

OUTLINE — DISCUSSION CLASS 5

ALEXANDER III ON MARRIAGE

Decretals of Alexander III

1. The first stage is illustrated by *Veniens . . . B* (before 1170 VIII–17).

Alexander, bishop, servant of the servants of God to his beloved sons G the chief canon and the canons of Lucca greetings and apostolic blessing. Coming to the clemency of the apostolic see, B. the bearer of these presents not without blushing and shame proposed that when Guilla the woman had been lawfully espoused to L. and both were of full age, the aforesaid B. driven on by sin knew her. When the deed was published the *treugani* and consuls of Pisa seized him and compelled him by their force and threats to take the aforesaid woman as wife. Wherefore, since it is unworthy and contrary to the sanction of the canons that the same woman be handed over to two men, we commend to your discretion by apostolic writing that you very carefully inquire into the truth of this matter, and if it is notorious or otherwise lawfully apparent to you, that the aforesaid L. previously received the aforesaid woman as his by espousal, as, for example, it is usually done with the pledge of a ring, you should totally absolve the same B. from her petition and impose on him a moderate and suitable penance for perjury. Otherwise, you should very strictly compel him, though it appears that he is in holy orders, to take the same woman as wife and treat her with marital affection.

What is the scheme of rules that can be derived from this decretal?

In it Alexander seems to be holding that any espousal, whether or not accompanied by intercourse, is binding and prevails over a second espousal. If this is the holding of this case, it conforms neither to Gratian's nor to Lombard's theory, and may represent the ancient discipline of the Roman church (cf. Nicholas I).

2. The second stage is illustrated by *Sicut Romana* (VIII–18).

Alexander III to William, archbishop of Sens [1173 or 1174]: Further, if any man and woman contract marriage with equal consent and the man, the woman unknown, takes another as wife and knows her, he is to be compelled to dismiss the second and return to the first. For although some think differently and the church does not have the same custom, it nonetheless seems safer (*tutius*) that he ought to have the first rather than the second, since he ought not to be separated from the first without that judgment of the church after he contracted marriage with her by equal vow and consent. Indeed, although it is permitted for an espoused woman unknown by a man to become a nun, he cannot take another woman as wife.

What is the scheme of rules that can be derived from this decretal?

In the late 1160's Alexander spent some time in France, and he may well have been exposed to the ideas of Peter Lombard while he was there. He also became aware that there was considerable controversy about this matter, and that controversy is reflected in the hesitance that characterizes the letters in this period. This decretal does not say that the marriage was one of the present tense, nor is it completely consistent with the Lombard's thinking because it makes the issue of entry into religion dependent on whether the woman has had intercourse. I am inclined to think, however, that it reflects the influence of Lombard's thinking with its focus on the type of consent, and there is one other decretal (*Sollicitudini*, VIII–21) which probably belongs to this

period that shows the same.

3. The “Solemnity Period”

[X 4.16.2 (WH 439; Donahue, *Marriage Decretals* at 84, 105–6).]

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

From the letter of our venerable brother the archbishop of Canterbury, the legate of the Apostolic See, we have discovered that Gilbert of Saint-Leger espoused his daughter Maria who was absent at the time to a certain young man, R. by name, (and afterwards, the above-said R. in Maria’s presence and with certain of her relatives as witnesses contracted, it is said, matrimony by words of the present tense [*per verba praesentis temporis*], and he bodily swore an oath that he, as husband, would have her as his proper wife from that time forward and, she, that she would reverently and without contradiction obey him as her proper husband. Nothing was lacking except the celebration of the solemnity in the face of the church. Because it was the season of Lent the handing over [*mancipari*] could not take place.) Afterwards some got suspicious that the above-said R. wanted to break his vows and take up others. The matter was brought to examination of the above-said archbishop who prohibited under threat of anathema, as we understand from his letter, the man from taking up other vows before the matter was fully brought to light. But he, contemptuous of the prohibition which had been laid down, took to wife solemnly in the face of the church the daughter of V., Matilda by name. (Afterwards the two women and the man being brought before the archbishop, the above-said R. publicly confessed that he had contracted marriage with Maria, as it is described above, and that the afterwards had taken the other one misled by wicked suggestion. Maria, on her part, continuously asserted that her father did not stir up the quarrel of his own will. She asserted that except for the oath of contracting marriage, there was nothing binding between herself and the above-said R., and that she was not bound to the oath since he had not kept the oath when he left her for another.) Since, however, she had asked that the above-said R. be restored to her as her proper husband and since the archbishop wished to know about the first marriage because the women said that there was an impediment of consanguinity, for which reason the vice of incest was feared as much as that of adultery, the above-said Maria appealed to the Holy See and asked that her appeal be heard before the feast of the Circumcision [January 1]. Deferring to this appeal the archbishop laid a very strict interdict upon Maria upon peril of her soul and threat of excommunication that she not marry anyone until this cause be brought to its proper end either before us or before judges delegate from the Holy See. She, nonetheless, trusting in the remedy of her appeal married another, by the name of V. Called before the archbishop on this account, she refused to appear because of the appeal which she had taken.

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

When this decretal was reduced to the official text by Raymond of Peñafort, he omitted many of

the facts including the matter enclosed in parentheses. He also added the word “future” at the point indicated in the text with an asterisk. Why?

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

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

What scheme of rules can be derived from this decretal?

Alexander III to the archbishop of Salerno [1176 or 1177]: [I]f a proper present agreement is made between man and woman (observing the customary solemnities, that is, before a priest or before an official in the presence of suitable witnesses, as is still done in some places,) that the one receives the other unto himself by expressing the customary words of mutual consent, saying to the other “I receive you as mine” and the other saying “I receive you as mine,” whether accompanied by an oath or not, that man is not permitted to marry another woman. And if he does marry another woman, even if intercourse follows, she ought to be separated from him, and he ought to be compelled by constraint of the church to return to the first. Although some have felt one way and some another on this matter, this is the way the matter was at one time resolved by some of our predecessors.

What is the scheme of rules that can be derived from this decretal?

If that was the direction in which Alexander was going in the early 1170’s he changed his course very briefly in the mid 1170’s. Both *Ex litteris* (VIII–18) and *Licet preter solitum* (VIII–19) hold that an unconsummated present consent marriage will prevail over a subsequent one accompanied by intercourse, but both require (*Ex litteris* so holds in the common-law sense) that the present consent be accompanied by the solemnities customary in the area.

4. The easiest case in which to see his ultimate resolution is *Veniens ad nos* (VIII–19).

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.

What is the scheme of rules that might be derived from this decretal?

- a. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.
- b. 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.)

5. At the end of his pontificate Alexander abandoned the solemnity requirement (something that he held only briefly, see *Quod nobis* (VIII–21)). Two decretals from after 1176 (one certainly so, one probably so; see *Significasti*, VIII–20, and *Veniens ad nos*, VIII–21) come up with the following rule scheme:
 - a. 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.
 - b. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.
 - c. With few exceptions any Christian man was capable of marrying any Christian woman, so long as they were of marriageable age, not in orders or solemn vows, and not too closely related to each other.

I would suggest that the extraordinary thing about these rules, which prevailed throughout the West until the council of Trent in 1563 is not what they require but what they don't require. No solemnity or ceremony of any sort was necessary to make an indissoluble marriage; no parental consent was required. There were no class barriers to marriage. We will have occasion to ask later how these rules were received by a society in which arranged marriages were the norm, and cross-class marriages were uncommon. For the time being, I think we have shown how they came about. I offered some speculations in the lecture on why he came out the way he did.

INNOCENT III ON SIMONY

(=X 5.3.31; Innocent III to the prior of St. Victor and Masters L. of Bologna and L of Modena, canons [1199])

Although Ely the high priest was a good man himself, because he did not effectively root out the crimes of his sons, he brought down the vengeance of divine retribution on himself as well as on his sons, until, his sons having been taken away in battle, he fell from his saddle and died of a broken neck. A prelate ought therefore to strive more earnestly to correct the offenses of those below him the more damnable he deems their uncorrected offenses to be. Against whom, to pass over treatment of notorious crimes, one can proceed in three ways: by accusation, denunciation, and inquisition of them. Careful caution ought to be had in all three, so that lawful inscription ought to precede accusation, charitable correction denunciation, and open attribution (*clamosa insinuatō*) inquisition. "I will go down," says the Lord, "and I will see whether they have fulfilled in deed the cry that has come to me." A cry has come to a prelate at that time when by public fame and frequent attribution the crimes of his subjects are referred to him, and then he ought to go down and see, that is send and inquire, whether truth accompanies the cry that has come. For according to the canonical sanctions if anything comes to the ears of the prelate about any cleric, anything which can justly offend him, he ought not easily believe it, nor ought an unexamined matter spur him to punishment, but the truth is to be examined before the elders of the church carefully, so that, if the nature of the matter requires, canonical districtio may strike the fault; not as if he were both judge and accuser, but as if fame were claiming and cry denouncing, he may follow the duty of his office, always lending the moderation as is dictated by the form of the judgment and the form of the sentence.

Since things were often attributed to us about the abbot of Pomposa, which sounded too different from honest regularity, the monks coming to our presence, some of them charged him with simony, perjury, dilapidation and insufficiency. When the same abbot excepted against them that

fraternal correction had not preceded this denunciation according to the evangelical rule, and these constantly asserted that such correction had previously taken place, although the oaths of two monks were exhibited on this point, because they still did not cease to argue about it, we, as aforesaid, aroused by frequent cries, wished to inquire of our office about the aforesaid matters, binding all the monks, those who had come with the abbot and those against him, with the bond of an oath to tell the full truth that they knew about what had been proposed. When the depositions, reduced to writing, were published, they began to dispute about them in many ways. Because, however, both by the assertion of the monks and by the confession of the abbot himself we learned that the same abbot had expended a large sum of money left by his predecessor and had obligated the monastery to pay another greater sum of money, we deemed him according to canonic and lawful sanctions on account of these and other presumptions suspect of dilapidation and to be suspended from the administration of the abbacy. And because simony in many ways seemed to have been proven by witnesses against the same abbot, he opposed many exceptions against the witnesses, on which there was a great dispute on both sides, some asserted that in the crime of simony as in the crime of treason (*laesa maiestas*) all indifferently, both infamous and criminals were to be admitted not only to accusation but also to testifying, others replying to the contrary that although these two crimes are deemed as equal with regard to accusation, they differ in many ways, since one penalty is imposed for one and another penalty for the other, and there is a distinction between the person of the accuser and the person of the witness, since crimes are proved not by accusers but by witnesses, many reasons and arguments being brought forth about this. Lest either the purity of innocence fall confounded or the evil of simony escape unpunished, we, weighing equity, deemed that not all the exceptions proposed against the witnesses be admitted, nor all repelled, but admitted to proof those exceptions that seem to prove that they [the witnesses] proceeded not from the zeal for justice but the tinder of malignity, to wit, conspiracies and capital enmities. We deem that the other opposed objections, like theft and adultery, because of the pervasiveness of the heresy of simony, in comparison with which all crimes are like nothing, are to be rejected, for even if they weaken the confidence in the witness in some measure, they do not totally remove it, especially when other indications (*adminicula*) support.