyr's day at Christmas, two years ago, she was present and saw that William Smith whom the case is about gave his faith to the said Alice by these words: "I William take you Alice as my wife if holy church permits, and thereto I give you my faith." And Alice replied by these words. "And I Alice will have you as husband and will hold you as my husband." Asked about the hour she says that this was done before the hour of sunset. Asked about the place, she says in the house of John le Ankre in the southern part before the bed of the said Alice. Asked who were present, she says Celia daughter of Richard Long and Margaret the sister of Alice whom the case is about and the contracting parties and no more. Asked why the said William came there, she says she does not know. Asked if she ever saw them having intercourse, she says no. Asked in what garments they were clothed, she says that the said William was wearing an overtunic of russet and a hood and a tunic of grey Irish, and Alice was wearing a white tunic and a blue hood.

Production of the said Alice about the presence of the said William

Edith of Winterbourne Stoke sworn and carefully examined about the presence of William Smith says that she saw the aforesaid William Smith in the eastern part of the church of St. Peter of Winterbourne Stoke, leading a crowd of women[1] after him on the day of St. Stephen martyr there were three years past. Asked about the hour of the day, she says that it was after dinner before the hour of sunset. Asked about clothing, she says the she does not recall. Asked where he went, she says she does not know. Asked how she remembers the lapse of time, she gives no cause of her knowledge. Asked if she saw him many times, she says only once. Asked who saw him with her, she says Edith, Alice and Agnes, her cowitnesses and many others of the parish.

Edith Dolling, the sister of her whom the case is about, sworn and carefully examined about the presence of William Smith, says the same as the aforesaid Edith in all things, adding that she saw him many times that day and that the man was dressed in a cloak of russet and a hood of blue, and that she herself went in his hand.[2]

Agnes Grey sworn and examined says the same in all things as Edith the next previously sworn, except that she gives the reason for her knowledge of the lapse of time that she was pregnant at the time.

Alice daughter of William Chaplain sworn and carefully examined says the same in all things as the aforesworn Edith Dolling.

Production of William Smith on his exception of absence previously proposed

John Chaplain, sworn and carefully examined, asked for what he was produced, says to prove a certain exception proposed by William Smith against Alice Dolling of Winterbourne in court. Asked what the exception is, he says that the said William proposed by way of exception that he was not present on St. Stephen's day on which the witnesses of the said woman depose that he ought to have contracted marriage with her. Asked where the said William was on the said day, he says that he well knows and that he saw him and spoke with him on the day of St. Stephen martyr, at Christmas there will be three

[1] Textual problem here. This may mean "leading a lewd woman".

[2] An obscure phrase.

years passed, at Bulford from the ninth hour of the aforesaid day of St. Stephen and for the entire night following up to midday on the following St. John's day [26–27 December, 1268 or 1269; see below fn. 3]. Asked how he knows this, he says that they serve[d] a guild of parishioners in the said town of Bulford finding food and other things necessary for those serving, as is customary, along with Alice his mother. Asked where he was at table that day, he says in the house of Alice his mother at Bulford. Asked if he left at any hour of the aforesaid day or night, he says no. Asked how he knows this, he says that both of them were together at the said guild and in eating at the house of Alice the mother of the aforesaid William from the ninth hour until midnight, and immediately afterwards they went to the house of the mother of the aforesaid William where the said William spent the night. Asked who were at the guild, he says the guild brothers. Asked who the guild brothers are, he says almost all the better men of the parish. Asked if all his cowitnesses were present, he says yes. Asked if he knows Alice whom the case is about, he says no. Asked how far Winterbourne Stoke is from the town of Bulford, he says four miles. Asked how he recalls such a lapse of time, he says by this: that in the same year, the guild ceased.

Richard Sturre sworn, examined and carefully asked, says that William Smith whom the case is about was present in the town of Bulford from the ninth hour of St. Stephen, at Christmas there will be three years passed, continuously for the whole day and the night following and St. John's day until noon. Asked how he knows this he says by this that he saw him at the guild of Bulford and spoke with him and saw him serving as butler at the said guild until midnight. And the same day, along with Alice his mother, he found food and other necessaries for the guild, as is customary, for each guild bother in his course when he came to him. About the rest he agrees with John, previously sworn.

Walter de Ponte, sworn, examined and carefully asked, agrees in all things with the previously sworn John and Richard, adding however that they lay in one bed in the house of his mother at Bulford. Asked who spent the night in that house that night, he says the witness himself, William whom the case is about, and their mother and a serving maid and no more.

John le Devenes sworn and carefully examined agrees in all things and through all things with the previously sworn John and Richard.

Hugh Baghe sworn and carefully examined agrees in all things and through all things with the previously sworn.

Peter son of Alice sworn and carefully examined says that he well knows and it well comes to his memory that William Smith whom the case is about was continuously in the town of Bulford on St. Stephen's day from the ninth hour through the whole day and the following night until the third hour of the next day, this year there will be three years elapsed. Asked how he knows this, he says that he saw him on the said St. Stephen's day eating and drinking at the table of the mother of the said William. Asked where the said W. went after dinner, he says to the guild at the hour of sunset and he stayed there with many others drinking until almost midnight, and afterwards he went to the home of his mother to bed and lay there until morning. Asked how he knows this, he says that he was in his company and is his next-door neighbor. Asked how he remembers when so much time has elapsed, he says by this that in the same year the guild ceased. Asked how far Bulford is from Maiden Winterbourne, he says three leagues. Asked if the said William left Bulford any hour of the day or night between the ninth hour of the aforesaid St. Stephen's day and the third hour of the following St. John's day, he says no.

John son of the weaver sworn and carefully examined agrees in all things and through all things with the previously sworn Peter.

Roger de Cowland sworn and carefully examined agrees in all things and through all things with the previously sworn P. and J. except that he does not give the reason for his knowledge.

* * *

Tuesday after the feast of St. Mathias the apostle, continued until Wednesday, Thursday, Friday, Saturday next following [1–5 March, 1271/2], the parties appeared personally. The same man alleged that he could not produce his witnesses before us because some of them did not exist in the nature of things and some of them had left the province for a journey and for other necessary cause. And when the

parties had disputed for a while about the processus, the same William demanded that a copy of the entire processus be made for him, which decreed and obtained, a day was given for doing what law shall dictate in the next consistory after Easter. Wednesday after 'Misericordia' Sunday [11 May], A.D. 1272, the parties appeared personally and concluding the case asked that sentence be given. We the official of Salisbury proceeded to definitive sentence in this way: "In the name of the Father, amen. We the official of Salisbury having examined the merits of the aforesaid cause and having gone over the acts of court carefully, because we find the claim of the said Alice sufficiently proven, notwithstanding the exception proposed on the part of William, which is not proved clearly in its form, as it ought to be, adjudge William by sentence and definitively to be husband to the same Alice."

No. 4

[An initial long paragraph in this document recites the procedural steps in the Salisbury court and those taken in the Court of Canterbury. The only thing worth noting is that the woman at no time appears in the proceedings at Canterbury.]

Item, having examined the statements of the witnesses of the said Alice on the *de presenti* marriage contract that she proposed, the first two witnesses seem to depose that they contracted between themselves by words of the future tense. And these witnesses were sisters of each other, as the second witness seems to depose. Item, the third witness seems to depose that the man contracted by words of the present tense and the woman by words of the future tense, and she says that the second witness is the sister of Alice.

Item, having examined the witnesses of William produced on his exception of absence it seems that he proved by ten witnesses his absence at the same hour about which the witnesses of the said woman depose. Item, having inspected the statements of the witnesses produced on the replication of presence, they do not seem to obviate the statements of the witnesses on the exception of absence nor do they help the claim of the woman because they seem to speak of the previous year,[3] and even if they are speaking about the same year they seem to depose less fully, and they are only four in number and the witnesses of the man are ten.

B. ADAM ATTEBURY C. MATILDA DE LA LEYE

(Court of Canterbury, 1271–72) in N. Adams & C. Donahue, eds.,
Select Cases from the Ecclesiastical Courts of the Province of Canterbury (Selden Soc'y no. 95, 1981) 118–23 [CD trans.]

Unlike *Smith c. Dolling*, above p. 94, this case first appears in the Court of Canterbury[4] as an appeal to the apostolic see in which the aid of the Court of Canterbury is sought to protect the appellant against action by the court below pending the appeal (a so-called "tuitorial appeal"). Subsequent to proving his appeal in the Court of Canterbury, Adam agreed to abandon the appeal to the pope and have the Court of Canterbury hear the appeal. The first document translated below (No. 2) is the depositions of Adam's witnesses on the tuitorial appeal. The second document is the *processus* in the case below transmitted by the official of the archdeacon of Huntingdon[5] (No. 4) after the parties had agreed "to proceed with the principal [case]." in the Court of Canterbury. Other than two brief certificates by the official of the archdeacon of Huntingdon, no other documents survive from the case.

No. 2

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[3] A neat point—Alice's witnesses on the principal claim speak of an event on St. Stephen's day, there were two years passed; William's witnesses on his absence speak of period on St. Stephen's day, there will be three years passed, i.e., on next St. Stephen's day; Alice's witnesses in replication speak of a period on St. Stephen's day, there were three years passed. We cannot exclude the possibility of scribal error ('erant' for 'erunt'), nor, it seems, could the examiners. The explanation may be, however, that Alice's replication witnesses were examined after 26 December, 1271.

[4] The Court of Canterbury was the appellate court for the province of Canterbury. The province included the diocese of Lincoln.

[5] The archdeacon of Huntingdon was subordinate to the bishop of Lincoln. As can be seen from this case, the area of jurisdiction of this archdeacon extended in this period beyond the small county of Huntingdon into the county of Hertfordshire. It will be noted that the appeal omits the intermediate court in the hierarchy, that of the bishop of Lincoln.

Examination of witnesses produced on behalf of Adam Attebury.

Robert Crips, unlettered, sworn and examined, says that he was present in the church of All Saints', at Hertford, Lincoln diocese, on the day of st Denis the martyr (9 October), around the third hour of the aforesaid day, A.D. 1271, before the official of the archdeacon of Huntingdon, hearing cases by ordinary authority, in a case of matrimony which was pending between Matilda de la Leye, plaintiff on one said, and Adam Attebury, defendant on the other, where on the said day and at the said hour the said official in the said case proceeding rashly, rendered an inequitable[6] definitive sentence for the said woman against the aforesaid Adam, as he says.[7] From this sentence as from an inequitable sentence, the same (Adam) appealed to the Holy See and to the see of Canterbury for protection of his appeal[8] in English and without writing, as he says. Immediately afterwards master Thomas Pollard[9] in writing and in Latin and afterwards orally in French, similarly appealed and asked for apostoli,[10] as he says. These apostoli the said official refused to grant him, as he says. Asked how he knows this, he says he knows it because he was present and saw and heard these things done. Asked how he knows that the official was hearing the case by ordinary authority, he says he knows this because the same day the official held a full chapter openly, and this was one of the cases argued in this chapter. Asked why the said A. was called to judgment against the said woman, he says because the said woman asked that this A. be adjudged her husband because he contracted marriage [with her] by words expressing mutual consent, as he says, and he saw and heard this, as he says. Asked how he knows that the said official rashly proceeding rendered an inequitable definitive sentence against the mentioned A., he says that he knows this because he (the official) followed what was said by some witnesses produced against the aforesaid A. One of them was and is the sister of her who produced her. Alice the witness is noted[11] as infamous for witchcraft and theft, and is commonly regarded as a prostitute in those parts. Asked who was present at the appeal thus taken, he says that he and his co-witness, John, and many others both clerk and lay, as he says.

[John de Raddeburne, also unlettered, testifies to the same effect, except that he does not know whether *apostoli* were granted or not.]

Processus *before the official of the archdeacon of Huntingdon, 14 November, 1270 —* (*9 October*), 1271.

To the venerable man of discretion the lord official of Canterbury constituted by the prior and chapter of Canterbury, sede vacante,[12] the official of the archdeacon of Huntingdon greeting, and due and honorable reverence and obedience. At your mandate I transmit the processus held before my predecessor, that was pending between Matilda de la Leye, on one side, and Adam Attebury of Berkhamstead,[13] on the other:

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[6] *iniquam*. The word can also mean "wicked," not in the colloquial sense of that word.

[7] The style of this deposition differs from that of the subsequent ones in that, among other things, this one is sprinkled with a large number of "as he says." Before we draw the conclusion, however, that this examiner was skeptical of the veracity of this witness, we should remember that this deposition was taken in a different court. It may have been the style of the Court of Canterbury to use a large number of "as he says," whereas it was not the style of the court of the official of the archdeacon of Huntingdon to do so.

[8] As indicated above, Adam subsequently abandoned his appeal to the Holy See, and the parties agreed to have the case determined in the Court of Canterbury.

[9] Not otherwise identified, the title "master" suggests, but not quite prove, that Pollard was a university graduate.

[10] These were letters of protection that were routinely granted to appellants. The fact that the official did not grant them (if the witness is to be believed) suggests that the official thought that the appeal was frivolous or that he was being a bully.

[11] *notatur*. The word frequently implies a formal charge brought in an ecclesiastical court. It will be noticed that Adam's exception in the archdeacon's court focused on Lucy, whereas this witness focuses on Alice.

[12] Between the death of an archbishop and the appointment of another, the cathedral chapter of Canterbury (the prior and chapter) exercised the archbishop's judicial and administrative functions. The vacancy of the see here is the one between the death of Archbishop Boniface of Savoy (18 July, 1270) and the consecration of Archbishop Robert Kilwardby (February, 1273).

[13] co. Herts.

The aforesaid Adam was cited at the instance of the aforesaid Matilda for the Friday after the feast of st Martin in winter (14 November), A.D. 1270, at Harpenden.[14] The said woman issued a libel against the same Adam: "Matilda de la Leye says and proposes before you lord judge against Adam Attebury of Berkhamstead that the same A. contracted marriage with her, which having been proved, she asks that he be adjudged her husband by way of sentence." When the libel was recited, Adam immediately joined issue (litem contestando) and said that what was told in the libel is not true and therefore what was asked for should not happen. Both parties having been sworn to tell the truth, the woman spoke as she had before, and the man persisted in denying it. When they were asked whether they had had sexual intercourse, both confessed the carnal coupling. A day was given to the woman to produce witnesses and to the man to see the witnesses swear and [to both parties] to do further what the law would require, to wit, the Friday just before the feast of st Lucy the virgin (12 December), in the place as before, in the aforesaid year. On the said day and in the said place, the said M. personally appeared, but the said A. in no way appeared. As a penalty for the contumacy of the said A., the judge admitted two witnesses who were sworn and examined and deposed as follows:

Lucy, wife of Richard the ploughman, sworn and examined, says that she saw and heard Adam Attebury contract with Matilda de la Leye in these words: "I give you my faith that I will have you[15] as my wife from this day forward." She replied, "And I to have you as husband from henceforth, my sister Alice and Lucy wife of Richard the ploughman being witnesses." Asked how she happened to see and hear this, she says that she came with them from Luton.[16] Asked about the place, she says it was in the middle of a field called 'le Riding'.[17] Asked about the day and the hour, she says it on the vigil of st Hugh the bishop (16 November) seven years had passed; it was after dinner[18] before the evening hour. Asked who were present, she said the contracting parties; she, Lucy, who had sworn, and Alice, sister of Matilda, and no more. Asked about the clothes, she says that the man was dressed in a tunic of russet[19] and an overtunic of hauberget,[20] and the woman in a dress of burnet.[21] Asked if she says these things out of fear or love or for money or a bribe, she says no, only that she might remain without peril from the oath she had sworn.

Alice, sworn and examined, says that she was present when Adam Attebury gave his faith to Matilda de la Leye in these words, "Matilda, I give you my faith that I shall have you[22] henceforth as wife." She replied, "Thank you, and I you as husband, my sister Alice and Lucy here present being witnesses." Asked about the place, the lapse of time, the day, the hour, and the clothes of the contracting parties, she agrees in all things with Lucy, who had previously sworn. Asked who were present at the contract, she says the contracting parties and two witnesses.

The named parties having been peremptorily called and personally appearing at the chapter[23] held in the church of Great Gaddesden[24] on the Friday next after the feast of st Vincent (23 January), [1271], the said M. renounced further production [of witnesses], the aforesaid attestations (depositions) were published at the request of the parties, and a copy was decreed for the parties and obtained. And after the parties had disputed about the aforesaid attestations for a while, the often-said A. at the chapter celebrated

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[14] co. Herts.

[15] *volo te habere*. This is "I will have you," not "I shall have you," i.e., it is not unambiguously words of the future tense.

[16] co. Beds., about 8 miles northeast of Berkhamstead.

[17] Unidentified.

[18] Medieval dinner tended to be in the early afternoon.

[19] A coarse, home-spun woolen of reddish brown.

[20] This was a kind of cloth, not further identified, that frequently appears in conjunction with russet. O.E.D, s.v. *haberjet*.

[21] A cloth of some dark color.

[22] *habebo te*. These are unambiguously words of the future tense.

[23] Sessions of lower ecclesiastical courts tended to be called "chapters."

[24] co. Herts.

at Berkhamstead on the Thursday next after the feast of sts Perpetua and Felicity (5 March), in the aforesaid year, excepted against the witnesses of the said Matilda in this way:

"I Adam Attebury standing before you lord official of the lord archdeacon of Huntingdon, except against the person of Lucy, witness of Matilda de la Leye produced to testify against me in a marriage case, and propose that no faith is to be given to her because she is of ill fame, suspect life and opinion, and accused[25] of theft and persevering in that crime. Again, because she is a pauper and without goods, and on account of her poverty strongly suspect, and on account of this to be repelled from testimony. These exceptions I propose in the alternative, and I ask that they be admitted and received, asking that one or the other of them having been proved, which can and should be enough to win the case for me, the testimony of the said Lucy should be annulled and pronounced null, and I should be absolved from the petition of the said Matilda. … ."

And after solemn dispute was held many times about the said exception, the parties being present, at length the judge in the chapter held at Berkhamstead on Thursday next before the feast of st Botolph (11 June), A.D. 1271, quashed the aforesaid exception with the advice of the legal experts sitting with him and asked the parties if they wished to propose anything other than what had previously been proposed in the said case. And because they proposed nothing lawful, the case was concluded, and the parties were assigned a day, to wit, the Friday next after the feast of st James the apostle (31 July), in the church of st Peter, Berkhamstead, in the aforesaid year. On this day and in this place, because the judge wanted to examine the processus, he set for the parties the day after the synod of Hertford in the church of All Saints to hear the definitive sentence precisely.[26] On which day and in this place, the parties appearing personally, the judge, with the counsel of prudent men, pronounced sentence in the marriage case in this form:

"In the name of God, amen. Having heard and fully understood the merits of a marriage case which is pending between Matilda de la Leye, on one side, and Adam Attebury, on the other, a libel having been offered, issue having been lawfully joined in the negative, an oath having been taken by each party to tell the truth, the woman asserting the marriage contract, the man denying and confessing carnal coupling with her, an exception proposed against the witnesses of the woman having lawfully been quashed, because we find the complaint of the said Matilda was lawfully proven by the aforesaid witnesses, the subsequent carnal coupling adding support (*adminiculum prestante*), we by sentence and definitively adjudge the said Adam to be the husband of the said Matilda.

Farewell. Given at Shillington[27] on the morrow of st Mathias the apostle (26 February), A.D. 1272.

NOTES AND QUESTIONS

This case appeared on the exam that I gave in this course in 2003. Here are the "guide questions" that were offered on the exam.

(1) What institutions are evidenced by this case? Briefly, sketch out the prior and subsequent history of these institutions. (This is a question about framework; don't spend a lot of time on it.)

(2) What is the form of procedure being used by these institutions? Briefly sketch out the prior and subsequent history of this form of procedure. (This is a question about framework; don't spend a lot of time on it.)

(3) What is the nature of the exception that Adam makes to the testimony of Lucy? Why does Adam's exception say that if he proves either of his exceptions against Lucy he will have won his case? How does the exception suggested by Adam's witness, Robert, differ?

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[25] *irretita*. The word normally implies a formal criminal charge.

[26] "Synods" were more important ecclesiastical gatherings than "chapters" and tended to be held once or twice a year. This one probably took place on 8 October 1271. See the first set of depositions.

[27] co. Beds.

(4) Have Matilda's witnesses (assuming that we believe them) said enough to allow her to prevail in the case under Alexander III's rules about marriage formation? Have they said enough to allow her to prevail in the case in a jurisdiction that had adopted the rules about marriage formation prescribed by the council of Trent (below, p. 1)? by the *Ordonnance of Blois* (below, p. 114).

(5) Does this case tell you anything about why the council of Trent adopted the rules that it did? why the French adopted the *Ordonnance of Blois*?

(7) What does the ruling of the archdeacon of Huntingdon's official tell us about the role of the judge as he interacts with the social situation of the parties?

(8) Considering how the Court of Canterbury ruled in *Smith c. Dolling* (above, p. 94), how do you think that same court is going to rule in this case?

(9) What do your answers to the previous questions tell you about the relationship of procedural and substantive law in the history of Western legal development?

C. DECISION (HOLY ROMAN ROTA, 1360 X 1365)

in Bernardus de Bosqueto, *Decisiones Antiquiores*, in [Catholic Church. Rota Romana], *Do[minorum] de Rota Decisiones, Novae, Antiquae et Antiquiores* (Cologne 1581) 627–8 [CD trans.]

Peter, being married to Anna his wife, made many and various clothes and furniture [*arnesia*] for her, and he also gave her many and various jewels, saying "You may hold this [*teneas istud*]." It is true that the said Anna, while she was married, acquired money in various ways, some of which she handed over to the said Peter her husband, and she acquired with the notice of her husband nine florins for the fur edging of her cloaks, more or less, on one occasion or a number, and also many jewels, silver cups and spoons, and much cloth both for her cloaks and dresses, given her by her in-laws and friends of her husband to do with as she would [*ad beneplacitum sibi*]. At length Peter living on the verge of death [*vivens ad mortem*] made his testament in which he made their common children heirs, and constituted his wife, the said Anna, tutor, governor and administratrix both of the children and of the goods, but with benefit of inventory. Now it is asked whether the said Anna, the aforesaid wife, is held to put her above-written furniture and jewels in the inventory she is making, and also, since the said Peter her husband made no mention of this in his testament nor made a legacy of them to her, what is the law so far as the clothing and furniture made or bought by the man?

It seems that it ought to be said that he did not seem to give them to her, because the necessity of supporting and administering such things for her falls on the husband, and therefore the laws favor the husband, so that he is understood to have handed them over to her only for current use, as is proved in [D.24.1.31.pr–1],[1] with what is noted there at the beginning, and in [D.24.1.53.1] at the end, and [D.24.3.66.1] supports. Oldradus and Cynus are of this opinion, and [D.24.1.31] is commonly held to say this.

So far as what was acquired by her industry and diligence is concerned, it seems that it ought to be said that if they were acquired by her efforts [*operis*], they ought to pertain to the husband or to the man and his heirs after him, because the wife is held to work for the husband, as in [D.38.1.48] and note [C.6.46.5.1 v^{o} *potestate*] at the end, and the said law [D.24.1.31] supports, and for this note what Innocent

[1] "Where, however, a husband makes clothing for his wife out of his own wool, although this is done for the wife and through solicitude for her, the clothing, nevertheless, will belong to the husband; nor does it make any difference whether the wife assisted in preparing the wool and attended to the matter for her husband. (1) Where a wife uses her own wool, but makes garments for herself with the aid of female slaves belonging to her husband, the garments will be hers, and she will owe her husband nothing for the labor of the slaves; but where the clothing is made for the husband, it will belong to him, if he paid his wife the value of the wool. Where, however, the wife did not make the clothing for her husband, but gave it to him, the donation will not be valid; as it will only be valid when the clothing is made for her husband, and she will never be permitted to render a bill for the labor of her husband's female slaves."

says in [X 3.26.6] near the end of the first column.[2] What is said of the wife is also relevant to this point: when he adds a little after, "for whatever the wife acquires by her effort is acquired for the man." If however she acquires other things otherwise and can show whence and from whom or in what way, then they ought to pertain to her and not to the husband, even if she acquired with the money of the man, for example, in trading or in keeping it in the bank [*cambiis*]. Argument: [D.24.1.15.1] for the woman is free, except as to the carnal debt and working, as the law [C.6.46.5.1] says and ones like it.

So far as the vessels and jewels and clothing and other ornaments are concerned, which of necessity the man is not held to minister to her, if it appears that they were handed over to her with the intention of making a gift, although the gift is not valid, as one made between husband and wife, then, because the husband did not expressly revoke it, I would say that it was confirmed by the death of the man, and that they ought to pertain to her and not to the heirs of the husband, as [D.24.1.32.1]. But in the aforesaid case of handing over, I do not believe that by these words which the husband said to the wife, "You may hold this," he seems to have made a gift, but rather that she keep it and to commend it to her use indiscriminately, because in a doubtful matter someone is not presumed to have made a gift nor to have cast aside what is his (argument [D.22.3.25] and [D.39.5.7]) especially lest in so presuming they despoil themselves by mutual love, and because a gift between husband and wife is prohibited by law, and in a doubtful matter one is not presumed to have done something against the disposition and prohibition of law.

So far as the other things given to the wife by others with the man looking on are concerned, I believe that a distinction ought to be made, whether these intended chiefly to give to the man and wanted them to be his acquests, although they handed them over to the wife, and then I believe that such things ought to pertain to the man and to his heirs and not to the wife, because what the man acquires by the ministry of the wife he acquires for himself, even when he ratifies such a gift (argument: [D.3.5.23]), unless the man, when it was credited to the wife, intended to make a gift to her, for then, although at that time of the gift between husband and wife it was not valid, nonetheless it was confirmed by the death of the man [D.24.1.3.13, 1.4; 24.1.32.1], although I would not presume this in a doubtful case, to wit that the man wanted to make a gift to the wife (argument: what I said in the preceding section using [D.22.3.25]). If, however, those who gave to the wife with the man looking on intended principally to give to the wife, and they wanted the things given to be acquired by her and not by the man, although they did this with him looking on, then I would believe that such gifts were acquests of the wife and not of the man, for she is a free person who can acquire for herself, nor are they acquired for him, because they are not acquired by her efforts, as is noted by Cynus. [C.6.2.22] in the last question at "However this argument is removed." Nor is she held to put such things in the in the inventory. In a doubtful case I would believe that recourse must be had to conjecture and to the type of thing given, whether it is more fitting for a man than for a wife and vice versa, so that according to this it may be presumed whether the givers wanted it to be acquired by the man or by the wife. And for this proposition Johannes Adreae's notes in the Novel. [VI 2.15] *in fine super verbo ad eundem* do well. And if nothing can be presumed from these things I would believe that in a doubtful case the givers wanted it to be acquired by the husband, because they gave while he was looking on. Argument [D.28.6.10.5] with what is noted there [D.24.3.64.5] with the laws that are in agreement. About those things given to the wife with the wife looking on and not the man, there is no doubt that without doubt they ought to pertain to her by the argument of the aforesaid laws. In a doubtful case, however, if the wife cannot prove whence, how and from whom she acquired, everything is presumed to be of the man's goods, as [C.5.16.6] and l. quamvis. ff. eod tit. [i.e., *De donationibus inter virum et uxorem*].[3]

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[2] The reference is to Sinibaldus Fliscus [Innocent IV], *Commentary in X 3.26.6* (Venice 1570), fol. 239rb, discussing the presumption that what a beneficed clergyman acquires, he acquires from the goods of his church: "And support this with what is said of the wife, that whatever she acquires during the marriage, she is presumed to have acquired from the goods of her husband."

[3] This appears to be a "bum cite."

And therefore it would be safer for the wife to put everything in the inventory, protesting her right that on account of this she does not intend to confess that these things pertained to the husband or his heirs or ought to pertain, and protesting that the things appear to pertain to her by right, as she wishes to obtain her own things, lest without protestation by simply placing them in the inventory she might seem to confess that they pertained to the man or to his heirs or ought to pertain, as [C.5.51.13], which she will not seem to confess with the aforegiven protestation which will keep her right for the future. Argument [D.20.6.4.1] and [11.7.14.7]. Note about the matter of protestation in [X 1.2.9] and by [Johannes Monachus and Johannes Andreae] in [VI 5.[13].81].[4]

[4] VI 5.[13].81: "In a general grant are not included those things which someone is unlikely to grant specifically."

D. NICHOLAUS DE TUDESCHIS (ABBAS PANORMITANUS), CONSILIA

a. CONSILIUM LXXIX (*Stante statuto*)

in Nicholaus de Tudeschis, *Consilia* (Venice 1569) 2.79, fol. 162v–163v
[CD trans. Most citations omitted.]

The case of the following *consilium*:

There is a statute that provides that a man is enriched with a third part of his wife's dowry if she dies before him without children, if a man leads a wife to his house and lives with her or goes to live with her. It is asked if he who led a wife by words of the present tense and brought her to the house of his usual habitation and had her there in his family enjoys the benefit of the statute, the aforesaid consort or spouse dying in the house of the same man before the marriage was consummated by carnal coupling.

Having invoked the name of Christ and of his mother. It seems first that not: because the statute makes mention of a wife and man, but the name "wife and man" sometimes is understood to be only those who have consummated the marriage by carnal coupling, as is proved in [X 3.32.7].[1] For then a marriage is perfected as to its essence and is signified as in [X 1.21.5, 4].[2] … Sometimes, however, it is understood to be those who have contracted by words of the present tense even without carnal coupling as is proven in [D.35.1.15],[3] and [D.24.1.3[.1] v° *concubine*][4]. And there the good gloss proves by many canon laws in which it is provided that consent *de presenti* alone makes a marriage as to its essence and that they can be called husband and wife. The very definition of marriage proves it, which is had in the gloss at the beginning of [C.27 q.2][5] and in [JI.1.10pr][6]][7]. where there is a good text with a gloss.

[1] In this decretal, Alexander III holds that a *sponsa de presenti* who had not had intercourse with her *sponsus* could dissolve the *sponsalia* by entering the religious. It closes with the following ringing phrase: "Clearly, what the Lord said in the gospel, that it was not permissible for a man to dismiss his wife except by reason of fornication [above, p. 22], is to be understood, in accordance with the interpretation of sacred speech, of those whose marriage is consummated by carnal coupling, without which it cannot be consummated."

[2] The issue in the first decretal is whether a man who marries a woman who has been espoused to another but with whom she had no carnal relations can later become a priest (i.e., is not a "bigamist"). The decretal holds that he is not a "bigamist." The second decretal is less relevant. It holds that those who being in holy orders contract with and have sexual relations with a second woman, are to be treated as "bigamists," even though they are not in fact such.

[3] D.35.1.15: "Where a legacy is left to a woman under the condition 'if she marries within the family', the condition is treated as fulfilled as soon as she is taken to wife [*ducta*, literally "led"], even though she has not entered her husband's bedchamber, for it is consent, not sleeping together, that makes a marriage." The last phrase of this fragment = D.50.17.30, below, p. 81.

[4] D.24.1.3[.1] v° *concubine* (Lyon, 1604), col. 2179: " … Again I ask, if gifts are impeded when a marriage has been contracted by words of the present tense before the leading into the house [of the husband], for according to the canons they are husband and wife. Azo replies that they are. …"

[5] Above, p. 59, which, in turn, is a paraphrase of JI.1.9.1, above p. 37. The reference to the "gloss" is probably to the *dictum Gratiani*, because there is no definition marriage in the formal glosses.

[6] There is no definition of marriage in JI.1.10pr. The reference is probably to JI.1.9.1, above p. 37, in which case the gloss is probably that v° *coniunctio* (Torelli ed.), col. 59: "*Joining.* Of souls not of bodies, as [D.50.17.30], and this joining

Sometimes, however, these words, "husband and wife," are applied to spouses *de futuro*, although by benign interpretation, as it is in the notable text [C.6.61.5].[8]

From this you can infer that these words "husband and wife" are sometimes taken in a strict sense and signify man and consort, as in the marriage. There was true [marriage] between Joseph and Mary, although there never intervened carnal coupling ... . This clearly was the intent of this statute, in which she is called "wife" before she is led, and thus before the succeeding carnal coupling ... . And she cannot be called a *sponsa* from the time that present consent intervenes, because a *sponsa* is said of one who is promised. For spousals are said by *spondeo* and *spondes*, which is the same as "I promise" and "Do you promise" ... . But from the time matrimony is contracted, she cannot be called promised, but married [*coniugata*] and wife ... .

Second, the woman was led to the house.

Third, she lived with her husband, even though she was not carnally known. For the signification of this word "lived with" carnal coupling is not required, but consort of a common dwelling, as is expressly proved in our matter in [C.27 q.2 c.42].[9] Since therefore the words bear this interpretation and the contrary intent of the makers of the statute does not appear, we should not depart from the words. ...

Indeed, if we wish to conjecture the reason and mind of the statute, it will not deviate from the above-written interpretation but will corroborate it. Although no reason is expressed in the said statute, nonetheless it is permissible to conjecture the natural reason which could move the makers of the statute and according to that conjecture we can and should extend or restrict the statute ... . [Citations to Baldus, Cynus and Dinus] where natural justice is alleged for conjecturing the mind of him who laid it down, and that ought to be presumed the reason of the law, by which similarly the mind of him who laid it down moved ... . But the reason of the statute deferring gain to the man and to the wife upon the dissolution of the marriage cannot be because of carnal coupling, because this reason is found equally in both. Not that the carnal debt should be judged equally ... but rather there ought to be gain for the wife, who has lost her virginity, which is another dowry, and performed many services for the man, particularly with regard to children ... . Nor can it be conjectured that it was on account of conjugal affection or the relics of the dissolved marriage, for this reason also militates in favor of the wife. Hence it is that the law will not validate any pact for taking gain that is not common to both spouses ... . There cannot therefore be assigned any good reason to the law unless it be that the husband in sustaining the burdens of the marriage incurs many losses, and although he has dowry for supporting them, the expenses for clothing and ornaments are so great that the dowry is consumed in them. This is the reason Baldus puts ... and Bartolus in the treatise on the two brothers, where by this reason he says the notable phrase that if the father sustains the burdens of the marriage, that gain which the husband acquires by reason of the statute, cedes to the father, because it seems to arise on account of the paternal goods, out of which the burdens of the marriage were sustained. And thus you see that respect is not had for coupling; otherwise the father would gain nothing, which is not found in our case. For, as is presumed in our case, the man led the woman to his house and made all the expenditures, as a husband normally does for a wife living with him. He had prepared, as I hear, much clothing, and had made many preparations, so that he might

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signifies the union exists between God and the just soul, whence the Apostle: 'Who adheres to God is one spirit with him'. [1 Cor. 6:17] The rest, that is the joining of bodies, designates the conformity that exists between Christ and the holy church, whence the evangelist: 'The Word was made flesh'. [Jn. 1:14]."

[7] D.24.1.3[.1] v° *concubine* (Lyon, 1604), col. 2179: " … Again I ask, if gifts are impeded when a marriage has been contracted by words of the present tense before the leading into the house [of the husband], for according to the canons they are husband and wife. Azo replies that they are. …"

[8] C.6.61.5. The text treats a *sponsa* the same as an *uxor* for purposes of applying the rule that what is given to wife by way of testament from her husband is not acquired by her father, even if she is in his power, but, rather, is acquired directly by the wife.

[9] Above, p. 66.

consummate a marriage with a wedding feast[10] with her with the usual solemnity. He ought therefore to enjoy the benefit of the statute, since the words and the natural mind of the statute persuade. To the same effect is Baldus on [C.1.3.54(56)].[11]

The statute does not require handing over with solemnity, but contents itself that she be led and that he live with her, because by cohabitation he sustains the burdens of the marriage. Indeed the statute says more, that is, it suffices that the man go to live with her. These words ought be weighed much, for they imply that even though he has not cohabited much, nonetheless, from the time he goes with the intent of living with her, he enjoys the benefit of the statute. And thus it is not required that he have made many expenditures in leading and living with her. For if the husband goes to live with her, there is no need of a solemn handing over, and nonetheless the statute defers the gain to the husband. Therefore the preceding part that says that when the woman is led to the house of the husband to live with him ought to be understood also to be without solemn handing over. For the statute is satisfied with effect and does not care about the means. This last consideration is indeed the best in favor of the man. For the reason of the statute ought to be uniform ... .

The argument to the contrary mentioned above does not stand in the way. It works in the situation where the inquiry is about a marriage in its perfected significance, in which case it ought to be understood as one that is consummated. For then it has its perfected significance, as in the laws alleged above. Otherwise when mention is made of marriage or of husband and wife for another end, as is the case in our case, then the words are taken properly, for there is no underlying reason for taking that most strict significance. For if the reason of that most strict signification ceases, the signification itself ought to cease ... and in our case mention is not made of husband and wife on account of the signification "perfected matrimony," but on account of the burdens of matrimony, as I said above. And this is enough.

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[10] *conviviorum matrimonium*. Read *convivio matrimonii*.

[11] See below, next section, note 9.

b. CONSILIUM I (*Facti contingentia*)

in Nicholaus de Tudeschis, *Consilia* (Lyon 1562) 1.1, fol. 2ra–vb
[CD trans. Most citations omitted]

The factual circumstances are as follows: A certain A. contracted spousals by words of the present tense with B. and received from her a dowry of 1000 [*lire*]. It happened that the espoused woman died before she was led to [A's] house or the marriage was otherwise consummated. Now it is asked whether the said espoused man is entitled to one-half of the dowry in light of the following statute: "If any woman dies without children from the man to whom she is married (*viro cui nupta est*), a half of the dowry at the time of her death shall remain with the husband (*apud maritum*) not counting in the said half the profit from the man's marital gift (*donationis propter nuptias*), of which part the husband cannot be deprived." Afterwards some additions were made to the statute in which it was always mentioned whether children existed or not.

And, invoking the name of Christ and his mother, it is argued first that the truth shines greater on the affirmative part in this way: The statute in deferring this profit to the husband requires only two things: that the woman be married (*nupta*) and that she die without children. But these two things come together on the facts proposed, as I will immediately prove. The major premise is obvious by itself; the minor is proven as follows:[1] For it is true to say that she died without children by her husband, since none appeared, and facts are not presumed. … That she was married I prove most plainly by a text most notable in my judgment in [D.35.1.15],[2] where it is plainly said that a woman is called married, even though she is not known. And, what is more, even if she was not lead, it suffices that there intervened

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[1] I may not have this right. "conn'a de se satis est nota, maior etiam probatur."

[2] Above, p. 104, note 3.

consent to marriage *de presenti*, which alone makes marriage and not carnal mingling, as is proven in the end of that law, and more fully the gloss and Bartolus hold this in the same place.

Secondly, it is proved by [D.24.1.3[.1] v° *concubine*],[3] where it is noted that it is said to be marriage, and [the couple] are called husband and wife, so long as there is a contract of espousals *de presenti*, and although the gloss says there that this is a matter of canon law, I say the same of civil law, as is proved in [Nov. 22.3][4] and in the good gloss there.[5] And this text applies very well to this point, where it is proven, particularly in the gloss, that marriages are contracted by consent alone, that is to say, of the man and the woman, although nothing else intervenes.

Thirdly, it is proved by many canon laws (*iura*) which say in common that marriage is a true one by the by present consent alone, although nothing else intervenes, to the extent that a second [marriage], even with intercourse, does not take away [the first], because it [the first] already had its essence in the consent, as is proven in [X 4.4.5][6] … . The definition of marriage is relevant, the one that is posed at the beginning of [C.27 q.2][7] and of [JI.1.10pr][8] where there is a good text with a gloss.

Fourthly, this question seems to be [resolved] at first blush by the *casus* particularly with the joined commentary of Baldus on [C.1.3.54(56)][9] where it is said to be proven that that a pact which provides for a [person] to be awarded a particular part of the dowry in the event of death takes its effect when one of the spouses enters religion, and nonetheless it is certain that after the consummation of the marriage it is not permissible for either of the spouses to enter religion. … Thus, it would seem that this text is to be understood when one or the other enters religion, the marriage having been contracted and not consummated. … And according to this, this text seems to prove that the said pact of awarding a part of the dowry in the case of death also applies even in the situation where death intervenes after the spousals have been contracted by words of the present tense, the marriage having not yet been consummated, as happened in our case. And for this proposition the things that are read in [C.6.61.5][10] are relevant.

But notwithstanding these things I think the contrary is the law, that is that the said man should be awarded nothing under the statute. And first I take a fundamental two propositions: First, the word "marriage" (*nuptie*) is taken in law in multiple senses. Sometimes it is taken for the very pure essence of marriage, which is caused by the intervention of *de presenti* consent alone, as is proven in the said [D.35.1.15], the said [Nov. 22.3], [C.27 q.2 c.10][11] and like texts. Sometimes it is taken for the very carnal mingling that intervenes after the marriage has been contracted as is proven in [?X 4.17.4],[12] and is

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[3] Above, p. 104, note 4.

[4] Nov. 22.3: "Affect on either side makes a marriage, without any addition of dowry. Once they have agreed with each other either by pure marital affect or also with an offering of dowry and a marital gift, it is necessary that a cause attend the dissolution, whether without punishment or with penalty … ."

[5] Authen. 4.1 (=Nov. 22.3), v° *affectus* (Lyon, 1604), col. 163: "[D.50.17.30] is on point. And this is so if there intervene words of the present tense, such as these: 'Will you be my wife [now]?' and she responds, 'I will'. And she, on her side, asks [the same question]. It is otherwise if [the words are] of the future tense: 'Will you be my wife [in the future]?' For she will then be a wife when she is led to the house of her husband as in [D.23.2.5, 1]. …"

[6] Above, p. 59.

[7] Above, p. 59, which, in turn, is a paraphrase of JI.1.9.1, above p. 37

[8] See above, p. 104, note 6.

[9] C.1.3.54(56), a rescript of Justinian's which provides, as Panormitanus indicates, for division of the property of spouses, when one of them enters the religious life. There is nothing in the text to suggest that the couple had not yet had sexual intercourse nor, as Panormitanus will argue below, that both are entering the religious life, or that they had both consented to one of them entering the religious life. These were requirements in Panormitanus's time, but do not seem to have been the requirements in Justinian's time.

[10] Above, § TOPIC 9.D.a, note 8.

[11] Above, p. 61.

[12] The ed. omits the title, but if this text is being referred to, it is probably to the statement at the end: "she cannot be a wife who staining the bed of her husband presumes, while he is living, to couple with another." In the context (which is a question of the

proven more clearly than light in [C.27 q.2 c.40] and the third gloss there[13] … . Sometimes it is taken for the accompaniments and festivities that take place at the time when the wife is lead to the house of the man, as is proven in [C.30 q.5 cc.3, 5],[14] and in this way it is taken in the Gospel where it is said that a marriage was made in Cana of Galilee, when Jesus made wine of water there. [Jn. 2:1–11] And this last explanation seems most appropriate and conforming to the popular usage (*consantanea vulgo*), whence it is the common usage in certain places to speak of *le nozze*, and this is what Gaspar de Calderinis thinks in his commentary on the rubric *de sponsa*[*libus*] [X 4.1].

The second proposition is that the word "matrimony" (*matrimonium*) or "marriage" (*coniugium*) is sometimes verified in a marriage contracted by words of the present tense where carnal coupling has not yet intervened. And espousals by the present tense are commonly said [to be marriage], and they are so called by many people, [even] when the wife has not been transferred (*traducta*) to the house of the husband, as most clearly appears in [X 4.1.22],[15] and more clearly in [X 2.23.13],[16] and similar texts. Sometimes the word "matrimony" or the words "wife and husband" are verified, only in a marriage that is consummated, as is proven in [X 1.21.5].[17]

Under these propositions I proceed to the decision of our question in this manner, under the assumption that (*cum*) the word "wife" and the word "husband" are verified and found verified after the marriage has been consummated, and not before, and particularly the word marriage (*nuptie*) [is verified] because it is properly applied only (*saltem*) to a woman who has been solemnly lead. The antecedent was plainly proven above; the consequent, however, I plainly prove here in this way: There is just cause for restricting a statute when if it were taken simply and in a broad sense someone would take a gain that is not owed and another would suffer harm. The first is proven in … . The second is proven in … . And both are far better proven than elsewhere in [X 1.4.8].[18] There a custom is approved which does not prejudice the *ius commune* where the words of the statute are not only confined to an understanding, as it were, far from the usual (*quodammodo extraneum*) but also far from what the words mean (*multum a longe verbis adptabile*), whence the word "election" is taken to mean "confirmation" by those to whom it is referred, and Bartolus approves this procedure (*theoricam*) … .

To the same point, wherever statutes are penal (and it suffices to call them penal in that they diminish someone's patrimony …), the words should be confined so that they are not understood as they would be understood if they were broadly interpreted. … But in our case all these things intervene not only singly but collectively; therefore there ought to be a restitution, as is apparent. For this man unlawfully and without just cause took the half of the dowry, although he had not consummated the marriage nor had he solemnly led the wife to his house. Again, the heirs of the girl would suffer grave harm form this broad interpretation. Again, it would prejudice the *ius commune*, since [under the *ius commune*] a dowry should

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legitimacy of the child born of the adulterous union), it seems clear that the statement means that she cannot be the wife of the man by whom she had the child.

[13] The ordinary gloss on "nuptials" in this decretal (Venice, 1572), p. 999a, reads: "I.e., carnal mingling, because she did not know his carnal coupling."

[14] Both of these texts describe customary marriage ceremonies of the times in which they were written, and they, or the accompanying commentary, suggest that this is what is meant by "nuptials" (*nuptie*).

[15] This is one of a number of decretals that holds espousals *de presenti* to be a valid marriage, although the focus of the decretal is not on the absence of a *ductio* for those espousals.

[16] The phrase in the decretal that seems to provoke this remark is "whether a young man ought to have as wife the espoused woman to whom he consented by words of the present tense."

[17] Above, § TOPIC 9.D.a, note 2.

[18] A complicated case in which both the *ius commune* of the church and a privilege granted by Alexander III had given the power to elect an abbot to the monks of a particularly monastery but a statute promulgated by the local bishop had required that the election take place at another monastery, that the person elected be a monk of that monastery, and, apparently, that the monks of that monastery participate in the election. Innocent III interprets the statute as requiring only that the other monastery confirm the election and gives the electing monastery the power to choose whomever they wish as abbot and to do it at their own monastery.

be restored to the woman upon dissolution of the marriage, as in [X 4.20.1],[19] with many similar texts. And this interpretation ought to be applied to the aforesaid statute, since all deviations from the *ius commune* are odious and ought to be restrained. … To this point there is a notable saying of Innocent III in [X 3.24.6],[20] where he says that we broadly interpret privileges insofar as they concern the rights of those who grant them … but in so far they concern the rights of others they are strictly interpreted. … Therefore this statute, since it is such [that it concerns the rights of third-parties], even if it is privileged, ought to be strictly interpreted insofar as it prejudices the heirs of the girl. This is especially so if we consider that in this case, the statute is odious and not motivated by the common (*vagum*) understanding [of the purpose of dowry], the disparity between the espoused man and the espoused woman or husband and wife, since with the woman (*viro*) having predeceased, especially before the transferal and consummation of the marriage, she gained no advantage, nor did the man sustain any burdens, contrary to the intention [of dowry] … .

The second thing that principally moves me to this sentence is the intent of the statute, which can be derived in many ways. First from its very beginning, when it says "died without children, which words have reference to the time at which she died without children … . From these words it seems that those who made the statute were thinking of woman who was at the time of her death in the position of and had the possibility of having children, for these words "without children" include within themselves the privation of children and including within themselves the position and possibility of children. … But in our case this woman was not at the time of her such a position and possibility, because she had not been led to the house of her husband. Therefore it is most clearly apparent that these words of the statute are not verified in her, especially because she did not cause the fact that she had not been lead. It is also to be noted that the intent of the makers of the statute can be presumed from the fact that all the additions to the statute mention [the absence] of children.

Third, I consider chiefly those words "to the man to whom she was married." For properly according the common manner of speech, he who contracts marriage by words of the present tense is not said to be the husband of that woman until he has led her to his house, except by [special] custom of certain places, as in [C. 27 q. 2 c.40],[21] where Jerome says, when you hear "Joseph the husband of Mary" you should not think that he had undergone marriage, that is to say carnal coupling, but you should recall the custom of scripture that espoused men are called "husbands" and espoused women "wives." Further on it becomes clear, where Jerome says that one who contracts by words of the present tense, as the blessed virgin contracted with Joseph, he is properly called an espoused man rather than a husband, because she was not yet led, but Joseph was called husband on account of the custom of scripture. In support of the this proposition are [X 4.1.22; X 4.1.32][22] where they are called "espousals of the present tense." In support of this proposition is the fact that before transferal one can enter religion even if the other is unwilling, as I said above. Therefore he [the man in the case] can not be strictly called her husband, that is, in the proper significance of the word. This is a true proposition in the circumstances of the case: These words, "husband and wife," are frequently taken for those who have consummated their marriage, and especially by the common custom of our time. Therefore this understanding ought to be taken strictly in our consideration (*in animo nostro*) for the reasons that I mentioned above, by the rule that odious things are to be restrained … and because statutes should be reduced to the *ius commune* whenever that can be done.

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[19] X 4.20.1 (a canon of an unidentified early church council): "We command that when women are separated from their husbands for any lawful cause, their entire dowry be given back to them."

[20] In interpreting a charter of gift that granted a number of pieces of property to a monastery, Innocent III applies a restrictive clause found at the end of the grant to apply only to the last piece of property granted and not to all of them, "because in contracts full, testaments fuller, and benefices fullest interpretation is to be given." Hence, the decretal does not say quite what Panormitanus says it says, but one can see how it could be so interpreted.

[21] Above, p. 66. Cf. above, text and note 13.

[22] The citation of X 4.1.22 is more on point here than it is above, text at note 15; X 4.1.32 is less apt, but the general point is well supported..

Again, the statute says "a married woman" (*nupta*). I spoke very fully about this word in the beginning, above. Again, it says "with her husband" (*apud maritum*). But in many places and writings he is called an espoused man before he has led her and not a husband. … Particular attention should be paid to the custom of this city and practically all the places in which I have been, by which he is called "an espoused man" even on that day on which solemnly led [her] to his house, until the marriage is consummated. And the common usage of speech is to be observed even in statutes, because in whatever matter the common usage of speech is to be preferred to the precise significance of the words where the interpretation is to be a restrictive one (*etiam in materia restringibili*).

Finally, I adduce a pretty argument which I have taken from the statements of Peter [probably Pierre de Belleperche] and Cynus principally on [C.1.14.5][23] … . This is the argument: We should draw back from the words of the statute and keep its intention not only where the intention is expressed but also where the intention or reason is not expressed in law, so long as that reason is defined as natural, and naturally and commonly can be shown from similar cases. By which reason, even if the law is to the contrary, the contrary [to the law] can be imagined and can notably be proven … from natural justice itself. On this point is *l. mulier* with the joined gloss *ff. solu. mat.*[24] where an intent is found contrary to the words of the [law]. … For, as Baldus notably says,[25] as man consists not only of a soul, but also of a body, so a law consists of intention or reason and words. And the words are taken like the body or the superstructure (*superficies*). The reason, however, is taken as the spirit and the soul, and this ought to restrain[26] more than the superstructure of words. To determine the reason of the law where it is not expressed, we ought to determine why a wise man made it or by what reason he made it, since a legislator is presumed to be such a person. For the law ought to be rational. … And to the doctor or the judge is given the power of interpretation. … But certainly in our case it cannot be presumed that the cause of the award [of the dowry] was the disposition to marry (*affectus coniugii*) or the religion of espousals *de presenti*, for by the same reason a similar award extends to the woman, because man and wife ought not be adjudged unequal in such matters. … Nor can we determine that the reason was that the man is the head of his wife, for this reason does not suffice. … We can therefore determine no other good and sufficient reason for this disparity between husband and wife other than that the man in transferring [her] to his house and in sustaining the burdens of marriage incurs many expenses. For he expends almost the entire dowry in ornaments and feasting, so that if he wished to sell these ornaments he would not recover half of what he expended. Again, the expenses made in an extraordinary feast, as the man in no way recovers them from the woman, the statute properly wanted to provide for him in the award of half the dowry, so that the man not remain charged with these expenses (*in sumptibus*), just as in a similar situation it provided for the restitution of the dowry. … In the case of the wife, however, these reasons do not apply; [hence] the statute did not give an award to her. Since therefore this and not another is the reasonable and sufficient reason of the statute, it ought not to apply in our case, where the reason of the law ceases. And although he did make some expenditures, he did not however make those excessive ones that are accustomed to be had in a solemn transferal. The law does not care for trifles. … For the espoused woman also made some expenditures among her relatives and at least to honoring herself on the first occasion [presumably when the consent was exchanged], about which, however, the statute does not seem to have taken account.

From this clearly follows the decision of this case: the man should gain nothing by virtue of this statute.

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[23] This is a major text on interpreting statutes according to their intention, not just their words, and it gave rise to considerable commentary.

[24] There is no *lex mulier* in D.24.3 or in C.5.18. Other *leges mulier* should be checked.

[25] No reference is given. It may be on the same unidentified law.

[26] Reading *restringere* for *restringi*.

It remains now to consider the first and last arguments [given above for the contrary conclusion], because the answer to the others is apparent from what has been said. And first [D.35.1.15][27] I say as I said above, that the word *nuptie* is sometimes verified in marriage contracted by consent alone, and sometimes not, as is plainly proved above. For in the said law it suffices to contract by consent alone, for there we are dealing with testaments where there is a broad interpretation … . Properly this large sense is taken [there], but in our case we are dealing with narrow matter. Properly another stricter understanding ought to be taken [here]. This is [not] unusual that the same word be taken one way in a broad matter and otherwise in a narrow matter; indeed, it is expressly proven that this can and ought to done in [X 1.4.8][28] … and we do this every day. …

It remains to reply to [C.1.3.54(56)].[29] To this I respond in two ways: First, that in that case it is by no means to be gathered that the marriage was not consummated and that what was done afterwards with the consent of the other was not valid. … And that law can be understood to be such a case. Second, I respond, and more subtly to this point, that the pact of award was common to both the man and the woman, as it says in the text and the gloss, so that if there were any disparity it would be reduced by operation of the law to equality, as there according to the understanding of the gloss, in which case it cannot be said that the award was granted on account of expenses or the burdens of marriage, because that has no place in the case of the woman, as we have said. If by necessary operation it is understood by reason of that equality that they gave that award on account of the marital affection, which affection arises out of the essence of matrimony alone … then the [award] has a place even before the transferal and consummation, especially because each of them could be in a position to gain or lose. And thus the same disposition of the law is operative in our case, for if the reason of the statute ceases, the disposition of the statute ought to cease in popular rights. See the good gloss in a similar case about the replication of fraud, which is sometimes granted and sometimes denied, the same reason always remaining., as is noted in [X 2.25.10].[30] As for [C.6.61.5][31] I say that it does not stand in the way, because it speaks about a favorable disposition, otherwise in an odious one, as is commonly noted there and especially by Baldus who seems to contradict what he said about [C.1.3.54(56)]. And finally laying aside all prejudice (*affectione*), I think this view is the truest, nor should the contrary opinion of any other individual [texts or authors] move the judge, because either all the aforesaid elements do not come together in their terms, or, although apparently proven, they are not to be followed on account of the aforesaid; sometimes it [the contrary opinion] is evidently false, or it can be overturned by probable reasons, as a good judge of sharp intelligence will determine … .

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[27] Above, note 2.

[28] Above, text and note 18.

[29] Above, text and note 9

[30] Something is wrong here. X 2.25.10 and its accompanying glosses deal with the exception of excommunication not the exception of fraud, though it could be taken to illustrate the same point.

[31] Above, text and note 10.

E. LISBON. MATRIMONY. MONDAY (15 MARCH, 1574)

in Caesare de Grassis, *Decisiones Sacrae Rotae* (Rome 1590) 79–80 [CD trans. Citations mostly omitted.]

The lords [of the Rota] said that diminished faith, at the discretion [*arbitrio*] of the lords, was to be given to Helena de Conto and Catharina Gundisalvi, witnesses examined for donna Maria. And some of the lords thought that absolutely no faith was to be given to the aforesaid Helena, because she is a slave [*serva*], as all the witnesses both of don Pedro and of donna Maria seemed to confess in deposing that she is the daughter of Maria Roderici, an engendered slave [*seminigtae servae*], and the rule is undoubted that the offspring follows the womb. ...

Nor was it pleasing, what was urged on the other side, that servitude is not one of those things that are perceived by the senses, for the witnesses further deposed that she was treated like a slave and was taken for one at home and outside, that she served and that in effect she was called a slave. From which things it is clearly to be inferred that she is in the status of servitude. That seems to suffice that she not be admitted as a witness. ...

Nor do the witnesses of donna Maria stand in the way when they say that the aforesaid Helena was very well treated in that house, and that it was said by many that she was the sister of the same Maria. For it is said, and the witnesses confirm it, that she is a slave, insofar as it is said that her father left her liberty, her father still being alive. Whence she cannot be free by this, because a testament is confirmed by death, as is generally held.

Nor does it stand in the way that she is the slave or freedwoman of the father and not of Maria, for as soon as she is the slave or freedwoman of the father, she is also the slave or freedwoman of the daughter, and thus also of Maria. [D.50.16.58.1].

Further it is said that she is an *aya* or a *cuitos*.[1] Whence it seems to be in her great interest to act so as not to be said to be engaged in bawdry, in which case a witness is repelled. ... And let her not only try to exonerate herself but also her mother ... . Since all these things came together, it seemed to some of the lords that she ought be entirely repelled... . Which proceeds even where the truth cannot otherwise be had. ... On the part of some, as I have said, it seemed that she ought to be repelled entirely.

Some said that she ought not be entirely repelled, since some of the witnesses seemed to depose of her reputation and of a certain sort of treatment as a freedwoman, and since the matter is favorable. When there is a case about proof of marriage, in the proof of it witnesses not greater than any exception seem to be admitted, as is handed down to us in [X 4.18.3; Panormitanus *ad* X 2.20.22] in 3 not., more clearly in [Philippus Decius, *Consilium*] 163. col. 4. sub. numer. 7. vers. *octavo oppono*., after [Alexander Tartagnus, *Consilium*] 146. col. 6. vers. *nec obstat si aliquis*, vol. 5.

Even those who felt this way agreed that her faith should be reserved for discretion, with not a little diminution.

As to the second witness, Catherina Gundisalvi, since she is [Maria's] nurse and her familiarity remains and consequently she still is a domestic, both of which things normally repel a nurse (. . .) and because she desires that the marriage be effectuated, which desire similarly in marriage cases totally rejects a witness (. . .), on this account the lords wanted equally to reserve her faith also for discretion with considerable diminution. So much the more so because between the first and second examination there are certain variations, which although it seemed possible that it [the testimony] could be saved on account of the lapse of time that intervened between the first and second examinations, nonetheless they displeased the lords.

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[1] Both words apparently mean "nanny." "Aya" is today a Spanish word and "cuitos" Portuguese, but in this period the distinction between the two languages was not that great.

TOPIC 10. EARLY MODERN LEGISLATION

A. COUNCIL OF TRENT, DECREE *TAMETSI* CONCERNING THE REFORM OF MATRIMONY (1563)

in *The Decrees of the Council of Trent* (R. Schroeder trans. 1941) 183–90

C.1: The form prescribed in the Lateran contracting marriage is renewed; bishops may dispense with the publication of the banns; whoever contracts marriage otherwise than in the presence of the pastor and of two or three witnesses, does so invalidly.—

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,[2] 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.[3] 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,[4] 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;[5] and it decrees that the blessing is to be

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[2] [X 4.3.2]

[3] [C.30 q.5 c.3; C32 q.2 c.13; C.35 q.6 c.2; X 4.18.3]

[4] [X 4.3.3]

[5] [C.30 q.5 c. 2, 3, 5; C.35 qq.2–3 c.19]

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.

Finally, the holy council exhorts the betrothed that before they contract marriage, or at least three days before its consummation, they carefully confess their sins and approach devoutly the most holy sacrament of the Eucharist. If any provinces have in this matter other laudable customs and ceremonies in addition to the aforesaid, the holy council wishes earnestly that they be by all means retained. And that those so salutary regulations may no remain unknown to anyone, it commands all ordinaries that they as soon as possible see to it that this decree be published and explained to the people in all the parish churches of their dioceses, and that this be done very often during the first year and after that as often as they shall deem it advisable. It decrees, moreover, that this decree shall begin to take effect in every parish at the expiration of thirty days, to be reckoned from the day of its first publication in that church.

B. ORDONNANCE OF BLOIS (MAY, 1579), ARTS. 40–44

in *Recueil des grandes ordonnances, édits et déclarations des rois de France* (Pijon ed., Toulouse, 1786) 173–4 [CD trans.]

An ordinance of Henri II promulgated in February 1556 denounced clandestine marriages and extended to the whole country the custom in some regions authorizing parents to disinherit their children who married without parental consent. *Recueil géneral des anciennnes lois français* (Isambert ed., Paris, 1829) 16:520 n.1. The French reacted to the decree *Tametsi* almost immediately. They refused to promulgate the decree in France, but three other pieces of legislation were promulgated on the topic before the famous *ordonnance* of Blois, which follows. *Ibid.* A good genral account of the whole story may be found in B. Diefendorf, *Paris City Councillors in the Sixteenth Century* (Princeton, 1983).

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* (*enfans 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 for misprision 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.

C. DECLARATION CONCERNING THE FORMALITIES OF MARRIAGE, THE QUALITIES REQUIRED, THE CRIME OF RAPE, ETC. (26 NOVEMBER 1639)

in *Recueil géneral des anciennnes lois français* (Isambert ed., Paris, 1829) 16:520–24 [CD trans.]

Louis XIII turned his attention to the issue again ten years later under his chancellor Paul Séguier. This *ordonnance* is particularly notable for its statement of policy at the beginning. Although it was amended on six different occasions by Louis XIV (Isambert, p. 520 n.1), it, together with the *ordonnance* Blois, formed the basis of French secular law of marriage-formation until the end of the *ancien régime*.

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*,[1] 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.[2]

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[3] 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

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[1] 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 former.

[2] There would seem to be a gap here in the provisions for men between the ages of twenty-five and thirty.

[3] The referent here is *personne*, so it could be referring to both men and women.

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.

4. And so that everyone may recognize how much we detest all sorts of rapes, we prohibit very strictly princes and lords from appealing to us to grant letters to the end of rehabilitating those whom we have declared incapable of successions; [we prohibit] our secretaries of state from signing them, our very dear and loyal chancellor from sealing them, and all judges should have no regard for them, in case that, by importunity or otherwise, any have been impetrated from us, we willing that notwithstanding such derogations or dispenses, the penalties contained in our ordinances be executed.

5. Desiring to remedy the abuse which is beginning to be introduced in our realm by those who keep their marriages secret and hidden during their lives, inconsistent with the respect due such a great sacrament, we ordain that all those over the age of majority contract their marriages publicly, and in the face of the church, with the solemnities prescribed by the *ordonnance* of Blois, and we declare that the children which are born of these marriages that the parties have held until now, or will in the future keep, hidden during their life—which smack more of the shame of concubinage than the dignity of a marriage—incapable of all successions, along with their posterity.

6. We will that the same penalty apply to children who are born of women whom the fathers have kept and whom they espouse when they are at the end of their lives, as well as children procreated by those who marry after they have been condemned to death, even by sentences rendered by our judges in default, if before their death they have not been remitted to the first state, following the laws prescribed by our ordinances.

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.

Given, etc.

D. GUY COQUILLE, INSTITUTION AU DROICT DES FRANCOIS

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

Titles

[Introduction] Concerning the law of royalty

Concerning the peers of France

Concerning dukes, counts, barons, lords of castles

Concerning rights of justice in common

Concerning fiefs

Concerning *cens*, *bordelages* [a charge in produce rather than money] and other charges that remove direct lordship

Concerning many common rights in feudal, censual, *bordelage* and other tenures

Concerning personal and dead-hand servitudes

Concerning real servitudes and predial rights in cities and fields

Concerning woods and usage of them

Concerning communities or partnerships

Concerning the rights of the married [This title consists of 32 pages of tightly-packed 17th century French prose (pp. 181–213). I translate below only a portion of it.]

A married woman, after the words of present tense and solemnization of the marriage in the face of the church, is in the power of her husband and out of the power of her father, and cannot contract or go to court without the authority of her husband. Nivernais, tit. concerning the rights of married persons, ar. 1. Paris, art. 223. Poitou, art. 225. Sens, art. 111. Auxerre, art. 221. Melun, art. 213. Bourbon, art. 232. Orleans, art. 194. Troyes, art. 80. Laon, art. 19. Reims, 12.13. Blois, art. 3. Bourgogne, art. 20. None of said customs remits the nullity of the contracts which the wife makes without authority after the dissolution of the marriage, either with regard to her husband, or herself or her heirs. [Citations omitted.] This decision of absolute nullity has been taken from the subtleties of the Roman law, in that an act done by a *filiusfamilias* when he is in power, remains null, even after his emancipation [D.29.1.33 (an odd cite for this proposition); D.19.6.1.2 (on point)], and so it was desired to infer the same of the wife in power of her husband. But it seems that since the power of the husband is all that renders the woman incapable of disposition that only the respect of the husband ought to make the nullity and not that the nullity be in and of itself. A woman considered in herself, who has reached the age of majority, can without difficulty make all sorts of contracts, so that her person does not carry any prohibition. Only the survival of the husband, who has the wife in his power, clouds and covers that liberty of the woman. It is therefore only in respect of the said power that there is a prohibition, which is a temporary hindrance, not inherent in the person, but being outside and causative, it ought to cease when the cause ceases.

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

The customs of Nivernais in the said art. 1 and Burgundy art. 20 do not permit the wife to make a will without the authority of her husband. But Poitou, art. 275, Auxerre, art. 238, Berry, concerning wills, art. 3 and Reims, art. 12, permit the married woman to make a will without the authority of her husband. In truth the will cannot and ought not be subject to the authority nor depend in any way on the will of another, so that it ought to move of the pure and entire liberty of the testator. [D.28.5.32 (on point)]. Wherefore it would seem that if the prohibition of the custom ceases, or if the husband doesn't complain, one cannot challenge the validity of a will made without the authority of the husband in those provinces where a woman is forbidden to make a will without the authority of her husband.

A married man and woman are common, without there being any agreement, [in] movables, debts, and movable credits, made and to be made, and in conquests made during the marriage. This is said in almost all the customs of France. Nivernais, concerning the rights of married people, art. 2, and in the first article, speaks of solemnization in the face of the church. Paris art. 220 speaks of from the day of the nuptial blessing. Poitou, art. 229, speaks of the nuptial blessing in the face of holy church. Nivernais in speaking of the solemnization of marriage in the face of holy church speaks with greater efficacity than Paris which speaks simply of the nuptial blessing for two reasons. The first is that the nuptial blessing can be made by the priest in a private house, or clandestinely without assembly. The second reason is that all weddings are not subject to the nuptial blessing, for second and third weddings do not receive the ceremony of blessing and blessing is there forbidden. [X 4.21.1, .3.] And that this public ceremony is required was decided by my teacher, Mariano Socini, the younger.[1] Consilium 31 and Consilium 86, vol. 1. And he cites [Nicholas

[1] Professor of law at Bologna, and a member of a distinguished legal family, Socini died in 1556.

de Tudeschis on X 4.17.15], and the same [Nicholas] decided this in Consilium 1, vol. 1,[2] saying that when there are only words of the present tense, they are called *sponsalia de presenti* and the words "matrimony" and "husband and wife" are used if the marriage has been consummated.[3] This modification of the public ceremony ought to be general, for although the words of the present tense make the marriage according to the canon law so far as the bond of marriage is concerned, nonetheless with regard to those matters of the civil law, such as marital power, the community and the dower, publication and ceremony is necessary, which consists not only in the ministry of the priest by the nuptial blessing but also in a grand and notable assembly of Christians in the place where Christians are accustomed to assemble, for "church" signifies both the assembly of Christians and the place where they assemble. Sens, art. 272. Auxerre, art. 190. Berry, marriages, art. 7, which speaks of deflowering or consummation as the solemnization, but Poitou and Nivernais speak more properly. Bourbon, art. 223, is satisfied with words of the present [tense]. Orleans, art 186, Touraine, art. 230, like Paris, also Melun, art. 221, Bourges, art. 21, Troyes, art. 83, Laon, art. 17, Bretagne, art. 421, 446, 448, say that they are not common in conquests if they are not married for a year and a day, and if they are not married a year and a day the wife takes what she has brought it. Reims, art. 139, does not make married people common, but after the death of the husband it is the choice of the wife to partition in movables and conquests while making what she brought in in movables (for example, dowry) remain confused and mingled, or to take what she brought in and dower, or she takes the will of her husband, outside of her half, with the exception of her Sunday and holiday clothes, and Laon says the same, art. 21, with regard to clothes. This community between married persons (of which the effect is properly after the marriage is dissolved, because during the marriage the husband is master and lord of the movables and conquests, as will be said afterwards) operates in such a way that after the dissolution the movables and conquests are divided in half between the survivor and the heirs of the deceased, each paying a half of the debts. Certain provinces have an exception by which in the cases of noble married couples the survivor takes all the movables and the debts and movable credits and also must pay the debts and the taxes. Vitry, art. 74 and art. 104 says that the heirs ought to perform the will and imposes the condition that there are no children. Laon, art. 20, speaking of the surviving husband, and similarly Reims, art. 279, say that the surviving husband pays the debts. And Reims, art. 284, says that the survivor of two married nobles who takes the movables ought to pay the funeral expenses but is not held responsible for the legacies. But in other provinces, ?especially among commoners, the movables and conquests are divided in half and the debts are also paid by halves. Touraine, art. 307, imposes a nice and honest limitation that deserves to be general by which the survivor has in addition his daily and Sunday clothes, and if he is noble, he also has a *préciput* of his arms and if he is lettered his books. And the reason for this is that he has a particular affection for such movables. And it is an emotional blow (*contre-coeur*) for the survivor to see them partitioned, and according to the reason of the Roman law that which is attributed to someone by particular affection is not transmitted to other persons unless they be heirs. [D.31.1.28 (not really on point); D.33.3.6 (closer).] And so far as other clothes are concerned, Touraine, in the aforesaid art. 307 and Laon, art. 21, say that the survivor can and ought to have them, offering recompense, but the expenses of the funeral and the taxes of the deceased, or the testamentary legacies, are not part of the community and the survivor ought not contribute to them, unless, as in some provinces, he takes all the movables, as has been said above. Thus says Nivernais, concerning the rights of married persons, art. 7. But Reims, art. 277, says that the husband who takes all the movables ought to have the wife buried. This corresponds to the Roman law. [D.11.7.16, .22 (on point if one accepts the analogy of dowry to community property.] Later on in the title about the state of persons and tutelage, we will speak of the situation of noble guardianship that the survivor of two married persons has on account of which he acquires the movables.

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[2] See above Sec. 14C.

[3] The French text is corrupt here. This seems to be what it means. Panormitanus says that the word "matrimony" is sometimes used of *sponsalia de presenti* and sometimes only of those that have been consummated.

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

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

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

Our custom of Nivernais in the said title on the rights of married persons, art. 12 and 13, and that of Burgundy, art. 36 and 37, have taken note of the assignments which husbands make to their wives for their dotal payments, which ought to come purely from the heritage proper to them, and have said that the wife is seised of the assignment made in particular, in order to enjoy it after the death of her husband. Nivernais says that both she and her heirs get the fruits [of this assignment]. Burgundy says that the widow gets the fruits but that her heirs ought to account for them at the time of the division. Nivernais makes the assignment redeemable within thirty years. And Burgundy says that [it is redeemable] at all times and whenever, notwithstanding the lapse of time. Because of this difference the fact results that Burgundy has held its assignments to be simple hypothecs with enjoyment of the hypothecated thing, the fruits of which take the place of the thing hypothecated, which the custom regards as true interest so far as the woman is concerned, who does not have the substance of her dowry and a true patrimony. And so far as the heirs of the woman, [Burgundy] has determined that it is not interest but is like [*ad instar*] fruits of an hypothecated thing, which are to be accounted for when the principal is returned. C.4.24[.3, citation to *lex* missing, but this is probably the one Coquille has in mind.] And Nivernais adjudges that these assignments import translation of property, so that the wife and her heirs take the fruits as of their own thing. But according the reason of common sense and politic usage, it seems to me that such assignments ought not take place, except when a widow or her heirs renounces the community with the husband, or when the movables and conquests of that community are not sufficient to reimburse the woman for her dotal payments. For the first purpose of such payments coming purely from the proper heritage is to use them in buying the heritage proper to the woman, and if they are so employed the assignment ceases. This is what is being spoken of in art. 32 of the custom of Nivernais. If the payments are not used to that effect, they remain in the mass of common goods or anything else subrogated in lieu of it which is the same as if the same payments were still existing in the said mass. [D.31.1.70.3, .71, .88pr; D.34.4.23.] Being in that mass they ought to be taken and given to the woman before any partition according to what is said in the 18th art. of the said title on the rights of married persons. And if we permit the widow who takes the community to take the assignment out of the heritage of her husband, beyond her right to the community, she would take a third more than she brought in. The situation is this: the particular assignment is from the heritage proper to the husband and by contract of marriage is destined to be heritage of the wife. In the case where the husband does not employ the dotal payments to purchase the heritage for her, say if the payments of the wife coming purely from her heritage and assigned by the husband on his own heritage are 1000 *écus*, the wife taking the community would take half of the 1000 *écus* in the mass of the community where they have entered. And beyond that she would also take from the heritage of her husband and on her husband alone 1000 *écus*. That would be 1500 *écus* instead of 1000, an unreasonable sum, seeing that it does not appear that the husband wanted to give 500 *écus* to his wife, and a gift, which is in itself bad management, is not to be presumed if the will of the donor is not certain. [D.22.3.25.] Therefore the true intention of the contracting parties is to assure the woman her dowry and nothing else. Hence the custom of Bourbon and many other customs do not speak of assignments.

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

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

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

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

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

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

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

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

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

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

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

A heritage acquired during the marriage from the proceeds of the sale of an ancient heritage of one or the other of the parties is proper to that party upon proof that the payment of the purchase was made with the same money that came from the sale or better by showing that the at the time of the alienation and at the

time of the reuse the partners or one of them have affirmed before the judge that the alienation was made to use it for another heritage and that the acquisition was made from the proceeds of the sale. ...

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

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

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

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

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

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

Concerning dower

What things are movables, conquests, or *propres*

Concerning gifts

Concerning the state of persons, tutelage and curatorship

Concerning the *retrait lignager*

Concerning wills

Concerning successions and heredities

Concerning prescriptions

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

Concerning contracts and agreements

Concerning bastards and aliens

Concerning seisin

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

E. 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.][1]

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 . . .[2] 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;

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. . . .

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[1] 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.

[2] This ellipsis is in the original.

[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[3] 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.*[4]

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 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].[5]

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

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:[7]

> 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

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[3] 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.

[4] *nullum contractum, nullum conventum, lege contrahere prohibente*.

[5] 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.

[6] Above, p. 77.

[7] Above, p. 113.

which was not contested and which was not accused of clandestinity. This is what d'Héricourt[8] teaches in his *Ecclesiastical laws,* chapter "On marriage," art. 1, no. 2, and many other authors. Bardet,[9] 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,[10] reported in vol. 5 of the *Journal des Audiences,*[11] although in the case in question the marriage had begun *ab illicitis*.[12]

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.

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:[13]

> 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[14] 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,

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[8] 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.

[9] Pierre Bardet, 1591–1685 , the compiler of a *Recueil d'arrests du Parlement de Paris* that was published in 1690.

[10] 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.

[11] 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.

[12] 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.

[13] Above, p. 113.

[14] The reference is to Jacques Boileau (1636–1716), *Traité des empechemens du mariage* (Cologne, 1691). The only copy in the US would appear to be at Berkeley.

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][15] and in [JI.1.10.12],[16] 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][17]

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."[18] 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][19] 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 these words "so long as the Church has not declared them invalid."[20] 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

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[15] Above, p. 37.

[16] Above, p. 37.

[17] Above, p. 37.

[18] 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.>

[19] "Evaristus to all bishops: A marriage cannot otherwise be legitimate unless the wife is sought from those who have lordship over the woman and by whom she is protected; and she is espoused by her nearest kin and lawfully dowered; and she is sacerdotally blessed at the proper time with prayers and offerings by a priest; and, accompanied by bridesmaids and escorted by those closest to her, she is solemnly given and received at a suitable time. Let them spend two or three days in prayer and preserve their chastity, so that good offspring might be produced, and they may please the Lord and beget not bastard sons, but lawful and legitimate heirs. Therefore, most beloved sons, know that marriages performed in this manner are lawful; but have no doubt that unions made otherwise are not marriages, but are adulteries, concubinages, lusts or fornications rather than lawful marriages, unless full consent is given and lawful vows are made." It will be noted that the first of Pothier's two quotations is not exact.

[20] Above, p. 114.

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. 114)].

325. This ordinance of Henri II was confirmed by that of Henri III at the estates of Blois, article 41.[21]

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*."[22]

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[23] 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:[24]

> 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, nonetheless if one considers the sprit 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*

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[21] Above, p. 114.

[22] *Ibid.* The emphasis is Pothier's.

[23] Above, p. 115.

[24] Above, p. 116. The omissions are Pothier's.

of rape leads to this conclusion. The ordinance wills that these parish priests bye 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:[25] "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 father and mother and without their consent. In effect,[26] the absence of publication of banns is not given any

[25] Above, p. 114.

[26] Pothier may be referring here to the interpretation of the statute in the cases described above in nos. 67 and 69.

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 si 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 and argument from the second disposition of article 40 of the *ordonnance* of Blois, reported above no. 78,[27] 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,[28] 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.

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 Flueri against Mademoiselle de Rezac, which is the third volume of this works, and which is the thirtieth of his *plaidoyers*.[29] 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. …

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[27] Above, p. 114.

[28] 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 above, p. 115.

[29] 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).

F. LORD HARDWICK'S MARRIAGE ACT

26 Geo. 2, c. 33 (1753)

CAP. XXXIII.

An Act for the better preventing of Clandestine Marriages.

WHEREAS great Mischiefs and Inconveniencies have arisen from Clandestine Marriages; For preventing thereof for the future, Be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the twenty fifth Day of *March* in the year

of our Lord one thousand seven hundred and fifty four, all Banns of Matrimony shall be published in an audible manner in the Parish Church, or in some publick Chapel, in which publick Chapel Banns of Matrimony have been usually published, of or belonging to such Parish or Chapelry wherein the Persons to be married shall dwell, according to the Form of Words prescribed by the Rubrick, prefixed to the Office of Matrimony in the Book of Common Prayer, upon three *Sundays* preceding the Solemnization of Marriage during the time of Morning Service, or of Evening Service (if there be no Morning Service in such Church or Chapel upon any of those *Sundays*) immediately after the second Lesson: And whensoever it shall happen that the Persons to be married shall dwell in divers Parishes or Chapelries, the Banns shall in like manner be published in the Church or Chapel belonging to such Parish or Chapelry wherein each of the said Persons shall dwell; and where both or either of the Persons to be married shall dwell in any Extraparochial Place, (having no Church or Chapel wherein Banns have been usually published) then the Banns shall in like manner be published in the Parish Church or Chapel belonging to some Parish or Chapel adjoining to such Extraparochial Place: And where Banns shall be published in any Church or Chapel belonging to any Parish adjoining to such Extraparochial Place, the Parson, Vicar, Minister or Curate, publishing such Banns, shall, in writing under his Hand, certify the Publication thereof in such manner as if either of the Persons to be married dwelt in such adjoining Parish; and that all other the Rules prescribed by the said Rubrick concerning the Publication of Banns, and the Solemnization of Matrimony, and not hereby altered, shall be duly observed; and that in all Cases where Banns shall have been published, the Marriage shall be solemnized in one of the Parish Churches or Chapels where such Banns have been published and in no other Place whatsoever.

II. Provided always, and it is hereby further enacted, That no Parson, Vicar, Minister or Curate shall be obliged to publish the Banns of Matrimony, between any Persons whatsoever, unless the Persons to be married shall, seven Days at the least before the Time required for the first Publication of such Banns respectively, deliver or cause to be delivered, to such Parson, Vicar, Minister or Curate, a Notice in Writing of their true Christian and Surnames, and of the House or Houses of their respective Abodes within such Parish, Chapelry or Extraparochial Place as aforesaid, and of the Time during which they have dwelt, inhabited or lodged in such House or Houses respectively.

III. Provided always, and be it enacted by the Authority aforesaid That no Parson, Minister, Vicar or Curate solemnizing Marriages after the twenty fifth day of *March* one thousand seven hundred and fifty four, between Persons, both or one of whom shall, be under the Age of twenty one Years, after Banns published, shall be punishable ecclesiastical Censures for solemnizing such Marriages without consent of Parents or Guardians whose Consent is required by Law, unless such Parson, Minister, Vicar or Curate shall have Notice of the Dissent of such Parents or Guardians; and in Case such Parent or Guardians, or one of them, shall openly and publickly declare, or cause to be declared in the Church or Chapel where the Banns shall be so published, at the time of such publication, his, her or their Dissent to such Marriage, such Publication of Banns shall be absolutely void.

IV. And it is hereby further enacted, That no Licence of Marriage shall, from and after the twenty fifth Day of *March* in the Year one thousand seven hundred and fifty four, be granted by any Archbishop, Bishop or other Ordinary or Person having Authority to grant such Licences, to solemnize any marriage in any other Church or Chapel, than in the Parish Church or Publick Chapel of or belonging to the Parish or Chapelry, within which the usual place of Abode of one of the Persons to be married shall have been for the space of four Weeks immediately before the granting of such Licence; or where both or either of the parties to be married shall dwell in any extraparochial Place, having no Church or Chape1 wherein Banns have been usually published, then in the Parish Church or Chapel belonging to some Parish or Chapelry adjoining to such Extraparochial Place, and in no other Place whatsoever.

V. Provided always, and be it enacted by the Authority aforesaid, That all Parishes where there shall be no Parish Church or Chapel belonging thereto, or none wherein Divine Service shall be usually celebrated every *Sunday*, may be deemed Extraparochial Places for the purposes of this Act, but not for any other purpose.

VI. Provided always, That nothing hereinbefore contained shall be construed to extend to deprive the Archbishop of Canterbury and his Successors, and his and their proper Officers, of the Right which hath hitherto been used, in virtue of a certain Statute made in the twenty fifth Year of the Reign of the late King *Henry* the Eighth, intituled, *An Act concerning* Peter Pence *and Dispensations*; of granting Special Licences to marry at any convenient Time or Place.

VII. Provided always, and be it enacted, That from and after the twenty fifth Day of March in the Year one thousand seven hundred and fifty four, no Surrogate deputed by any Ecclesiastical Judge, who hath Power to grant Licences of Marriage, shall grant any such Licence before he hath taken an Oath before the said Judge faithfully to execute his Office, according to Law, to the best of his Knowledge, and hath given Security by his Bond in the Sum of one hundred Pounds to the Bishop of the Diocese, for the due and faithful Execution of his said Office.

VIII. And whereas many persons do solemnize Matrimony in Prisons and other Places Without Publication of Banns, or Licence of Marriage first had and obtained; Therefore, for the Prevention thereof, Be it enacted, That if any Person shall, from and after the said twenty fifth Day of March in the Year one thousand seven hundred and fifty four, solemnize Matrimony in any other Place than a Church or publick Chapel, where Banns have been usually published, unless by Special Licence from the Archbishop of *Canterbury*; or shall solemnize Matrimony without publication of Banns, unless Licence of Marriage be first had obtained from some Person or Persons having Authority to grant same, every Person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be .deemed and adjudged, to be guilty of Felony, and shall be transported to some one of his Majesty's Plantations in *America* for the space of fourteen years, according to the Laws in force for the transportation of Felons; and all Marriages solemnized from and after the twenty fifth Day of March in the Year one thousand seven hundred and fifty four, in any other Place than a Church or such Publick Chapel, unless by Special Licence as aforesaid, or that shall be solemnized without Publication of Banns, or Licence of Marriage from a Person or Persons having Authority to grant the same first had and obtained, shall be null and void to all Intents and Purposes whatsoever.

IX. Provided, That all prosecutions for such Felony shall be commenced within the Space of three Years after the Offence committed.

X. Provided always, That after the Solemnization of any Marriage, under a Publication of Banns, it shall not be necessary in support of such Marriage, to give any Proof of the actual dwelling of the Parties in the respective Parishes or Chapelry where the Marriage was solemnized; nor shall any Evidence in either of the said Cases be received to prove the contrary in any Suit touching the validity of such Marriage.

XI. And it is hereby further enacted, That all Marriages solemnized by Licence, after the said twenty fifth Day of *March* one thousand seven hundred and fifty four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty one Years, which shall be had without the Consent of the Father of such of the Parties, so under Age (if then living) first had and obtained, or if dead, of the Guardian or Guardians of the Person of the Party so under Age, lawfully appointed, or one of them; and in case there shall be no such Guardian or Guardians, that of the Mother (if Jiving and unmarried) or if there shall be no Mother living and unmarried, then of it Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever.

XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Parts beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Trust reposed in him, her or them, by refusing or with-holding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before mentioned Cases to apply by Petition to the Lord Chancellor, Lord Keeper or

the Lords Commissioners of the Great Seal of *Great Britain* for the time being, who is and are hereby impowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians or Mother of the Person so petitioning, had consented to such Marriage.

XIII. And it is hereby further enacted, That in no Cafe whatsoever shall any Suit or Proceeding be had in any Ecclesiastical Court, in order to compel a Celebration of any Marriage *in facie Ecclesiae*, by reason of any Contract of Matrimony ,whatsoever, whether *per verba de presenti*, or *per verba de futuro*, which shall be entered into after the twenty fifth day of March in the Year one thousand seven hundred and fifty four; any Law or Usage to the contrary notwithstanding.

XIV. And for preventing undue Entries and Abuses in Registers of Marriages; Be it enacted by the Authority aforesaid, that on or before the twenty fifth Day of March in the Year one thousand seven hundred and fifty four, and from time to time afterwards as there shall be Occasion, the Church-wardens and Chapel-wardens of every Parish or Chapelry shall provide proper Books of Vellum, or good and durable Paper, in which all Marriages and Banns of Marriage respectively, there published or solemnized, shall be registered, and every Page thereof shall be marked at the top, with the Figure of the Number of every such Page, beginning at the second Leaf with Number One; and every Leaf or Page so numbered, shall be ruled with Lines at proper and equal Distances from each other, or as near as may be ; and all Banns and Marriages published or celebrated in any Church or Chapel, or within any such Parish or Chapelry shall be respectively entered, registered, printed or written upon or as near as conveniently may be to such ruled Lines, and shall be signed by the Parson, Vicar, Minister or Curate, or by some other Person in his Presence, and by his Direction ; and such Entries shall be made as aforesaid, on or near such Lines in successive Order where the Paper is not damaged or decayed, by Accident or Length of Time, until a new Book shall be thought proper or necessary to be provided for the same Purposes, and then the Directions aforesaid shall be observed in every such new Book; and all Books provided as aforesaid shall be deemed to belong to every such Parish or Chapelry respectively, and shall be carefully kept and preserved for publick Use.

XV. And in order to preserve the Evidence of Marriages, and to make the Proof thereof more certain and easy, and for the Direction of Ministers in the Celebration of Marriages and registering thereof, Be it enacted, That from and after the twenty fifth Day of *March* in the Year one thousand seven hundred and fifty four, all, Marriages shall be solemnized in the Presence of two or more credible Witnesses, besides the Minister who shall celebrate the same and that immediately after the Celebration of every Marriage, an Entry thereof shall be made in such Register to be kept as aforesaid; in which Entry or Register it shall be expressed, That the said Marriage was. celebrated by Banns or Licence; and if both or either of the Parties married by Licence, be under Age, with Consent of the Parents or Guardians, as the cafe shall be; and shall be signed by the Minister with his proper Addition, and also by the Parties married and attested by such two Witnesses; which Entry shall be made in the Form of to the Effect following, that is to say,

<sp><sp><sp> the
A.B. of Parish
<sp><sp><sp> this
<sp><sp><sp> the
and *C.D.* of Parish
<sp> this
<sp><sp><sp><sp><sp><sp><sp>
Church Banns
where married in this by with Consent of
Chapel Licence
<sp><sp><sp><sp><sp><sp><sp><sp><sp><sp><sp>
Parents
this
<sp><sp><sp> Guardians

Day of in the Year

<sp><sp><sp><sp><sp><sp>
Rector
by me *J.J.* Vicar
Curate
<sp><sp><sp><sp><sp><sp><sp><sp><sp><sp><sp>
This Marriage was solemnized *A.B.* in the presence of *E.F.*
<sp><sp> between us *C.D.* *G.H.*

XVI. And be it further enacted by the Authority aforesaid, That if any Person shall, form and after the twenty fifth day o *March* in the Year one thousand seven hundred and fifty four, with Intent to elude the Force of this Act, knowingly and wilfully insert, or cause to be inserted in the Register Book of such Parish or Chapelry as aforesaid, any false Entry of any Matter or Thing relating to any Marriage; or falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or act or assist in falsely making, altering, forging or counterfeiting any such Entry such Register; or falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited any such Licence of Marriage as aforesaid; or utter or publish as true any such false, altered, forged or counterfeited Register as aforesaid, or a Copy thereof; or any such false, altered, forged or counterfeited License of Marriage as aforesaid;, knowing such Register or License of Marriage respectively to be false, altered, forged or counterfeited; or if any Person hall, from and after the said twenty fifth Day of *March*, wilfully destroy, or cause or procure to be destroyed, any Register Book of Marriages, or any Part of such Register Book, with Intent to avoid any Marriage, or to subject any Person to any of the Penalties of this Act; every Person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to guilty of Felony, and shall suffer Death as Felon, without Benefit of Clergy.

XVII. Provided always, That this Act, or any Thing therein contained, shall not extend to the Marriages of any of the Royal Family.

XVIII. Provided likewise, That nothing in this Act contained shall extend to that Part of *Great Britain* called *Scotland*, nor to any Marriages amongst the People called *Quakers*, or amongst the Persons professing the *Jewish* Religion, where both the Parties to any such Marriage shall be of the People called *Quakers*, or Persons professing the *Jewish* Religion respectively, nor to any Marriages solemnized beyond the Seas.

XIX. And be it further enacted by the Authority aforesaid, That this Act shall be publickly read in all Parish Churches and Publick Chapels, by the Parson, Vicar; Minister or Curate of the respective Parishes or Chapelries, on some *Sunday* immediately after Morning Prayer, or immediately after Evening Prayer, if there shal1 be no Morning Service on that Day, in each of the Months of *September*, *October*, *November* and *December*, in the Year of our Lord one thousand seven hundred and fifty three, and afterwards at the same Times, on four several *Sundays* in each Year, (That is to say,) The *Sundays* next before the twenty fifth Day of *March*, twenty fourth Day of *June*, twenty ninth Day of *September*, and twenty fifth Day of *December* respectively, for two Years, to be computed from and immediately after the first Day of *January* in the said Year one thousand seven hundred and fifty four. EXP.

TOPIC 11. NINETEENTH-CENTURY CODIFICATIONS

[Note: This is fuller for the Napoleonic Code than it is for the others. Don't assume just because a topic is covered in the Napoleonic Code and not covered in the extracts given from the other codes that there are not similar provisions in the other codes.]

a. Code Napoleon c.63–64, 66–75, 144, 148, 1511–153, 165–166, 168–169, 212–220 (1804)

(trans. R.S. Richards, London, n.d., compared with "a[n anonymous] barrister of Inner Temple, London, 1827)

[1. Of persons. 2. Acts before civil authorities. 3. Of acts of marriage.]

63. Before the celebration of a marriage, the civil officer shall make two publications, with an interval of eight days between them, one being on a Sunday, before the gate of the town hall. These publications, and the act which shall be drawn up relating to them, shall set forth the Christian names, surnames, professions, and domiciles of the parties about to be married, the circumstance of their majority or minority, and the Christian names, surnames, professions, and domiciles of their fathers and mothers. This act shall set forth, moreover, the days, places, and hours at which the publications shall have been made; it shall be inscribed on one single register, which shall be endorsed and marked as directed in article 41, and deposited at the end of every year among the rolls of the court of the *arrondissement*.

64. An extract from the act of publication shall be affixed to the door of the town hall, and remain so during the interval of eight days between the one and the other publication. The marriage shall not be celebrated until the third day exclusive after that of the second publication.

66. Acts of opposition to marriage shall be signed, both original and copy, by the parties opposing or by their attorneys, specially and authentically appointed; they shall be communicated, with a copy of the appointment, to the party, or delivered at the domicile of the parties, and to the civil officer, who shall put his visa on the original.

67. The civil officer shall, without delay, make mention concisely of the oppositions on the register of publications; he shall likewise make mention, on the margin of the copy of the said oppositions, of the judgments or acts of renunciation which shall have been sent to him.

68. Where opposition has been made, the civil officer shall not be at liberty to celebrate a marriage, until he shall have had a renunciation transmitted to him, upon pain of a fine of 300 francs, together with all costs.

69. If there has been no opposition, a memorandum thereof shall be made in the act of marriage; and where publications have been made in several communes, the parties shall transmit a certificate from the civil officer of each commune, certifying that there is no opposition.

70. The civil officer shall cause to be transmitted to him the act of birth of each party about to be married. [Provisions concerning proof of birth of those who cannot produce an "act of birth" are omitted.]

73. The authentic act of the consent of fathers and mothers, or of grandfathers and grandmothers, or in the defect of these, that of the family, shall contain the Christian names, the surnames, the professions and domiciles of the future husband, or wife, and of all those who shall have concurred in the act, together with their degree of relationship.

74. The marriage shall be celebrated in the commune in which one or other of the parties shall be domiciled. This domicile, as regards the marriage, shall be established by six months' continued habitation within the same commune.

75. On the day appointed by the parties after the interval for the publications, the civil officer in the town hall, in the presence of four witnesses, relations, or otherwise, shall read to the parties the before-mentioned documents, relating to their condition and to the formalities of the marriage, and from cap. 6. title "*Of marriage*" "*On the respective rights and duties of married persons*." He shall receive from each party, in succession, a declaration that they are willing to take each other for husband and wife; he shall pronounce, in the name of the law, that they are united in marriage, and he shall forthwith draw up an act to that effect.

76. In the act of marriage shall be set forth:

1st. The Christian names, surnames, professions, age, place of birth, and domiciles of the married persons;

2nd. If they are of full age, or minors;

3rd. The Christian names, surnames, professions, and domiciles of the fathers and mothers;

4th. The consent of the fathers and mothers, grandfathers and grandmothers, and that of the family, in cases in which they are requisite.

5th. The respectful acts, if any have been made;

6th. The publications within the different places of domicile;

7th. The oppositions, if any have been made; the relinquishment of them, or the memorandum that no opposition has been made;

8th. The consent of the contracting parties to take each other as husband and wife, and the declaration of their union by the public officer.

9th. The Christian names, surnames, age, professions, and domiciles of the witnesses, and their declaration whether they are relations or allied to the parties, on which side and in what degree.

[1. Of persons. 5. Of marriage. 1. Of the qualities and conditions required in order to be able to contract marriage.]

144. A man before the age of 18, and a woman before 15 complete, are incapable of contracting marriage.

148. The son who has not attained the full age of 25 years, the daughter who has attained the full age of 21 years, cannot contract marriage without the consent of their father and mother; in the case of disagreement, the consent of the father is sufficient.

151 Where the children of a family have attained the majority fixed by article 148, they are required, previously to contracting marriage, to demand, by a respectful and formal act, the advice of their father and mother, or that of their grandfathers and grandmothers when their father and mother are dead, or under an incapacity of manifesting their will.

152. From the majority fixed by article 148 to the age of 30 years completed for sons, and until the age of 25 years completed for daughters, the respectful act required by the preceding article and on which consent

of marriage shall not have been obtained, shall be renewed two several times, from month to month; and one month after the third act it shall be lawful to pass on to the celebration of the marriage.

153. After the age of 30 years, it shall be lawful, in default of consent, upon a respectful act, to pass on, after the expiration of a month, to the celebration of the marriage.

[*Id*. 2. Of the formalities relative to the celebration of marriage.]

165. The marriage shall be celebrated publicly, before the civil officer of the domicile of one of the two parties.

166. The two publications directed by article 63, under the title "*Of the acts of the civil power*" shall be made to the municipality of the place where each of the contracting parties shall have his domicile.

168. If the contracting parties, or one of them, is or are, as regards the marriage, under the power of others, the publications shall besides be made to the municipality of the domicile of those, under whose power they are found to be.

169. The government, or those to whom it shall give charge to this effect, shall be at liberty, on weighty reasons, to dispense with the second publication.

[*Id.* 6. Of the respective rights and duties of married persons.]

212. Married persons owe to each other fidelity, succor, assistance.

213. The husband owes protection to his wife, the wife obedience to her husband.

214. The wife is obliged to live with her husband, and to follow him to every place where he may judge it convenient to reside: the husband is obliged to receive her, and to furnish her with every thing necessary for the wants of life, according to his means and station.

215. The wife cannot plead in her own name, without the authority of her husband, even though she should be a public trader, or non-communicant, or separate in property.

216. The authority of the husband is not necessary when the wife is prosecuted in a criminal matter, or relating to police.

217. A wife, although non-communicant or separate in property, cannot give, alienate, pledge, or acquire by free or chargeable title, without the concurrence of her husband in the act or his consent in writing.

218. If the husband refuse to authorize his wife to plead in her own name, the judge may give her authority.

219. If the husband refuse to authorize his wife to pass an act, the wife may cause her husband to be cited directly before the court of first instance of the *arrondissement* of their common domicile, which may give or refuse its authority, after the husband shall have been heard, or duly summoned before the chamber of the council.

220. The wife if she is a public trader may without the authority of her husband bind herself for that which concerns her trade; and in the said case she binds also her husband if there be a community between them.

She is not reputed a public trader, if she merely retail goods in her husband's trade, but only when she carries on a separate business.

226. The wife may make a will without the authority of her husband.

b. Austrian Civil Code c.49, 69–75 (1811)

(trans. J.M. Winiwarter, Vienna, 1866, modified CD)

[1. Of the rights of persons. 2. Of the law of marriage.]

49. Minors [defined in c.21 as those under 25], as well as persons, who have attained their majority, but who for whatever reason, are not able alone to conclude a valid obligation, are likewise incapable of marrying without the consent of their legitimate father. If the father is no longer alive, or incapable of representing his children, besides the declaration of the proper representative, the consent of the tribunal is required for the validity of the marriage.

69. For the validity of the marriage the publication of the banns and the solemn declaration of the consent is required.

70. The publication of the banns consists in an announcement of the intended marriage, mentioning the Christian-name, family-name, place of birth, station and domicile of both persons betrothed, with the remark, that everyone, who knows any impediment to the marriage should give notice of the same. The notice must be given directly, or by means of the guardian of souls (*curator animarum*), who has published the banns, to the guardian of souls who is competent to celebrate the marriage.

71. The publication of the banns must take place on three Sundays or holidays before the usual congregation of the parish, and when each of the persons intending to marry live in another parish, before the usual congregations of both parishes. For marriages between non-catholic Christians, the publication of the banns must take place not only in their meetings for the celebration of divine service, but also in those catholic parish-churches, in the district of which they live; and for marriages between Catholic and non-Catholic Christians, both in the parish-church of the Catholic, and in the prayerhouse of the non-catholic party, as well as in the catholic parish-church in the district, in which the latter lives.

74. To constitute the validity of the publication of the banns and the validity of the marriage depending upon it, it is sufficient, it is true, that the names of the persons intending to marry and their imminent marriage should be announced at least once, both in the parish-district of the bridegroom, as well as of the bride, and any insufficiency in the form or number of publications, which has occurred, does not make the marriage invalid; but both the parties intending to marry or their representatives and the guardians of souls are, under the threat of suitable punishment, bound to take care, that all the publications prescribed here, be carried out in proper form.

75. The solemn declaration of consent must take place before the proper guardian of souls of one of the persons intending to marry, whether his denomination, according to the difference of the religion, be parson, pastor or otherwise, or before their representatives, in the presence of two witnesses.

c. Italian Civil Code c.63, 70, 78, 93–94 (1865)

(CD trans.)

[1. Of persons. 5. Of marriage. 1. Of the promise of marriage and of the necessary conditions for contracting it. 2. Of the conditions necessary for contracting it.]

63. A son who has not reached his twenty-fifth year, a daughter who has not reached her twenty-first year cannot contract marriage without the consent of their father and mother. If father and mother disagree, the consent of the father suffices. ...

[Id. 2. Of the formalities preliminary to marriage.]

70. Celebration of marriage ought to be preceded by two publications made by the officer of civil state. ...

78. The king or authorities delegated for that purpose can, for grave reasons, dispense with one of the publications. In this case mention of the dispensation shall be made in the one publication.

Dispensation even from both publications can be granted for very grave reasons, by making use of a notarial act in which five persons, relatives or otherwise of the future spouses, declare under oath before the pretor of the district of one of them that they well know the said future spouses, indicating exactly their Christian names, surnames, professions and residences and that they are prepared to assure on their consciences that none of the impediments in articles 56, 57, 58, 59, 60, 61, and 62 stand in the way of their marriage.

The pretor should read the said articles before the notarial act is done and should solemnly warn the declarants of the importance of their testimony and the gravity of the consequences which can result from it.

[Id. 4. Of the celebration of marriage.]

93. The marriage ought to be celebrated in the town hall and publicly, before the officer of civil state of the commune where one of the future spouses has his domicile or residence.

94. On the day indicated by the parties, the officer of civil state, in the presence of two witnesses, relatives of the spouses or not, will read to the spouses articles 130, 131, and 132 of the present title, he will receive from each of the parties, in person, one after the other, the declaration that they wish to take each other for man and wife respectively, and then he will pronounce in the name of the law that they are united in marriage.

The act of marriage will be drawn up immediately after the celebration.

d. Spanish Civil Code c.42, 45–47, 50, 75–77 (1889)

(C.S. Walton trans., Washington DC, 1900)

[1. Persons. 4. Marriage. 1. General. 1. Forms of marriage.]

42. The law recognizes two forms of marriage, the canonical which all who profess the Catholic religion should contract, and the civil, which shall be celebrated in the manner provided in this Code.

[*Id*. 2. Provisions common to both forms of marriage.]

45. Marriage is forbidden:

1. To the minor [defined in c.320 as one under 23] who has not obtained consent and to a person of age who has not asked the advice of the persons to whom it pertains to authorize one or the other, in the cases provided for by law. ...

46. The consent, referred to in No. 1 of the preceding article, ought to granted to the legitimate children by the father; in his default, or where he is impeded, the power to grant it devolves, in this order, upon the mother, the paternal and maternal grandparents, and, in default of all of them, upon the family council. ...

47. Children of age are obliged to ask the advice of the father, and, in his default, of the mother. If they should not have obtained it, or it should be unfavorable, the marriage cannot be celebrated until three months after the petition is made.

50. When, notwithstanding the prohibition of article 45, the persons comprehended within it get married, their marriage shall be valid; but the contracting parties, without prejudice to the provisions of the Penal Code, shall remain subject to the following rules:

1. The marriage shall be understood as contracted with the absolute separation of property, and each consort shall retain the dominion and administration of that which belong to him or her, making as his or her own all the fruits, although with the obligation of proportionally contributing to the support of the marriage charges.

2. Neither one of the consorts shall receive from the other anything by donation or by will. ...

3. When one of the consorts is a minor, not emancipated, he shall not receive the administration of his property until he attains majority.

In the meantime, he shall only have a right to support which shall not exceed the net income from his property. ...

[Id. 2. Canonical marriage.]

75. The requisites, form, and solemnities for the celebration of canonical marriages shall be governed by the provisions of the Catholic Church and of the Holy Council of Trent, accepted as laws of the Kingdom.

76. Canonical marriage shall produce all the civil effects in respect to the persons and property of the consorts and their descendants.

77. A municipal judge or other state official shall be present at the act of celebration of the canonical marriage with the sole object of verifying the immediate inscription of it in the Civil Registry. ...

[Id. 3. Civil marriage.]

[Corresponds to the French and Italian provisions with differences in detail.]

e. German Civil Code c.1305, 1308, 1316–1319 (1900)

(W. Loewy trans., Boston, 1909)

[4. Family law. 1. Civil marriage. 2. Consummation of marriage.]

1305. A legitimate child requires, up to the completion of his or her twenty-first year, the father's consent to the marriage; an illegitimate child requires, up to the same age the consent of the mother. ...

1308. if the parental consent is refused to a child of the age of majority [21], it can upon its application be conferred by the Court of Guardianship. The Court of Guardianship shall confer the consent, if it is refused without essential reason. ...

1316. Banns shall precede the marriage. The banns lose their validity, if the marriage is not contracted within six months after the completion of the banns.

Banns may be dispensed with, if the dangerous sickness of one of the betrothed does not admit of the postponement of the marriage.

Dispensation from the banns may be granted.

1317. Marriage is contracted by the contemporaneous declaration of the betrothed personally before an official of the Civil Status that they will take each other in marriage. The said official must be ready to receive the declarations. ...

1318. The official of the Civil Status shall at the contract of marriage in the presence of two witnesses ask the betrothed singly and successively the question whether they will marry one another, and shall after the betrothed have answered the question in the affirmative, pronounce, that by virtue of this law they are now lawfully joined as husband and wife. ...

The official of the Civil Status shall enter the marriage contract in the Register of Marriages.

1319. One who not being an official of the Civil Status publicly exercises the office of such official is, for the purpose of the marriage, an official within the provisions of § 1317, unless the betrothed at the time of the contract of marriage knew of the want of legal competency.

f. Swiss Civil Code c.98 (1907)

(trans. R.P. Schick, Boston, 1915)

[2. Family law. 1. The law of marriage. 3. The contract of marriage. 2. Marital capacity and impediments.]

98. Minors [under 21; art.14] can enter into a marriage only with the consent of their father and mother or guardian. If at the time of the publication only one of the parents has the parental power, the consent of that one suffices.

[Id. 3. Publication and marriage.]

[These sections largely parallel the French ones with differences in detail.]

g. Bernhard Windscheid, Lehrbuch der Pandekten § 489 (1886)

(CD trans from *Diritto delle pandette* C. Fadda & P.E. Bensa eds. (1925)) [footnotes omitted]

[5. Family law. 1. Marriage 1. Its concept. How it is constituted and how it has its end.]

Marriage is the union of man and woman for undivided community of life. This concept of marriage was already recognized in all its purity in Roman law.

The means by which marriage is constituted and ended is not governed today according to the common law of principles of Roman law, but by those of the law of the Empire of 1875 and by the canon law.

Likewise the more particular exposition of the theory of the promise of marriage (*sponsalia, Verlöbnisse*) which sometimes precedes marriage ought to be referred to the discipline of canon law.