

OUTLINE — DISCUSSION CLASS 4

Canonists on Marriage

Gratian, *Causa 27, quaestio 2*:

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

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

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

[quaestio 2] Part 1. Gratian: The second question follows in which we seek to discover whether a girl espoused to another man can renounce the previous match and transfer her vows to another. First, we shall see whether they are married, second whether they can depart from each other. That they are married is easily shown by the definition of marriage and by the authority of many. ... Again John Chrysostom on Matthew [an anonymous author of a collection of homilies on Matthew, Homily 32]:

[Canon 1.] Coitus does not make a marriage, but will does. ...

[Canon 2.] Again, Pope Nicholas [I, Response to the Bulgarians (866), c.3]:

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

[Gratian’s answers to these texts, which seem to constitute a powerful objection to his thesis, does not come until the *dictum post* c. 45 (*Mats.*, p. VIII–10). These seem to boil to two arguments: 1) in context these quotations do not support the view that marriages without intercourse are indissoluble, and (2) there’s a distinction between necessary and sufficient conditions. Rather, having gathered together 15 canons that do not seem to support his position, Gratian then offers two that to his mind do:]

Canon 16: [Attributed to Augustine]

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

Canon 17: Again Pope Leo [to Rusticus of Nabonne, Ep. 167, 458–9].

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

[The core, however, of Gratian’s argument does not rest on these questionable texts. It rests rather on what he deems to be church practice in six different specific areas, summarized below.]

Canons 18–28: A married man or woman may not espouse the religious life without the consent of his or her spouse, but that rule does not apply if the marriage has not been consummated.

dictum post Canon 26: See, those who are married cannot profess continence without the consent of the other. Espoused, however, even without consulting those whom they have

espoused are shown by examples and authority to be able to keep continence. As St. Jerome reports, Macharius, a most distinguished hermit of Christ, the marriage feast having been celebrated, was in the evening about to enter the bridal chamber, he fled the city and sought foreign shores and chose for himself the solitude of the hermit. § 1. Again St. Alexius, the son of the most distinguished Epiphanius, similarly called from the wedding by divine grace, deserted his espoused, and alone began to keep company with Christ. By these examples it is clear, that espoused can profess continence even without asking for the consent of their espoused. The same is proved by the authority of Pope Eusebius [actually from the Penitential of Theodore, c. 11], who says:

Canon 27: It is not permitted for the parents of an espoused girl to give her to another man, but it is permitted for them [?her, *sibi*] to choose a monastery.

Canons 29–34: These deal, somewhat confusedly with the following problems: (1) impotence, (2) the prohibition against a clergyman to marry a widow, (3) penalties for incest, and (4) *raptus*.

dictum post Canon 28: Again, Pope Nicholas teaches [actually the interpretation of Paul, *Sentences* 20.4.2] that those who are cut off by their enemies or deprived of their members are not to have their marriages dissolved on account of this. On the other hand, Pope Gregory [an unidentified canon] laid down about those who cannot render the debt to their wives by reason of frigidity, that both of them shall swear by the seventh hand of their neighbors, touching the holy relics, that they never were made one flesh by the joining sexual intercourse. Then the woman can contract second nuptials; the man, however, who is of a frigid nature, shall remain without hope of marriage.

dictum post Canon 29: Again, if an espoused were a wife, upon the death of her spouse she would be a widow. If however she were a widow her husband could not rise to holy orders. For the husband of a widow, just like the man who has married twice, is prohibited from becoming a priest. Out of this kind of linking, however, no one is prohibited from holy orders. As Pope Pelagius [555 X 560, suspect] says: “There is nothing (so far as pertains to this article) in the canonical institutes that prevents him.” It appears therefore that these were not married.

We do not have the time to go into the complexities of the problem of incest. There is little doubt that the Germanic local councils quoted here regarded incest with an affine of one’s wife or husband as more serious if the marriage had been consummated than if it had not. We also need to put to one side the problem of *raptus* as illustrated by canon 34 (p. VII–8; the council of Toledo but really Aix-la-Chapelle (817)). Suffice it to say here that I think Gratian may misread the text, but he is right in seeing that in this Germanic context, the fact that the espoused has not had intercourse with her espoused does make a difference. Otherwise, we would be dealing simply with a case of rape of a married woman or adultery, and it is clear that the council does not see it as either.

The problem of the marriage of the Blessed Virgin is scattered throughout the question. Gratian’s difficulty is that wants to maintain that Mary and Joseph were truly married, but they did not have intercourse. He reconciles this by saying that it is perfectly true that were married, just that it wasn’t an indissoluble marriage.

dictum post Canon 45: From all these things it appears that those espoused are called married by a hope of future things not by the fact of present things. How therefore, can they be called married from the time of the first oath of espousal, if that joining which they assert at the espousal may be denied? But, from the first oath of espousal, it may be called marriage, not because there

is a marriage in the espousal, but because of the faith which they owe another because of the espousal that they afterwards will become married. In the same way sins are said to be forgiven by faith not because they are forgiven by faith before baptism but because faith is the cause by which we are cleansed from our sins in baptism. § 1. For this reason John Chrysostom says “Intercourse does not make matrimony, but will.”¹⁵ And Ambrose says “Not the deflowering of virginity but the conjugal pact makes matrimony.”¹⁶ This is to be understood as: intercourse without the will to contract matrimony and the deflowering of virginity without conjugal pact does not make matrimony, but the will to contract matrimony and the conjugal pact make it so that a woman in the deflowering of her virginity or in intercourse is said to be married to a man or to celebrate the nuptials. § 2. Again, Pope Siricius¹⁷ calls the departing of espoused persons a marriage separation. But such parting is to a violation of a present marriage but a future one, one hoped for because of espousal. Thus, even the devil was said to have fallen from beatitude not that the beatitude which he then had but that beatitude for which he was made. Thus also, a man who by the merit of his life and his learning is elected as a priest or a bishop, if in the meantime he should deserve to be deprived of his election, is said to lose the priestly or episcopal oil, not that which he has received, but that which he was elected to have. Therefore, by this authority, an espousal cannot be called a marriage. § 3. But granted that an espoused is not a wife, nonetheless it is asked whether she may renounce her prior condition. This is prohibited by the authority of the council of Ancyra [c.11 (314)]

Why did Gratian come down the way he did?

Peter Lombard on the Formation of Marriage

Lombard, Sentences D.27: *Consent makes the marriage.* The efficient cause of marriage is consent, not just any consent, but the expression of words not of the future but of the present tense. For if the parties agree for the future, saying: I shall take you as my husband and I shall take you as my wife; this is not an effective agreement of marriage. If they agree mentally, but do not express it in words or by other definite signs, such consent will not make a marriage. However, if they say the words which nevertheless they do not mean in their hearts; if there is no compulsion or fraud, the binding power of the words with which they consented, saying: I take you as my husband and I take you as my wife, makes the marriage.

[Dealing with many of the same texts as Gratian, the Lombard came to a different conclusion: indissoluble marriages are formed by exchange of words of present consent. Sexual intercourse has nothing to do with it. Promises to marry, however, are dissoluble.]

Alexander III on the Formation of Marriage

Alexander III to the bishop of Norwich [1176 X 1181]. A certain William appealed to us, showed in his account that he received in his house a certain woman by whom he had children and to whom he swore before many people that he would take her as wife. In the meantime, however, spending the night at the house of a neighbor, he slept with the neighbor’s daughter that night. The girl’s father finding them in the same bed at the same time compelled him to espouse her with present words. Recently, William standing in our presence, asks us to which woman he ought to adhere. Since he could not inform us whether he had intercourse with the first woman after he had given his oath, we therefore order you to examine into the matter carefully, and if you find that he had intercourse with the first woman after he had promised he would marry her, then you should compel him to remain with her. Otherwise, you ought to compel him to marry the second one unless he was compelled by a fear which could turn a steadfast man.

From this we might derive the following rule-scheme:

1. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.
2. Present consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, even if that consent is given in the most informal of circumstances. (This is less easy to see just from this decretal because all Alexander may be doing is enforcing the contract.)

Other decretals of Alexander's allow us to derive the following rule-scheme:

1. Present consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, unless one of the parties chooses the religious life.
2. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.
3. With few exceptions any Christian man is capable of marrying any Christian woman, so long as they are of marriageable age, not in orders or solemn vows, and not too closely related to each other.

Why Did Alexander III Decide as He Did?

How Does Accursius React to Alexander's Decisions? (*Mats.*, pp. VIII–21 to VIII–22) (We'll talk about this in lecture on Monday. It's a great topic for a paper.)

What do you make of the following canon promulgated in 1215? (Lateran IV, c. 51 in *Mats.*, pp. VIII–20 to VIII–21)

Although the prohibition of the conjugal bond has been revoked in the last three degrees, in other degrees we want it strictly observed.⁴ Wherefore, following in the footsteps of our predecessors, we strictly forbid clandestine marriages, also forbidding any priest from presuming to participate in them. Therefore, extending generally to all places the custom of some places, we decree that when marriages are to be contracted, they shall be proclaimed publicly in the church by the priests, and that an appropriate time be set within which anyone who wishes to and can may bring forward a lawful impediment. Regardless of whether this happens, the same priests shall investigate whether any impediment exists. When a probable conjecture appears against the joining, let the contract expressly be forbidden until it can clearly be established by documentary evidence what ought to be done about it.

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

Clearly any parish priest who fails to prohibit such unions or any regular priest [i.e., a member of a religious order] who presumes to become involved with them ought to be suspended from office for three years and should be more severely punished if the gravity of the fault demands it. And also let a fitting penance be imposed on those who enter into such marriages even if in a

permitted degree [of kinship]. Moreover, if anyone maliciously interposes an impediment to a lawful joining, let him not escape ecclesiastical sanction.

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