Alex III Rules
Nicholas I
Causa 27
Causa 4

CLASS OUTLINE — LECTURE 8

The Revival of Academic Law—The Canonists

Decretists:

a. Gratian (d. c. 1140)—the *Concordance of Discordant Canons* consists of three parts of which the first two are by far the longest and the greater part of which are indisputably by Gratian: 1st part: 101 *Distinctiones* (cited 'D.1 c.1'); 2d part: 36 Causae (hypothetical cases), each subdivided into *Quaestiones* (cited 'C.1 q.1 c.1'); 3d part: 5 *Distinctiones*, principally on liturgical law (cited 'De cons. [for *De consecratione*] D.1 c.1')
In E. Friedberg (ed), *Corpus Juris Canonici* vol. 1.

b. Paucapalea
Rolandus
Rufinus
Stephen of Tournai
Huguccio

Summae of all these except for the last were edited in 19th-century editions of varying quality.

c. Ordinary gloss: Johannes Teutonicus (1215 X 1217); revised Bartholomeus Brixiensis (c. 1245)
The standard edition of Gratian is still E. Friedberg's, in *Corpus Juris Canonici* vol 1.

Gratian, Causa 27:

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

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

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

> The answer to the first question ends with a distinction: a solemn vow of chastity, such as that taken in religious profession, bars subsequent marriage, but a simple vow does not.

[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.

> We have already seen that the Western Christian tradition was firmly committed to the indissolubility of marriage, but logically, and indeed in the Roman secular world, the two questions were not the same, and Gratian's analytic technique here provides the first clue as to how he is going to come out. Gratian's answer is going to be that the couple are married when they were espoused but the marriage was not indissoluble until they had sexual intercourse.

That they are married is easily shown by the definition of marriage and by the authority of many. For matrimony or nuptials are joining of man and woman holding firm to an undivided mode of life. Among them [the couple in the hypothetical case], moreover, was a joining which required

an undivided mode of life, for there was between them consent which is the efficient cause of matrimony according to the statement of Isidore [of Seville; cf. *Etymologies* 9.7, a very free quotation; but the statement is a commonplace, ultimately deriving from D.50.17.30.], "consent makes matrimony." Again John Chrysostom on Matthew [an anonymous author of a collection of homilies on Matthew, Homily 32]:

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

[**Canon 2**.] Again, Pope Nicholas [I, Response to the Bulgarians (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.

O.k. there we have it. Nicholas I and the text from pseudo-Chrysostom cited at the end of Nicholas' letter. Why is this not a total answer to Gratian's question?

This is followed in the Vulgate edition by thirteen canons to the same effect.

Gratian's answers to these texts, which seem to constitute a powerful objection to his thesis, does not come until the *dictum post* canon 45 (*Mats.*, p. VIII–10). Rather, having gathered together 15 canons that do not seem to support his position, Gratian then offers two that to his mind do:

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

Canon 16: [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 the nuptial mystery.

It has been argued, and quite rightly, that these are questionable texts. Nobody has found the supposed quotation from Augustine in Augustine's genuine works. Pope Leo did write a letter to Rusticus of Narbonne, but Gratian had a bad text of it. Here's the received text: "Since the partnership of nuptials was so instituted from the beginning that it has within it in addtion to the mingling of the sexes the sacrament of Christ and the Church, there is no doubt that that woman does not pertain to marriage in whom it is learned that there was not the nuptial mystery."

At best, the text is irrelevant, since it is attempting to distinguish marriage from concubinage. At worst, it argues against Gratian's position, since it may say, in the correct version, that sacrament of Christ and the Church exists even in unconsummated marriages. 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 five different specific areas, summarized below.

Canons 18–27 concern whether a married man or woman may espouse the religious life without the consent of his or her spouse. The rulings are inconsistent, and none of them makes

the distinction between consummated and unconsummated marriages, but the following examples, quoted in Gratian's dictum certainly suggest it:

Gratian dictum ante c. 27. 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. *An espoused girl is not prohibited from choosing a monastery.*

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

Canons 28–34 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*. We dealt with them very briefly in the lecture. Let's look at the first two more carefully, together with an important remark on the marriage of the Blessed Virgin.

Gratian dictum post c. 28. Since it does married parties no good to offer continence to God without each other's consent, and since (although a husband does not have power over his body but his wife has it) nonetheless espoused women may choose the monastic life and espoused men may with benefit take up the better life without seeking the consent of their espoused, it is apparent that there is no marriage between espoused parties. . . . 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. Whence the same [actually Rabanus to Heribald, 853] writes to Venerius bishop of Cagliari saying:

Canon 29. . . . What you asked me about those who are joined in matrimony and cannot marry *nubere*, if he can take another and she can take another, about these it is written: If a man and woman are joined and afterwards the woman says of the man that he cannot come together with her, if she can prove by a true judgment that this is true, let her take another.

Gratian dictum post c. 29: See, the impossibility of intercourse, if it arises after intercourse has occurred between the parties, does not dissolve the marriage, but if it arises before intercourse has occurred, then the woman is free to marry another. Whence it is apparent that the parties were not married otherwise they would not be permitted to depart from each other except on account of fornication, and if they departed they are obliged to remain unmarried or to reconcile themselves with each other. § 1. Again, if an espoused were a wife, upon the death of her spouse she would be a widow. If however she were a widow her husband could not rise to holy orders. For the husband of a widow, just like the man who has married twice, is prohibited from becoming a priest. Out of this kind of linking, however, no one is prohibited from holy orders.

As Pope Pelagius [555 X 560, but the letter is 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.

The text of Pelagius, if it is genuine, provides strong support for G.’s view. It is quoted in full in Distinctio 34 c. 20: “There would be for Valentine the clerk no obstacle for promotion [to higher orders] on the ground that he took the veil again, when he was joined in conjugal coupling to a woman who was previously veiled with another man who later died, but not married (*nupta*) to him, but remained a virgin, because there is nothing in the canonical constitutions (so far as this article is concerned) that stands in his (V’s) way.”

Again, if they were married, the departure from each other would be a divorce. But the separation of these Ambrose denies is a divorce, saying of the Blessed Mary whom Joseph espoused, and took her to his own [*Comm. in Luke* 2.1]: “Joseph never knew her. For if the just man had known her, he never would have allowed her to depart from him, nor would the Lord, who commanded a wife not to depart from her husband except for the reason of fornication, have been the author of divorce, commending her to John.” See, the commendation of Mary to John and her withdrawal from Joseph is denied to be a divorce, because Joseph did not know her. Whence it is apparent that they were not married. If however the Blessed Mary whom Joseph espoused and took to his own is denied to have been married, how much less she who is simply espoused to be called married.

cf. Mt.1:20 μὴ φοβηθῇς παραλαβεῖν Μαρίαν τὴν γυναῖκά σου = (very literally) not you should fear to receive Mary the wife of you

Vulgate: noli timere accipere Mariam coniugem tuam = do not fear to take Mary your wife

The problem is not the translation. The problem is the strange reading that Ambrose’s commentary on Luke gives to Jesus’ commendation of Mary to the beloved disciple while he is on the cross (Jn. 19:26–27).

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. Here he comes as close to resolving the question as he is going to.

It has been argued that no one in Rome would pay any attention to these canons because they all come from Germanic sources. It is true that many of the canons on incest and *raptus* do come from Germanic sources, but there is nothing that anyone in the 12th century could see in the canons about choosing the religious life, impotence, marriage to clergyman, or the marriage of the Blessed Virgin that looks Germanic.

I leave you to work out what Gratian has to say about incest and *raptus* (which frequently means abduction rather than rape in the modern sense). What interests Gratian about incest is that the canons that deal with incest with a sibling of an espoused sometimes prohibit the incestuous couple from ever marrying and sometimes allow them to marry after doing penance. They do not say that the difference in these penalities results from the fact that in the former case the relationship with the espoused had been consummated and in the latter case it has not, but they can be reconciled if one makes that distinction. Similarly, all the canons on *raptus* command that the *rapta*, the woman who has been abducted, be returned. Some of them forbid her marry another if the espoused does not want her back; some allow her do so. They do not say that the difference in these penalities results from the fact that in the former case the relationship with the espoused had been consummated and in the latter case it has not, but they can be reconciled if one makes that distinction.

After drawing these distinctions, Gratian makes his key move:

Part 3. **Gratian**: . . . How, therefore, according to Ambrose and the other fathers, are those espoused [*sponsae*] called married [*coniuges*] when by all these arguments they have just been shown not to be married? But it ought to be known that marriage is begun by espousal but is perfected by intercourse. For this reason there is marriage between those espoused, but it is begun [*coniugium initiatum*]; between those who have had intercourse there is complete marriage [*coniugium ratum*].

There follows (in the Vulgate edition of Gratian) 11 canons that seem to make the distinction between iniiatiation of marriage and the marriage itself. They are quite easy to find, because the distinction is found both in those writing in a Roman context and in the Bible. None of them quite says that only consummated marriages are indissoluble, but they are open to that interpretation.

Having done that, Gratian is ready to return to what seems to be the contrary authorities with which he began his discussion. The *dictum post* canon 45 (*Mats.*, p. VIII–10) too long to be quoted here, but Gratian's answer to those authorities seems 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.

At the end of question Gratian turns to authorities that seem to forbid an espoused person from marrying someone else. Distinguishing these is a piece of cake. Of course, one ought to marry one's espoused, and if one hasn't and especially if the espousal has been a solemn, church authority can forbid another marriage. But that's not the issue. If such a marriage takes place, what then? Unless the espousals have been consummated, Gratian says, the subsequent marriage is to prevail.

The structure of Gratian's argument is typically scholastic. He begins with the best that can be said on the opposite side of the way in which he is going to come out. Then he offers what can be said on his side. Then he offers his synthesis. Next he returns to answering the arguments on the other side. Readers of Thomas Aquinas will recognize the pattern. It is followed in every article in the *Summa theologiae*.

What lies in the background of Gratian?

In the lecture, I then went on to sketch a background for Gratian in Roman law and what I quite hesitantly called 'Germanic law'. There was one thing that was missing that I should have said.

1. Roman law made a sharp distinction between engagements, which they called espousals, promises of marriage, and nuptials, the marriage itself. Nuptials were characterized by the exchange of consent between the bride and groom and the exchange of consent of their fathers if either or both of them were in their power, and, almost everyone who had a living father was in power. Whether anything more was required is controversial, but there are a number of texts in the Digest that seem to require some form of ceremony, or at least some form outward manifestation of the consent, which in Roman wedding ceremonies took place when the bride was led to the house of the groom, the so-called deductio in domum mariti, the leading of the bride into the house of the groom. Intercourse was not required. An unconsummated marriage was still a marriage. Any marriage was, of course, dissoluble. Roman law freely allowed divorce.
2. The Germanic law of marriage, to the extent that it may be said to exist, is even less well known than the Roman, but it seems to have a number of characteristics that differentiated it from the Roman. Unlike Roman law, Germanic law seems to have placed more emphasis on

the initial exchange of consent, engagements were more like marriages and less like the Roman espousal, and more emphasis on intercourse; until the parties had had intercourse, they were not fully married. Indeed, some customs suggest that they were not fully married until the birth of a living child.

3. [New]. The *Jewish* law of marriage also treated espousals very seriously. For example, to have intercourse with an espoused woman was treated as adultery. You might ask whether Western Christians in the Middle Ages knew anything about that. The answer is that they did because that aspect of Jewish law is key to understanding the infancy narrative in Matthew's Gospel.

Peter Lombard on the Formation of Marriage

The lecture dealt with two Paris theologians, both of whom drew the line between dissoluble and indissoluble in a different way. Rather than focusing on sexual intercourse as the moment at which the marriage became indissoluble, they focused on the distinction between present and future consent.

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. The Lombard's ideas are derived from Hugh of St. Victor (about a generation earlier) who espoused the idea of a dual scarmentality of marriage.

The canonic *Summa Pariensis* (1150s) and the canonic *Summa Coloniensis* (1160s) argue that this conflict between the Parisian view on this topic and the Bolognese view is not good for the unity of the Church.

For a while the academic canonists resisted this idea. But by the time that Alexander III made most of his decisionns in the 1170s, there were a number of them who were espousing the distinction between present and future consent. The evidence on this is not all in because much of what the canonists were doing in this period remains buried in manuscripts, and the dating of many of these manuscripts is not precise. It would seem, however, that before Alexander reached the final stage of his decisions on the topic of the formation, the academic canonists were prepared to accept them.

Alexander III on the Formation of Marriage

It would seem that Alexander went through at least three, and perhaps four, stages, in arriving at his ultimate resolution. Let us take a look at those decisions rather than summarizing them as we did in the lecture.

1. The first stage is illustrated by *Veniens . . . B* (*Mats.*, p. VIII–16), decided sometime in the 1160s. 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 (compare Nicholas I to the Bulgarians).

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.

2. The second stage is illustrated by *Sicut Romana* (p. VIII–16), written to a French archbishop in 1173 or 1174. This decretal does not say that the unconsummated marriage that was to prevail over a second 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.It seems, however, to reflect the influence of Lombard's thinking with its focus on the type of consent. There is one other decretal (*Sollicitudini*, VIII–19), which probably belongs to this period, that shows the same.

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

3. The third stage might be called the "solemnity period". If Alexander was heading in the direction of the Lombard's thinking in the early 1170s he changed his course very briefly in the mid 1170s. Both *Ex litteris* (p. VIII–16) and *Licet preter solitum* (p. VIII–17) 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 strict sense) that the present consent be accompanied by the solemnities customary in the area.

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

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

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

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

4. At the end of his pontificate Alexander abandoned the solemnity requirement (something that he held only briefly, see *Quod nobis*, p. VIII–19). Two decretals from after 1176 (one certainly so, one probably so), *Significasti*, p. VIII–18, and *Veniens ad nos*, p. VIII–19), 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 prior to their having sexual intercourse one of the parties choses 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 is capable of marrying any Christian woman, so long as they are of marriageable age, not in higher orders or solemn vows, and not too closely related to each other.

Alexander III to the Bishop of Norwich:
William, the bearer of this document, came to us (*Veniens ad nos*) and showed in his account (*relatio*) 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, asked 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.

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, cross-class marriages were uncommon, and ceremonies accompanied every important aspect of life.

5. In 1200, Innocent III wrote the following letter to the bishop of Mantua (Mats. p. VIII–19):

Innocent III to the bishop of Mantua.
Concerning the custom that has long prevailed in the city of Mantua that if someone swears that he will take a woman to wife and, without having carnal knowledge of her, espouses her, if he subsequently espouses another and knows her, the first known is adjudged to that man as husband and not the woman whom he previously espoused. Lest it be the shameful part that does not fit with its whole, even the church of Mantua ought to humbly follow and keep what the see of blessed Peter and its metropolitan are seen to follow and teach. In marriages to be contracted we wish that from henceforth you observe this: that after lawful present consent, which alone

suffices in such matters according to the canonical sanctions (if that alone is lacking, other things, even is celebrated with coitus itself, are in vain), has intervened between lawful persons, if persons [so] lawfully joined contract afterwards with others *de facto*, what proviously was done *de iure* cannot be nullified.

How is this different from any of Alexander's decretals?

Why Did Alexander III Decide as He Did?

This is obviously a key question, certainly one on which reasonable people can differ. What do you think?

1. Christian marriages once fully formed were indissoluble.
2. Alexander was committed, as was the church of his time, to incorporating as many people as possible within the realm of orthodox Christianity.
3. Twelfth century thought, both religious and secular, puts a heavy emphasis on individual choice.
4. Within this context, a consensual system of marriage has obvious attractions.
5. As these principles emerge as <u>the</u> principles all else tends to fall by the wayside.

How Does Accursius React to Alexander's Decisions? (*Mats.*, pp. VIII–21 to VIII–22)

1. As a practical matter, marriage was not a topic that belonged to the civilians in the 13th century.
2. The civilians seem to have reinterpreted their texts to keep things in line with the canonists.
3. But they did not drop the parental consent requirement for children who are in the power of their fathers. Justinian had said that those in power "must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law." Accursus glosses this passage (Gloss 8) to say "otherwise, it [the marriage] is not valid."
4. The only suggestion that he is aware of the problem does not come until later where he is glossing the passage that describes Justinian's ruling that the child of father who is insane may marry if the child obtains the consent of the father's curator (Gloss 17): "But by the law of the canons the consent of those whose matrimony is at stake suffices; but this perhaps is understood for others, not for children in power, or I believe that this is corrected because it is also an honest thing like going into a monastery." Here what he says at the end suggests that he may countenance the proposition that the canons have "corrected" the civil law. This passage probably does not mean that the whole law that he has just explained has been corrected. It may mean that just the law about lunatics has been corrected. What he may, also, be suggesting is that the consent cannot be unreasonably withheld.
5. Having won the war, Accursius prepared to concede the battle (Gloss 8). The father is deemed to consent unless he expressly forbids the marriage.
6. The fact that the civilians were willing to bend their texts to make them fit the canonic requirements shows us that another drive toward unity was operating in the system. If the canonists' complaints about the lack of unity in the customs of the churches on the basics about marriage reflect the strong drive toward unity that they felt as religious matter, the fact that the civilians were willing to bend their texts to make them fit the canon law shows that legal unity as well as religious unity were thought to be important. It is then all the more interesting that in this one important area, parental consent, the civilians, by and large,

refused to budge Their holding on this issue remained largely in the realm of the academic. It did, however, remain as a kind of time bomb ready to go off whenever anyone was ready to challenge the exclusive jurisdiction of the church over the question of the formation of marriage. As we will see, that will happen in the 16th century.

Illustrative Texts

NICHOLAS I TO THE BULGARIANS (866)

Responsum Nicolai [I] ad consulta Bulgarorum, c. 3

Avoiding the verbiage that would be necessary to rehearse the custom that you say that the Greeks have in marital unions, we will strive immediately to show you the usage that the Holy Roman Church had of old and still has in this kind of union. Our people, both men and women, do not wear on their heads filigree of gold or silver or any other kind of metal when they contract nuptial covenants, but after espousals, which are the promised covenants of future nuptials,[1] are celebrated by the consent of those who contract these things and with that of those in whose power they are, and after the espoused man gives earnest to the espoused woman by placing a ring on her finger of faith, and [after] he has handed over to her before those who are invited the *dos*[2] that was agreed on with a writing containing this thing, either soon or at an appropriate time, lest such a thing be presumed to be done before the time defined by law,[3] both are led to the nuptial covenants. And first they stand in the church of God with offerings, which they ought to offer to God by the hand of the priest, and then at length they receive the blessing and the heavenly veil, after the example of the Lord who blessed the first men in paradise, saying "Increase and multiply, etc." [*Genesis* 1:28: "And God blessed them and said: 'Increase and multiply', etc."] Indeed, Tobias, also, before he came together with his wife, is said to have prayed to the Lord with her. [*Tobias* 8:6–10] Nevertheless, those who are marrying for the second time do not receive the veil. Afterwards they leave the church carrying crowns on their heads, crowns that are commonly kept in the church.[4] And the nuptial feast having been celebrated, they direct their way to leading an undivided life thereafter,[5] the Lord willing. These are the laws of nuptials (*iura nuptiarum*); these are the solemn pacts of marriage unions (except for other things that I do not at present remember). We do not say, however, that it is a sin if all of these things are not present in a nuptial covenant, as you say that the Greeks are instructing you, particularly when such great poverty can constrain some people that they do not have the means to prepare these things, and for this [reason], the consent alone of those whose joining is

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[1] This is probably a reference to D.23.1.1: "Espousals are the proposal and promise back of future nuptials." If it is, it is the last time that the *Digest* is cited in the West until Ivo of Chartres does so in the late 11th century. The following material on parental consent may also be from D.23.1, but it need not be, because the same requirement is to be found in JI.1.10pr (*Materials* I-6).

[2] *Dos* in classical Roman law was dowry, a payment made by the bride or the bride's father (or relatives) to the groom. Here, a payment by the bridegroom seems to be contemplated. Such payments were known to the classical Romans, at least in the later Empire, but they are never called *dos* but "gift before nuptials" (*donatio ante nuptias*). On the basis of this text, it has been suggested that the Germanic custom of the husband's making a marriage payment had penetrated as far south as Rome in the mid-ninth century.

[3] There was no fixed period in Roman law that had to elapse between the espousal and the nuptials. This is either a reference to the minimum ages for marriage fixed by Roman law (12 for the bride, 14 for the groom) or it is a reference to the period fixed by the agreement of espousals (the word *lex* being used in Roman law not only for laws passed by the Roman people but also those to which parties bind themselves by private agreement).

[4] Nicholas does not say how these crowns differ from those that he says the Greeks wear and the Romans do not.

[5] Perhaps an echo here of the definition of nuptials in JI.1.9.1: "Nuptials, moreover, or matrimony is the joining of man and woman, involving an undivided habit of life."

at stake suffices according to the laws.[6] If this consent alone is lacking, everything else, even if it is accompanied by carnal union, is frustrated, as the great doctor John Chrysostom testifies when he says "Carnal union does not make marriage but will."[7] Now you ask whether a man can marry another woman when his own wife has died. Know that he most definitely can. Paul, the outstanding preacher say (1 Cor. 7): "I say to those who are not married and to widows: 'it is good for them to say as they are, as I am, but if they cannot contain themselves, let them marry." And again: "A woman," he says, "is bound to the law so long as her husband is alive; but if her husband falls asleep [i.e., dies], she is freed; let her marry whom she will, so long as it is in the Lord." What he lays down concerning a woman is also to understood concerning a man. Look at how we say: "Blessed is the man who walks not in the councils of the ungodly" (Ps. 1), and again "Blessed is the man who fears the Lord" (Ps. 111), where we believe, not without reason, that a woman too who walks not in the councils of the ungodly and fears the Lord is blessed.

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A certain man who had been excommunicated decided to accuse a bishop. He gets a youth younger than fourteen years of age to put forward his cause. Prohibited from accusing he makes the youth the accuser and himself a witness. The youth desires to play the role of accuser and witness. On the day appointed for trial by the chosen judges, the bishop does not come. He is suspended from communion. Then, the trial being renewed, the accuser is found guilty in his accusation. At length he proceeds to assert his own case.

(Qu. I) Here it is first inquired whether someone who is excommunicated can accuse another?

(Qu. II) Secondly, whether someone below fourteen can testify in a criminal case?

(Qu. III) Thirdly, whether someone prohibited from accusing can assume the role of witness?

(Qu. IV) Fourthly, whether the same person can be accuser and witness?

(Qu. V) Fifthly, whether someone should be suspended from communion for not coming on the appointed day.

(Qu. VI) Sixthly, if someone is found guilty in the role of accuser in the trial of bishops, whether he can then be admitted to assert his own cause?

[6] It is probably significant that Nicholas says "according to the laws" (*leges*) and not "according to the canons" (*canones*), i.e., he is referring to Roman law.

[7] Not by John Chrysostom but by an anonymous author of a collection of homilies on Matthew's Gospel. The mistaken attribution is old, and probably antedates Nicholas. That Nicholas is citing a great father of the Greek Church in the context of an argument with the Greeks will not escape notice. In context, this passage is less powerful than it seems because the author of the homily is arguing that separation without remarriage does not violate the prohibition on divorce found in *Matthew* 19:9. See C.27 q.1 c.1, quoted below.