Law, Marriage, and Society in the Later Middle Ages

CHARLES DONAHUE, JR.

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Arguments About Marriage in Five Courts

This is a study of marriage litigation (with some reference to sexual offenses) in the archiepiscopal court of York (1300–1500) and the episcopal courts of Ely (1374–1381), Paris (1384–1387), Cambrai (1438–1453), and Brussels (1448–1459). All these courts were, for the most part, correctly applying the late medieval canon law of marriage, but statistical analysis of the cases and results confirms that there were substantial differences in both the types of cases the courts heard and the results they reached. Marriages in England in the later Middle Ages, the book argues, were more often under the control of the parties to the marriage, whereas those in northern France and the southern Netherlands were more often under the control of the parties' families and social superiors. Within this broad generalization the book brings to light patterns of late medieval men and women manipulating each other and the courts to produce extraordinarily varied results.

Charles Donahue, Jr., is the Paul A. Freund Professor of Law at Harvard Law School and immediate past president of the American Society of Legal History. Among other books, he is the coauthor or coeditor of *Select Cases of the Ecclesiastical Courts of the Province of Canterbury, c. 1200–1301*; *Year Books of Richard II: 6 Richard II, 1382–1383*; *The Records of the Medieval Ecclesiastical Courts*; and *Cases and Materials on Property: An Introduction to the Concept and the Institution*. He is also the author of more than 70 articles in the fields of ancient, medieval, and early modern legal history. Donahue teaches legal history in both the Law School and the Faculty of Arts and Sciences at Harvard and has taught at the University of Michigan, the London School of Economics, the Vrije Universiteit te Brussel, Columbia University, the University of California at Berkeley, Boston College, and Cornell University. Donahue is vice-president and literary director of the Ames Foundation and a councillor of the Selden Society (UK). He is a Fellow of the Royal Historical Society and a previous Guggenheim Fellow.

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Preface

This book had its origins in a remarkable seminar given by Stephan Kuttner and Peter Landau more than 40 years ago. At that time those of us in law schools were enamored of what we called 'policy', looking at legal doctrine from the point of view of the social objectives it was designed to achieve, or could be used to achieve. As we read Alexander III's decisions on the topic of the formation of marriage in the seminar, it struck me that the policy of those decisions was to enhance the power and control of the couple over their choice of marriage partners at the expense of others (parents, lords, etc.) who might seek to dictate that choice. I wanted to study how Alexander's decisions were used in actual cases in order to determine whether they had had this effect.

While I have not abandoned the notion that the classical canon law could have been used to enhance the freedom of a marrying couple and that it was, in some sense, designed to achieve this effect, I look back now on those initial thoughts as somewhat naïve. My understanding, and, I think, that of those who study law generally, of what goes into making an important legal change has deepened, but it has also become more incoherent. Rare is the important legal change that can be explained simply on the basis of 'policy considerations', as we understood them in the mid-1960s, and Alexander's decisions are not among those that can. A full study of the context in which those decisions arose must await another book. The Introduction offers a survey of the work that has been done since the mid-1960s, tracing their effect in actual cases. As this book and the work of others show, it is a complicated story, one that reveals remarkable variations, variations that seem to be based on the type of institution that applied Alexander's decisions, the types of people to whom they were applied, the period in which they were being applied, and – the factor that this book emphasizes (without, I hope, ignoring the others) – the place where the applications occurred.

Forty years is a long time, and one's attitudes change over time. When I took the seminar I was in my early twenties; I had just married; I had written my bachelor's essay on *Romeo and Juliet*, and I thought that Alexander's decisions

were unqualifiedly a Good Thing. I am now in my mid-60s and have just become a grandfather. *Romeo and Juliet* is no longer my favorite Shakespeare play, though I still prefer *As You Like It* to *King Lear*. I still think that Alexander's decisions were a good thing, but the story that this book tells is, in many ways, a story about how they did not work.

Acknowledgments

Forty years is a long time, and the debts that I have accumulated over those years cannot be repaid, certainly not with this book. The first is to Sheila, who had no idea what she was getting into when her new husband started mumbling about Alexander III in the spring of 1965 and who has tried to teach me over the years what marriage is all about. Archivists in England and on the Continent have been unfailingly generous to a grouchy American with a thick accent, none more so than David Smith of the Borthwick Institute for Archives in York. It is largely due to his efforts that the Institute's splendid collection of cause papers, which were virtually unusable when I first looked at them more than 30 years ago, are now easily accessible. Research assistants who have, or can learn, the skills necessary to help with this kind of project are rare. There have been a number, but four stand out: David Dasef (who was able to make sense of my handwritten notes because he, too, had worked on the cause papers at the Borthwick), Kate Gilbert (who will recognize some of her descriptions of late fourteenth- and early fifteenth-century York cases), Diana Moses (who corrected the translations and reminded me that a translation ought, in the first place, to be in English; those that are not are the result of my stubbornness), and Kyle Young (who helped to proofread the text and to normalize the footnotes in a book written over many years). Two anonymous readers for Cambridge University Press were both encouraging and helpful, in a dark moment. Marcia Stentz and Monique Vleeschouwers-van Melkebeek shared with me unpublished work on the courts of Ely and of Tournai, respectively. I am particularly grateful to a group too numerous to mention individually: friends and colleagues who offered comments on pieces of this book given as papers. I have tried to acknowledge specific assistance that I received on particular matters in the notes. One person must be named here: Jane Bestor read a draft of this book that was so long that I was ashamed to show it to anyone, and she told me that I had two books and where to divide them.

Thanks of a different sort are owing to Dunker & Humblot, GmbH, Berlin, for permission to use portions of Donahue, "English and French Marriage

Cases," which appear in Chapters 7, 10, and 12; to the *Northern Kentucky Law Review*, for permission to use portions of Donahue, "A Legal Historian Looks at the Case Method," which appears in Chapter 2, to the University of Michigan Press for permission to use portions of Donahue, "Female Plaintiffs" (© by the University of Michigan 1993), which appear in the Introduction and in Chapter 3; and to Oxford University Press for permission to use a portion of Donahue, "Comparative Law" (© by the editors 2006), in the Epilogue. In all cases, the material has been substantially rewritten. Unpublished material from the Borthwick Institute for Archives at the University of York appears with the kind permission of C. C. Webb, the Keeper of Archives, and that from the Ely Diocesan Records with that of P. M. Meadows, Keeper of Ely Diocesan Records, Cambridge University Library. The image on the dust jacket appears with the permission of Harry S. Martin, Librarian of the Harvard Law School Library.

I would like to express particular thanks to Dean Elena Kagan of the Harvard Law School not only for encouragement over the years, including a sabbatical leave that allowed the book to be completed, but also for the generous subvention of the publication costs of the book, provided from research funds of the School. Many years ago the John Solomon Guggenheim Foundation gave me a fellowship that it thought was going to result in this book. It did, though the length of time that intervened must have led the Foundation to wonder whether it would ever happen.

Neither Charles Donahue, Sr., nor Rosemary Spang Donahue lived to see this book. It is dedicated to their memory.

Notes About This Book

The original version of this book, even after the division, was half again as long as the printed version of the book. Most of the material that now appears only in this version of the book was in the footnotes: Latin quotations from the cases, discussions of alternative interpretations, references to primary sources that support the argument, and references to the literature on the cases, with discussions where I disagreed with it. They are now to be found in this version of the book under the label 'Texts and Commentary' (T&C), with a brief reference given in the footnotes and hyperlinks connecting them. The following forms are used: 'T&C no.' (followed by a number) within a case name means that a quotation from the case is to be found in the T&C under the number given; 'Ref. T&C no.' means that the item contains supporting references; 'Lit. T&C no.' means that the item contains references to the literature (and, normally, discussion of it); 'Disc. T&C no.' means that the item contains further discussion of the matter. This version of the book also contains a number of tables and appendices; the former are listed at the end of the list of tables at the beginning of the book, the latter in a separate list following the list of tables. The material that is only in this version of the book is also available on a website: www.cambridge.org/9780521877282.

The name and style of the parties given in the record is frequently telling. *Marjorie daughter of Simon Tailour and servant of William de Burton leatherdresser of York c John Beek saddler of York*[1] obviously tells us more about the parties (and perhaps what the case was about) than does the standard 'short form' *Tailour c Beek*. There are, however, more than a thousand cases cited in this book, and giving the full form of the name of every case, particularly where no use is made of it, would considerably increase its length. I have therefore used the short form in all the references except in those cases where I have used in the discussion information provided by the long form. Similarly, cross-references are given to other places where the case is discussed only where it is relevant

[1] (1372), CP.E.121.

to the topic under discussion at the time. Dates and manuscript references (or references to the edition) are normally given only once, with cross-references in the other places where the case is cited. Where the references are unusually long, that fact is indicated by the note 'refs. in TCas', indicating that the references will be found in the the full Table of Cases in this version of the book, which gives the long form of the name of the case and all the references to it. The key to the table (and to the cross-references in the book) is the short form of the case name. The short form omits all prefixes (*de*, *le*, *vander*, etc.) whether the clerk has separated them in his rendition of the name or not (e.g., 'Deplatea' has a short form, 'Platea').

Because of the nature of the surviving records, only the year of grace is given in the dates appended to the York case names, and even these must be regarded as only approximate. Beginning in Chapter 6, where we are relying on registers, the dating can be more precise. Here, I have used the form '1.i.85' or '1.i.1385' (for 1 January 1385), which has the advantage of being concise and unambiguous across dating conventions.

Unpublished material at the Borthwick Institute for Archives in York is cited by the archive reference number (in most cases, 'CP', followed by a letter and a number).[2] Unpublished material in the Cambridge University Library (Ely) is cited by the folio number of the Ely Act Book (Ely Diocesan Records D2/1). Paris material edited in Petit, *Registre* is cited by column number. Material from Cambrai diocese is cited to the two editions of the Vleeschouwers by document number, the two works being distinguished, as indicated in the next paragraph, by the language of the name of the case.[3]

In descriptions of cases I refer to parties by their Christian names, as the records normally do, except in cases where that would create an ambiguity (a case, for example, that has two Johns or two Joans). I have also named the parties and the cases in the language that is now spoken in the area. That created some problems in the case of Cambrai, and here I followed the practice of the editors of the *Liber sentenciarum* and the *Registres de sentences* of using French for the court at Cambrai and Dutch for that at Brussels. I have translated *pars actrix* and *pars rea* as 'plaintiff' and 'defendant', but have kept the Latin *actor*, *actrix*, *reus*, *rea* (which is found in the records, though less often in the academic procedural writing) where it was necessary to distinguish the parties' genders.

Cross-references are given by footnote number rather than page number. Where they are preceded by 'at', the reference is to the text, as well as, or in lieu of, the note. Where there is no chapter number given before the reference, the reference is internal to the chapter. Cross-references to footnotes also include the T&C cited in the note.

[2] The number refers to a file containing from as few as one to more than 50 documents (see Ch 3, n. 5). The individual documents are, for the most part, not numbered, but the researcher familiar with the diplomatic of medieval court records should be able to find the particular document to which I am referring on the basis of my description of it.

[3] The Table of Cases gives both page number and document number.

In translations, *dictus*, *antedictus*, and so on, are left out, and the definite article substituted where appropriate. With one exception in Chapter 2, I have not tried to translate direct quotations in the Latin of the depositions into the vernacular of the time. I have, however, kept the distinction between 'thou/thee' and 'ye/you' that the English clerks preserve with various forms of 'tu' and 'vos'. As is well known, English preserved the distinction between the familiar and polite forms of the second person singular well into the seventeenth century, and the usage tells us something about the relations between the people speaking, most notably where a man exchanges words of marital consent with a woman using the 'thou' form, and she replies using the 'ye' form.

Translation of technical legal terms is always problematical. I would prefer not to translate them at all, but I hoped for a book that would be comprehensible to those who are not familiar with the terminology of the *ius commune*, the law taught in the medieval universities, and, for the most part, applied in the ecclesiastical courts that are featured in this book. Most of the technical terminology of the law discussed in this book is defined in Chapter 1, and that used or implied in the registers of the courts is discussed at the beginning of Chapter 6 (at nn. 4–6), where we introduce our first register.

In transcriptions (now mostly in the T&C), extension of standard abbreviations and correction of obvious errors are done silently. Editorial additions are marked in square brackets ([]). Ellipses in square brackets ([. . .]) mean that something is missing or illegible in the manuscript; without square brackets, they simply mean that I did not reproduce the full document. Diamond brackets (<>) indicate something that is in the text that should be omitted. Carats (^^) mean that what is within the carats is interlined; 'x-[word]-x' means that a word or words are crossed out or deleted. Doubtful readings are preceded by a question mark (?). Where necessary, the end of a line in the manuscript is indicated by a slash (/). In quotations from modern and early modern editions I have normalized spelling (e.g., substituting 'i' for 'j') and punctuation.

References in the footnotes are radically abbreviated. Except in the case of the Bible (cited by standard short forms) and English statutes (cited by regnal year and chapter), full references are given in the Bibliography. I have tried to provide in the margin (as noted, the 'margin' is for the most part in the T&C section) the original of everything that I have quoted in translation in the text. In the case of Paris and the two courts of Cambrai diocese, I have been considerably fuller in providing the original Latin text. I have done so both because there are more inferences that need to be drawn from these cryptic records and because the amount of editing that would have been required to provide comparable quotations from the unpublished records of York and Ely would have delayed the production of this book considerably. In the case of York and Ely, a number of previous works have contained transcriptions of the material, and where they have I have normally referred to, but not reproduced, those transcriptions. By contrast, the Paris and Cambrai editions are not easily available to English-speaking readers, and that fact is another reason why more from them is included here.

Introduction

The law of marriage of Western Europe in the Middle Ages was canon law, and it was complicated. The basic principles, however, of that law from the late twelfth century into the sixteenth were deceptively simple: (1) Present consent freely exchanged between a man and a woman capable of marriage makes a marriage that is indissoluble so long as both of them live, unless, prior to the consummation of the marriage, one of them chooses to enter the religious life. (2) Future consent freely exchanged between a man and a woman capable of marriage makes an absolutely indissoluble marriage so long as both of them live, if, subsequent to the exchange of future consent and prior to the formation of another marriage, the couple who have exchanged future consent have sexual intercourse with each other. (3) Any Christian man is capable of marrying any Christian woman so long as: (a) both are over the age of puberty and capable of sexual intercourse; (b) neither was previously married to someone who is still alive; (c) neither has taken a solemn vow of chastity, and the man is not in major orders (subdeacon, deacon, priest, or bishop), and (d) they are not too closely related to each other.[1] This last requirement was, indeed, complicated, but I will argue in this book that it was not so important socially as it used to be – and to some extent still is – thought to be.

These rules, and particularly the first two, can first be seen clearly in a series of decisions, known as decretals, rendered by Pope Alexander III (1159–81). The story of their origin and development is the topic for another book. Suffice it to say here that while research over the last 30 years points to academic and papal predecessors of Alexander who anticipated, to some extent, his decisions and to the importance of both academics and popes who followed Alexander in ensuring the acceptance of these rules, it has, at least in my view, confirmed

[1] See Ch 1, at nn. 13–72, for further details.

the pivotal role that Alexander played. I therefore feel comfortable calling the first two of them 'Alexander's rules'.[2]

The striking thing about Alexander's rules on the formation of marriage is not what they require but what they do not require. Although, as we shall see, the church strongly encouraged couples to solemnize their marriages, no solemnity or ceremony of any sort was necessary to contract a valid marriage.[3] There did not even have to be witnesses to the exchange of consent if both parties admitted that it took place and if the rights of third parties were not involved. Further, in an age characterized by arranged marriages and elaborate provisions in the secular law for feudal consents to be given to marriages, it is striking to find that Alexander required the consent of no one other than the parties themselves for the validity of the marriage.[4] Finally, in an age also characterized by class consciousness, it is surprising to discover that the only significant restrictions on the capacity of persons to choose marriage partners were the rules prohibiting the marriage of close relatives.[5]

In marked contrast to what seems to be reflected in Alexander's rules, marriage in the twelfth and in the three subsequent centuries, not only as a matter of secular law but also as a matter of social fact, was not the exclusive concern of the parties to the marriage. Family, financial, and feudal concerns at all levels of society and also political and military concerns at the upper levels of society dictated, in many instances, marriage choice.[6] There is evidence that the choice of the parties, particularly of the woman, was hardly considered in many marriage dealings.[7] Legal and literary evidence and that of diplomatic history combine to attest to these facts. For example, in many parts of England the daughter (and in some cases the son) of a man who held land by unfree tenure could not be married unless the tenant made a payment, known as *merchet*, to his lord.[8] Much of the land held by free tenure was subject to the lord's right of wardship and marriage, which, at the very least, meant that he could give in marriage (or sell the right to give in marriage) an infant heir or heiress, and may at times have meant that he had to consent to the marriage of any female tenant and the female child or close female relative of a male tenant.[9] The extensive records concerning dower and *maritagium* attest to the importance of the financial elements in marriages.[10] This impression is confirmed by literary

[2] The formulation of the first rule was not completely clear until the pontificate of Innocent III (1198–1215). See Ch 1, at nn. 5–6.
[3] Donahue, "Policy," 259–60.
[4] *Id*., 256–7, and sources cited.
[5] Disc. T&C no. 1.
[6] Lit. T&C no. 2.
[7] Duby, "Les 'Jeunes'," 839, quoted T&C no. 3.
[8] Lit. T&C no. 4.
[9] See Holdsworth, *History of English Law*, 3:61–6, and sources cited; Pollock and Maitland, *History of English Law*, 1:318–29.
[10] See *id*., 2:15–16, 420–8; Milsom, *Historical Foundations*, 167–72, and sources cited in both.

evidence, a striking example of which may be found in the *Paston Letters*.[11] The importance of marriage as a device for securing political and military alliances in the upper levels of society is too well known to need documentation.[12]

The preceding paragraphs were drawn from an article written more than 30 years ago, as the age of the references (a fact now buried in the Bibliography) shows.[13] That article also complained that social historians had to do better than Howard's *History of Matrimonial Institutions* if legal historians were properly to do their jobs. The last thirty years have seen an explosion of studies of medieval marriage and the family. There is so much that one can hardly keep up with it. The late Georges Duby, whose work in this area was just beginning 30 years ago, produced two books and a number of articles on the topic.[14] In his view, two 'models' of marriage were competing in the period from roughly 1050 to 1300: a secular one that was built on the lineage, sought tightly to control marriage choice, and had a tendency to marry in; and an ecclesiastical one that was unconcerned with lineage, emphasized the choice of the marrying couple rather than that of their families or lords, and insisted on exogamy. A recent work carries Duby's idea into the fourteenth and fifteenth centuries and argues that at least among the nobility, the tension between these two models of marriage persisted.[15] Having announced in a pioneering article on marriage cases in the Ely act book of the late fourteenth century that the attitudes toward marriage revealed in the book were "astonishingly individualistic," the late Michael Sheehan proceeded subtly to outline all of the factors that were likely to go into marriage choices in later medieval England.[16] He came to the conclusion that families, and in some places and for some people, lords, played an important role and that runaway marriages, though possible, were perhaps not that common. Others have emphasized the theme of a uniquely English individualism, but the tendency in the literature, which seems, for the most part, to deal with a slightly later period, is to emphasize a similarity if not a sameness between England and at least the northwestern parts the Continent with regard to family structure and marriage choice.[17] While the recent literature quite rightly emphasizes differences across class, temporal, and geographical lines, the basic point of the previous paragraph has been confirmed. Marriage in the twelfth and in the three subsequent centuries was not the exclusive concern of the marriage parties, and this was true at every level of society for which we have records.[18]

[11] See, e.g., *Paston Letters* 2:347–9 (no. 607), 363–6 (no. 617).
[12] See literature cited in n. 6; cf. Duby, "Lignage, noblesse, et chevalerie."
[13] Donahue, "Policy," 256–7.
[14] Duby, *Chevalier*; Duby, *Medieval Marriage*; Duby, *Mâle Moyen Age* (a collection of essays).
[15] Ribordy, *Faire les nopces*.
[16] Compare Sheehan, "Formation," 76, with Sheehan, "Choice of Marriage Partner."
[17] Lit. T&C no. 5.
[18] See Hanawalt, *Ties That Bound*, esp. 197–204; Bennett, *Women in the Medieval English Countryside*.

The article then asked what the effect of Alexander's rules was on this social pattern. It noted that until recently the only way in which we could study the effect of Alexander's rules was by drawing inferences from theological and legal commentary and conciliar legislation. The chief evil the rules led to, at least as perceived by commentators throughout the Middle Ages and into the sixteenth century, was clandestine marriages. 'Clandestine marriage' is a troublesome term because it can mean a number of things: a marriage that cannot be proved for a lack of witnesses or other evidence, a marriage that can be proved but lacks any ceremony *in facie ecclesie*, or a marriage celebrated *in facie* but lacking some element of the prescribed ceremony, for example, banns. These are distinctions to which we will have to return, but that clandestine marriages were of concern can be seen by the outpouring of legislation against such marriages in both general and local councils from before the time of Alexander until the council of Trent.[19]

A whole complex of pastoral, governmental, and jurisprudential reasons combined to stimulate the concern with clandestine marriages. For the secular law it was important that who was married to whom be a matter of public knowledge so that the complex of property rights and duties that arose out of the married state might be determined with reasonable certainty.[20] For a church that was prepared to punish fornication and adultery through a system of public criminal law, the same knowledge was also desirable. Further, since marriage was a sacrament, the church had an interest in seeing to it that the parties were in fact capable of matrimony, that they did not enter into it lightly, and that their entry into the state of matrimony be accompanied by ceremonies, such as the blessing and the nuptial mass, which befitted the sacrament.[21] Further, 'occult' clandestine marriages led to two highly undesirable results: They permitted an unscrupulous man to have sexual relations with a woman after an exchange of words of marital consent and later free himself from the consequences of the relationship by perjuring himself and denying that the words were ever exchanged.[22] Further, those who entered into an occult marriage relationship, even in good faith, and later publicly married others would be compelled by the church to live a state of adultery; the public marriage would be enforced when the previous union could not be proven. Both of these consequences were the result of the insistence of the external forum on independent witnesses to prove the exchange of present consent, a rule that created an undesirable tension between the external and internal fora.[23] This tension could also occur where the clandestine union was not occult but where the words exchanged were ambiguous or imperfectly remembered by the witnesses.[24]

[19] See Ch 1, at nn. 73–88.
[20] See Pollock and Maitland, *History of English Law*, 2:374–84.
[21] Howard, *History of Matrimonial Institutions*, 1:291–314.
[22] *Id*. at 350, citing Whitford, *Werke for Householders*.
[23] Ref. T&C no. 6.
[24] See Howard, *History of Matrimonial Institutions*, 1:340–4; Luther, *Von Ehesachen*, 102–3, in *Werke* 23.

All of these objections to clandestine marriages were serious ones. The desire to ensure that the parties were capable of matrimony, that is, that there were no impediments, was the most frequently cited reason for legislation against clandestine marriages, but each of the other reasons probably provided some motivating force for these legislative efforts. There is one further objection, however, which may have been critical: The availability of clandestine marriage permitted persons, if they were sufficiently desperate, to escape from the complex of family, financial, and feudal concerns that surrounded marriage and to enter into a valid marriage without the consent of their families or their lords, and even without their families or lords knowing about it.[25] The most familiar evidence of this phenomenon is literary, the legend of Romeo and Juliet, which originates in pre-Tridentine Italy.[26] But the most striking evidence that this particular effect of Alexander's rules on the formation of marriage was among the chief objections to these rules may be seen in the history of the Tridentine decree *Tametsi*.[27] The delegates of the king of France to the council were instructed to press for a rule that would make the consent of the parents of the marriage parties (if the parties were under parental power) a necessary element for a valid marriage. The earlier drafts of the decree contain this requirement. Only in the final draft of *Tametsi* did the council omit this requirement and return to what we might suggest is the spirit of Alexander's rules by providing that promulgation of the banns might be dispensed with where there was reason to fear force.[28]

This evidence is well known and was well known 30 years ago. What the earlier article sought to do was to begin to explore another body of material, the records of the ecclesiastical courts themselves, to determine whether they provided evidence that Alexander's rules had the effect that we suspected on *a priori* grounds they might have had and that at least some contemporaries thought that they had. At the time, relatively little work had been done on the records of those courts. R. H. Helmholz had written a dissertation on marriage litigation in the English ecclesiastical courts, which was to appear as a monograph; Michael Sheehan had written an article on marriage litigation in the only surviving medieval register of the Ely consistory court; I had begun some work on the cause papers of the York consistory.[29] On the basis of this evidence, I concluded, somewhat rashly I now confess, that Alexander's rules did have the effect of breaking down, at least in some instances, the control that families had over marriage choice and, even more rashly, that Alexander had intended them to have this effect.

There was more pioneering work contemporaneous with the article. Anne Lefebvre had written, and by the time the article was published, had published,

[25] Disc. T&C no. 7.
[26] Disc. T&C no. 8.
[27] See Epilogue and Conclusion, at nn. 1–5.
[28] Council of Trent, sess. 24, *Canones super reformatione matrimonii*, c. 1 (*Tametsi*), in *Decrees of the Ecumenical Councils*, 2:756.
[29] Helmholz, *Marriage Litigation*; Sheehan, "Formation"; Donahue, "Policy," 261–6.

a dissertation on the French ecclesiastical courts in the later Middle Ages, and Beatrice Gottlieb was writing, and by the time the article was published, had finished, a dissertation on marriage litigation in two northern French dioceses.[30] Gottlieb argued that the objection to clandestine marriage in the sixteenth century was political rather than social. The cases did not reveal many runaway marriages. There had been one in the Montmorency family that may have accounted for the edict of Henry II on the topic in 1557, but ordinary people were getting married in the ordinary way, normally with the advice and consent of their families and friends. Lefebvre had not concentrated on the issue of clandestine marriage, but what she reported about the French cases in her period looked very different from what those of us who had been working in England saw.

Clearly, a systematic comparison of the English and French material was called for. At first, I attempted a survey of all the surviving French medieval records and published the preliminary results of that survey, including some comparisons with England.[31] I became dissatisfied with the approach of that article, however, because the more that I got into the records, the more I realized that a very large variety of situations was revealed in them. The issue of control of marriage choice was there, sometimes on the face of the record, sometimes so close behind it that it could, without too much speculation, be inferred. There were, however, many other social situations in which medieval men and women invoked Alexander's rules or had them invoked against them. Again, sometimes these situations were obvious on the face of the record, and sometimes, again without too much speculation, they could be inferred. In short, medieval marriage cases illustrate a wide variety of legal problems and social situations. If one looks for it, one can find evidence to support almost any proposition about the effect of Alexander's rules, particularly if one is satisfied with the evidence of one or a few cases.

Perhaps one should be satisfied with the particular.[32] Human experience is extraordinarily varied, and the relationship between the law and that experience is anything but simple. But the mind seeks to impose patterns on the variety, to understand the experience by grouping like cases to see if larger patterns can be discerned. Fortunately, the litigation experience in medieval marriage cases can be organized into distinct categories; perhaps the underlying social experience can be so organized as well. Unfortunately, in order to do so, we are going to have to make use of numbers – 'statistics' is probably too grand a term for it.

The reasons for the need to use numbers are simple. While the surviving records of the later medieval ecclesiastical courts are not so extensive as those of the English secular royal courts or even the French secular courts, there are, when added up, records of thousands of medieval ecclesiastical marriage

[30] Lefebvre-Teillard, *Officialités*; Gottlieb, *Getting Married*.
[31] Donahue, "Canon Law and Social Practice."
[32] The next four paragraphs are derived from Donahue, "Female Plaintiffs."

cases.[33] A lifetime is too short for one person to read all of them, and the laborers are few. The only hope for getting some idea of the whole is to sample them and to describe them numerically. Skimming over the material and picking out what seem to be the most interesting records may yield an answer to certain kinds of questions, such as when a form or an idea first appeared, or when a form or an idea became part of the regular practice of a court. But the answers to these questions may benefit from the greater precision that numbers can give: When the form or idea first appeared, did it begin slowly or did it spread rapidly? What do we mean when we say that a form or idea was the 'regular' practice of a court? Underlying both questions is an implicit quantitative statement, a percentage of total cases, or of total surviving cases. Words such as 'slowly', 'rapidly', and 'regular' are proxies for a judgment about what underlying numerical measures indicate.

When we come to ask the question, moreover, of what effect the activities of the court had on society and of what effect society, as opposed to, or in addition to, the academic law, had on the behavior of the courts, the question 'how much' becomes even more critical. In a legal system, such as medieval canon law, where decisions in individual cases were not meant to set precedents for the decisions of other cases, the range of possible cases and possible solutions was wide indeed. One can find in the records of the medieval ecclesiastical courts disputes involving a great variety of social situations and support for a wide range of propositions about the law. Unless one is simply to list all the possibilities, one must generalize, and generalization ought to involve a commitment to what was normal and what was abnormal. We should also try to discern how what was normal changed over time, how what was normal became abnormal, and vice versa.

Finally, use of quantitative methods helps us to avoid the fascination of the 'interesting' case. There are many interesting cases in the records of the medieval ecclesiastical courts. They are made more interesting by the fact that in many of them, particularly in England, the depositions have survived. We can thus hear ordinary men and women of the Middle Ages speaking about their ordinary experiences. The dangers of relying on such evidence are substantial. Witnesses frequently told lies, and the process of redacting the testimony into a legal record involved considerable distortions. For historians who cannot resist the temptation to use deposition evidence, quantitative analysis is the penance for succumbing to that temptation. Quantitative evidence allows us to control the deposition evidence, to see which witnesses were telling normal lies and which abnormal, and to see whether the way in which the witness tells his or her story is more likely to be a product of the witness or of the clerk who recorded the testimony.

Because we cannot examine all the cases in all the courts, we must sample, and since the samples are unlikely to be random, we must be careful of the biases built into the samples. After a brief chapter in which we outline the

[33] See Donahue, ed., *Records 1*, *2*; disc. T&C no. 9.

underlying rules and institutions (Chapter 1) and another in which we discuss in depth four English cases that have left unusually full records (Chapter 2), we begin with marriage cases in the consistory court of York in the fourteenth and fifteenth centuries. Our earliest record dates from 120 years after Alexander's death, our latest from 320 years after his death. Since our purpose is to try to determine the social effect of Alexander's rules, starting so late calls for some explanation. There are earlier records, but all the runs of records earlier than this date have some factor about them that leads us to doubt whether we are getting a typical run of marriage cases, much less of marriages. In England, the earliest runs of ecclesiastical court records come from the court of Canterbury in the thirteenth century (and this may be the earliest extensive documentation that exists anywhere). The Canterbury records are not, however, a good group of records to use for numerical analysis. They were probably preselected by the monks of Canterbury to serve as a muniment of their title to exercise vacancy jurisdiction;[34] they cover a wide range of cases, and rarely does the same type of case appear more than once. Further, the court of Canterbury was an appellate court, the most prestigious ecclesiastical court in England. We would expect, and indeed we find, a disproportionately large number of people of wealth and status litigating in that court.

By contrast, the court of York was both the appellate court for the northern province and the first instance court for the diocese of York. There is thus in the York records a much wider sample of types of litigants. Further, so far as we can tell, the survival of the records of the court was not determined by a desire to illustrate anything other than the records of the court. Finally, the records survive in loose papers rather than solely in the act books or registers that are the sole surviving records for so many other medieval ecclesiastical courts. We thus have for this court what the parties, their proctors and, to some extent, their witnesses chose to present to the court, rather than what some clerk of the court decided to write down. Experience with other medieval ecclesiastical court archives in the British Isles and in continental Europe suggests that this is the best set of such records yet to be discovered.

The three chapters on York (Chapters 3, 4, and 5) establish a pattern for the rest of the book. We begin with numbers (Chapter 3): What kinds of cases did the court hear? What kinds of marriage cases did it hear? What was the nature of the claims and defenses made? What was the gender ratio of the litigants, and what was their success ratio? We then try to burrow more deeply into the cases. We look at those from the fourteenth century (Chapter 4) to see if we can combine the legal arguments that were made with what the depositions are saying into what we call 'story-patterns'. While no two stories are exactly alike, definite patterns do emerge. We will not argue that these patterns tell us the 'true story' of any given case, but we will argue that they represent, to some extent, the social expression of medieval people when they came to dispute about marriage. We will also argue that the stories being told are not so far away

[34] *Select Canterbury Cases*, introd., 35–7.

from the experience of the judges that they would regard them as implausible or impossible. The final chapter on York (Chapter 5) looks at the fifteenth-century cases to determine what was different about the story-patterns in that century.

Chapter 6 deals with the court of Ely from 1374 to 1381. The reasons for the choice of Ely are fairly straightforward. The register that records the cases is remarkably full and well kept. It has already been analyzed in a way that allows us to control the large amount of data it contains.[35] The diocese was small and, for the most part, rural, and in marked contrast to York, the court heard quite a few marriage cases *ex officio* (i.e., roughly corresponding to our criminal procedure). We hear less of the stories that the litigants were telling than we do at York, but we hear something. We also get a very good idea, perhaps better than we do at York, of the course of the litigation. Because of the nature of the record, the story that we tell for Ely is more a story of the litigants' reactions to what the court did and to what they did to each other in court, but there is some evidence of extrajudicial behavior.

The work with Ely prepares us for our work with Paris (Chapter 7). Here, too, all we have is a register and, unfortunately, not one as well kept as that at Ely. The Paris register is close to contemporary with the Ely register (November of 1384 to September of 1387), and it reveals a very different kind of court from that of Ely. While it is difficult to penetrate behind this register to the social realm, a few dramatic cases emerge, and, probably more important, a pattern of litigation that suggests quite different marriage practices from those that prevailed at both York and Ely. To what extent those practices are only the practices of those who litigated or are those of the wider society, a court register cannot tell, but there are enough cases in the register to suggest that the difference in practice probably extended beyond the court into the wider society.

Our last courts are those of the diocese of Cambrai, which has left a series of registers from the mid-fifteenth-century court at Cambrai (1438–53) and one very large one from the separate court at Brussels in an overlapping and slightly later period (1448–59) (Chapters 8 and 9). These are registers of sentences only. There are so many sentences that we had to sample them. It takes quite a bit of effort to figure out what is going on at the legal level in these sentences, but it seems to be worth the effort. It takes even more effort to figure out what may be going on socially, because we hear only the voice of the judge, not that of the parties, nor even, as in the Ely and Paris registers, the voice of the parties as reported by the registrar. The sentences were, however, rendered by four different judges, each of whom had a distinctive style. We learn less about what the parties to the cases in Cambrai diocese were arguing, but we learn as much or more about the judges' attitudes toward the facts that they found. What seems to lie behind the Cambrai cases is not the same as what seems to

[35] Stentz, *Calendar*.

lie behind the Paris cases, but it is closer to Paris than it is to York and Ely in most important respects.

While all five courts were courts of the official (chief judge) of a bishop (archbishop in the case of York), there are some institutional differences among them that it is well to flag at the beginning, because we will have to explore the extent to which the institutional differences account for the differences that we see in the records. The official was not the only judge of the court at York, Ely, and Paris. At York and Ely there were commissaries general of the official and occasional appointments of special commissaries to hear particular cases; at Paris there was an auditor (perhaps two), though we know little about his activities in this period. At Cambrai, and eventually Brussels, the official is the only judge of the court of whom we hear. In all four dioceses there were lesser ecclesiastical courts that had some jurisdiction over marriage matters, at least such matters as broadly conceived. Once more, it is at Cambrai and Brussels where we hear the least of such jurisdictions. Professional lawyers, proctors and advocates, were available to assist the parties, at least in instance (civil) litigation, at York, Ely, and Paris. There were probably proctors and advocates at Cambrai and Brussels, though we hear nothing of them in our records.[36] The courts of Paris, Cambrai, and Brussels had promotors, professional prosecutors of office (criminal) cases. York and Ely had no promotors.

After the chapters on the diocese of Cambrai, we deal with two substantive issues largely excluded from consideration in the chapters that deal with the individual courts: separation issues (Chapter 10), where we find a marked difference between the practice of the English courts and those on the Continent, and issues about consanguinity and affinity (Chapter 11). These latter do not play a very large role at York and Paris, but they do play a large role in one court not in the group, and they play a somewhat significant role at Ely and in Cambrai diocese. We conclude with an attempt to put all our findings together and to suggest some lines for further research (Chapter 12).

There is a methodological problem with the approach taken by this book, one to which we will return in a number of places but which it is well to confront at the beginning. Disputed marriages are, in most times and most places, a rather small subset of the number of marriages; certainly that is what most married couples or couples contemplating marriage have hoped would be the case. In addition, the number of disputed marriages that find their way into a court sufficiently sophisticated to leave a record is, in many times and places (and there are good reasons for thinking that the Middle Ages in Western Europe, even the late Middle Ages was one such time and place), a rather small subset of the number of disputed marriages. The problem is well known to social historians and students of the relationship of contemporary law and society. It is the danger of generalizing from 'trouble cases' or of 'writing social history from

[36] They certainly existed by the seventeenth century. See *Ancienne procédure ecclésiastique*, 37–8, 42–3.

a police blotter'.[37] Marriage was a fundamental institution in the society of the medieval West. But this is a book about disputes. Any society in which the workings of a fundamental institution generate more than a small proportion of disputed cases is approaching the pathological. That may have been happening in the diocese of Cambrai in the mid-fifteenth century; that is an issue to which we will have to return (Chapters 8, 9, and 12). There is no evidence that it was happening at York, Ely, or Paris in the periods with which we are dealing.

The fact is, however, that except for the very top of the society, court records are the best evidence that we have about how marriage worked for ordinary people in the Middle Ages, even the later Middle Ages. Court cases, however, are not normally evidence about how an institution works but about how it does not work. There are two ways around the problem. The first is to check what we find in the court cases against what we know from other types of evidence. The sermons, liturgy, literature, and art of the later Middle Ages have quite a bit to say about marriage. We will not examine them systematically in this book, but we will occasionally refer to them and to the works of others who have examined them more closely.[38] Routine administrative records, which become more abundant for the later Middle Ages, frequently allow us to draw some inferences.[39] Again, we will not examine such material systematically in this book, but we will refer to the works of others who have. Sermons, liturgy, literature, art, and routine administrative records, of course, have their own biases. This is notorious in the case of the first four, less well known in the case of the last. The fundamental problem with the last may be summed up in the fact that the maker of a bureaucratic record frequently assumes, and hence does not describe, the very things that the modern historian is investigating.

The second approach to the problem is the one on which we will focus in this book. It is constantly to be aware of the problem, and carefully to focus on the nature of the question that we are trying to answer. At the very basic level we must ask whether the record is likely accurately to reflect what happened in court. Sometimes there are reasons to suspect that it does not, but in most cases we will be able to say that it probably does, though, of course, the clerk or judge has selected what he reports. The next question is whether what happened in court is likely accurately to reflect what happened before the parties got to court. Here, there are substantial problems of distortion, ranging all the way from outright lying by the parties and the witnesses to the more subtle process of recasting the story in such a way that fits the categories with which the court was dealing, and in such a way as was likely to be persuasive. This is a book about arguments, and arguments are, by definition, tendentious. Lies and arguments are, however, also a product of the society in which they are

[37] See further, Ch 2, between nn. 21 and 22, and at nn. 35–7.
[38] Lit. T&C no. 10.
[39] Lit. T&C no. 11.

made, and so all is not lost once we conclude that the story is not literally true. Finally, there is the question of extrapolating from what happened in court and the stories that were told there to the larger world of marriage disputes that did not come to court or to the much larger world of marriages that were not disputed. This is obviously the most speculative question, one about which reasonable people can differ. The nature of the argument in this book is that in some areas and in some places, the sheer quantity of certain kinds of disputes and stories about them makes it likely that we are looking at a pattern that was also found in disputes that did not come to court and, perhaps, allows us to infer the kind of behavior that was expected in undisputed marriages.

The bad news is that this approach has resulted in a long book. Each level of question requires discussion. Is this record likely to be an accurate record of what happened in court? Is what is recorded likely to reflect what in some sense actually happened before the parties got to court? On the basis of the answers to those questions, what conclusions can we draw about disputes that never came to court and about marriages that were never disputed? Hence, the method of the book requires not only that all the cases in the samples be reflected in the numbers, but also that a large number of them be discussed individually.[40] The process, however, does produce what, at least to me, are fascinating results.

Another reason for the length of the book has to do with the complexity of the legal institutions with which we are dealing. The substantive canon law of marriage was, as we shall see in the first chapter, quite complicated. The procedural law was equally so. There was also local law, both ecclesiastical and secular, that added to, and we shall argue, changed the practical import of, some of the general law of the church. All these bodies of law, which are quite evident in the cases, were being filtered through the medium of five sophisticated institutions operated by a group of men, some of whose personalities we can see in the records. To call these cases examples of an interaction of law and society is, to some extent, misleading. The formal law was itself a product of medieval society, as were the men who administered it. The social, in short, is reflected in the rules and institutions, just as it is reflected in the stories, reactions, and maneuverings of the lay people who came before the courts. It is tempting to contrast the attitudes of clerical professionals, who in many cases seem to have been quite learned in a law that the lay people only partially understood, with those of the lay people, and we will certainly see areas in which the contrast was

[40] Which cases get discussed individually and which more generally is very much a judgment call. I have tried to say something, either in the text or in the margin, about all the fourteenth-century York marriage cases (Ch 4), but have dealt with those from the fifteenth century only selectively (Ch 5). The cases involving male plaintiffs at Ely, because they seemed to be unusual, are dealt with quite exhaustively, those involving female plaintiffs only selectively (Ch 6). With Paris we attempted to say something about every marriage case in the register that said something different from the routine (Ch 7). In the case of Cambrai and Brussels, particularly the former, we tended to say something about all of the sentences, because we had sampled them to begin with and because we were tracing differences in the attitudes of the four judges and changes in those attitudes over time (Ch 9).

stark. But it is also striking that there seems to be a substantial overlap between the two groups. Figuring out what rules lie behind the cases (which, for the most part, do not cite specific rules) requires considerable discussion. Getting the balance right between the areas of agreement and the areas of disagreement requires more. Once again, however, at least to me, the results of the process are quite fascinating.

1

The Background Rules and Institutions

As we have said, the law of marriage of Western Europe of the Middle Ages was canon law, and it was complicated. By the beginning of the thirteenth century, the period in which we first have records of runs of cases, it was the product of a continuous development of more than seven hundred years, with roots going back into Roman law, Judaism, and early Christianity, and the customs of the non-Roman peoples of the West. A particularly notable feature of this development was the extraordinary efflorescence of learning, teaching, and promulgating law that occurred in the twelfth century. As we have also said, the story of this development is the topic for another book. Here we must briefly outline the rules as they existed, or were thought to exist, in the early years of the thirteenth century. While the next three centuries saw some development of these rules, perhaps more than is normally thought to have occurred,[1] the changes were subtle and, with the notable exception of developments in the law of separation with which we have occasion to deal in Chapter 10, they do not seem to have had much effect on marriage litigation in ecclesiastical courts, the focus of this book. Hence, the outline that we give here may be taken as the outline of the rules that the proctors, advocates, and judges of the courts with which we are dealing assumed, or should have assumed, as they presented and decided the cases that were brought to them.[2] It will not outline all the doctrine that is at stake in this book. Some points are better left to the specific cases in which they arose.

Uncontroversial as the statements in the preceding paragraph might seem, we should pause for a moment before we undertake our outline. There are few statements of legal rules that cannot be made the subject of argument. Even if the statement of the rule is more or less agreed upon, its application to the facts of any given case will frequently, perhaps always, be the subject of argument. Once the rule has been applied, either actually in a court or

[1] See Donahue, "Was There a Change."
[2] Lit. T&C no. 12.

hypothetically in a classroom, the lawyer's or judge's, student's or teacher's, plaintiff's or defendant's understanding of the rule will change. He or she will now know that the general statement of the rule applies to this set of specifics, and that knowledge changes that person's understanding of the rule. Since no given lawyer, judge, student, teacher, plaintiff or defendant will have dealt with the same set of real or hypothetical cases, no two persons' understanding of the rule will be quite the same. Shared experience, such as that produced by a common educational pattern or knowledge of the practice of a given court, can produce overlapping fields of understanding, but the potential for different understandings is always there.

The phenomenon just described is not limited to legal systems that have a doctrine of precedent. In such systems, the process by which decisions in individual cases changes the understanding of the rule is brought up to the conscious level and is allowed to change the formal statement of the rule. In systems like medieval canon law, those that do not have a doctrine of precedent, the phenomenon operates below the level of the formal rule, perhaps below the conscious level, but it is certainly there, granted the fact that no two human beings have the same experience of the rule. The phenomenon is perhaps even more notable in systems like medieval canon law (and the Anglo-American common law) where the rules are not formally codified. There are, of course, in both systems, authoritative documents that state the rules (and a hierarchy of authorities for resolving the more obvious conflicts), but in no place in medieval canon law was there a formal, systematic, authoritative, and exclusive statement of the law of marriage such as that found in the modern Code of Canon Law or in a modern European civil code.

These facts should make us uncomfortable about stating the rules of the law of marriage in the later Middle Ages, even if we confined ourselves to canon law. We would be even more uncomfortable if we broadened our scope to include other potentially applicable bodies of law, such as Roman law, as it was taught, and to some extent practiced, in the later Middle Ages, or the various customary and/or statutory systems of law that were in some areas expanding their scope of geographical coverage to correspond to that of the highest secular political authority. This latter we will not undertake here, though we will have occasion in later chapters to refer to other bodies of law as we seek to explain variations in practice in the different ecclesiastical courts. We could avoid many of the difficulties that we just stated if we confined ourselves to the canon law as described in a single work, such as the influential *Summa de matrimonio*, composed by Tancred of Bologona, for the most part, shortly before 1215, and revised by Raymond of Peñafort, probably around 1235, but even this relatively compact work is too long for our purposes, and although it was highly influential, it is in some ways an idiosyncratic work.[3] We will, therefore, adopt the organizational scheme of the Tancredian-Raymondian *Summa*, but the statement of the rules is our own, supported, in most instances, by the *Summa* and, in all

[3] Disc. T&C no. 13.

instances, by authoritative texts found in the *Liber extra*, an official collection of decretals promulgated by Pope Gregory IX (1227–41) in 1234, or Gratian's *Decreta*, the vulgate edition of which was probably completed around 1150. We believe that most late medieval canonical professionals would have agreed with this statement of the rules (if they were translated back into Latin), though in some instances they would not have phrased them in the way that we have.

Four characteristics of Christian marriage law are assumed in the Tancredian-Raymondian *Summa*, and it is well to specify them in advance: First, marriage is between a man and a woman and is monogamous. Monogamy was, so far as we can tell, Jewish practice in the time of Jesus and was also the practice, and, to a large extent, the law of the Greco-Roman world. Second, a Christian marriage once fully formed was indissoluble while both of the parties were living. This characteristic was thought, not without justification, to have been the teaching of Jesus as found in the New Testament, and it received a powerful reinforcement in the reform movement of the eleventh century. Third, close relatives could not validly marry. While this prohibition had its origins in both Jewish and Roman law, it had been greatly expanded in the early Middle Ages. The extent of the prohibition had been debated in the eleventh and twelfth centuries, and traces of these debates, and their resolution, can be found in the Tancredian-Raymondian *Summa*. Fourth, marriage between Christians once fully formed was a sacrament of the church. This idea was not fully articulated until the twelfth century, but it is accepted without comment in the Tancredian-Raymondian *Summa*.

FORMATION OF MARRIAGE

Sacramental Christian marriage is formed in either of two ways: (1) Present consent freely exchanged between a Christian man and a Christian woman capable of marriage makes a marriage that is indissoluble so long as both of them live, unless, prior to the consummation of the marriage, one of them chooses to enter the religious life. (2) Future consent exchanged between a Christian man and a Christian woman capable of marriage makes an absolutely indissoluble marriage so long as both of them live, if subsequent to the exchange of future consent and prior to the formation of another marriage, the couple who has exchanged future consent has sexual intercourse with each other.[4]

This scheme of rules is first seen clearly in the decretals of Pope Alexander III (1159–81) in the context of cases in which he was called upon to determine the priority between two attempted marriages.[5] Pope Innocent III (1198–1216) limited the grounds for dissolution of an unconsummated present-consent marriage to the one stated in the previous paragraph. Alexander and his immediate successors had contemplated other such grounds – supervenient affinity, supervenient impotence, supervenient leprosy, and possibly others – but Innocent III closed the door. A respectable body of canonical and theological opinion

[4] See Donahue, "Canon Law and Social Practice," at 144–5, and sources cited.
[5] See Donahue, "Dating."

maintained that the pope had the power to dissolve any unconsummated marriage, but from Innocent III to the beginning of the fifteenth century, no pope, so far as we are aware, did so. When the popes did begin to dissolve such marriages in the fifteenth century, they did not publicize the fact that they were doing so. Knowledge of the possibility of papal dissolution of such marriages seems to have been widespread, at least in certain circles in Italy, in the mid-fifteenth century (perhaps a bit later); it does not seem to have been generally known (or the practice common) until the sixteenth century.[6]

Innocent III also changed the statement of the second rule. For Innocent (as it had been for the canonist Huguccio), engaging in sexual intercourse after the exchange of future consent created a presumption that the parties had presently consented. This was, at least in the public forum of the courts, a *de iure* presumption; no evidence could be introduced to rebut it. Hence, for Innocent, all marriages were formed by present consent, either actual or presumed. We have stated the rule as we have, however, because this is way that at least English lawyers drafted libels in which they claimed a marriage had taken place.[7]

An exchange of future consent, if not followed by sexual intercourse, did not form a marriage. The parties could be relieved of any obligations that they had thereby contracted for cause, perhaps even by mutual consent. Whether the obligations of future consent were enforceable when one of the parties was willing and the other was not was debatable. It was clear that penalties inserted in marriage contracts were unenforceable,[8] and that a contract of marriage would not be specifically enforced against someone who had married another by either of the two methods previously described.

Hence, in the absence of subsequent sexual intercourse (and we might add, speaking of the external forum, provable subsequent sexual intercourse), it made a large difference whether the consent was characterized as present or future. There were relatively well-defined formulae for expressing each kind of consent: "I take you as wife/husband," for present consent; "I promise to take you as wife/husband," for future consent. But there was a large gray area in between. Many, perhaps most, canonists regarded "I will have you from henceforth as wife/husband" and "I will that you be my wife/husband" as expressions of present consent, while "I will have you next Easter as my wife/husband" or "I will that you be my wife/husband next Easter" were expressions of future consent. But what if a couple said to each other "I will take you as wife/husband" without specifying when? The Latin for this (*volo te accipere*) is somewhat less ambiguous than the English because Latin does not need a copulative verb to express futurity and hence the use of *volo* is clearly intended to express volition, but even though volition is clearly expressed, it is ambiguous as to the time at which the taking is to occur. The problem becomes even more complicated if we remember that few ordinary people in medieval Europe expressed themselves in

[6] See Donahue, "Policy," 252 and n. 2; Donahue, "Was There a Change," 74–7; disc. T&C no. 14.
[7] Disc. T&C no. 15.
[8] X 4.1.29 (Gregory IX, *Gemma*).

Latin. Circumstances might clarify the ambiguity, as, for example, where a couple exchanged these words at the church door after they had been engaged for some time, but where circumstances did not clarify the ambiguity and there was no other proof of their intention, it was not even clear that such an exchange created an obligatory future consent, since no words of promise were used.[9]

Returning to our definition of the rules, we will treat what modern authors call 'vices of consent' (error, insanity, etc.) and capacity under 'impediments' in the next section. One thing in the definitions remains to be explained: what of non-sacramental marriages? By the beginning of the thirteenth century it was clear that a marriage between Christians was sacramental, if it was a marriage at all. There was no such thing as a non-sacramental marriage between Christians. It was also clear that there could be no marriage between a Christian and a non-Christian.[10] Marriages between non-Christians were recognized, but they were not sacramental. We prescind from discussing such marriages here, and from discussing the related issue of what happens if one of the non-Christians becomes a Christian, because these issues do not figure in any of our cases.

IMPEDIMENTS

By the beginning of the thirteenth century the impediments to marriage were neatly divided into two kinds, diriment and impedient. The former, as the name implies, invalidated any attempted marriage; the latter did not invalidate the marriage but rendered it unlawful. Those who married in the face of an impedient impediment could be penalized (whether they were penalized is an issue to which we shall return), but their marriage was valid and could not be dissolved. By the beginning of the thirteenth century it was also clear that for an impediment to be diriment, it had to exist at the time that the marriage was contracted. The one possible exception to this rule, supervenient entry into religion following an unconsummated present-consent marriage, is probably better thought of as a voluntary dissolution of a marriage that exists but is not yet absolutely indissoluble.

The canonists and popes of the twelfth and early thirteenth centuries made considerable progress in trimming the luxurious growth of impediments that was their heritage from the past. They also made considerable progress in rationalizing and classifying the impediments. They had not yet achieved a complete rationalization and classification, however, because of the power of a mnemonic verse that they taught to their students:

> Error, condition, vow and relation,
> Crime and diff'rence of cult,
> Force, order, and bond,
> Hon'sty, affinity,

[9] See the discussion in Raymond, *De matrimonio*, 4.2, p. 511 (gloss), and Helmholz, *Marriage Litigation*, 34–40, with references.

[10] Disc. T&C no. 16.

> And impotence also forbid
> Marriage to be and if joined you see
> What was done, by the court, undid.
> Church prohibition and times of devotion
> Also forbid 'em, you see,
> But if they're done, they won't be undone;
> The court will just let 'em be.[11]

In his discussion of the impediments, Tancred makes clear that he saw how many of the impediments were, in fact, vices of consent. The tradition had, however, already committed itself to a list of impediments. Bernard of Pavia had hit on 14; Tancred followed him; Raymond followed Tancred, and the system got stuck. This meant that madness, nonage, and unfulfilled condition, all of which were diriment impediments (the latter two, only under certain circumstances), never got incorporated into the list and were discussed, if at all, in general discussions of consent. The fixing of the number of impediments at 14 meant not only that the more sophisticated understanding of consent that had developed over the course of the late twelfth century was only partially integrated into the system, but also that further exploration of the problem of consent happened only occasionally. Another consequence of the fixing of the categories was that a rather large number of impedient impediments were never fully considered. There are far more than two: simple vow, prior *de futuro* bond, lack of the solemnities required by the Fourth Lateran Council or by local synodal legislation, and various crimes other than those encompassed in the diriment impediment of crime being the most obvious. Finally, since the list of impediments was dictated by the scansion, such as it is, of the doggerel hexameters, the *summae* treat the impediments in an order that impedes rather than aids understanding. Let us reorganize them.

Vices of Consent

These may be divided into two categories: those who lack the mental or physical capacity to consent and those who are capable of consent but whose formal consent is impeded, whether they are aware of it or not.

Insanity. Those who are insane are incapable of consent, at least while they are insane. This impediment is recognized by all the canonists, but little is said about it. It is also not prominent in the cases.[12]

Impotence and Frigidity. More is said about physical incapacity for sexual intercourse. "Impossibility of intercourse has the highest place among the other impediments," Tancred tells us, "because it impedes matrimony out of its very

[11] The Latin is not much better, T&C no. 17.
[12] Ref. T&C no. 18.

nature rather than by constitution of the church."[13] The reason for this is that it removes both primary causes of marriages, the procreation of offspring and the avoidance of fornication. It was, however, only after some hesitancy that the classical canon law recognized impotence or frigidity as a ground for dissolving a present-consent marriage, and it did so only if it existed at the time of the exchange of present consent and only if the party who was capable of intercourse did not know of the other's inability.[14] The classical law also reintroduced a three-year period during which the couple must remain together and attempt to consummate the marriage, unless the impotence or frigidity was obvious.[15]

But what if it is not obvious? The ancient rule set out in Gratian's *Decreta* was that if a man asserts that he has had intercourse with a woman and she denies it, the judge is to defer to the oath of the man.[16] Alexander III followed this rule on the one occasion that he had to deal with the issue.[17] Gregory VIII (1187) substantially modified this rule by allowing the wife's oath and the testimony of seven women, who examined the wife and declared her to be a virgin, to overcome the man's oath.[18] Hence, in the classical law the only situation in which recourse to conflicting oaths was necessary was the one in which the woman was not a virgin at the time of the marriage.

Nonage. Nonage combined notions of mental and physical incapacity. In the classical canon law, the 'espousals' (*sponsalia*) of those below the age of seven were a nullity.[19] They lacked the mental capacity to consent. Those between the age of seven and the age of puberty (notionally fixed at 12 for girls and 14 for boys) were binding in the same way that future consent was binding: They could become indissoluble marriages if the parties had intercourse or if they exchanged present consent after reaching the age of puberty, but before either of those events happened they created an obligation but no marriage. The obligation could be dissolved for cause, and it would not prevail over a subsequent marriage entered into after the parties had reached the age of puberty. If one of the parties was over the age of puberty and the other under, the party above the age of puberty was held to the contract while the party below the age of puberty was held until he or she reached the age of puberty at which time he or she had the option to rescind.[20] The focus here seems to be on physical rather than mental incapacity. Contractual consent is possible above the age of seven, but it cannot be present consent until the age of puberty is reached.

[13] Tancred, *Summa de matrimonio* 30, p. 60–1; T&C no. 19.
[14] X 4.15.6 (Innocent III, *Fraternitatis tuae*); X 4.15.4 (Lucius III, *Consultationi tuae*).
[15] See X 4.15.5 (Celestine III, *Laudabilem. Requisisti*); X 4.15.7 (Honorius III, *Litterae vestrae*).
[16] C.33 q.1 c.3 (from the capitulary of Compiègne [757]).
[17] X 4.2.6 (*Continebatur in litteris*, WH 204[a]), disc. T&C no. 20.
[18] X 2.19.4 (*Proposuisti*).
[19] Ref. T&C no. 21.
[20] X 4.2.8, 7 (Alexander III, *A nobis. De illis*, WH 4[a]–[b]).

There is a tension in the classical canon law between measuring puberty on the basis of objective criteria or fixed rules (12 for girls, 14 for boys) and measuring it on the basis of subjective criteria, the physical capacity of the individual. Alexander III's decretals on this topic, for example, seem to have moved in the direction of subjectivity. In one decretal, Alexander requires the girl to have been "near to the age" of puberty and to have had intercourse in order for the marriage to be binding.[21] In another, we hear nothing of the age of the parties, but the addressee is to inquire whether in fact they have had intercourse.[22] In yet another decretal, Alexander denies separation on the ground of nonage to those who are "near to the age that they could be joined by intercourse."[23] While the exact import (and indeed the grammar) of the last decretal is not clear, it clearly seems to be based on the possibility rather than the actuality of intercourse and thus goes the furthest in the direction of subjectivity. (Some of the classical commentators turned this into an objective measure, but the summary that appears at the head of the decretal in most printed editions of the *Liber extra* does not.)

Force or Fear. Since the canon law based its notion of marriage on the free consent of the parties, one would expect it to be open to argument that the consent was forced or prompted by fear. It was, but the authoritative statements on this topic are quite cautious. For example, Alexander III has four decretals on the topic: In one, he refuses to lay down an abstract rule: "Concerning the woman who was handed over to a man against her will and kept by him, since there are different kinds of force and you did not tell us for certain whether afterwards she consented, we cannot tell you anything for certain."[24] Similarly, Alexander rules that a young woman who took the veil with the consent of her husband and afterwards left the convent when her husband was dead and married another should be compelled to return to the convent unless she took the veil because of mortal fear of her husband.[25] Even then, she should be compelled to return if she consented after the fear had passed. Two later decretals on the topic of force, while they are not inconsistent with the earlier ones, reveal more openness to the argument that the marriage was forced. In a complicated case from Pavia, Alexander orders that the woman who has claimed that her consent was forced be placed in a safe place, away from the pressures of the contending families:[26] "Since consent has no place where there are fear and compulsion, it is necessary that when the consent of someone is at stake the occasion of compulsion be removed. Marriage is contracted by consent alone, and where that is at stake, she whose intent is being examined ought to enjoy

[21] X 4.2.6 (*n.* 17), T&C no. 22.
[22] X 4.2.8, 7 (n. 20).
[23] X 4.2.9 (*Tua fraternitas. De illis*, WH 1033[b]), T&C no. 23.
[24] X 4.1.6 (*Sollicitudini. De muliere*, WH 991[b]), T&C no. 24.
[25] X 1.40.1 (*Relatum est ad audientiam*, WH 862).
[26] X 4.1.14 (*Cum locum non habeat*, WH 270), text and disc. T&C no. 25.

full security, lest out of fear she say that someone whom she hates pleases her and there follow the results that usually come about from forced marriages." In yet another case, Alexander was willing to express the matter as a general principle. A man is to be compelled to adhere to the woman with whom he had gone through a 'shotgun marriage', unless he had been compelled to consent "by a fear that could turn a constant man."[27]

While all four decretals recognize that marriage (or entry into religion) is not binding if it is forced, they seem to reflect a change in attitude toward the impediment. The first two decretals state that even if the consent is forced it may subsequently be ratified. The latter two do not. The first decretal distinguishes between types of force, and the second (admittedly in a somewhat different context) seems to suggest that only mortal fear will vitiate the consent. The third decretal suggests no standard but offers a strong statement that forced marriages are a bad idea, and the fourth, while it adopts an objective standard, adopts one considerably more relaxed than the second: "the fear that could turn a constant man."

Since all four of these decretals appeared in the *Liber extra*, it was open to the canonists to make of them what they would. They tried to find bright-line rules in the decretals:

> What sorts of fears excuse? Ask him who knows:
> Violation, slavery, death, and also hard blows.[28]

But ultimately they had to admit: "The judge will judge according to the diversity of persons and places what sort of fear it is, and will pronounce in favor of some marriages and for the nullity of others."[29]

Error. If marriages are to be based on consent, one would expect that that consent could be vitiated by mistake, just as contractual consent may be vitiated by mistake. The classical canon law resisted this conclusion, ultimately holding that only mistake of person (I marry Joan thinking that I am marrying Alice) and mistake of status (I marry a slave thinking that I am marrying a free woman) would vitiate the consent. The assumption of this latter doctrine is that a marriage between a free person and one of servile condition could be a valid marriage. This assumption is in marked contrast to Roman law, where slaves could not validly marry each other or a free person.[30] A remarkable decretal of Hadrian IV (1151–9) held that such was not the case in canon law:[31]

Clearly, just as in Christ Jesus, according to the word of the Apostle,[32] there is no free nor slave who is to be removed from the sacraments of the church, so too, marriages

[27] X 4.1.15 (*Veniens ad nos Wi.*, WH 1071), T&C no. 26.
[28] Tancred, *Summa de matrimonio* 25, p. 47: *Excusare metus hos posse puta, quia nescis / Stupri sive status verberis atque necis.*
[29] Raymond, *De matrimonio* 4.11, pp. 551b–552a, T&C no. 27.
[30] See Donahue, "Case of the Man Who Fell into the Tiber," 10–11, with references.
[31] X 4.9.1 (*Dignum est*), T&C no. 28, with lit.
[32] Cf. Gal 3:28.

between slaves are not in any way to be prohibited. And if they are contracted in the face of the prohibition and unwillingness of their lords (*domini*), by no reason are they to be dissolved by the judgment of the church on this ground. They [the *servi*] ought, nonetheless, to render to their lords the customary services that they owe.

Condition. In the classical canon law the impediment of condition referred to two quite separate types of conditions. The first is the type involved in the previous paragraph, where one of the parties married in ignorance of the other's servile condition. The second is the situation where the parties made their consent conditional on the happening of some event: "I take thee to wife if my parents consent," or "I take thee to wife if your father will give me so much in dowry." The classical canon law ultimately came to the conclusion that such conditions did serve to suspend the binding effect of the marriage. If the condition was fulfilled, the parties were married automatically. They also were married automatically if they subsequently exchanged the words of present consent unconditionally or if they had intercourse. Further complexities were introduced if the condition was contrary to the nature of marriage or if it was shameful or disgraceful. The former type of condition voided the marriage; the latter did not void the marriage but was simply ignored.

Considerable academic attention was devoted to the problem of conditional marriage, and such discussion does help to explain how the academics regarded marriage.[33] In the practical realm of the decretals, however, particularly decretals in real cases, conditions were of less importance. For example, Alexander III's one decretal on conditional marriages involves a quite normal condition and one that was regarded as 'honest': "I will take you to wife if you give me so much as dowry." And Alexander's resolution of the problem anticipates, if it does not quite completely cover, the solution that the later law was to reach: "If someone takes an oath to a woman in this form of words: 'I will take you to wife if you give me so much money', he will not be regarded as guilty of perjury if he does not take her when she refuses to pay what he asked be given to him, unless present consent or sexual intercourse has followed subsequently."[34]

The classical law followed the ruling of this decretal. Gregory IX completed the classical law in a ruling that was probably made at the instance of Raymond of Peñafort:

If conditions contrary to the substance of matrimony are inserted, for example, if one says to the other 'I contract with you if you will avoid the generation of offspring', or 'until I find another woman more worthy in honor or wealth', or 'if you will hand yourself over to adultery for the sake of gain', the contract of matrimony, though it is favored [in the law], lacks effect. If, however, other conditions are imposed on a marriage, if they are disgraceful or impossible, they ought to taken, because of the favor [of matrimony], as if they had not been added.[35]

[33] See, most fully, Weigand, *Bedingte Eheschliessung*.
[34] X 4.5.3 (*Quia nos duxit. De illis. Si vero*, WH 808[b1, b2]), T&C no. 29.
[35] X 4.5.7 (*Si conditiones*), T&C no. 30.

Religious Impediments

Disparity of Cult. The impediments of disparity of cult, orders, and vow all had as their focus the maintenance of marriage as a secular relationship between Christians. As noted earlier, the classical law was firmly committed to the notion that a Christian could not marry a non-Christian. On heretics there was some hesitancy, but the ultimate resolution was that such marriages were valid, though illegitimate.[36]

Orders. Priests and deacons could not marry, and if they married, they must dismiss their wives, who were not their wives but concubines, do penance, and return to their clerical service.[37] So far as subdeacons were concerned, there was some hesitancy. Alexander III made various pronouncements on the topic. In one decretal he says quite plainly that they may not marry.[38] In another, he praises the bishop of Le Mans for having made a subdeacon abjure his wife, and says that if the subdeacon enters religion and behaves himself, he may be promoted to higher orders. If he does not wish to enter religion, he cannot function as a subdeacon or be promoted to higher orders, but he may function in minor orders.[39] In other decretals Alexander is more qualified about subdeacons.[40] The classical law suppressed Alexander's hesitancy about whether the order of the subdiaconate was a diriment impediment to marriage. It was, and the only issue was how to punish those clerics who did so marry. In this regard, the second decretal described here became the model, just as the first was taken for the statement of the basic rules.[41]

Vows. The classical canon law distinguished between simple vows and solemn vows. Only the latter were a diriment impediment to marriage. The converse of the proposition that one who has taken a solemn vow of chastity cannot marry is that one who is married cannot take a solemn vow of chastity, at least not without the consent of his or her spouse. The foundation of this proposition is the saying of St Paul, "the husband has no mastery over his body but the wife, and the wife has no mastery over her body but the husband."[42] Husband and wife are mutual debtors; each must perform the act of sexual intercourse when asked by the other. A vow of chastity taken without the consent of one's spouse is a unilateral repudiation of that obligation. This much was clear by the time that Alexander III wrote, but precisely what was to happen if one spouse, with the consent of the other, wished to espouse the religious life was not clear. Alexander did much to clarify it.

[36] Esmein, *Mariage*, 1:245. For the development of the impedient impediment of mixed religion, we must wait until the council of Trent. *Id*. 2:253–68.
[37] E.g., X 4.6.1 (Alexander III, *Consuluit. De diacono*, WH 188[cd]).
[38] *Ibid*.
[39] X 4.6.2 (*Ex literarum tuarum*, WH 416).
[40] Ref. T&C no. 31.
[41] X 4.6.2 (n. 39); X 4.6.1 (n. 37).
[42] 1 Cor 7:4.

In a decretal that may be part of, or connected with, the bull by which he established the Italian branch of the order of Crucifers, Alexander lays out rules on the topic:[43]

> You are in no way to receive a married man among you without the permission of his wife, who if she is of such honest *fama* and opinion that no suspicion may worthily be had that she wants to transfer to another husband or that she will not live continently, such woman, when her husband is received in your group, can, having publicly professed continence in the sight of the church, remain in her own house with her children and *familia*. If, however, she is such a person about whom suspicion is not lacking, she, having celebrated a vow of continence, should separate herself from the company of secular men and remain forever in a religious place where she may serve God.

Failure to follow these rules would invalidate the entry into religion, as a recently published decretal to the prior and brothers of Dunstable shows.[44] Walter of Odell had entered the priory when his life was despaired of. His wife consented, albeit reluctantly, but she thought he was about to die. She herself, however, did not enter religion, nor did she promise to do so. Walter did not die, and now his wife wants him back. The canons are to let him go, and if they refuse to do so, papal delegates will force them to do so.

Suppose that Walter's wife, having extracted him from the priory, now dies. Is Walter obliged to go back to the priory, or may he remarry? Such questions have been asked in law schools from the twelfth century to this day, but the situation actually arose in the diocese of Pisa, and the archbishop asked Alexander what to do about it. Alexander's reply is curious:[45]

> The vow [that the man took in the monastery] is not binding; hence by reason of the vow he is not obliged to return to the monastery. Further, however, he cannot take a wife. For he promised not to require the debt.[46] That was in his power, and therefore the vow binds thus far. Not to render the debt, however, was not in his power but in that of the woman. Whence, the Apostle says, 'The man does not have mastery over his body; likewise the woman', etc. [1 Cor. 7:4]

The logic of this decretal is not perfect. On the one hand, the vow that the man took in the monastery was not only a vow of continence; it almost certainly also involved a vow of obedience or 'conversion of manners'. That vow was suspended by the higher obligation that the man owed to his wife, but now that she is dead there is no reason why he cannot perform it. On the other hand, taking another wife is not necessarily inconsistent with a vow not to require the debt. Just as the man could be said to be unable to require the debt while his former wife was alive, so too he could be said to be permitted to marry but not to require the debt. The result, then, that Alexander reaches is more like a

[43] X 3.32.8 (*Ad petitionem. Uxoratus*, WH 84), T&C no. 32.
[44] *Decretales ineditae*, no. 63, p. 109 (*Ex parte S. mulieris*, WH 466).
[45] X 3.32.3 (*Quidam intravit*, WH 814), T&C no. 33.
[46] I.e., sexual intercourse. The canonists derived from 1 Cor 7:3 an obligation of spouses to have sexual intercourse with each other when asked.

compromise than one required by the strict logic either of the vows in question or the sayings of the Apostle.

Alexander's basic resolutions of the problem of what the canonists called 'conversion of married persons' were accepted by the classical law. Both the reasoning and the result in the Pisa case caused much debate,[47] and Urban III (1185–7) attempted to overrule it, requiring, in cases in which the man had remarried, that he be separated from his new wife and forced to return to the monastery.[48] This holding, however, simply provoked more discussion, and both decretals were included in the *Liber extra*.

Crime

The classical canon law recognized that crime was a diriment impediment to marriage in two situations: (1) Where a couple had committed adultery and one or both of them then conspired in the death or participated in the killing of the spouse of either or both of them, they could not marry after the death of the spouse. (2) Where a couple had committed adultery and had pledged faith to each other that they would marry, they could not marry after the death of the spouse or spouses of either or both of them. This latter impediment also applied to those who went through a form of marriage while spouses of one or both of them were alive, since such a form of marriage would almost invariably involve a pledge of faith.

To these basic rules, Alexander III added an important qualification, which was received in the classical law. In a decretal addressed to the abbot of St Albans,[49] Alexander dealt with the case of one O. who had gone through a form of marriage with an unnamed woman, who was unaware of the fact that O. was married to another woman and had had many children by her. Now his wife was dead, and O. wanted to leave the woman with whom he was living on the ground of the impediment of crime. Alexander did not hesitate:[50]

> Although we have it in the canons that no one should couple in marriage with a woman whom he previously polluted in adultery, and particularly with her to whom he pledged faith while his wife was alive or if she has conspired in the death of the wife (*vel quae machinata est in mortem uxoris*), because, nonetheless, the woman was ignorant that he had another living wife, and it is not fitting (*dignum*) that the man, who knowingly contravened the canons, should profit from his fraud, we respond thus to your consultation, that unless the woman asks for a divorce, they are not to be separated.[51]

Clement III (1187–91) may have entertained the idea of extending the impediment to any situation in which the couple knowingly committed adultery (without regard to whether there was machination in the death of the innocent spouse

[47] See glosses *ad* X 3.32.3, 3.32.9 (Venice 1572), pp. 745a–b, 747b–748a.
[48] X 3.32.9 (*Ex parte abbatis*).
[49] Lit. T&C no. 34.
[50] X 4.7.1 (*Singulorum. Propositum*, WH 989), T&C no. 35.
[51] Disc. T&C no. 36.

or a pledge of faith),[52] but Innocent III firmly held that simple adultery without pledge of faith was not enough to impede the subsequent marriage.[53] Gregory IX, at the request of Raymond of Peñafort, completed the classical law by holding that a married man's pledge of faith to another woman, unaccompanied by adultery, did not give rise to the impediment.[54]

The Problem of Incest

Medieval canon law on the topic of incest was extensive. It applied to those who were related by blood (consanguinity), by marriage (affinity), and by spiritual bonds, usually arising out of baptism (spiritual affinity). The tendency of the preclassical canon law was to expand the number of people who were forbidden to marry because of one kind of relationship or another. The causes of this tendency are still imperfectly understood, and the literature on the topic is large.[55] The tendency in the classical canon law was to reduce the number of such people by reducing the degrees of relationships within which marriages were forbidden, by reducing the kinds of relationships that gave rise to an impediment to marriage, by tightening the procedures by which such relationships could be proved, and by authorizing the pope to dispense from all but the closest degrees of relationship.[56]

Prior to Alexander III, the twelfth-century canonists had been largely engaged in collecting the sources and trying to determine precisely what the rules reflected in the mainstream sources were. This process did result in pruning from the authoritative materials some of the more extreme statements of the rules and in fixing a limit on the expansion. This process had resulted in the fixing of the limits of the prohibition at the sixth or seventh degree of consanguinity and the same degree for those who married into a consanguineous line (affinity). The computation of the degrees was by the canonic method, that is, by tracing the number of acts of generation back to a common ancestor (where the number was unequal, the longer was used for purposes of determining the prohibition). Hence, if the seventh degree was taken, the limit was reached with sixth cousins (fifth cousins once removed, fourth cousins twice removed, etc.).

Consanguinity. Alexander III's decretals on the topic of consanguinity can be regarded as having begun the trend to cut back on the reach of the impediment. These decretals may be laid out on a series of spectra: whether and how long the marriage had existed, how remote the degrees were, and how reliable the evidence of the consanguinity was. The longer that the marriage has gone

[52] X 4.7.5 (*Cum haberet*) (dictum).
[53] X 4.7.6 (*Significasti nobis*).
[54] X 4.7.8 (*Si quis uxore vivente*) (since the decretal is in the *Liber extra*, it dates from 1234 or before).
[55] See Ch 11.
[56] See Brundage, *Law, Sex*, 355–6.

unchallenged, the more remote the degrees, the less reliable the evidence, the more Alexander was likely to sustain the marriage.[57] Innocent III continued Alexander's practice.

The problem with this approach from a juridical point of view is that it makes decisions quite unpredictable. It all depends on the facts of the particular case. In the Fourth Lateran Council, Innocent III took a different approach. He reduced the prohibited degrees of consanguinity and affinity from six or seven to four, but insisted on strict observance of the rules as modified:

> We wish the prohibition to be perpetual, notwithstanding earlier decrees on this subject issued either by others or by us. If any persons dare to marry contrary to this prohibition, they shall not be protected by length of years, since the passage of time does not diminish sin but increases it, and the longer that faults hold the unfortunate soul in bondage the graver they are.[58]

This ruling made obsolete whatever had previously been said about consanguinity in the fifth degree and beyond. It also made obsolete Alexander's (and to some extent, Innocent's) carefully constructed spectrum of the length in which the marriage had gone unchallenged. It did not make obsolete what Alexander had said about separating *pendente lite* couples who had married in defiance of an interdict, nor what he had said about dispensing with the *ordo* in cases of notoriety, with the qualification that notoriety could hardly be had in cases not of the first or second degrees, and these are the only decretals of Alexander's on the topic of consanguinity that appear in the *Liber extra*.[59] Alexander's rulings in this area were more influential than their survival rate would suggest, however. The principle that Alexander established that the prohibition of intermarriage in the more remote degrees of consanguinity was a matter of human, not divine, law meant that parties could be dispensed to marry within these degrees. Popes continued to employ the dispensing power in the more remote degrees of consanguinity (fourth and third). Alexander had been the first to do so, at least extensively. Alexander's cautions about accepting the evidence of those who had an opportunity to object to a marriage and did not do so also found resonance in the later law, though here it was a decretal of Innocent III's on the topic that appeared in the *Liber extra*.[60] Finally, another decree of the Fourth Lateran Council set firm rules (which had been anticipated by both Alexander III and Innocent III) about who could be witnesses in cases of consanguinity (and affinity) and how they were to testify, with the effect of making proof in such cases more certain, but also more difficult.[61]

[57] Ref. T&C no. 37.
[58] 4 Lateran (1215), c. 50, in *Decrees of the Ecumenical Councils*, 1:257–8, T&C no. 38.
[59] X 4.16.3; X 4.19.3 (n. 57).
[60] X 4.18.6 (*Cum in tua. Si vero*).
[61] 4 Lateran (1215), c. 52, in *Decrees of the Ecumenical Councils*, 1:259, T&C no. 39.

Affinity. After the Fourth Lateran Council, the impediment of affinity applied only to those who were related within the fourth degree of consanguinity to the spouse of the affine. It also only applied to the person who had sexual relations with someone within the consanguineous line. The baroque variations of affinity that went under the names of affinity of the second type and affinity of the third type were abolished by the council.[62]

Alexander III faced early and often the problem that would later be called *affinitas per copulam illicitam*. A man and a woman have illicit sexual relations and one or the other or both of them later seek to marry a relative of the person with whom they have had sexual relations.[63] The problem was even more serious where the subsequent marriage had already taken place when the matter came to the attention of the church authorities and especially where the illicit intercourse occurred after the marriage had taken place. In these situations the ancient canons could be read to impose a penalty of perpetual continence on the affines who had sexual relations with each other ('the ancient incest penalty').

Of a number of conclusions that we might derive from Alexander's decretals on the topic, one seems relatively obvious and does not seem to have been noted before. Where he is dealing with an affinity that arises out of a legitimate marriage, Alexander requires that the impediment be observed up to the fourth degree (third cousins), to the extent that if a marriage has been formed within those degrees, it must be dissolved.[64] Beyond the fourth degree, he does not require dissolution, but he does not forbid it either. In the case, however, of affinity *per copulam illicitam*, he is reluctant to dissolve an already-existing marriage at all, and when he speaks of degrees, he speaks of the first, second, and, occasionally, the third. In cases of affinity *per copulam illicitam*, Alexander distinguishes between public and occult affinity. Dissolution is to take place only in the former case.[65] It is possible that Alexander, like some later theologians and canonists,[66] had doubts about whether an affinity by illicit intercourse really impeded the marriage or, at least, whether it did so *iure divino*.

If this is the path of Alexander's decretals on *affinitas per copulam illicitam*, then the canonists suppressed it. None of Alexander's decretals on the topic appear in the *Liber extra*, and very few of them appear in the *Compilatio prima*. The solution of the classical law went in a different direction. In the first place, the same canon of the Fourth Lateran Council that reduced the degrees of consanguinity to four also reduced the degrees of affinity. No distinction was drawn between *affinitas per copulam illicitam* and that arising out of a lawful marriage. Hence, so far as the degrees were concerned, the council's ruling

[62] Disc. T&C no. 40.
[63] Disc. T&C no. 41.
[64] Disc. T&C no. 42.
[65] Ref. T&C no. 43.
[66] See Thomas Aquinas, *Summa Theologiae* Supp. q. 65 art. 4; disc. T&C no. 44.

was consistent with those of Alexander in the case of affinity arising out of lawful marriage and considerably broadened the degrees in the case of *affinitas per copulam illicitam*. In the second place, Innocent III expressly overruled Alexander's holding that an unconsummated *de presenti* marriage could be dissolved by reason of supervenient affinity. In the classical law, only *sponsalia de futuro* could be dissolved by supervenient affinity, and here the dissolution was mandatory. Preexisting affinity, whether by licit or illicit intercourse, was a diriment impediment to marriage. Affinity that arose by illicit intercourse after the marriage subjected the guilty party to the ancient incest penalty, but for purposes of separation the incest was treated as an aggravated case of adultery. The innocent spouse had to ask for the separation, and if he or she did, he or she could not remarry while the guilty spouse lived.[67]

All of this would suggest that Alexander's distinction between public and occult incest was totally suppressed. Such is not the case, however. The classical canon law dealt only with the external forum. Dissolution of marriages because of preexisting affinity and the imposition of the ancient incest penalty for cases of subsequent affinity only occurred in situations in which both the illicit intercourse and the degree of relationship could be proved in open court. What was to be done in the case of secret incest revealed in the privacy of the confessional was a topic for writers of manuals for confessors. It is here that we see the greatest use of the distinction that Alexander had drawn between asking for the marital debt and rendering it when asked.

Spiritual Affinity. The problem of spiritual relationship had spawned a law that we suspect was out of all proportion to its practical import.[68] The problem was that the past had left a singularly obscure set of canons, and the popes were continually asked to resolve the issue. Although there was debate about what gave rise to a spiritual relationship, the first two 'species' of prohibition were clear enough: A spiritual parent (godfather, godmother) could not marry his or her spiritual child ('spiritual paternity'), and a spiritual parent could not marry the natural parent of his or her spiritual child (*compaternitas*, what we will call 'co-paternity'). The third species, 'spiritual fraternity', was the subject of considerably more controversy. "And it should be known," Tancred writes in his *Summa de matrimonio*:

> that at one time there were varying opinions, and divers laws came forth which said that the children of two co-parents could not marry each other, whether they were born before or after the co-paternity. Other laws said that only those born after the co-paternity could not marry. Passing over all of these, it is firmly and without any doubt to be held that all children of two co-parents, whether born before or after the co-paternity can lawfully join in marriage, except that person who gives rise to the co-paternity.[69]

[67] Ref. T&C no. 45.
[68] Lynch, *Godparents*, however, does point out how important spiritual relationship was in a somewhat earlier period.
[69] Tancred, *Summa de matrimonio* 21, p. 34, T&C no. 46.

Nor are co-parents forbidden from marrying the children of their co-parents, except for the child who gave rise to the co-paternity. There were further elaborations, but since none of our cases gives rise to them, we confine the discussion to the margin.[70]

Public Honesty. Affinity could not arise unless one of the potential marriage partners had had sexual intercourse (lawfully or unlawfully) with a blood relative of the other. But if one of the parties had contracted to marry a relative of the other, either as adults or before they had reached the age of puberty, the classical canon law recognized an impediment to their marrying each other, even though no true marriage had ever existed with the relative and even if there had never been sexual intercourse between them. It was thought scandalous, for example, for a man to marry the mother of his former fiancée. And because of this focus on scandal, the impediment was called the impediment of 'public honesty'.

The doctrine of the impediment of public honestly was somewhat modified by the Fourth Lateran Council, in that the degrees of the prohibition were reduced to four. Boniface VIII (1294–1303) determined that the impediment would arise even if the contract of marriage was null (for example, because the person with whom it was formed was impotent or in orders), so long as there was proper consent by someone of appropriate age, and so long as the contract was not subject to an unfulfilled condition.[71] The impediment remained throughout the classical period and beyond, although the degrees were radically reduced by the council of Trent.[72]

Impedient Impediments – The Problem of Clandestinity and Solemnity

The only impedient impediment that regularly came before the ecclesiastical courts was lack of solemnity, which the canonists treated as a branch of the impedient impediment of marriage against the interdict of the church.[73] Only two contemporary decretals appear in the *Liber extra* under the title "Concerning clandestine espousals."

The first is a reply of Alexander III to the bishop of Beauvais concerning whether "we [i.e., the pope] ought to issue a dispensation concerning clandestine marriages."[74] Alexander replies that no dispensation is necessary. If the parties to the occult marriage do not publish it, there is nothing that the church can do about it (*non sunt aliquatenus compellendi*). The church does not judge about things that are hidden.[75] Further, if the parties do publish the marriage

[70] Disc. T&C no. 47.
[71] IV 4.1.1 (*Ex sponsalibus*). This is one of the few advances in marriage doctrine that we find in the later books of the *Corpus Iuris Canonici*.
[72] See Esmein, *Mariage*, 1:159–64 and 2:95–8 (on Trent).
[73] Disc. T&C no. 48.
[74] X 4.3.2 (*Quod nobis ex tua parte*, WH 819[a]), T&C no. 49.
[75] *Ecclesia de occultis non iudicat*, disc. T&C no. 50.

(and no impediment appears), the marriage is valid *nunc pro tunc*. Alexander then spells out the obvious implications of this ruling for the legitimacy of the children of the marriage – that they are legitimate.[76]

The second, a canon of the Fourth Lateran Council, takes a considerably less relaxed attitude toward clandestine marriages.[77] The proper way to get married, the council declared, is publicly after the proclamation of banns. Any priest who participates in a marriage where banns have not been proclaimed is to be suspended from office.[78] The council did not prescribe the 'suitable penance' (*condigna penitentia*) for the parties to such a marriage (other than the loss of the benefits of putative marriage,[79] not technically a penance), nor did it invalidate such marriages. They were illegitimate, but they were still marriages. The importance of this last qualification for our understanding of the classical law of marriage cannot be overstated. Marriages are made by the consent of the parties, or, in the case of future consent, their consent plus intercourse. The church could, and did, strongly encourage parties to publicize their marriages in advance of the event. This way the church could ensure that the parties were truly capable of marriage, and difficult problems of proof might be avoided. But neither Alexander nor any of his successors until the council of Trent took the step of invalidating such marriages.

It was left to the local churches to deal with the problem of clandestinity. For example, the prohibition of clandestine marriage and the concomitant requirement of the publication of banns was repeated, sometimes in the form of the canon of the council of Westminster of 1200,[80] sometimes in the form of the canon of the Lateran Council, and sometimes in a locally composed form, in more than 30 pieces of English conciliar legislation and episcopal decrees between 1200 and 1342.[81] None, however, excommunicated automatically the parties to such a marriage.[82] The only *ipso facto* excommunications in the English canons are for those who knowing of an impediment have their marriages solemnized nonetheless, and for clergymen who participated in marriages of persons who were not their parishioners without obtaining the requisite license or who participated in marriages not in a parish church.[83] Simply getting married at home, however, was not an offense for which the parties incurred *ipso facto* excommunication, whatever other sanctions might have been imposed for engaging in such behavior.[84]

[76] Disc. T&C no. 51.
[77] 4 Lateran (1215), c. 51, in *Decrees of the Ecumenical Councils*, 1:258, T&C no. 52.
[78] Lit. T&C no. 53.
[79] See at n. 113.
[80] Ref. in T&C no. 52.
[81] See Sheehan, "Marriage and Family in Legislation"; *id*., "Marriage Theory and Practice in Legislation."
[82] Disc. T&C no. 54.
[83] London (1342), c. 11, in Wilkins, *Concilia*, 2:707; cf. Lyndwood, *Provinciale*, 4.3.[2], p. 275–7.
[84] See Donahue, "Canon Law and Social Practice," at 154 and sources cited. We will return to the English legislation in Ch 6.

Modern analysis of local French ecclesiastical legislation is just beginning, but enough has been done that we can see that in at least some dioceses, the French went further. Beginning with the synodal statutes ascribed to Eudes de Sully, bishop of Paris from 1196 to 1208,[85] French bishops not only required the promulgation of banns and the contracting of marriage publicly in the face of the church in the presence of the parish priest and witnesses, but also automatically excommunicated those who contracted marriage otherwise. A provision imposing the same sanction for the same offense is found in the synodal statutes of Guillaume de Seignelay, bishop of Paris from 1219 to 1224.[86] The sanction was being repeated in Parisian diocesan statutes as late as 1515.[87] Other French dioceses had similar legislation.[88]

DIVORCE

As we have already in part intimated, the classical canon law allowed divorce with permission to remarry (*divortium quoad vinculum*) of a consummated marriage only in the situation were there was a diriment impediment to the marriage. This divorce corresponded to what today we call 'annulment'. Divorce without permission to remarry so long as both partners were alive (*divortium quoad thorum*), what we today call 'separation', was allowed in the case of the adultery of one of the parties, and, perhaps, in other cases as well. At the beginning of the thirteenth century, the law was not clear about what other grounds for separation there might be.[89] The case of the unconsummated present-consent marriage was more complicated, as we have already seen, but the classical law allowed its dissolution, at least officially, only in the case where one of the parties entered the religious life. The basic principles of indissolubility and separation in the case of adultery were well established by the beginning of the thirteenth century, as was the proposition that no divorce, of either type, could take place without the judgment of the church. This meant, at a minimum in the case of a marriage that was public, that the public forum of the church had to be petitioned, and it is to the process in that forum that we must now turn.

PROCEDURE IN MARRIAGE CASES

Before we consider the rules of procedure, a word is in order about the courts themselves. By the middle of the thirteenth century virtually every bishop had a regularly sitting court, normally presided over by an officer called an official. These courts had their own clerks and records, and they normally had a group

[85] Statutes of Eudes de Sully, bishop of Paris (1196–1208), c. [98], in *Statuts synodaux français I*, p. 89; cf. *id.*, c. [85], in *id.*, p. 85.
[86] c. [13], *id.*, 101.
[87] Pommeray, *L'officialité archidiaconale de Paris*, 320.
[88] Ref. T&C no. 55.
[89] We outline the later developments in Ch 10, at nn. 11–20.

of lawyers attached to them, who functioned as proctors and advocates for the parties in instance cases, and as promotors (prosecutors) and defense lawyers in office cases. Below the level of the episcopal courts, there were, in many if not all dioceses, courts of lesser ecclesiastical officers; archdeacons were among the most common. Archidiaconal courts were, at least notionally, courts of limited jurisdiction, and appeal lay from them to the court of the bishop. Appeal lay from the court of the bishop to that of the metropolitan (archbishop) and from there to the pope. At the beginning of the thirteenth century, this structure was far less formal. Episcopal courts tended to be *ad hoc* bodies. Officials, though they existed, were not full-time, or almost full-time, judges of the courts, and the courts of papal judges delegate played a more important role than they did in the latter half of the thirteenth century, and certainly than they did in the later medieval centuries.

This development of a court structure had considerable implications for the practical effect of the canon law on the lives of ordinary medieval men and women, the concern of later chapters in this book. Ecclesiastical justice was available in the late twelfth and early thirteenth centuries, but it was less regularly available than it was in the second half of the thirteenth century and beyond. The procedure, however, by which these informal courts operated and by which the more formal courts of the later period operated was largely the same, the creation of the twelfth and early thirteenth centuries. We may therefore outline the procedural rules given in the Tancredian-Raymondian *Summa* and still be stating the rules that were in effect, with some variations in local practice, in the fourteenth and fifteenth centuries.[90]

Tancred was a specialist in procedure; he also had a genius for clear presentation of procedural law. We would expect much of his treatment of marriage processes, and we will not be disappointed. This part of the *Summa de matrimonio*, however, posed considerable problems of organization and presentation. Marriage process followed the Romano-canonical 'course of judicial process' (*ordo iudiciarius*), normally adopting those special rules, where they existed, that applied to 'spiritual' as opposed to civil or criminal cases.[91] To summarize, then, what one needed to know about marriage processes would involve summarizing the whole *ordo*, and Tancred had another book that did that. On the other hand, if Tancred simply listed those procedural rules that were peculiar to marriage processes, he would have ended up with a grab bag of miscellaneous rules that would have been quite unintelligible to someone who was not deeply familiar with the contents of the *ordo*. Tancred's compromise was to assume some familiarity with the overall contents of the *ordo*. He offers a brief summary of the *ordo* as it applies to marriage cases (tit. 33), an outline of the rules special to marriage cases about who may bring a case and who may be

[90] For a fuller, but eminently readable, introduction to the topic of this section, see Brundage, *Canon Law*, 120–53.

[91] Tancred uses these terms, so I will, but when we come to the procedures actually followed by the courts, 'instance' and 'office' describe them better.

a witness (tit. 34), a special section on procedure in cases of separation from bed and board on the ground of adultery (tit. 35), and more than an outline of the process of receiving, examining, publishing, and reproving witnesses, with special references to marriage cases (tit. 36–7).

We begin (tit. 33) with a division of marriage cases based on what the plaintiff (*actor*) is trying to achieve.[92] Some cases seek the joining of parties; some seek their disjunction or separation. The latter type of cases may be divided into those that seek full divorce, such that the parties may both marry others, as in the case of claimed frigidity, and those that seek a partial divorce, insofar as the mutual servitude of the carnal debt or cohabitation is concerned, but in such a way that neither party may marry another, as in the case of adultery or entry into religion (after consummation). The distinction between cases of matrimony and cases of divorce was to become fundamental in classifying cases in the ecclesiastical courts, though, as we shall see, an intermediate category developed, at least in some courts, that of cases of matrimony and divorce, in which the plaintiff sued a supposedly married couple seeking their divorce and marriage to one of them. Tancred's distinction between 'full' and 'partial' divorce came to be reflected in the terms 'divorce as to the bond' and 'divorce as to board and bed' (*divortium quoad vinculum* and *divortium quoad mensam et thorum*). Again as we shall see, some courts developed a lesser category of separation, separation of goods, which technically left the 'mutual debt of carnal servitude' intact.

If a woman claims a man, or vice versa, Tancred tells us (tit. 33), she ought to offer a libel, even though the custom of some churches is to the contrary. The practice of presenting the libel is, however, "better and more honest" because the defendant ought to be certain what is being asked of him or her.[93] Further, as we have just seen, there is an important legal difference (*obtinet de iure*) whether someone is claiming a woman as a *sponsa de futuro*, a *sponsa de presenti*, or a wife already known (*uxor iam cognita*), and so the libel ought to specify this.[94]

The libel also should specify, Tancred continues, whether the plaintiff is bringing a petitory or a possessory action. This importation from the law of property is at first glance startling (though Tancred does say that the petitory action is brought "as if she were making a claim about ownership" [*quasi agat de proprietate*]). Tancred insists upon the distinction, however, and it is fundamental to his understanding of procedure in marriage cases. Either the woman is claiming that the man "has contracted with her and asks that he should be adjudged her husband" (the petitory action) or "she asks that he be restored to her, as one who has been unjustly cast out by him whom she says is her husband" (the possessory action).[95]

[92] Tancred, *Summa de matrimonio* 33, pp. 71–8.
[93] *Id.*, pp. 71–2; text and disc. T&C no. 56.
[94] *Id.*, p. 72, T&C no. 57.
[95] *Ibid.*, text and disc. T&C no. 58.

The distinctions between the two types of actions were substantial. If the action is a petitory action, Tancred tells us, and the defendant objects ('excepts') that the marriage cannot proceed because they are consanguine, the exception should be heard before the petition, because if the exception prevails that is the end of the case. In the possessory action, however, the exception will not be heard until restitution (of conjugal rights) has been made. Among other authorities, we are told, Innocent III expressly made this distinction.[96] All the plaintiff has to do is prove that she was "in possession" (*in possessione*) (of her husband? of the marriage?) and that she was deprived of possession by her husband without the process of law (*sine iuris ordine*).[97] If she does this, she is entitled to restitution forthwith, unless she can be shown to have deprived herself of her right. (Tancred is here thinking of a case of a wife who lived in open adultery with another man.)[98]

Restoration without the exception being heard (*sine aliqua exceptione*) is not granted if (1) the exception is that the woman has engaged in public and manifest fornication; (2) the exception is one of consanguinity "prohibited by divine law,"[99] and for which proof is readily at hand;[100] (3) the exception is one of *res iudicata*, or (4) the man is seeking restoration, and there are reasonable grounds for fearing for the safety of the woman. (Even here, we later learn, restitution should be made if suitable arrangements can be made for the woman's safety, which is to be done, at least in some cases, by the man's taking an oath, or offering a pledge, or a surety.) Finally, as in the case of all possessory actions, failure in the possessory action does not preclude bringing a petitory action, but failure in a petitory action precludes a possessory action.

The distinction between petitory and possessory actions, though it had a somewhat checkered history in practice, as we shall see, is an important one here. The papal decretals (particularly Alexander's decretals) show considerable reluctance to dissolve long-term marriages and to overturn previous judgments upholding the validity of a marriage. The validity or invalidity of a marriage, however, was an absolute concept. An invalid marriage could not be made valid by having existed for a long time. Hence, the reluctance to upset the existing order had to be expressed in procedural rather than substantive terms. One could not say that a marriage became valid by prescription, but the system could, and did, give procedural advantages to the person asserting the validity of the existing order. One way of achieving this was to put the burden of proof on the person asserting the invalidity of the existing order. If, for example, a husband asserting the invalidity of his existing marriage took the law into his own hands and simply dismissed his wife, the wife could, at least under normal

[96] Citing X 2.13.13 (*Literas tuas*).
[97] Tancred, *Summa de matrimonio* 33, pp. 74–5.
[98] Citing C.32 q.1 c.5.
[99] *in divina lege prohibita*. In this context this may mean consanguinity in the fourth and lower degrees. See X 2.13.13 (n. 96).
[100] In this case all other things are restored except (the right) to sexual intercourse.

circumstances, be restored to him simply by showing the fact of the existing marriage, and thus force her husband to undertake the burden of proving its invalidity.

Tancred is disappointingly vague about when a person becomes 'possessed' of his or her marriage, but simply 'contracting' the marriage (here probably meant in the sense of exchanging words *de presenti*) was not enough. Such a person must bring the petitory action and discharge the burden of proof. In all probability Tancred would have regarded a couple that lived together and had had intercourse as being 'possessed' of their marriage. Whether one element but not the other would suffice he does not say. Nonetheless, it is hard not to see here a procedural reflection of the older notion, found for example in Gratian's *Decreta*, that marriages are not 'perfected' simply by the exchange of consent.

The remainder of title 33 deals with the steps of the procedure up to the examination of the witnesses. The offer of the libel, Tancred tells us, is followed by a delay for deliberation.[101] The parties then return and take the oath to tell the truth. (Tancred insists on this, though he admits that the oath against calumny is not taken in spiritual cases.) The oath either precedes or follows the *litis contestatio*, the formal joinder of issue. This is followed by the interrogation of the parties. The process, as Tancred conceives of it, should take place in the presence of the judge and both of the parties. (He concedes that the church of Bologna follows the practice of examining the parties separately, as if they were witnesses, but he regards the practice as improper, a violation of the principle that all judgments require three persons, the plaintiff, the defendant, and the judge.) Each party, or his advocate, or the judge is to pose questions of the other party relevant to establishing the case. The party is to answer on his own, without the counsel of his advocate, though he may seek a delay if he is not sure how to answer it. The process of the parties' putting questions to each other, known in later practice as 'making positions', will be found in the documents that we will examine in later chapters.

Sometimes at this point one or both parties will confess, and these confessions will be determinative of the case unless they prejudice the marriage at stake in the case or that of some third party. This statement of the rule neatly combines the principles of the law that marriages are to be favored and that the confession of two parties cannot prejudice the rights of a third. Hence, parties could confess themselves into a marriage if the rights of third parties were not at stake, but they could not confess themselves out of a marriage. To dissolve a marriage or to obtain a judgment affecting a third party, they needed proof independent of their confessions.

The law about accusers of matrimony (tit. 34), that is, those who could bring an action to dissolve a marriage, was complicated.[102] A canon of dubious origins but ascribed to the early Roman pope Fabian held that only relatives could accuse a marriage of invalidity. Only if there were no relatives could others

[101] Tancred, *Summa de matrimonio* 33, pp. 76–8.
[102] *Id*. 34, pp. 78–85.

be admitted to the accusation.[103] The context of the canon strongly suggests that the only accusation of which it was speaking was the accusation that the marriage was invalid because of consanguinity or affinity. The justification later developed for the rule was that relatives know best what the degree of relationship is,[104] and the canon continued to be recited for the proposition that, unlike the situation in other cases, in consanguinity cases relatives were not only admissible witnesses but also the preferred witnesses. Tancred recites the rule excluding non-relatives from testifying when relatives were available, but then admits that perhaps as a matter of custom, in many places extraneous persons could be admitted, even if there were relatives who could accuse. After Tancred, we hear little of this rule of exclusion.

There were a number of rules disqualifying accusations on the ground of what might broadly be called estoppel. Someone who knew of an impediment and when questioned about it said nothing would not later be heard to raise the objection. Further, someone who was present in the diocese when the banns were proclaimed and who did not object to the marriage would not later be admitted as an accuser. This rule became particularly important after the Fourth Lateran Council generalized the custom of proclaiming the banns, and an elaborate body of law developed that attempted to define what would be an appropriate excuse for failing to object to the banns. Finally, an accuser should not be admitted who was shown to be bringing the accusation for nefarious motives, such as private hatred or financial gain.

Tancred continues by describing how an accusation of matrimony is to proceed. His effort is one of integrating something that had developed as a separate type of proceeding into the mainstream of Romano-canonical procedure. In the first place, he tells us, the word *accusatio* is improper; it should be called a denunciation (*denunciatio*) of a marriage, placing it, apparently, in the category of 'evangelical denunciations', a procedure ultimately derived from Matthew's gospel (18:15–18). Tancred argues that the denunciation should be in writing, like a libel, though he concedes that sometimes it is not. It should precisely specify the impediment complained of and a copy should be provided to the couple accused so that they could prepare their defense. The case is then to proceed along the lines of a standard procedure outlined previously.

Finally, Tancred tells us that the formal procedure that he has just outlined only applies to a marriage that has already been contracted, the same phrase that he uses to distinguish petitory from possessory cases. Before the marriage has been contracted, the denunciation can proceed without full proof. For this proposition he cites decretals of Alexander III and Urban III, both of which deal with the difficult-to-prove impediment of affinity by illicit intercourse.[105]

Proceedings to separate a marriage on the ground of adultery (tit. 35), Tancred tells us, are properly called 'accusations', because a crime is being

[103] C.35 q.6 c.1.
[104] See X 4.18.3 (Clement III, *Videtur nobis*).
[105] Ref. T&C no. 59.

alleged.[106] Nonetheless, the proceeding differs from the normal criminal proceeding in that if separation is sought, only the husband or wife can bring the case. Some people had argued that no libel of accusation should be offered in such cases, because in the ecclesiastical court, unlike the secular court, the plaintiff in a case of separation for adultery was not bound to commit him- or herself to the penalty of the talion if he or she failed in the proceeding. That the talion does not apply in ecclesiastical separation cases is obvious enough to Tancred; if it did, the accuser would get what he or she wanted, separation, whether the case was won or lost. But Tancred insists on the formal libel, and he lays out a form, designed for use by the provost of Gurk, the person to whom the treatise is addressed and dedicated.[107]

The right to dismiss a spouse for adultery was strictly limited. Tancred tells us that it does not apply if (1) the accuser has also committed adultery; (2) the husband has prostituted his wife; (3) she believed him dead and married another (though she must return to him if he returns); (4) she was known secretly by a man whom she believed to be her husband; (5) she was raped; (6) they were reconciled after the adultery, and (7) there have been divorces and remarriages while the couple were infidels, and both are converted. In this last situation, Tancred says, they must return to the original marriage, adding that the situation rarely occurs.

Finally, Tancred notes that once a separation has been granted, if the person to whom the separation has been granted does not live continently, he or she is to be compelled to return to the original spouse. The support for this is a decretal, probably of Clement III, which the summary tells us "can be cited all the time" (*multum allegabilis*).[108]

Tancred's two titles on witnesses (tits. 36–7) are largely derived from small treatises that he wrote on parts of the *ordo* and which were later combined in his well-known *Ordo iudiciarius*.[109] The rules are important for understanding medieval marriage litigation, though they are, for the most part, not peculiar to marriage cases.[110]

The form Tancred gives for the admission, examination, and reprover of witnesses is part of the standard overall form for the course of judgment in Romano-canonic civil procedure. After the joinder of issue (*litis contestatio*), the plaintiff is assigned a number of terms (three was standard; a fourth was given as an exceptional matter) to produce witnesses to discharge his burden of proof on his case in chief.

Once produced, the witnesses are to take an oath to tell the whole truth and to tell the truth for both parties. They are also to swear that they do not come

[106] Tancred, *Summa de matrimonio* 35, pp. 85–90.
[107] *Id*., pp. 86–7. The date is given as 17 November 1210, giving us a *terminus a quo* for the treatise.
[108] X 4.19.5 (*Ex literis tuis*); disc. T&C no. 60.
[109] Tancred, *Summa de matrimonio* 36–7, pp. 91–104; cf. *id*., *Ordo iudiciarius* 3.6–13, pp. 222–48.
[110] Ref. T&C no. 61.

to bear testimony for a price or out of friendship, or for private hate, or for any benefit they might receive. After they have taken the oath, the witnesses are to be examined separately and in secret, after the manner of Daniel's questioning of the elders.

When all the witnesses have been examined, the parties are to renounce further production of witnesses. The witnesses' depositions will then be published by the notary who has written them down. The defendant now has an opportunity to except to the testimony of the witnesses. He may except to their persons, if he has reserved the right to do so when they are produced, or he may seek to demonstrate that their testimony is false in some respect.

The proceduralists like Tancred not only outlined the form by which witnesses were to be admitted, examined, and reproved; they also elaborated some basic principles of their system of proof by witnesses. At the core of that system are three propositions: (1) The character of each witness is to be examined; certain witnesses are not to be heard because of their status, and the testimony of others is to be regarded as suspicious because of their status or mores or their relationship to one or the other of the parties. (2) Witnesses are to be examined carefully to determine if they are telling the truth about events they saw and heard themselves. (3) On the basis of the written depositions and what has been demonstrated about the character of the witnesses, the judge is to determine whether the standard of proof fixed by law has been met.

As a general matter, Tancred tells us, two witnesses make a full proof.[111] But not everyone may be a witness. Slaves, women (in certain circumstances), those below the age of 14, the insane, the infamous, paupers (though Tancred has some doubts about this), and infidels may not be witnesses. Criminals may not be witnesses. No one may be a witness in his own cause. Judges, advocates, and executors may not be witnesses in cases in which they have performed their official duties. Children may not testify on behalf of their parents or parents on behalf of their children, with certain exceptions. Familiars and domestics of the producing party and those who are enemies of the party against whom they are produced may not be witnesses. This is all summed up in another set of mnemonic verses:[112]

> Condition and gender, age and discretion
> Fame and fortune and troth
> If these aren't found in the *testes*
> You should, to admit 'em, be loath.

Witnesses are to be questioned, Tancred continues, about all the details of what they have seen and heard, for only then can it be determined whether they are consistent. They are to be asked about the matter, the people, the place, the

[111] What was required for full proof (*probatio plena*) was complicated and somewhat controversial. It is best dealt with where it arises, e.g., Ch 5, at n. 48; Ch 9, at nn. 50–2.

[112] *Conditio, sexus, aetas, discretio, fama / Et fortuna, fides, in testibus ista requires*. Tancred, *Summa de matrimonio* 37, p. 99.

time, perhaps even what the weather was like, what the people were wearing, who was consul, and so on. In only a few instances, such as computing the degrees in incest cases, is hearsay testimony to be accepted.

If a witness contradicts himself, Tancred concludes, then his testimony should be rejected. If the witnesses agree, and their *dicta* seem to conform to the nature of the case, then their *dicta* are to be followed. If the witnesses on one side disagree among themselves, then the judge must believe those statements that best fit the nature of the matter at hand and that are least suspicious. If the witnesses on one side conflict with those on the other, then the judge ought to attempt to reconcile their statements if he can. If he cannot, then he ought to follow those more trustworthy – the freeborn rather than the freedman, the older rather than the younger, the man of more honorable estate rather than the inferior, the noble rather than the ignoble, the man rather than the woman. Further, the truth-teller is to be believed rather than the liar, the man of pure life rather than the man who lives in vice, the rich man rather than the poor, anyone rather than he who is a great friend of the person for whom he testifies or an enemy of him against whom he testifies. If the witnesses are all of the same dignity, then the judge should stand with the side that has the greatest number of witnesses. If they are of the same number and dignity, then absolve the defendant. The basic principle, then, is that the burden of proof rests on the one who is asserting the proposition (*onus probandi incumbit ei qui dicit*).

SECULAR CONSEQUENCES OF MARRIAGE

Legitimacy

Tancred's section on legitimacy is short but important.[113] The basic proposition about legitimacy in canon law and in civil (Roman) law was that legitimate children were those who were born of a valid marriage. Granted the rules about what made a valid marriage, this meant that a marriage lacking solemnities could, nonetheless, produce legitimate children. The church had also added, as Roman law had not, the notion of what was called, although Tancred does not use the term, 'putative marriage'. If a couple married publicly and believed their marriage to be valid, their children would be legitimate, even if it later turned out that the marriage was invalid. As we have seen, an important provision of canon 51 of the Fourth Lateran Council denied the benefit of putative marriage to those who did not follow the formal requirements of the statute (basically, public proclamation of the banns).

The rules of putative marriage required that at least one of the couple believe in good faith in the validity of the marriage. If both of them had guilty consciences (*laesam conscientiam*) and knowingly married against the canons, their children were bastards. Much decretal law was devoted to this topic.

[113] *Id*. 38, pp. 104–7.

Tancred offers a fourfold division among children, derived in part from Roman law, and elaborated by the glossators. Children are either (1) natural and legitimate (those procreated in lawful marriage), (2) natural and not legitimate (those born of a concubine or fornication between two unmarried persons), (3) legitimate and not natural (adopted), and (4) not legitimate and not natural, that is 'spurious' (those born of [knowing] incest or adultery). The distinction was important because in canon law (secular law had more doubts), natural children could be legitimated by the subsequent marriage of their parents, but spurious children could not. Innocent III's famous decretal *Per venerabilem* had asserted that the papacy had the power to legitimate even spurious children.[114] Tancred proceeds to elaborate on the various methods of legitimating children in the civil law, but closes with the note that the civil law does not have a method for legitimating spurious children.

Marital Property

Tancred's treatment of marital property is skimpy.[115] He apologizes for this at the end, though he says enough about it that we can get some idea of what his concepts were. He asserts at the beginning of the section that matters concerning marital property belong to the ecclesiastical judge as accessory to marriage cases. He seems to be thinking principally of the proposition that when an ecclesiastical judge grants a divorce, he should also make a decree about the restoration of marital property. He mentions a custom in Bologna that judges will not deal with a divorce case unless the man posts security that he will restore the woman's dowry if the divorce is granted.[116]

On this relatively narrow base, the classical canon law built quite a bit. Urban III authorized the dean and chapter of Lisieux both to order the restoration of *dos* and to supervise the division of community property incident to a divorce.[117] Clement III chastised a papal judge delegate for not ordering restoration of the *dos* when he pronounced a divorce for consanguinity between a couple. The return of the *dos* is 'incident' to the main cause, and jurisdiction over it is 'accessory' to the jurisdiction over the main cause.[118] The same pope also pronounced that a woman separated from her husband for adultery lost her dowry (the Roman-law rule).[119] Innocent III ordered the restoration of a husband's *donatio propter nuptias* when the wife's retention of it was impeding the dissolution of a marriage that Innocent regarded as incestuous.[120] Both Innocent and Gregory IX made rulings that tended to equate canonical marital property with that of the *ius commune* and hence of Roman law.[121]

[114] X 4.17.13.
[115] Tancred, *Summa de matrimonio* 39, pp. 107–11.
[116] Disc. T&C no. 62.
[117] X 4.20.2 (*Significavit P.*). Granted where we are, the *dos* here may be dower rather than dowry.
[118] X 4.20.3 (*De prudentia vestra*).
[119] X 4.20.4 (*Plerumque*).
[120] X 4.20.5 (*Etsi necesse sit*).
[121] Ref. T&C no. 63.

CONCLUSION

We have just sketched what seems to be a complicated body of law, and indeed it is. Before we look at how it was used, we should ask the question whether on an *a priori* basis it is possible to make some guesses as to which portions of it are likely to have been socially significant and which not. In order to do so we will have to make some broad assumptions about the nature of medieval marriage as a social institution, assumptions that we will later have to question but that find support in the current literature. We will also anticipate some of the findings that are supported more fully later.

It took far more space to describe the basic rules about impediments than it did to describe the basic rules about marriage formation (and in the former case, we, in many cases, only skimmed the surface), so one's first reaction might be that it would be the rules about impediments that gave rise to the most controversy and confusion. Simply explaining these rules to a population, the vast majority of whom could not read, would have been a formidable task, and unless this population had already absorbed these rules and made them customary by the beginning of the thirteenth century (and all the evidence suggests that it had not), we might imagine that enforcement of the rules about impediments would be difficult and disputes about them common.

We are going to discover that this last, by and large, was not the case. True, instances of violation of the rules about impediments and disputes about all but the most arcane of them can be found, but those were not the issues to which most ecclesiastical courts that heard a large number of marriage cases (and we will see that not all did) devoted most of their time.

Knowing that fact we can go back to the rules to try to discern if there is anything about the rules themselves and about the institutional structures that were designed to apply them that makes this fundamental finding less surprising than it might at first seem. In the case of the impediments that we broadly described as 'vices of consent', a group of rules dealing both with physical and mental capacity to consent and with defective or incomplete (conditional) consent, there is something about the rules themselves that suggests why disputes about them might be uncommon – they were all waivable. In some cases the waivability was built into the statement of the rule. A person who claimed to have been forced into a marriage could not obtain dissolution of that marriage if he or she later freely consented to it, and consent would be presumed, at least in some statements of the rule, after a year's cohabitation. Subsequent consent without defect would also waive the impediments of insanity, error, expressed condition, and nonage, and sexual intercourse had by the couple after the impediment was removed gave rise to a *de iure* presumption of consent.

In some cases, the waivability, even if not normally stated as part of the rule or only partially stated, lay in the nature of the impediment itself. If a couple who could not have sexual intercourse continued to cohabit and neither complained about the inability of the other, no one would be the wiser for it. (While it is hard to imagine this happening with a younger couple, it is quite possible to imagine it with an older couple.) The practical waivability of

this impediment was reinforced by the rule that stated that if a person who was capable of having sexual intercourse knowingly married someone who was not, the marriage could not be dissolved. It was further reinforced by the doctrine, of uncertain scope, but which certainly applied to this impediment, that the only person who could 'accuse' a marriage of certain kinds of invalidity was one of the marriage partners. (Limitation of the accusers to the marriage partners was probably also the rule in the case of the other impediments that we labeled as 'vices of consent'.)

The impediment of crime was also waivable by the innocent spouse, if there was one. In this case, the accusers were probably not limited to the marriage partners themselves,[122] but the innocent spouse could block dissolution of the marriage (though he or she could not block the imposition of penalties on the guilty spouse).

That leaves the religious impediments, those that were formed around the incest taboo, and prior bond (*ligamen*), all of which were emphatically not waivable and all of which could be the subject of public accusation. Prior bond did give rise to a considerable amount of litigation, both office and instance. That litigation, as we might expect, frequently raised fundamental issues about marriage formation. We will have occasion in Chapter 11 to ask why it is that the elaborate set of rules about incest did not, so far as we can tell in the present state of our knowledge, give rise to many disputes. So far as the religious impediments are concerned, we can only offer some speculation here as to why we do not find more disputes about them.

In the case of the impediment of disparity of cult, our surviving records are from areas in which there were not many non-Christians, except, in some areas and in some periods, for Jews. Jews, like Christians, were endogamous by law, and Jewish communities in the West tended to be endogamous in practice. Canon law demanded the conversion to Christianity of the proposed Jewish marriage partner of a Christian; Jewish law, as I understand it, demanded the reverse. Each community regarded conversion to the other as apostasy. Intermarriage certainly did occur, both legally according to one or another set of laws, and illegally, and the problems to which it gave rise were discussed academically. It did not, however, leave any records that we have been able to find in the church courts.[123]

The impediments of vows and of orders did give rise to some cases and disputes. That they did not give rise to many is probably the product of both the fact that the vows had to be solemn (and hence relatively easy to prove, though there were disputes about the nature of them) and the fact that the conferral of orders was normally, from the thirteenth century on, recorded (and, hence again, relatively easy to prove). The insistence on the celibacy of those in major orders cannot be firmly dated before the eleventh century. There is evidence that it was not totally accepted in the twelfth century. By the thirteenth century,

[122] Disc. T&C no. 64.
[123] Disc. T&C no. 65.

it does seem to have been accepted at least as a matter of principle. Hence, the rather large number of prosecutions of those in major orders that we find in the thirteenth and later centuries are prosecutions for what is described as clerical concubinage. Whether all the clerics and their partners regarded their relationship as no better than concubinage is hard to know, but so far as the church courts were concerned, the issue was one of prosecuting a form of aggravated fornication, not one of dealing with a potential marriage.

That brings us back then to the basic rules about marriage formation. We have already seen that there was considerable ambiguity in the formulation of the rules about what constituted present and what future consent, an ambiguity heightened by the difficulties of translation from the vernaculars in which the words of consent were normally spoken into Latin. Further, in the Introduction we suggested that perhaps the most striking thing about the rules about marriage formation was not what they required but what they did not require. How did people behave under a body of rules that said that a couple could get married by an informal exchange of present consent without solemnity or ceremony of any sort and without obtaining the consent of anyone else or by an equally informal exchange of future consent followed by sexual intercourse? It is to that question that much of the rest of this book will be devoted.

In closing this chapter, we should emphasize another point that has not been featured in the chapter because its origins and most of its development lie before the period to which this chapter has been devoted. From the point of view of comparative law, perhaps the most striking feature of the medieval canon law of marriage is not the fact that it allowed the formation of marriage with relatively little formality; it is the fact that marriages, whether formed formally or informally, were indissoluble so long as both parties lived. Jewish law, Roman law, and Greek law, to take three possible antecedents of the Christian law of the Middle Ages, all allowed divorce relatively freely. That some marriages simply do not work out seems to be a virtually universal phenomenon, even in societies like those of the Middle Ages where there were strong economic and social pressures holding couples together and where shorter life spans ensured that in many cases 'so long as both parties lived' might not be very long. We would expect, and we will find, that there was a curious interplay between the rules about marriage formation and those about marriage dissolution. To put the matter more bluntly, the formal unavailability of a mechanism to dissolve a properly formed marriage put pressure on those seeking to dissolve a marriage to find in its formation reasons why it was not validly formed. It also put pressure on the courts to find a way to separate, if they could not dissolve, couples whose marriages had proved hopeless.

2

Lying Witnesses and Social Reality

Four English Marriage Cases in the High Middle Ages

Let us depart from the law as stated and ask about the law as applied. Our sources for this are annoyingly incomplete, nothing like what they are, for example, for the English central royal courts, but we do have substantial pieces of the picture, runs of records from various courts in various places at various times. The four cases I have chosen as examples are all typical of English marriage-formation cases. They differ from those on the Continent in ways that we will come to in later chapters. They differ from most of the other English cases only in that these examples have left particularly full records.

DOLLING C SMITH

In our first case, Alice Dolling appeared in the consistory court of Salisbury on 10 July 1271, claiming that William Smith was her husband.[1] William denied the charge, and Alice was told to produce her witnesses before the rural dean of Amesbury (Wilts). In September, the depositions of her three witnesses were published in open court. In October, William confessed that he had had intercourse with Alice but denied that he had married her. He claimed that he had been in another town on the St Stephen's day (26 December), almost three years previously, the day on which Alice alleged that they exchanged the words of marital consent in Winterbourne Stoke (Wilts). The dean of Amesbury was to examine William's 10 witnesses. In December, Alice answered William's claim with four witnesses who alleged that William had indeed been in Winterbourne Stoke on that St Stephen's day. After William's depositions had been published, the official asked him to produce his witnesses again, but he said that he could not, citing what seem to be formulaic excuses. In May of 1272, the official rendered sentence for Alice declaring that William was her lawful husband. William appealed to the court of Canterbury, the metropolitical court.

[1] *Dolling c Smith* (10.vii.1271 to 31.x.1272), *Select Canterbury Cases*, 127–37, discussed in Donahue, "Proof by Witnesses," 147–8, 151–2, 153–5.

The three sets of depositions are included in the record (*processus*) made up for the appeal: Alice first produces three witnesses, all women. The first testifies that on 26 December two years previously, she was present in the house of one John le Ankere in Winterbourne Stoke at nightfall, in front of the bed that she and Alice shared. William and Alice were sitting, probably on a bench in front of the bed. He was dressed in a black tunic of Irish homespun with an overtunic and hood of russet; she was dressed in a white tunic with a blue hood and wore shoes with laces. William took her by the hand and said: "I William shall have thee (*habebo te*) Alice as wife so long as we both shall live and to this I pledge thee my troth." Alice replied: "And I Alice shall have thee as husband and to this I pledge thee my troth."[2] Asked why William had come there, she says to have carnal knowledge of Alice if he could. Asked if she had ever seen them having intercourse, she says no, but she did see them naked in the same bed. The second witness, calling herself the sister of the first, basically agrees with the first's testimony, though she says that William's tunic, overtunic, and hood were all gray. She never saw them lying together. The third witness has a slightly different version of the words exchanged: William said: "I William take thee (*accipio te*) Alice as my wife if holy church allow it, and to this I pledge thee my troth." She said: "I Alice shall have thee (*habebo te*) as husband and shall hold thee (*tenebo te*) as my husband."[3]

William's 10 witnesses, all men, tell a different story. William was in Bulford, four miles away, on St Stephen's day two years previously. They give a vivid description of an all-day ale feast, held by the parish guild. William was serving at the feast and could not possibly have been in Winterbourne Stoke that day.

Alice's four replication witnesses, all women, say that they saw William in Winterbourne Stoke that day, where he is described as leading around a crowd of women or going hand in hand with a woman.

What are we to make of all this? In the first place, someone was clearly lying.[4] William could not have been at Winterbourne Stoke exchanging consent with Alice and continuously attending an all-day guild feast at Bulford, four miles away, at the same time. Two of Alice's witnesses on the principal case and one of her replication witnesses seem to have been related to her: They were probably her half sisters. The witnesses on the principal case are not completely clear about what words were exchanged: Two of them seem to testify to *verba de futuro*, one of them to *verba de presenti*, at least on William's part – but the tense of the verbs should make no difference when intercourse is conceded. The three sets of witnesses are not completely certain about their dates, though this may be the result of scribal error rather than any confusion on the witnesses' part.

Now none of the observations made in the preceding paragraph is new. In fact, they are all made in a remarkable document that survives from the

[2] *Select Canterbury Cases*, 129, T&C no. 66.
[3] *Id*., 130, T&C no. 67.
[4] As Helmholz, *Marriage Litigation*, 157, points out with regard to exceptions of absence generally, citing a number of other examples.

case on appeal.[5] The judge of the provincial court of Canterbury asked the examiners of the court to look at the *processus* transmitted by the Salisbury court and evaluate it for him. They committed their evaluation to parchment, and this has survived. In the end the examiners suggest that there are too many inconsistencies in Alice's story, and failing all else, 10 witnesses are better than 7. The judge of the provincial court seems to have agreed; he reversed the decision of the official of Salisbury.

There are many cases like this from all levels of the English ecclesiastical courts that have left records and from all periods in the Middle Ages.[6] Indeed, such cases continue after the Reformation. It was not until 1753 that the English finally came to invalidate clandestine marriages.[7] Can we draw any social conclusions from such cases?

I think we can. Even though we will never know what William Smith was doing on 26 December 1268, we do know that most liars do not make things up out of nothing. William may not have been at a guild feast in Bulford that day, but feasts like that took place. The witnesses would not have been able to describe it so vividly if it was not within their experience. Similarly, William and Alice may never have exchanged words of matrimonial consent before the bed in the house in which she was probably a servant, but people did such things. If they did not, the testimony would not have convinced the official of Salisbury.

Further, a hundred years after Alexander III's decisions on the topic of the formation of marriage, news of them had reached Winterbourne Stoke. The women seem to have had a good idea of what it is that Alice and William should have been saying in order for Alice to have a case. Whether they knew that in Alice's case it made no difference whether the words were of present or future tense is harder to know. If any exchange took place, I suspect it was a future one. William's confession of intercourse comes after the publication of the depositions. Before the confession the witnesses could not have known that Alice did not need to prove intercourse in order to make out her case. It is probably not by chance that the one witness who testifies, admittedly somewhat ambiguously, to words of the present tense is also the one who says nothing about intercourse.

As soon as we realize, however, that the witnesses know what it is that they have to say – and this knowledge, not surprisingly, seems to increase as the Middle Ages go on – we are faced with a problem: Can we ever be sure that the witnesses are telling anything like what really happened? To put the problem more bluntly, it seems highly likely that William's witnesses were lying. The official of Salisbury asked him to produce them again. It seems inconceivable that all 10 of them were either dead or had left the province on a pilgrimage or for some other necessity, and this is what William claims. It seems far more likely that having gotten them to lie before the dean, he could not

[5] *Select Canterbury Cases*, 134–6.
[6] See Helmholz, *Marriage Litigation*, passim.
[7] Lord Hardwicke's Marriage Act, 26 Geo. 2, c. 33 (1753).

persuade them to come to Salisbury and lie before the bishop's official. But what we have said here suggests that William's witnesses may not be the only ones who were lying. We can have no confidence in the veracity of Alice's witnesses either. What we have, then, may be a charade, and the historical record, dramatic as it is, is not completely credible evidence of the veracity of either the claim or the defense.

Can we say anything about what happened in Winterbourne Stoke? Not much with certainty, but we can offer some speculation. William seems to have been something of a local Don Juan. The women all suggest this, and William himself admits that he had intercourse with Alice. Now Don Juan was a member of the nobility. William was certainly no nobleman, but he had enough money to go to Canterbury to get his case reversed. Alice never appeared at Canterbury, and the testimony does not suggest that she was of particularly high station. The details will always escape us, but the whole affair has an aura of sexual politics about it. It looks as if the women of Winterbourne decided that William ought to marry Alice. There may have been more than just sexual relations between them; there was probably less than what her witnesses say. By contrast, William's alibi seems to be a lie, pure and simple. I suspect that the official of Salisbury knew all this, too. There was no third party involved, no reason why William could not marry Alice, and he had had intercourse with her. What the official could not do was put together a record that was proof against appeal, at least when Alice did not appear to defend herself at Canterbury.

MERTON C MIDELTON

The second case comes from about a century later.[8] On 15 April 1365, Marjorie (Margery) de Merton appeared before the official of York seeking that Thomas de Midelton, chapman of Beverley, be adjudged her husband. The official interrogated Thomas, who confessed that he had had intercourse with Marjorie, but he denied that they had ever exchanged words of consent. The official then delegated the hearing of the case to Mr Adam of York, who was the precentor of York cathedral and official of the archdeacon of Richmond.[9] Marjorie's case before Adam rested essentially on two allegations: (1) that in his brother Richard's house in Beverley on the afternoon of 5 January 1364, Thomas had promised to marry Marjorie and that they had had sexual intercourse that night, and (2) that Thomas had confessed in the decanal chapter of Beverley around Michaelmas in the same year that he had promised to marry Marjorie and that sexual intercourse had followed. Witnesses were heard on both these allegations at the end of May; a further deposition of Mr Ralph Waleys, the vicar of the dean of Beverley who had heard the case in the decanal chapter, was received in July. At the end of July, Thomas excepted to the persons

[8] *Merton c Midelton* (1365–7), CP.E.102. For the absence of references to particular documents within the file, see Notes About This Book, n. 2.

[9] Ref. T&C no. 68.

of Marjorie's witnesses; after the summer holiday at the end of September, he excepted that he was absent from Beverley on 5 January 1364; at the end of October, he excepted again, this time that the confession that he had made before Mr Ralph was not made with the intent of contracting marriage. Depositions on Thomas's exceptions were not taken until the middle of November, and they focused on the characters of Marjorie's witnesses and on the events in the decanal chapter of Beverley. In January of 1366, Adam of York interrogated Marjorie, and she stuck by her story. In March, Adam rendered sentence for Marjorie.

In April of 1366, Thomas appealed from Adam's sentence to the official of York. In his appeal he renewed all the substantive exceptions that he had made before Mr Adam. At this point the chronology becomes obscure. It would seem that almost a year passed. In March of 1367, testimony was finally received from Thomas's witnesses. They testified to his absence from Beverley and his presence in Middleton on 5 January three years previously. One deposition on behalf of Marjorie followed in the beginning of April. At the end of July, the official rendered a confirmatory sentence on behalf of Marjorie. Thomas appealed to the Apostolic See, an appeal that he may have pursued, because a *processus* seems to have been made up for purposes of the appeal, but no further record in the case has been found.

All the depositions have survived, and once more they are of some interest. Two women testify on Marjorie's articles in the principal case. They both describe events in Richard of Middleton's house, and their testimony is quite consistent: Thomas asked Marjorie why she was pursuing him before the court of the dean of Beverley; he promised to marry her after Easter; he offered her money in recompense for the litigation expenses that she had already incurred, and they spent the night together: "a man alone with a woman alone, a naked man with a naked woman, in one bed."[10] In the same depositions, three men testify about the events before Mr Ralph in the decanal chapter. The first, Thomas de Raventhorp, the apparitor of the court, states that he had cited Thomas and Marjorie for fornication. They both confessed the intercourse, and, under oath, Marjorie confessed a *de futuro* contract. Thomas had refused to take an oath but confessed that he had promised to marry Marjorie and that he had had intercourse with her after the promise. Later, privately, Thomas confessed the promise again, and banns were proclaimed between them. The other two men are more circumspect. According to them, Thomas had confessed that he promised to marry Marjorie if she behaved herself properly, and intercourse had followed. Following this confession, Mr Ralph declared them married and that banns should be proclaimed. These witnesses say nothing about any private confession of Thomas's.

Thomas's five witnesses before Mr Adam, all men, tell a quite different story. Two of them suggest that Marjorie's female witnesses were of bad reputation, both of them having been guilty of sexual offenses. All five men testify about

[10] *solus cum sola, nudus cum nuda in uno lecto*. Ref. T&C no. 69.

the events in the decanal chapter. In their view, Thomas de Raventhorp and Mr Ralph were trying to get both Marjorie and Thomas to confess that a marriage had taken place. After some hesitancy Marjorie confessed that it had, but all that Thomas said was that he had once told her in bed that she could behave herself in such a way that he would marry her.

Thomas's witnesses on appeal are even more striking. They tell a vivid story of Thomas's presence in Middleton on 5 January 1364. One witness had been with him most of the day. They went to mass together in the morning and spent most of the day drinking in various public houses where Thomas was trying to collect debts owed him and to make more sales. The witness remembers the events because he and Thomas had quarreled that day about the price of three ells of cloth that Thomas had sold him. Coming from the mill the next morning, the witness saw Thomas heading off for Beverley. Thomas's servant was riding a horse and carrying a sack of merchandise; Thomas was driving before him another horse loaded with merchandise. Altogether, six witnesses confirm various parts of Thomas's story.

Marjorie produces only one witness on appeal, Richard of Middleton's wife, and she testifies against Marjorie. According to Richard's wife, Thomas was not present at her house in Beverley on 5 January 1364.

Again, the question is whether we can make anything at all out of this. As in the case of *Dolling c Smith*, someone is clearly lying. Thomas could not have been at Beverley and in Middleton on the same day in 1364. Also, as in the case of *Dolling c Smith*, neither set of witnesses inspires much confidence. The two women who testify on Marjorie's behalf are of lower station, are clearly Marjorie's supporters, and could even have been bribed. The men of Middleton who testify on Thomas's behalf are his fellow townsmen, and there are not so many of them that they too could not have been corrupted. It is especially suspicious that it takes Thomas almost two years to produce them, enough time carefully to fabricate a story.

As in the case of *Dolling c Smith*, too, while the precise events of 5 January 1364 may never be known, the witnesses are testifying to things that are close to their experience. Thomas may not have spent 5 January 1364 visiting the pubs of Middleton, but chapmen did spend January days doing just that, and the witness's description of Thomas, his servant, and the horses conjures up a picture out of a fourteenth-century miniature. Similarly, the events at the house of Richard of Middleton may never have happened, but things like this did happen. Marjorie was Thomas's mistress; everyone concedes this. She probably hoped that he would marry her someday. Men in Thomas's position worried about prosecution before the lower-level church courts. They made vague promises of marriage, and some of them, like Thomas, got caught.

What distinguishes this case from *Dolling c Smith* is the role of the decanal court and its personnel. In *Dolling*, it is the women of Winterbourne Stoke who get together, if our speculations are correct, and decide that William should marry Alice. Here, there is a strong suggestion that the apparitor and commissary of the decanal court of Beverley made the decision and sought to shape

the events to ensure that it happened. Again, we may never know precisely what Thomas said in the decanal chapter (just as we may never know what his real objections to marrying Marjorie were), but the fact that even Marjorie's witnesses, with the exception of the apparitor and the commissary, testify to a considerably more ambiguous confession than do the apparitor and the commissary suggests that Thomas's version of the story may be at least as accurate as Marjorie's. The truth may lie someplace in between.

INGOLY C MIDELTON, ESYNGWALD AND WRIGHT

The third case, the simplest in terms of the surviving documentation, also comes from the consistory of York, about 60 years after *Merton c Midelton*.[11] In March of 1430, Joan Ingoly of Bishopthorpe, wife of John Midelton, sued her husband, Robert Esyngwald of Poppleton, and his wife Ellen Wright, alleging that neither her marriage to John nor Robert's to Ellen could stand because she and Robert had exchanged words of present consent before either her marriage to John or Robert's to Ellen. Witnesses on her articles were heard in April. At the beginning of July, the commissary general rendered sentence declaring both *de facto* marriages null and that Robert and Joan were husband and wife. John's proctor appealed to the Apostolic See, but a week later the official formally refused to grant dimissory letters (*apostoli*),[12] and the case disappears from view.

The depositions have survived, and they are of some interest. Two witnesses testify solely to the marriage of John and Joan, which took place in the presence of a priest in the parish of St Margaret's Walmgate, York, on 25 November 1414. Three witnesses testify to the marriage of Robert and Ellen, which took place in the presence of a priest in Poppleton chapel, on 25 May 1410. The two witnesses to Robert and Joan's informal marriage, Robert and Alice Dalton, are husband and wife; Alice is Joan's sister. They testify that on 22 July 1408, or perhaps it was 1409, Robert Esyngwald and Joan had contracted marriage in the high street of Upper Poppleton, at the end of the garden of one Thomas del Leys. Robert Dalton testifies that they both used the same form of words: "I will have you as wife/husband and to this I give you my troth." Alice has a slightly different version of Robert's words, "I will have thee and take (*conducere*) thee as wife and to this I pledge thee my troth."[13] Both agree that Robert held Joan by the right hand; after the words were exchanged they joined hands and kissed. Both Robert Dalton and Alice were in service when the marriage of Robert Esyngwald and Ellen took place, and both denied knowing anything about it until after it happened. Although Alice was present at Joan and John's wedding in St Margaret's Walmgate, she said nothing because she believed that Robert's earlier marriage to Ellen had been authorized by letters from the

[11] *Ingoly c Midelton, Esyngwald and Wright* (1430), CP.F.201; lit. T&C no. 70.
[12] See disc., n. 18.
[13] *Ibid*., T&C no. 71.

archbishop. Robert Dalton alleges the same belief and adds that he believed that reclaiming against the banns of Joan and John would have had no effect because the marriage of Robert and Ellen had been solemnized "many years" previously.[14]

Unlike *Dolling c Smith* and *Merton c Midelton*, there is no necessary reason why any of the witnesses in this case needs be lying. The two solemnized marriages almost certainly happened much as described, and the informal marriage could have happened as well. Certainly there is no reason to doubt the main outlines of the witnesses' stories of their lives. Their terms of service in York are with identifiable people, and the story of their lives is typical of the 'middling sort' of people in this period and well beyond.[15] Young people in service, required by the custom of their society to postpone marriage, frequently slept together and sometimes – often enough to produce a number of surviving cases – exchanged words importing some form of marital consent.[16] It is thus possible that Robert and Joan had some sort of relationship during their period of service, a relationship that led them to exchange words that might be regarded as words of marital consent.

What I find hard to believe, however, is that this story was anything like as straightforward as the record makes it out to be. In the first place, the Daltons' alibis for failing to come forward when Robert and Ellen were married look highly suspicious. Robert Dalton says that he spent the six or seven weeks preceding and following the marriage on his master's service in Lincoln diocese; Alice simply alleges that she was in service in York and so knew nothing about a marriage in Poppleton. Poppleton is only three miles northwest of York, and Alice came from there. It is hard to believe that she did not hear of the impending marriage, and if she really thought that Robert Esyngwald had married her sister, one wonders why she did not do anything about it when he married someone else. One possible explanation is that Joan may have decided that she was well enough rid of Robert Esyngwald, in which case one wonders why 21 years later she changed her mind. It seems more likely that nothing had occurred between Robert and Joan, or that what had occurred was not so clear as the witnesses make it out to be. The story of the rumors about letters from the archbishop is also hard to believe. Not that rumors like this did not circulate, but once it was clear that the letters did not exist, the failure of Robert and Alice to take any action calls for more of an explanation than the examiner demanded of them. Indeed, the examiner's questioning is remarkably lax. Other than asking why Robert and Alice had allowed the other two marriages to go ahead, he does little cross-examining. He does not inquire into the circumstances of the events in Upper Poppleton, the clothes the parties wore, the weather, and so on. Nor does he ask what the two witnesses did when they finally did find out about the conflicting marriages. He fails to ask the most obvious question: Granted

[14] Text and disc. T&C no. 72.
[15] Ref. T&C no. 73.
[16] See Goldberg, "Marriage, Migration, Servanthood and Life-Cycle"; *id*., *Women, Work*.

that you did not know about the other marriage at the time it took place, why have you remained silent for 19 years?

If this case raises so many doubts, why does it leave such a simple record? Even taking the record on its face, there are difficulties. As R. H. Helmholz has pointed out,[17] Alice's version of the words that Robert spoke go right to the edge of what the canonists and the courts would take as words of the present tense, and no one testifies to sexual intercourse. Yet the judge does not interrogate the parties; no exceptions are filed to the witnesses; the case goes forward without a hitch; it is so straightforward that *apostoli* are denied.

Perhaps a different explanation fits the evidence better: If we assume that this is not a contested case, much of what seems to be incomprehensible becomes comprehensible. Three defendants, represented by the best proctors of the day in the York court, present no defense to a weak case. Could it be that they presented no defense because this was the result that all of them wanted? This is certainly the case with Robert Esyngwald, because the *acta* in the case indicate that he admitted the facts in Joan's libel from the very beginning.[18]

But what of the personnel of the court? If the parties to the case were in some sense abusing the process of the court in order to obtain a consent judgment, why did the proctors and the judge allow this to happen, particularly when it involved the dissolution of two marriages of long standing? Surely, they knew, or suspected, that the defendants were not pursuing the case very vigorously. Even if all the parties to the case had consented to the judgment, the court personnel should have been concerned about the bond of the sacrament of marriage and about the potential scandal that the case might cause. My explanation for why the court allowed this to happen so easily is simple, if somewhat shocking: One of the defendants in the case, the reader will recall, was named Robert Esyngwald; his proctor was also named Robert Esyngwald, and the judge in the case was named Roger Esyngwald. My suggestion is, then, that the court personnel were complicitous in what was happening.

The name Esyngwald derives from the small town, now spelled 'Easingwold', 12 miles northwest of York. At least 13 men named Easingwold (with various spellings) appear in the court and city records of York in the first decades of the fifteenth century.[19] The cluster of men with this name in the York records in this period, coupled with their relative absence from earlier and later periods, suggests that many or most of our Easingwolds are connected. Blood relationship is demonstrable or probable in a number of cases. In other cases the connection is more likely to be geographical. Not that all of them came from Easingwold (Robert, the defendant in our case, may well have been born in Poppleton), but the fact that they bore the same toponym suggests relatively recent origins in Easingwold. This in turn would probably have led men named Easingwold

[17] *Marriage Litigation*, 32; cf. *id*., 64–5.
[18] Cons.AB 3, fol 60v; disc. T&C no. 74.
[19] The proctor and the judge in this case are well known. The defendant may be Robert, a tailor, who obtained the freedom of the city in 1423. Ref. T&C no. 75.

to patronize younger men with the same origin. It is certainly not pure chance that the commissary general and one of the proctors in our case both bore the same name. Nicholas Easingwold in the previous generation of proctors almost certainly passed on his practice to Robert, although he does not seem to have been his father, and he may have been the father of Roger, the commissary general.[20] John Easingwold, a moneymaker at the archbishop's mint, benefited from the patronage of Roger Easingwold, the commissary general.[21] Similarly, it is probably not by chance that Robert Easingwold the tailor, and perhaps the defendant in our case, was enrolled as a freeman of the city in the same year that Thomas Easingwold was the mayor. Hence, it is also probably not pure chance that Robert Easingwold, the putative tailor, is able to discard his wife of 19 years and marry another who has been another man's wife for 16 in a case in which another Robert Easingwold serves as his proctor and a Roger Easingwold is the judge. It is more plausible that something like this could have happened when we learn that the archbishop (John Kempe, who had been in office for only four years) was the chancellor of England and probably not paying much attention to what was going on in his court at York. We might even speculate that there is a connection between this case, and the scandal that it may have caused, and the fact that shortly after this time, Easingwolds disappear not only from positions of prominence in the court of York but also from positions of prominence in the city.

Now what does all this have to do with Alexander III and with the principles and policies that seem to have guided his decisions? Clearly, the connection is not simple and direct. On the one hand, we probably should avoid the conclusion that Alexander's decisions had no social effect at all. They clearly affected the parties in all three cases, and there are dozens of cases like them. On the other hand, there is the obvious problem of writing social history from a police blotter. We have hundreds of medieval marriage cases in various states of preservation, but there were millions of medieval marriages, and the litigated ones are not only a small sample but also a highly biased sample of the whole group. A skeptic would say that all we can know from these cases is that when people got to court, Alexander's rules were applied to whatever facts the parties chose to present. What went on outside of court cannot be known from the court records.

The cases do, however, give us some evidence that we can use to tell a story that might otherwise not be told: First, people did seem to know what the rules were. Informal marriages were valid, if not approved; no one's consent other than that of the parties was necessary for a valid marriage. Quite clearly, some of the people in some of the cases are making use of Alexander's rules to escape from the pressure of families and lords. It does not seem too far-fetched to suggest that others did the same, even though they produced no cases that left a record.

[20] See T&C no. 75.

[21] He calls him *magister meus* in his will and leaves him a small legacy. *Testamenta Eboracensia II*, 16.

Second, because people knew what the rules were, they knew what they had to say in order to achieve the desired result in court. In some cases we may suspect lying, pure and simple. In many cases – and the marriages described in all three of our cases may be examples – what the witnesses testify to may represent more shading of what happened than outright lies. That the witnesses did this, and that they seem to have done it quite frequently, may suggest not so much corruption, though there is some evidence of that, as it does that the witnesses shaded their testimony in order to produce a result that they believed to be a just one. This, in turn, could not have happened regularly without the tacit approval of the court personnel. Such approval was forthcoming in the case of the official of Salisbury in *Dolling c Smith* and of the York consistory in *Ingoly c Midelton*. It was not in *Merton c Midelton*, where the personnel of the decanal court take a much more active role in shaping the proceedings, using the ambiguities of the law and the facts to force what they seemed to have believed to be a proper result. The judgment of the personnel of the decanal court in this case was apparently shared by those of the York consistory. Nor was approval forthcoming from the appellate court in *Dolling c Smith*, where the personnel of the appellate court, divorced from the situation of the parties and the underlying facts, behaved much more like academic lawyers.

What causes the courts sometimes to accept the results that the parties and witnesses are urging them to accept and sometimes to reject them is a complicated question, the answer to which is highly problematical. Suffice it to say here that the result in the Salisbury court in *Dolling* and in the York consistory in *Ingoly* is more typical of the results in English medieval marriage cases than is that on appeal in *Dolling* or, with qualifications, that in both courts in *Merton*.

Third, as Michael Sheehan has noted, the attitudes toward marriage reflected in these court records are extraordinarily individualistic. Though there are cases in which people are clearly escaping from the pressure of families and lords, they pale in comparison with the number of cases in which families and lords are no place to be found. This is surprising only if one reads other types of sources about medieval marriage where the role of the choice of others than the parties seems to tell the whole story. There are two possible conclusions: Either all the cases that we are looking at are cases of runaway marriages, Romeo and Juliet run rampant, which seems unlikely, or the model of marriage that we get from other sources, manor records, charters, and literary evidence needs modification in the light of what the church court records seem to suggest was a wider practice than that prevailing among the people who ended up litigating.

This individualism, however, has limits. Where the couple are agreed and will stick to their story, the larger society is, by and large, forced to accept their judgment. Even here, however, the couple need some support, at least two witnesses, if the rights of third parties are at stake. Where the couple cannot agree, however (and not surprisingly most litigated cases are of this type), then the wider society has a role to play. The wider society may be a social group, like the women of Winterbourne Stoke, who chose to support Alice against William, or it may be an official group, like the personnel of the decanal court of Beverley,

who seem to have played a considerable role in encouraging Marjorie to bring her case, and perhaps even in telling her what she ought to say.

TIRYNGTON C MORYZ

Our last case is laden with ambiguity. It will serve in some ways to confirm the conclusions at which we tentatively arrived with the first three, but it will also expose us, in a way more dramatic than the others, to the difficulties of drawing even tentative social conclusions from legal records.

In June of 1367, Walter de Tiryngton (Terrington) of Tadcaster in the West Riding of Yorkshire sued Agnes daughter of William Moryz (Morice), his *de facto* wife, before the official of the archdeacon of York.[22] He claimed that their marriage of 15 (or perhaps it was 13) years should be dissolved on the ground that Agnes had precontracted marriage with one Henry Littester 16 years previously.[23] Agnes conceded each element in the complaint. The official appointed a special commissary before whom testimony was taken.[24]

Walter offers two witnesses to the precontract, Agnes's maternal aunt and her husband, Matilda and William Sturgis, who testify that around Michaelmas "two years after the first pestilence," they were present in the house of Richard Hare in Wilstrop where Henry and Agnes contracted marriage "at the procuration" of the two witnesses.[25] Henry says (I translate here from the Latin into the probable Middle English): "Ik taa thee her Agnes til wife if haaly kirk it suffer and to that ik plight thee my trauth."[26] And he took her by the right hand, and she said the same. William says that he remembers the time because around that time he and Matilda had moved into the house in which they now live. He and his wife toted up the years, and it will be 16 years next Michaelmas. Henry is still living in Wetherby, and William knows this because he saw him many times in the last quarter.[27] William cannot testify whether the couple had sexual intercourse but says that they confessed it.

Matilda agrees with William in all things, with the following additions: She had spoken with Henry in Tadcaster on the previous feast of John the Baptist (24 June). On the question of intercourse, she says that on the day of the contract, she saw Henry and Agnes lie together *nudus cum nuda, solus cum sola, in uno lecto*.[28]

The third witness, Agnes Payge, does not testify directly about the contract between Agnes and Henry. Rather, she testifies to the solemnization of the marriage between Agnes and Walter in the parish church of Tadcaster around

[22] *Tiryngton c Moryz* (1367–8), CP.E.95, disc. T&C no. 76.
[23] Disc. T&C no. 77.
[24] Disc. T&C no. 78.
[25] T&C no. 79. Wilstrop, Yorks, North Riding, is 2 mi. northwest of Long Marston.
[26] T&C no. 80. I am grateful to Nicholas Watson for help with the dialect.
[27] Reading *et hoc bene scit quia vidit dictum Henricum pluries infra quarterium anni ultimo preteriti*. Wetherby, Yorks, West Riding, is 14 mi. west of York.
[28] See text and n. 10.

24 June, 15 years previously. She recalls the time because her daughter Joan was 2 at the time, and Joan is now 17, and because around that time Joan's father went to Berwick where he was captured and imprisoned for two and a half years. The witness, too, had seen Henry in Tadcaster the previous 24 June, and she had heard Agnes say many times before the present litigation that she had precontracted with Henry and that he knew her before the solemnization with Walter, to which she was "craftily induced" (*contumeliose inducta*) by her aunt, Matilda Sturgis.[29] In addition, "[the witness] believes that the articles are true because there was never a good life between Walter and Agnes from the time the marriage was solemnized between them, but they were always quarrelling with each other, and she frequently took off and separated herself from his company (*consortium*) and had children by another man, as was said."[30]

On the basis of this testimony and Agnes's confession, the special commissary of the archdeacon rendered sentence for Walter.[31]

In the following autumn, Agnes sued Walter in the consistory court of the archbishop of York, alleging that Walter had abandoned her without cause.[32] Walter excepted to these proceedings on the basis of the judgment of the commissary of the archdeacon's official and introduced the documents from the lower court.[33] In May of the following year, Walter was back in the consistory court, petitioning again for divorce. At this point the documentation in the case ceases, with a notice on the back of the last petition that the case is pending.

We are dealing here with three propositions of law: First, if Agnes exchanged words of present consent with Henry before she married Walter, then her marriage to Walter was bigamous and void. It makes no difference whether Henry was still alive at the time of the suit, so long as he was alive at the time of the marriage between Walter and Agnes, though the fact that he is still alive now means that Agnes and Walter cannot set things right by marrying now.[34] It also makes no difference whether Agnes and Henry had intercourse or that they did not solemnize their marriage. If the marriage between Agnes and Henry was one of the present tense and can be proved by two independent witnesses, the marriage of Walter and Agnes is void.

Second, the words that Agnes and Henry are alleged to have exchanged are words of the present tense. Indeed, the formula that they use is so common in cases involving informal marriages that we might imagine that many men and women in late medieval Yorkshire had it memorized. There is, however, one potential ambiguity in the formula "if haaly kirk it suffer," *si sancta ecclesia hoc permittat*. This might be taken as making the marriage conditional on the permission of the church, one that would come about, for example, with the

[29] Text and disc. T&C no. 81.
[30] T&C no. 82.
[31] Disc. T&C no. 83.
[32] Disc. and lit. T&C no. 84.
[33] See at n. 47.
[34] Disc. T&C no. 85.

proclamation of the banns. That is not the only way of taking the phrase, but if it be so taken, then the fact that Agnes and Henry had intercourse would be deemed to have waived the condition. Hence, testimony is introduced about intercourse.

Third, there is another reason for the testimony about intercourse: As we have already noted, what counted as words of the present tense and what of the future was a matter of some controversy. If, however, the words of consent, be they present or future, were followed by sexual intercourse, then an indissoluble marriage had occurred without regard to the tense of the verbs. The standard allegation of a marriage in the pleadings in the York court in this period, as it was in this case, was to allege that X and Y "by words expressing their mutual present consent and/or by espousals by words of the future tense followed by sexual intercourse between them contracted marriage lawfully."[35] Whatever testimony came in, then, all the bases were covered.

These facts, however, pose a problem for the historian trying to reconstruct events from litigation records. They pose a particular problem for the historian trying to see in depositions medieval people telling stories about their lives. It is not only that the narrative is being reported by a clerk who is interested only in what is legally relevant and who is writing in a language that is normally not the language that the witnesses are speaking; it is also that most of the witnesses in the church courts of late medieval York have a very good idea what it is that they have to say in order for the party who produced them to have a case. If the law requires, or recommends, *hic accipio te in uxorem meam* or *maritum meum* as words to create a *de presenti* marriage, then the witness will say that what the parties said was "ik taa thee her Agnes *or* Harry til wife *or* husbonde." And if the witness cannot quite say that she saw them having intercourse, she will say "ik saw them bare-ersed in bedde, and ye wit what cam after," and the clerk will solemnly write down that the witness saw them *solus cum sola, nudus cum nuda, in eodem lecto*.

So in this case as in the preceding cases, if we are to use depositions as sources of narrative about medieval people's lives, the first thing that we should look to are the details that are not legally relevant, to the details that will not affect the outcome of the case. Witnesses were normally required to support their statements about when a particular event happened. They do so, quite frequently, by tying it into an event in their lives. I have little doubt that William and Matilda did indeed move into a new house in the autumn of 1351, and this move may well be connected to the disruption caused by the 'first pestilence' of 1348–9, to which William refers at the beginning of his deposition. More mysterious, but more intriguing, is Agnes Payge's reference to her daughter Joan, born at the end of the first pestilence in 1350, whose father, who does not seem to have been Agnes's husband, took off for Berwick on the Scottish border,[36] where he proceeded to spend two and a half years in jail. Captured by

[35] T&C no. 86.
[36] Disc. T&C no. 87.

the Scots? Perhaps, but Agnes's description suggests a more regular and perhaps well-deserved captivity.

But what of the main narrative, the story of the other Agnes, of Henry and of Walter? Here we must be cautious. A valid marriage once formed was *de iure* indissoluble. As we will see in later chapters, some ecclesiastical courts in this period – certain continental courts were notable – were experimenting with ways in which they could at least separate, if they could not divorce, in the modern sense, couples whose marriages had proved hopeless. The York court was not among them. It would seem that only adultery, and by the end of the fourteenth century perhaps extreme physical cruelty, would suffice to ground an action for separation, and, of course, this was without permission to remarry.[37] We would expect that couples involved in hopeless marriages would seek a way out, and it would seem that the conveniently remembered precontract was one, perhaps the most common, way to do it. All it required was the cooperation of the couple, two obliging witnesses, and a court that was not too skeptical.

Hence, the only thing that I find completely credible about this case is Agnes Payge's testimony that "Walter and Agnes did not have a good life together." It is also clear that Agnes Morice consented to the divorce, at least while the case was before the archdeacon's court. We may have considerably more doubt that the precontract with Henry happened, or at least that it happened with quite the clarity that the witnesses recall after 16 years. The subsequent proceedings in the court of York are something of a puzzle. It may be no more than a question of jurisdiction; the parties were advised to sue there again because of doubt over whether the special commissary had authority to render a divorce decree.[38] It may be, however, that Agnes had second thoughts. As we will see in Chapter 4, there is at least one case in the York archives in which the woman sues to have a divorce judgment before an archdeacon's court set aside, confessing that she had suborned perjury to a precontract in the previous action.[39]

If we put all the cases involving precontract together, it is clear that in litigation before the court of York in the later Middle Ages, the allegation and defense of precontract gave rise to a substantial amount of perjury, or shading of the truth. This is not to say that all the witnesses in such cases were lying, simply that in any case where we have evidence that the current marriage has broken down and where the divorce action is confessed, we have reason to suspect that the witnesses to the precontract are coloring their story.

It is hard to believe that the court was deceived by such cases. In *Ingoly c Midelton*, it would seem that the court was conniving in the false judgment.[40] In other cases, its attitude seems to have been more passive. In one case brought before the archbishop, the archbishop simply dropped the case when, we suspect, he came to realize that the plaintiff was not simply the innocent victim of

[37] See Ch 10, at nn. 27–32.
[38] Ref. and disc. T&C no. 88.
[39] *Palmere c Brunne and Suthburn* (1333), CP.E.25.
[40] See at nn. 18–19.

a runaway wife.[41] If the parties to a hopeless marriage were willing to agree to a consent judgment, the court was not going to press too firmly. The judgment had to be by consent, and the parties had to have witnesses to support them, but if those two conditions were fulfilled, it would seem that the court would leave them to their consciences.

But what of the parties' consciences? Obviously, we do not know what went on in their minds or what they told their confessors. We do have cases that suggest quite strongly that having agreed to a false judgment, some of these parties had qualms of conscience about what they had done.[42] In the other cases, *Ingoly c Midelton* may be an example, they may not have cared, brazenly manipulating the processes of the court to get what they wanted. There is also some suggestion of a third possibility. As we have said, the York court was strict about separations. On the other hand, we know that a number of these parties were stuck in what seem to have been hopeless marriages. It is possible that in such circumstances they were able to convince themselves that they really had never been married to the person with whom they were now living so badly. Hints of such an attitude may be found in the deposition of Agnes Payge, who testifies that Walter and Agnes Morice had not had a "good life." That fact is, of course, legally irrelevant to the question whether Agnes Morice had precontracted with Henry. But it is clearly not irrelevant in the witness's mind. The fact that Walter and Agnes did not have a good life seems to have convinced the witness that they were not married; their bad life was a punishment for the fact that they married each other when Agnes should have married Henry. Not only does the witness believe this but she also seems to think that Agnes Morice believes it as well.

This cast of mind is hard for us to grasp. It requires a belief in divine providence that borders on superstition and a total ignorance of what we believe to be the causes of marital breakdown. Under this cast of mind, if Agnes and Walter's marriage did not work out, that must have been because there was something wrong with it in the first place. There are other cases where witnesses testify to the same effect in cases involving consanguinity or affinity.[43] If the parties are related, the marriage cannot prosper. God will see to it that it does not. Similarly, if Agnes and Walter's marriage is not prospering, that must be because they are not really married. Thinking along these lines leads Agnes, and eventually her witnesses, to thinking about Henry. Over the course of 15 miserable years, the thinking can change subtly from "I/She would have been better off if I/she had married Harry" to "I/She did marry Harry, and that is why she is having so much trouble with Walter; she isn't married to him." Eventually, they come to the point where they can testify, perhaps even with a clean conscience, that Henry and Agnes exchanged words of present consent 16 years previously.

41 *Huntyngton c Munkton* (1345–6).
42 *Palmere c Brunne and Suthburn* (1333) is probably an example.
43 Example T&C no. 89.

But if we are going to engage in this kind of reconstruction – and I must confess that I find it irresistible – we cannot ignore other possibilities. If we are to imagine that Agnes Morice and Agnes Payge were engaged in self-deception, what of Matilda Sturgis and her husband? And what of the special commissary? The latter, of course, may have taken a bribe or simply not have cared. His questioning is certainly lax. He fails to ask the obvious question of the Sturgises: "Where were you when the banns were proclaimed between Walter and Agnes, and where have you been for the past fifteen years when you knew they were living in sin?"[44] Perhaps even more to the point: "Where's Harry? Why don't you have him come in and testify?" Is there something about the way in which William and Matilda tell their story that would have made it sound plausible to an experienced cleric? The clue may lie in William's statement that the marriage with Henry was done "at the procuration" of his wife and himself.[45] Agnes Morice's parents are never mentioned; her maternal aunt and her husband may have been her guardians. She could have been as young as 12 at the time of the marriage with Henry. The guardians arrange the marriage with Henry; consent is exchanged; then, for some reason, perhaps financial, the negotiations break down. Agnes is allowed to marry Walter (perhaps the Sturgises arrange that marriage, too), and Henry is conveniently forgotten. Now, 16 years later and faced with the disaster of Agnes's marriage to Walter, the Sturgises have qualms of conscience, and they tell Walter about the precontract. This scenario would fit well with Agnes Payge's statement that Agnes Morice told her that she was "craftily induced" into the marriage with Walter by her aunt.[46]

This scenario is, of course, not completely inconsistent with the scenario of self-deception that we outlined previously. We cannot, however, ignore any scrap of evidence, including negative evidence. Agnes Payge may have thought that Agnes Morice's bad life was punishment for her not having married Walter validly, but there is no evidence that Agnes Morice thought so. Indeed, other than her confession before the archdeacon's court, which could have been the product of considerable pressure, we hear nothing of Agnes Morice's version of the story. We do know, however, that two months after the special commissary had rendered judgment against her, she petitioned the archbishop's court to restore her husband to her, and that despite the impressive documentation of the previous case that Walter was able to present before that court,[47] he was advised to bring his suit all over again the following spring. Then he fails to pursue the case, and more than six hundred years later, it is still pending.

[44] As was required by X 4.18.6 (Innocent III, *Cum in tua. Si vero*).
[45] See at n. 25.
[46] See at n. 29.
[47] Disc. T&C no. 90.

3

Statistics

The Court of York, 1300–1500

The approach that we have taken to these cases so far is the traditional historian's one of trying to tell a story. We found that it may be possible to tell stories from this type of case material, but it is difficult. The litigation context distorts the story, particularly if one is trying to tell a story of what happened, as opposed to the story of what happened in the litigation. There is a further difficulty for the historian who is seeking to discover the social context of Alexander's rules: Frequently the particular makes us lose sight of the general. We suggested that there were many cases like *Dolling c Smith* and like *Merton c Midelton*, but there are not many cases like *Ingoly c Midelton*. Indeed, it is the only York case I have found in which *two* formal marriages are dissolved on the basis of an informal precontract prior to either one of them,[1] and it is one of only a handful in which there is such strong evidence that considerations far different from those that are found in Alexander's decisions played a dominant role in the decision. *Tiryngton c Moryz* may be such a case as well, but in the end, we had doubts. We were able to construct a plausible version of a story in which the precontract did happen, and of course the couple, so far as we can tell, never obtained a final judgment.

We turn then, for reasons described in the Introduction, to the court of York and to numbers.[2] Before we do that, however, a brief description of the court is in order. As we have already noted, the consistory court of York in the later Middle Ages served both as a first-instance court for the diocese and as an appellate court for the province, which included, in addition to York, the dioceses of Durham and Carlisle.[3] The diocese of York was large, and there

[1] There are other cases that involve three marriages, or two marriages and a claimed third; disc. T&C no. 91.

[2] An earlier version of this chapter appeared as Donahue, "Female Plaintiffs." Further analysis, particularly of the fifteenth-century cases, has led to a revision of the figures and some recasting of the argument.

[3] Disc. T&C no. 92.

were five active archdeacons who on occasion heard marriage cases, some of which were appealed to the court of York. The archbishop of York was the second most important prelate in England after the archbishop of Canterbury. As such, he was frequently absent from York. Three of the archbishops during our period also served as chancellors of England.[4]

In addition to being an important ecclesiastical center in this period, the city of York was also a governmental center. It served as the county town for the three large ridings of Yorkshire; Edward III moved his government to York when he wanted to be nearer to Scotland. It was also an important trading center. Along with those of London and Bristol, its mayor provided a registry for statutes merchant under the statutes of Acton Burnell (1283) and of Merchants (1285) and for statutes staple under that statute (1353). The York cycle of mystery plays dates from our period. In addition to York, our records mention other trading centers in the diocese, Kingston upon Hull probably being the most important.

YORK CAUSE PAPERS OVER TWO CENTURIES: THE BUSINESS OF THE COURT AND CLAIMS AND DEFENSES IN MARRIAGE CASES

There survive at the Borthwick Institute for Archives in York case files (cause papers) from 570 different cases that were heard before the archbishop's consistory court in the period from 1301 through 1499.[5] Their subject matter may be divided as shown in Table 3.1.[6]

As can be seen from the table, 215 of these cases are matrimonial cases (a case involving the validity, dissolution, or separation of a marriage or of the marriages of connected parties),[7] approximately 38 percent of the total.[8] The records, as we have already noted, are unusually full, and in marked contrast to most records of medieval ecclesiastical courts, they are spread over a relatively long period of time. They would seem, then, to be a good base of data to use for asking questions about the nature of medieval marriage litigation and about how it may have changed over the course of the later Middle Ages. In order to do this, we will deal first with the records as a whole and then subdivide the 86 marriage cases that date from the fourteenth century and the 129 such cases that date from the fifteenth century.

It is well to sound a note of caution at the start: The York records are good, but they are not a random sample of medieval English marriage litigation, and certainly not of marriage litigation in the Latin West. To focus on the differences

[4] Details T&C no. 93.
[5] Lit. and disc. T&C no. 94.
[6] Tables dividing the cases by decade, refining the subject matter, and explaining the differences from previous counts may be found App. e3.1, "The Business of the Court of York, 1300–1500 in Detail" (see T&C no. 95).
[7] Disc. with examples T&C no. 96.
[8] Disc. T&C no. 97.

TABLE 3.1. *York Cause Papers by Type of Case (1300–1499)*

Type of Case	Total	% of Total
Unknown	26	4.6
Breach of faith	35	6.1
Defamation	55	9.6
Ecclesiastical		
Benefice	44	7.7
Tithes	70	12.3
Other	73	12.8
SUBTOTAL	184	32.3
Matrimonial	215	37.7
Miscellaneous	6	1.1
Testamentary	46	8.1
TOTAL	570	100.0

Source: York, Borthwick Institute, CP.E; CP.F.

between the records of the court of York and those in other medieval ecclesiastical jurisdictions, the consistory court of York seems not to have exercised much office jurisdiction as a matter of first instance. There are a few office cases found in the cause papers, but most of them are cases that were being appealed from other courts or where the court was enforcing one of its own orders (and there are relatively few of either of these).[9] Clearly the criminal enforcement of the church's marriage law was socially important throughout the Middle Ages (as *Merton c Midelton* shows), and to the extent that it is only tangentially illustrated in the York records, these records are a biased sample of the whole picture. Second, the York court was both the consistory court for a diocese that had many active archdeacons and the appellate court for the province. We would thus expect to find, and we do find, a disproportionate number of the wealthy, the powerful, and the persistent among the litigants.[10] There is also a geographical bias in the first-instance cases, many of them being brought by parties who lived in or close to the city of York.[11] The two biases are probably related. Within a radius of about 40 miles from the city (and we might expand that number where the parties lived along the routes of the old Roman roads), the litigants in the court of York were quite ordinary people, ranging from citizens of York to village tradesmen and the wealthier peasants. Such people probably make up at least two-thirds of the litigants; it may be as high as four-fifths. As the distance from the city of York increases, so does the wealth of the litigants. The remaining one-fifth to one-third is heavily biased

[9] Listed with disc. T&C no. 98.
[10] E.g., *Hagarston c Hilton* (1467), CP.F.314; disc. T&C no. 99.
[11] Pedersen, *Marriage Disputes*, 184–5 and nn. 22–3.

in the direction of the wealthy, though normally not rising above the class of simple knights.[12] The very poor are almost, but not entirely, absent.

We will be able to correct for the first bias in Chapter 6 in which we will examine a consistory court from a small diocese (Ely) that did a substantial amount of office business. We will be able to correct, to some extent, for the second bias as well, because the Ely court did relatively little appellate business (though it did do some); its jurisdictional reach, as a practical matter, extended throughout the diocese at least so far as matrimonial litigation was concerned, and it seems to have dealt with more quite ordinary people. Here too, however, we may doubt whether the court often reached the very poor. We will be dealing throughout this book with litigation in ecclesiastical courts that left surviving records. As such we are dealing with an activity in which the very poor probably did not often engage, and any social conclusions that we attempt to draw from these records must bear that fact in mind. It is hard to imagine that the very poor did not, at least occasionally, have disputes about marriage, but when they did, they were probably most often resolved informally, perhaps occasionally in manorial or archidiaconal courts, courts that for the most part have left such cryptic records that we normally cannot tell more than that parties appeared before them and were fined.[13]

If the York records are not a random sample of all English medieval marriage litigation (and certainly not a random sample of all English medieval marriages), they may be a random, or at least an unbiased, sample of all such litigation that came to the court of York over the course of two hundred years. The arguments supporting this proposition are sufficiently complicated that they must be left to an appendix to this chapter.[14] Suffice it to say here that I am sufficiently convinced of the validity of those arguments that we will employ some kinds of simple statistical tests with this data (confidence intervals and *z* tests). Two apparent biases in the surviving records deserve attention here:

First, there is a chronological bias in these records. Although there are records of marriage cases (and of other types of cases) from every decade over the two hundred years, the decades from 1380 to 1440 produced a disproportionate number of the surviving files.[15] (This is not a bias peculiar to marriage cases; there is a similar bias in the records of non-marriage cases.) There is, however, no reason to believe that this bias in the sample does not reflect an actual bias in the underlying population. Appendix e3.1 to this chapter suggests that the decline in the later fifteenth century may well reflect York's economic decline in the same period, and the increase over the fourteenth century may well reflect a steady growth in the court's business over the course of that century, slowed, but not halted, by the plague years in the middle of the century.

[12] Lit. T&C no. 100.
[13] Example T&C no. 101.
[14] App. e3.3, "The Surviving York Cause Papers as an Unbiased Sample" (see T&C no. 150).
[15] See App. e3.2, "The Chronological Imbalance in the Surviving York Cause Papers" (see T&C no. 149).

Second, there is a chronological imbalance in the number of matrimonial cases appealed from lower courts in the fourteenth century.[16] The first three decades of the century produced only 7 percent of the cases (6/86), but they accounted for 16 percent of the appeals (4/25). The phenomenon continued if we add the next decade: The first four decades produced 16 percent of the cases (14/86), but 28 percent of the appeals (7/25). Were it not for the fact that the last decade of the century produced appeals in almost the same proportion as it did cases (32% of appeals [8/25], 33% of cases [28/86]), the imbalance of appeals toward the earlier part of the century would be even greater. The fifteenth century saw a dramatic decline in the proportion of appeals from lower courts in marriage cases: 10 percent (13/129) as opposed to 29 percent (25/86), and these appeals are clustered in the first half of the century: 11 of them (85%) before 1442, even though the second half of the century saw 38 percent of the cases (49/129).

Clearly, there is something happening here that needs explaining, but once again, there is no reason to believe that the sample is not reflecting something that was happening in the underlying population. The overall trend in the data is clear. Appeals from lower courts in marriage cases steadily declined over the course of the two centuries. At the same time, the proportion of first-instance marriage cases in the court increased quite steadily, at least until the middle decades of the fifteenth century. The two phenomena could be related, at least to the extent that people who were likely to appeal from the results that they got in archidiaconal courts tended, as time went on, to begin in the diocesan court to start off with. This explanation does not explain the aberrant decade of the 1390s, but then again, there is much about that decade that is unusual. It has, for example, the highest number of marriage cases of all the decades in the two centuries. It is possible that a particularly litigious decade also brought with it an unusually large number of appeals in marriage cases from lower courts.

A final note of caution: Good as they are (and this is a remarkably good set of records, as medieval church court records go), there are annoying gaps. We frequently do not know how a case ended. (Sometimes we suspect that it was compromised or abandoned, but sometimes we have reasonably good evidence that it was not, and we still do not know what the result was.) Sometimes we have the claim but not the defense; sometimes we have the defense but not the claim; sometimes we have the result but neither the defense nor the claim. In what follows, we have read the record as a whole and drawn what we believe to be reasonable inferences from it about matters that are not directly stated. Where both pleadings and depositions have survived, we have taken the depositions as indicating the 'true' nature of the legal claim or defense in preference to the pleadings, but where the depositions have not survived, we have used what can be gleaned from the pleadings. We have, on occasion, reconstructed the nature of a claim from the defense, sometimes even from the sentence. We have frequently reconstructed the result of a case in a lower court

[16] Disc. T&C no. 102.

on the basis of what is claimed on appeal. Someone else might classify some of these cases differently; perhaps one more cautious would leave more gaps in the base of evidence. Numbers imply a precision that the nature of medieval records does not always warrant. We do not believe, however, that the overall thrust of the numerical evidence would be greatly affected by a different or more cautious approach.

A particular warning is in order about the cause papers from the second half of the fifteenth century. The record-keeping practices of the court changed in this period with the result that cause papers from this period are not so helpful as those from the earlier ones.[17] The hope that I expressed earlier that a more thorough analysis of the surviving fifteenth-century act books would reveal more cases from that century and also provide more information about cases that are only skimpily recorded in the fifteenth-century cause papers has proved, for the most part, to be unfounded.[18] Thanks to a recent analysis of those books, we have been able to fill in a few details when we discuss individual cases in later chapters, but for the most part, the act books do not coincide with the dates of the cause papers, and what they tell us about the cases that do not have surviving cause papers is usually not enough even for the relatively simple statistical purposes of this chapter.[19]

The subject matter of the fourteenth- and fifteenth-century York marriage cases may be divided according to the type of claim that is being brought, employing a classification of types of claims that is found in the records themselves: There are two-party actions to enforce a marriage, what the records call *cause matrimoniales*, like *Dolling c Smith* or *Merton c Midelton*. We may further divide these (though the name of the action is the same) into those cases in which the record taken as a whole indicates that what is sought to be enforced is an informal *de presenti* marriage, those in which the record indicates that what is sought to be enforced is a *de futuro* promise normally followed by intercourse, those in which what is sought to be enforced is an 'abjuration under penalty of marriage' (*abiuratio sub pena nubendi*)[20] followed by intercourse (or, occasionally, appearance in suspicious places), and those in which it is unclear what type of marriage is at stake.

There are also three-party actions to enforce a marriage. These may be divided into cases that the records call *cause matrimoniales et divorcii*, in which the plaintiff sues a husband and wife seeking a divorce of their marriage and the enforcement of his or her own prior marriage to one of the couple, and cases involving what the records frequently call *competitores*, where two women sue a man or two men sue a woman each claiming that the defendant is his or her lawful spouse.[21]

[17] Details T&C no. 103.
[18] See Donahue, "Female Plaintiffs," 185–6. Details about the act books T&C no. 104.
[19] See App. e3.4, "What Can We Learn from the York Act Books?" (see T&C no. 151).
[20] A conditional marriage entered into before a judge hearing, normally a fornication case: "I take thee to wife/husband if I have carnal knowledge of thee." See n. 49.
[21] Disc. T&C no. 105.

TABLE 3.2. *York Marriage Cases – Claims (1300–1499)*

	14th c		15th c		Total	
Type of Claim	**No.**	**%**	**No.**	**%**	**No.**	**%**
Two-party – *causa matrimonialis*						
De presenti	24	28	37	29	61	28
De futuro	9	10	7	5	16	7
Abjuration *sub pena nubendi*	9	10	2	2	11	5
Uncertain form of marriage	3	3	19	15	22	10
SUBTOTAL	45	52	65	50	110	51
Three-party actions						
Competitores	10	12	24	19	34	16
Causa matrimonialis et divorcii	10	12	14	11	24	11
SUBTOTAL	20	23	38	29	58	27
Causa divorcii a vinculo						
Precontract	5	6	5	4	10	5
Other[a]	11	13	10	8	21	10
SUBTOTAL	16	19	15	12	31	14
Other[b]	5	6	11	9	16	7
GRAND TOTAL	86	100	129	100	215	100

Notes: See T&C no. 106.
Source: York, Borthwick Institute, CP.E; CP.F.

Closely related to the three-party enforcement cases in the issues that they raise are actions for divorce from the bond of marriage (*cause divorcii a vinculo*) brought on the ground of precontract. These differ from *cause matrimoniales et divorcii* only in that the person with whom the precontract was made is not a party to the action. (*Tiryngton c Moryz* was such a case.) Hence, a judgment for the plaintiff, who is one of the parties to the alleged subsequent marriage, will result only in a declaration of the nullity of the present marriage and not in a declaration of the validity of the prior one. (Joan Ingoly avoided this feature in *Ingoly c Midelton* by bringing both an annulment action against her husband and a *causa matrimonialis et divorcii* against Robert Esyngwald and Ellen Wright.) There are also actions for divorce from the bond of marriage brought on grounds other than precontract: affinity, force or nonage, impotence, crime, and servile condition. There are cases of separation from bed and board (*divorcium quoad mensam et thorum*), including cases that began as marriage-enforcement actions, and the separation issue is raised as a defense.[22] The grounds on which such a separation is sought are normally both adultery and physical cruelty, sometimes just one or the other. Finally, there are miscellaneous cases, such as an action to recover payment for registration of marriage sentence or an action to obtain a letter certifying freedom from marriage. Table 3.2 lays out the number and percentage of each type of case.

What we might make of the differences in types of claims in the two centuries will be discussed later in this chapter, but one difference calls for comment here.

[22] One certainly so, one probably so.

The number of cases that deal with a claim of marriage of an uncertain form increases substantially in the fifteenth century (3% vs 15%). The reason why this is so has to do with the nature of the fifteenth-century records.[23] There is no reason to believe that this difference in record keeping reflects any difference between the two centuries in the nature of the underlying litigation.[24]

Table 3.2 shows that the great majority of actions concerning marriage brought in the York court in the two centuries were actions to enforce a marriage (168/215, 78%), while only 14 percent (31/215) were actions to dissolve a marriage (excluding in both cases the 16 actions classified as 'other').[25] Even if we exclude the marriage-and-divorce cases, the percentage of 'straight' marriage-enforcement actions is still high (144/215, 67%). But looking at the cases totally from the point of view of what was sought to be enforced does not tell us what was the crux of the case from a legal point of view, much less from a social point of view. To do this we need to know how the cases were defended (Table 3.3), and what the results were (to be shown in Tables 3.5 and 3.6).

When we combine the claims and the defenses, we see that classifying the actions according to the claim frequently obscures what the core legal issue was in the case. For example, the core legal issue in a divorce case brought on the ground of precontract is identical to the core legal issue in a marriage-and-divorce case.[26] The remedy sought was different because the person with whom the precontract was made was not made a party to the action, but the core legal issue was the same.[27] The issue in such cases was also identical to that in all the cases involving *competitores*, and in the 13 two-party marriage-enforcement actions that were defended on the ground of precontract. While it is logically possible that cases involving *competitores* could have involved defenses to both marriages – and one case in each century did, though in somewhat unusual ways[28] – the fact-pattern that normally emerges is the same in all four types of cases: A marriage had concededly occurred. The concession might be *sub silentio*, but there was rarely much argument about it. Frequently, though not always, the conceded marriage was a formal one.[29] The issue was whether another marriage claimed or defended as precontract had also occurred, and if it had occurred whether it had antedated the conceded one. Normally the claimed precontract was an informal *de presenti* marriage, although this was not always the case.[30]

[23] It is the same reason why there are more cases of an unknown type in Table e3.App.2 (T&C no. 95) than there are in Table e3.App.1 (T&C no. 95): There are more partial records from the fifteenth century than there are from the fourteenth.

[24] See App. e3.3.

[25] Disc. T&C no. 107.

[26] Disc. T&C no. 109.

[27] Disc. T&C no. 110.

[28] Disc. T&C no. 111.

[29] I use the terms 'formal' and 'informal' in order to avoid that most difficult of terms, 'clandestine' marriage. Definition T&C no. 112. In later chapters, however, when the court uses the term 'clandestine', we will use it.

[30] Disc. T&C no. 113.

TABLE 3.3. *York Marriage Cases – Defenses (1300–1499)*

	14th c		15th c		Total	
Type of defense[a]	**No.**	**%**	**No.**	**%**[b]	**No.**	**%**
Precontract						
Divorce for precontract	5	6	5	5	10	6
Marriage and divorce	11	14	15	15	26	15
Competitors	9	12	24	24	33	19
Two-party enforcement[c]	8	10	5	5	13	7
SUBTOTAL[d]	33	42	49	49	82	46
Denial						
'Straight' denial[e]	12	15	10	10	22	12
Exceptions to witnesses	16	21	19	19	35	20
Absence	9	12	16	16	25	14
Disparity of wealth	5	6	6	6	11	6
SUBTOTAL[d]	33	42	43	43	76	43
Force and/or nonage						
Force[f]	10	13	14	14	24	13
Nonage[g]	6	8	4	4	10	6
SUBTOTAL[d]	10	13	17	17	27	15
Other						
Consanguinity/affinity[h]	9	12	7	7	16	9
Unfulfilled condition[i]	4	5	4	4	8	4
Crime[j]	4	5	0	0	4	2
Procedural objections[k]	4	5	0	0	4	2
Servile condition[l]	2	3	1	1	3	2
Impotence[m]	2	3	4	4	6	3
Vow	0	0	1	1	1	1
Orders	0	0	1	1	1	1
Mental incapacity[n]	0	0	1	1	1	1
SUBTOTAL	25	32	19	19	44	25
GRAND TOTAL[o]	78	100	100	100	178	100

Notes (including a reconciliation with Table 3.2): See T&C no. 108.
Source: York, Borthwick Institute, CP.E; CP.F.

Cases raising the issue of precontract occurred more frequently in the York medieval marriage cases than in cases raising any other type of issue (46%, Table 3.3),[31] although straight-out denial of the factual validity of the claim occurred in a comparable number of cases (43%). This latter type of defense produced a second cluster of legal issues, sometimes found in combination with issues involving precontract. We may have a simple denial of the factual validity of the claim, with no further defense being offered or surviving (12%). More often we have an attack on the witnesses for the other side, alleging that they were unreliable because of their personal characteristics or because they were

[31] The percentages in Table 3.3 are calculated on the basis of those cases in which the defense (or, in the case of divorce, the claim) is known.

corrupted or, simply, because they got the story wrong (20%).[32] Frequently, an attack on the witnesses was accompanied by an exception of absence, an 'alibi' defense: The marriage alleged could not have taken place because one of the parties was someplace else at the time.[33] Exceptions of absence are found in 14 percent of the York medieval marriage cases. Finally, an unusual defense is found in 11 of our cases (6%), the exception of disparity of wealth. Disparity of wealth was legally irrelevant to the question of whether a marriage had been formed. The defense was raised in order to attack the credibility of the claimant's story. The defendant, so the argument ran, could not possibly have married someone whose status was so much below his or hers. The defense was also offered in order to attack the plaintiff's witnesses: The claimant and his or her witnesses were alleged to have fabricated the story in an effort to get the defendant's wealth.

All other issues pale in comparison with the defense or claim of precontract and the attack on the factual validity of the claim of the marriage sought to be enforced. The next most common defense was force or nonage (15%). Altogether, 83 percent of the cases raise one or a combination of these three types of defenses.[34] We occasionally see one of the numerous other issues to which the medieval canon law of marriage could give rise. Sixteen cases (9%), including 6 of the 31 divorce cases, raise issues of affinity or consanguinity. Seven of the marriage-enforcement actions and one of the cases of divorce on the ground of precontract (4%) argue that the marriage in question was conditional and that the condition was not fulfilled. Six cases (3%), all divorce cases, claim the impediment of impotence. Four cases (2%), including one divorce case, suggest issues involving the impediment of crime.[35] Four (2%), including three of the abjuration cases, focus on procedural objections to the proceedings in the lower court. (*Merton c Midelton* is one of these.) Three, including two divorce cases, raise the issue of the impediment of servile condition.[36] One claims the impediment of prior bond (*ligamen*) not in the way that is typical of precontract cases, for here it is clear that a prior marriage did take place, and the issue is whether the former spouse was still living at the time of the subsequent marriage (not tabulated). The fifteenth century sees one each of claims of the impediment of orders, vow, and mental incapacity (drunkenness). Altogether, 25 percent of the cases (9% being divorce cases) raised one or more of these issues that we have classified as 'other'. (The reason that 83% of the actions involved precontract, denial, and/or force/nonage, but nonetheless 25% of the actions raised an 'other' defense, is that in 8% of the cases that have defenses, one or more of the 'core' defenses was raised and one or more of the 'other' defenses.)

[32] For a summary of the types of issues that could be raised in such exceptions with references to York cases, see Donahue, "Proof by Witnesses."

[33] On exceptions of absence, see Donahue, "Roman Canon Law," at 693–5; Donahue, "Proof by Witnesses," at 144, and sources cited.

[34] Disc. T&C no. 114.

[35] See Ch 1, at nn. 49–54.

[36] See Ch 1, at nn. 30–2.

Before we get to the results and before we even begin to ask what the social significance of all this might be, one thing is quite clear from what we have already shown. What was *legally* significant about marriage litigation in the court of York in the fourteenth century was the principle that present consent freely given between parties capable of marriage, even without solemnity or ceremony, makes an indissoluble marriage. The type of marriage sought to be enforced or claimed as precontract was most often a *de presenti* informal marriage (Table 3.4).[37] Of the 260 marriages at stake in the York medieval marriage cases, 194 (75%) were *de presenti* marriages, 18 (7%) were *de futuro*, and the type of the remaining 48 (18%) cannot be determined.[38] Of the 123 *de presenti* marriages claimed in the first instance, 115 were informal and only 8 formal.[39] The proportion of formal marriages raised by way of defense was higher, 28 out of 60 (47%). All told, of the 183 *de presenti* marriages raised by way of claim or defense,[40] 147 (80%) were informal. When this fact is coupled with the fact noted previously[41] that 83% of the cases in which the defense is known involved one or a combination of a defense on the facts, precontract, or force or nonage, the legal significance of the core principle becomes apparent.

RESULTS IN THE FOURTEENTH CENTURY

How did the court react to these claims and defenses? To discuss this question, it is better to divide the two centuries because there were some differences between them. Marriage cases in fourteenth-century York produced a high proportion of judgments,[42] much higher than in any other type of case. Sixty-seven of our 86 fourteenth-century cases (78%, see Table 3.5) have judgments from at least one level of court. Although in many cases we lack the results on appeal, confirmations were more common than reversals in those cases where we do have a result on appeal. Thus, any judgment may be taken as some indication of what the result on appeal is going to be. The first and perhaps the most striking characteristic of judgments in marriage cases in fourteenth-century York is the number that are favorable to the plaintiff (56/67, 84%). We should discount this number for the possibilities that some of them would have been reversed on appeal and that plaintiffs abandoned or settled unfavorably some of the cases that have no judgments when it became apparent that judgment would probably go against them. Even if we do discount the number in this way, the court of York in the fourteenth century was still a decidedly pro-plaintiff court in marriage litigation.[43]

[37] There are some differences between the two centuries, which are discussed in the text following n. 70.
[38] Disc. T&C no. 115.
[39] Disc. T&C no. 116.
[40] Again, excluding the abjuration cases and the cases of divorce on grounds other than precontract.
[41] Text and n. 34.
[42] Disc. T&C no. 118.
[43] Disc. T&C no. 119.

TABLE 3.4. *York Marriage Cases – Types of Marriages (1300–1499)*

	Claimed First						Defense						
Type of Case	**Inf Dp**	**For Dp**	**TOT Dp**	**TOT Df**	**Unc**	**Total**	**TOT Dp**	**Inf Dp**	**For Dp**	**TOT Df**	**Unc**	**Total**	**Total**
Two-party enforcement													
De presenti	61	2	63	0	0	63	7	3	4	0	2	9	72
De futuro	0	0	0	14	1	15	1	1	0	0	0	1	16
Abjuration[a]	0	0	11	0	0	11	2	2	0	0	0	2	13
Uncertain	0	0	0	0	22	22	1	0	1	0	0	1	23
Three-party actions													
Competitors[b]	31	0	31	2	0	33	23	22	1	1	10	34	67
Marriage and divorce[c]	15	5	20	1	3	24	18	4	14	0	9	27	51
Annulment													
Precontract[d]	8	1	9	0	0	9	8	0	8	0	1	9	18
Other[e]	2	13	15	0	7	22	0	0	0	0	0	0	22
Other	1	4	5	0	11	16	0	0	0	0	0	0	16
TOTAL	118	25	154	17	44	215	60	32	28	1	22	83	298
% of TOTAL	55	12	72	8	20	100	72	39	34	1	27	100	
TOTAL less divorce[f]	115	8	134	17	26	177	60	32	28	1	22	83	
% of TOTAL less divorce	65	5	76	10	15	100	72	39	34	1	27	100	
TOTAL 'spousals' cases [g]	147	36	194	18	48	260							
% of TOTAL 'spousals' cases	57	14	75	7	18	100							
TOTAL determinable solemnity[h]	147	36	183	18	0	201							
% of previous TOTAL	73	18	91	9	0	100							

Notes: Inf Dp=informal *de presenti* marriage; For Dp=formal *de presenti* marriage; TOT Dp=total *de presenti* marriage; TOT Df=Total *de futuro* marriages; Unc=uncertain formality of marriage. The summary totals at the bottom begin by totaling all the columns and then proceed to exclude certain kinds of cases. 'Spousals' cases exclude divorce, separation, and abjuration cases, and the total includes both claims and defenses. The final total excludes 'uncertain' marriages from the 'spousals' cases.

For notes *a–h*, see T&C no. 117.

Source: York, Borthwick Institute, CP.E; CP.F.

TABLE 3.5. *York Marriage Cases – Gender Ratios and Judgments (Fourteenth Century)*

Type of Case[a]	FP	MP	Total Cases	%F	SFP	SMP	TOT	SFD	SMD	TOT	GTOT
Two-party *de presenti*	16	8	24	67	14	3	17	1	0	1	18
Two-party *de futuro*	9	0	9	100	5	0	5	0	2	2	7
Abjuration	9	0	9	100	6	0	6	0	3	3	9
Two-party marriage (other)	3	0	3	100	1	0	1	0	0	0	1
Three-party competitors[b]	4	6	10	40	4	6	10	0	0	0	10
Three-party marriage & div[c]	9	1	10	90	5	0	5	0	3	3	8
Divorce precontract	1	4	5	20	0	4	4	0	0	0	4
Divorce other	6	5	11	55	3	3	6	0	1	1	7
Other	4	1	5	80	1	1	2	0	1	1	3
TOTAL	61	25	86	71	39	17	56	1	10	11	67

Notes: FP=female plaintiff; MP=male plaintiff; %F=ratio of female plaintiffs to total plaintiffs; SFP=sentence for female plaintiff; SMP=sentence for male plaintiff; TOT=total judgments for plaintiffs (or defendants); SFD=sentence for female defendant; SMD=sentence for male defendant; GTOT=grand total of judgments.

Ratio of judgments to cases: 78% (67/86).
Ratio of FPs to total Ps: 71% (61/86).
Ratio of successful female Ps to total successful Ps: 70% (37/58).
Female plaintiff success rate: 80% (39 won, 10 lost).
Female plaintiff success rate: 64% (39 won, 61 cases).
Male plaintiff success rate:[d] 94% (17 won, 1 lost).
Male plaintiff success rate:[d] 68% (17 won, 25 cases).
Male plaintiff drop rate: 28% (7 no judgment, 25 cases).
Female plaintiff drop rate: 20% (12 no judgment, 61 cases)[e].
Overall female success rate: 60% (40 won, 27 lost).
Overall male success rate: 40% (27 won, 40 lost).
For notes *a–e*, see T&C no. 120.

Source: York, Borthwick Institute, CP.E.

Plaintiffs were successful in almost all types of actions. Seventeen of the 18 (94%) two-party actions to enforce a *de presenti* informal marriage that have judgments resulted in judgments for the plaintiff, as did the one two-party action to enforce a marriage where the type of marriage cannot be determined. All 10 of the three-party competitor actions have judgments for one plaintiff or the other. Plaintiffs won six of the seven judgments (86%) in actions for divorce on grounds other than precontract, and four of the four judgments

(100%) in actions for divorce on the ground of precontract. Plaintiffs were, however, comparatively less successful in actions to enforce a *de futuro* contract of marriage (5 won, 2 lost, 67%), in abjuration actions (6 won, 3 lost, 67%), and in marriage and divorce actions (5 won, 3 lost, 63%).[44] They were even less successful in separation actions, losing the only one in which a judgment survives.[45]

Obviously the judgment in each case depends on the how successful each of the parties and their witnesses were in persuading the judge, but the pattern of successes and failures suggests some places where we might look for clues to what the judges found to be persuasive. One principle that will explain many of the results is that the York court (and many of the lower courts in the province) indulged in a broad presumption in favor of marriage.[46] If the great majority of the cases are marriage-enforcement actions, the great majority of plaintiffs will be successful if the court indulges in that presumption. This principle also explains some of the exceptions to the general rule that plaintiffs usually win. The two-party *de presenti* enforcement action that the plaintiff did not win involved a defense of precontract.[47] A presumption in favor of marriage will not help in this type of case; the question must be to which marriage the presumption will attach. Similarly the relatively low success rate of plaintiffs in marriage-and-divorce actions may be explained by the fact that these were hard cases. However the judge ruled, a marriage, or at least a claimed marriage, was going to be upset. The same is true of the cases involving competitors. All 10 of them were won by plaintiffs, but the nature of the action means that in 10 such cases plaintiffs lost.[48] The presumption in favor of marriage will also explain the singular lack of success of those seeking a separation.

The presumption in favor of marriage will not, however, explain the relative lack of success of plaintiffs in abjuration actions. Although plaintiffs ultimately won two-thirds of these actions (6/9), it took some doing to get there. Two plaintiffs had to appeal to the official from adverse decisions of the commissary general before prevailing. It is hard to escape the sense that the institution of abjuration *sub pena nubendi* was not favored by the York court, particularly at the end of the fourteenth century.[49]

The presumption in favor of marriage will also not explain the success rate of plaintiffs in cases of divorce other than those based on precontract. Here again we must look more deeply at the cases themselves. Suffice it to say here that in four of the cases, the plaintiff puts in a straightforward and compelling

[44] For possible exceptions, see T&C no. 121.
[45] Disc. T&C no. 122.
[46] Such a presumption has support in the academic law. See de Naurois, "Matrimonium gaudet favore iuris."
[47] Ref. and disc. T&C no. 123.
[48] Disc. T&C no. 124.
[49] Lit. T&C no. 125.

case; one does not give the nature of the ground for the divorce, and the final one is a complicated case involving affinity in the fourth degree.[50]

On the face of it, then, the results all seem quite close to what we have called the core principle of the medieval canon law of marriage: Present consent, even if informally given, will prevail over all else, so long as it is freely given. In almost all the cases where an alleged marriage did not prevail, another prior in time was asserted and proven, or it was shown that the consent was not given or that the consent was not free. Occasionally the numerous other issues to which the canon law of marriage could give rise were raised, and occasionally they prevailed, but only occasionally. Take away the core principle, and one cannot explain the bulk of the marriage cases that were litigated in fourteenth-century York.

But what is the social significance of this core legal principle? To put the question another way, why do so many cases raise issues about informal *de presenti* marriage? This is not the type of question for which litigation records give us an easy answer, particularly if we are confining ourselves to what can be learned from numbers. It is possible to organize the fact-patterns of the cases into groups and to draw some numerical conclusions from the proportions and changes of proportions in the types of stories that the witnesses told. That procedure, however, involves a substantial amount of interpretation of the records.[51] For our purposes here, let us rather look at a number that requires no interpretation to derive, the gender ratio of the litigants.

Marriage litigation in the court of York in the fourteenth century was an activity that women initiated. Sixty-one of our 86 fourteenth-century marriage cases (71%) have female plaintiffs (Table 3.5).[52] Since a high percentage of the judgments were in favor of the plaintiffs, marriage litigation in the York court in the fourteenth century was not only an activity that women initiated but also an activity at which women were successful. The ratio, moreover, of successful female plaintiffs to all successful plaintiffs approximates the ratio of female plaintiffs to all plaintiffs (70% vs 71%).

Female plaintiffs did not, however, have as high a success rate as did male plaintiffs (80% vs 94%).[53] Thus, despite the fact that women win a large number of cases, the success rate of male plaintiffs is higher. (If the female plaintiffs had been as successful as the male, they would have lost 2.9 cases rather than 10, and if the male plaintiffs had been as unsuccessful as the female, they would have lost 5.3 cases rather than 1.)[54] The reason that the success rate of male plaintiffs is higher despite the fact that women win cases in proportion to their proportion in bringing them is that 49 of the 61 female plaintiffs (80%), so far

[50] Listed T&C no. 126.
[51] We will undertake it in the next chapters.
[52] Lit. T&C no. 127.
[53] Statistical disc. T&C no. 128.
[54] Statistical disc. T&C no. 129.

as we can tell, pursued their cases to judgment, whereas only 18 of the 25 male plaintiffs did (72%).[55] The women had to lose more cases than did the men in order to get a number of favorable judgments equal to their proportion in the population.[56]

Why did the female plaintiffs lose more cases proportionally than did male plaintiffs? One possible reason is that women litigants pursued cases that they ought not to have pursued because they misestimated their chances of success. This could have been because, despite the high number of successes, the court was biased against women. Even more of them should have won than did win. The fact, however, that women as both plaintiffs and defendants had a 60 percent success rate, while men had only a 40 percent success rate, does not suggest bias on the part of the court.[57] Or it could have been because women did not have access to the advice that men had, and so pursued cases that men knew were better not brought. Finally, it could have been that women pursued more cases because they had more to gain by winning or less to lose by losing. Classically 'rational' behavior would suggest that someone will pursue a course of conduct even if her perception of the odds is the same as another's if the benefits to be gained from success are greater or the costs of losing are less.[58]

There is some evidence for this last suggestion in the final numerical analysis that we shall undertake of this group of cases. Although women, overall, brought almost three out of four of the marriage cases brought in the York court over the course of the fourteenth century, this ratio was by no means constant over the different types of cases (Table 3.5).

We suggested earlier that the legal issues in three-party cases of either type and in cases of divorce on the ground of precontract were identical. But the gender ratios were not. Men hardly ever brought a marriage-and-divorce action, women hardly ever brought an action for divorce on the ground of precontract, and the competitor actions were evenly divided between the genders. This is hard to explain, but some hint at an explanation may be given by the other types of cases in which there is an imbalance. Except for the competitor actions, the cases in which men were dominant as plaintiffs were all cases in which the result of the action, if successful, would be that the man would get out of a marriage and not get into another one. Women, on the other hand, were dominant in cases in which the result, if the case was successful, would be that the plaintiff would be declared the wife of the defendant.

In four of the eight two-party *de presenti* enforcement actions in which a man was the plaintiff, the defendant was a widow.[59] That suggests that financial considerations were important. In three of the other such cases, the defendant

[55] Statistical disc. T&C no. 130.
[56] Statistical disc. T&C no. 131.
[57] See Table 3.5.
[58] Lit. T&C no. 132.
[59] Listed T&C no. 133.