

PART VIII. GLOSSATORS: MARRIAGE

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A. GRATIAN OF BOLOGNA, CONCORDANCE OF DISCORDANT CANONS CAUSA 27, QUAESTIO 2 (C. 1140)

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

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

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

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

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

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

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

CASE 27¹

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

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

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

[On the first question, Gratian produces a large number of contradictory canons. If there is to be any hope of reconciling them, some sort of distinction must be found. The distinction that Gratian uses for his ultimate resolution is that between simple and solemn vows. The former do not invalidate the marriage; the latter do. (This resolution became that of the classical canon law.)] ...

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

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

¹ Translated below are all that was in C.27 q.2 in what has recently been determined to be the “first recension” of the work. See A. Winroth, *The Making of Gratian’s Decretum* (Cambridge [UK], 2000), p. 222. Those items, or portions of items, that are from the “second recension” (or beyond) are, if they given, enclosed in curly brackets {}.

has taken another woman, than he has fully dismissed [the first]. Therefore he who dismisses [his wife] does not commit adultery, but he who marries another.

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

[**Canon 3.**] The blessed Mary proposed a vow in her heart that she would preserve her virginity, but she did not express the vow of virginity with her mouth. She subjected herself to divine disposition, when she proposed that she would preserve her virginity unless God revealed something different to her. Committing therefore her virginity to divine disposition she consented to carnal mingling, not that she desired it, but obeying divine inspiration whichever [God should command]. After she had born a son, she and her husband expressed with their lips what she had conceived in her heart. The mutual consent of cohabitation and maintaining an undivided habit of life made them husband and wife (*coniuges*). The undivided custom is to share with her husband all things that she shared with herself, and he likewise.² To the undivided custom of life belongs that she could not take time out for prayer for a while nor profess continence without the consent of her husband. Because there was this consent between them, it is apparent that they were husband and wife (*coniuges*).

[There follows a passage [canon 4] that was added later.] ... **Gratian:** Again, they [the couple in the hypothetical case] are also proved by authority to be married. For Ambrose says in his book on virgins [c. 6]:

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

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

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

Again Isidore, [*Etymologies*, 9.7.]

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

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

Canon 9. *Concerning the same thing.*

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

² Literally, “manifest herself so to her husband in all things as she is to herself”: *talem se in omnibus exhibere viro qualis ipsa sibi est.*

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

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

Again, in the same.

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

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

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

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

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

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

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

Again Jerome [not Jerome, unidentified] ...}

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

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

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

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

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

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

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

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

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

Again Pope Leo [to Rusticus 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.³

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

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

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

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

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

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

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

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

The woman Agathosa, the bearer of this letter, has complained that her husband was converted to the monastery of the Abbot Urbicius against her will. Therefore, we order your honour to conduct a diligent inquiry, lest perchance he was converted by her wish or she herself promised to change. And if he learns⁵ this was so, let him both arrange for the husband to remain in the monastery and compel the wife to change as she promised. If, indeed, it is none of these, and you find that the aforesaid woman did not commit any crime of fornication on account of which it is lawful to dismiss a wife, in order that his conversion should

³ Gratian was using a corrupt text of Leo's letter (although the corruption goes a long way back). The original letter (PL 54:1204A–1205A), as the *Correctores Romani* point out, does not have the first "not," and probably should be translated "the partnership of nuptials was so instituted from the beginning that it has in itself the sacrament of the nuptials of Christ and the Church in addition to the mingling of the sexes." The point of the letter is that concubines are not wives.⁴ The reference may be to Novel 128.40.

⁴ The reference may be to Novel 128.40.

⁵ Someplace in the transmission of this letter, the person of these verbs got confused. It would seem that they all should be second person.

not be an occasion of damnation to the wife left in the world, we wish you to return her husband to her even if he has already been tonsured, dismissing all excuses, because although the secular law orders that a marriage can be dissolved for the sake of conversion,⁶ even if one party is unwilling, nevertheless the divine law does not permit this to happen. Except for fornication it in no way allows a husband to dismiss the wife [Mt. 5:32; 19:9] because after the consummation of marriage husband and wife are made one body, which cannot be partly converted and partly remain in this world.

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

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

If a married man wishes to be converted to a monastery he is not to be received unless he is previously released by his wife who herself professes chastity. For if she married another through incontinence while he is living, without doubt she is an adulteress. Nor is the conversion of same man accepted by God if it results in the prostitution of the conjugal covenant. Such people then who abandon the world to follow Christ do so without fault if there is consent to chastity by the will of both parties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ Again, probably a reference to Novel 128.40

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

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

Gratian: Since it does married parties no good to offer continence to God without each other's consent, and since (although a husband does not have power over his body but his wife has it) nonetheless espoused women may choose the monastic life and espoused men may with benefit take up the better life without seeking the consent of their espoused, it is apparent that there is no marriage between espoused parties. § 1. Again, since according to Augustine that woman does not pertain to matrimony with whom it is learned that there is no sexual intercourse. Again according to Leo she does not pertain to matrimony with whom it is learned that there was no nuptial mystery. It is apparent that between espoused there is no marriage. § 2. Again, Pope Nicholas teaches [actually the interpretation of Paul, *Sentences* 20.4.2] that those who are cut off by their enemies or deprived of their members are not to have their marriages dissolved on account of this. § 3. On the other hand, Pope Gregory [an unidentified canon] laid down about those who cannot render the debt to their wives by reason of frigidity, that both of them shall swear by the seventh hand of their neighbors, touching the holy relics, that they never were made one flesh by the joining sexual intercourse. Then the woman can contract second nuptials; the man, however, who is of a frigid nature, shall remain without hope of marriage. Whence the same [actually Rabanus to Heribald, 853] writes to Venerius, the bishop of Carlitanus,⁷ saying:

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

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

Gratian: See, the impossibility of intercourse, if it arises after intercourse has occurred between the parties, does not dissolve the marriage, but if it arises before intercourse has occurred, then the woman is free to marry another. Whence it is apparent that the parties were not married otherwise they would not be permitted to depart from each other except on account of fornication, and if they departed they are obliged to remain unmarried or to reconcile themselves with each other. § 1. Again, if an espoused were a wife, upon the death of her spouse she would be a widow. If however she were a widow her husband could not rise to holy orders. For the husband of a widow, just like the man who has married twice, is prohibited from becoming a priest. Out of this kind of linking, however, no one is prohibited from holy orders. As Pope Pelagius [555 X 560, suspect] says: "There is nothing (so far as pertains to this article) in the canonical institutes that prevents him." It appears therefore that these were not married.⁸ § 2. Again, if they were married, the departure from each other would be a divorce. But the separation of these Ambrose denies is a divorce, saying of the Blessed Mary whom Joseph espoused, and took her to his own [*Comm. in Luke* 2.1]: "Joseph never knew her. For if the just man had known her, he never would have allowed her to depart from him, nor would the Lord, who commanded a wife not to depart from her husband except for the reason of fornication, have been the author of divorce, commending her to John." See, the commendation of Mary to John and her withdrawal from Joseph is denied to be a divorce, because Joseph did not know her. Whence it is apparent that they were not married. If however the Blessed Mary whom Joseph espoused and took to his own is denied to have been married, how must less she who is simply espoused to be called married.

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

⁷ Cagliari in Sardinia. See the new [Graesse, *Orbis Latinus*, s.n. Calaris 1:381.](#)

⁸ This example requires some explanation. The famous passage in *First Timothy*, 3:1–13, on the qualifications for bishops and deacons says that both should be "married only once." *Id.* 3:2, 12. The same is required of presbyters in the *Letter to Titus*, 1:5. An ancient canon prohibited the ordination not only of those who themselves married more than once but also those who had married widows. [Apostolic canons?] But, according to Gratian, Pope Pelagius (555 X 560) had held that marriage to a "widow" who had never had intercourse with her deceased husband did not render the new husband a "bigamist," ineligible for orders. The canon ascribed to Pelagius is suspect, because it first appears in Ivo of Chartres and cannot be traced behind him.

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

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

Gratian: That is, he may not render the debt to his own wife, whom he rendered unlawful for himself by knowing her sister. Nor, even after the death of his wife, may he or the adulterous sister couple with anyone in marriage. Of an espoused, however, the contrary is read in the council of Tribur [895].⁹

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

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

[Canon 32 was added later.]

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

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

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

Canon 34. *Concerning the same.*

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

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

Part 3. Gratian: It appears therefore, that she is not a married since the privilege of marrying another is not denied to her who is espoused to a living man. How, therefore, according to Ambrose and the other fathers, are those espoused [*sponsae*] called married [*conjuges*] 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 [*conjugium initiatum*]; between those who have had intercourse there is complete marriage [*conjugium ratum*]. Whence Ambrose [cf. canon 5]:

Canon 35. *In espousals marriage is initiated.*

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

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

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

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

⁹ The canon does, indeed, come from c. 41 of the council, although the council would seem to be repeating a ruling first found in Regino of Prüm, 2.246.

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

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

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

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

Again, Ambrose to Paternus [ep. 66].

If anyone has use of a woman espoused and handed over to him, it is called marriage.¹⁰}

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

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

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

Gratian. According to this distinction the authority of Augustine is to be understood, “There is no doubt that that woman does not pertain to matrimony with whom it is learned that there was no mingling of the sexes.” It is to be understood as dealing with perfected marriage, such that has within it the sacrament of Christ and the church. So also is that statement of Pope Leo to be understood. § 1. But this statement of Augustine is raised by way of objection: “Between Mary and Joseph there was perfect marriage.”¹¹ But here perfect is not understood from the office but from those things that accompany marriage, to wit, faith, progeny and sacrament. The authority of Augustine proves that all these things were present between the parents of Christ. All these things therefore which are brought in for the purpose of not dividing a marriage are to be understood of its perfection which is initiated in the spousal joining but is perfected in the office of corporal mingling. Those things, however, which shows a separable marriage are understood of one that is initiated, which is not yet perfected by its office. § 2. It is possible to make another distinction. Espoused are so called by the custom of writing with regard to the hope of future things, not by the effect of present things. Whence Ambrose, when he says, “When marriage is initiated,” does not add “then the matter and the effect,” but “then the name of marriage is taken,” showing that such persons have the name of marriage, not the matter or the effect. Again, Augustine when he speaks of the parents of the Lord says “they were married in mind not in the flesh, just as they also were parents [in the same way].”¹² Out of which it is given to understand that as Joseph is called the father of the Lord not by the effect of procreation but by the office and care of providing; similarly his [the Lord’s] mother [reading *mater*] is called wife not by the effect of marriage but by submitting to those things necessary for it and by the affect of an undivided mind. Hence Augustine says, “Do not fear to take Mary your wife,” he called her *coniunx* because she was a wife to be.¹³ Hence also Bede on *Leviticus* [actually, Dt. 22:25, see above], “If anyone violates the espoused of another,” says that an espoused is called wife, not because she then was but because she was going to be wife. Hence also Jerome on Matthew in the Gospel, “When she was espoused.” [Mt. 1:18].

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

“He engendered Joseph the husband of Mary.” [Mt. 1:16] When you hear “husband” you should not suspect nuptials, but remember the custom of scripture that engaged men are called “husbands” and engaged women “wives.” *And below.* She was not found by anyone other than Joseph [to be with child (Mt. 1:18)], who almost by the permission given to a husband knew everything about his future wife. *And below.*

¹⁰ As the *Correctores* note, this passage is taken out of context and almost certainly does not mean what Gratian thinks it means.

¹¹ This would seem to be a summary of C.27 q.2 c.3, but the word “perfect” is not found in that passage. (?)

¹² Apparently a summary of C.27 q.2 c.9.

¹³ Apparently a reference to *id.* The quotation is from Mt.

“Joseph, son of David, [do not fear to take Mary your wife (*coniugem tuam*) (Mt. 1:20)]” etc. Now, as we said above, it is apparent that espoused women are called wives, which the book against Helvidius teaches more fully.¹⁴

Canon 41. *About the same.*

The same on Genesis [Jerome, *Questions on Genesis* 19:14]. “Lot went out to speak to his sons-in-law, those who were to take his daughters.” [Gn. 19:14] In what follows the daughters of Lot are said to be virgins. [Cf. Gn. 19:31] And he himself said to the Sodomites, “Behold here are my two daughters who have not known a man.” [Gn. 19:8] Now, however, he is said to have sons-in-law. But some think that those who had husbands perished at Sodom and those who were virgins went out with their father. But the Hebrew truth [i.e., the original Hebrew text] has “Lot went out to speak to his espoused men,” which is made more apparent by what follows, “those who were to take his daughters.”

Gratian. Whence it is given to be understood that Scripture calls espoused men “sons-in-law.”

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

Again John Chrysostom on the same Gospel.¹⁵

“Before they come together.” [Mt. 1:18]. He did not say “before she was led to the house of her espoused.” The ancients followed this custom, that espoused women lived in the houses of their espoused. Just as the sons-in-law of Lot lived in the house of their father-in-law with their espoused before they had coupled with them by the law of marriage [Gn. 19:14], so also Mary dwelt with her espoused. *And below.* For he did not wish to expel her from his house, but dismiss her. *And below.* “Do not be afraid to take Mary your wife (*coniugem*).” [Mt. 1:20] By which word (*coniugem*) he indicates an espoused woman, just as it is the custom of scripture to call those who are still espoused sons-in-law. What is, however, this “take”? [It means] to continue to keep her in his house. For he had already dismissed her in his mind. *And below.* Just as Christ afterwards commended her to the disciple [Jn. 19:26–7], so now the angel couples her to her espoused, not in the solemn covenant of marriage, but in the consortium of a dwelling place.

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

The same on the ?the same. ... }

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

Again Origen in the same [hom. I Evang.]. “She was found with child.” [Mt. 1:19] By St. Joseph, although he did not touch her, he nonetheless knew everything about his future, as he thought, wife. *And below.* If she is called your [Origen is addressing Joseph, explaining the words of the angel] wife, if in espousal she is said to be yours, she is not your wife, however, but the eternal mother of the only-begotten of God. *And below.* I [here God is speaking to Joseph] call her your wife so that I might hide from the devil her virginity, so that I might not destroy the institutes of the law. In what follows I will show that she is not be held as your wife according the custom of marriage, nor is he who will be born to be believed to be your son.

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

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

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

¹⁴ Curiously, Gratian does not quote the passage that gives rise to the difficulty that Jerome is explaining, Mt. 1:19: “Joseph, her husband (*vir eius*), being a just man, did not want to expose her to the law”

¹⁵ This is not, in fact, John Chrysostom, but comes from a collection of homilies on the gospel of Matthew by an unknown patristic writer.

Gratian: From all these things it appears that those espoused are called married by a hope of future things not by the fact of present things. How therefore, can they be called married from the time of the first oath of espousal, if that joining which they assert at the espousal may be denied? But, from the first oath of espousal, it may be called marriage, not because there is a marriage in the espousal, but because of the faith which they owe another because of the espousal that they afterwards will become married. In the same way sins are said to be forgiven by faith not because they are forgiven by faith before baptism but because faith is the cause by which we are cleansed from our sins in baptism. § 1. For this reason John Chrysostom says “Intercourse does not make matrimony, but will.”¹⁶ And Ambrose says “Not the deflowering of virginity but the conjugal pact makes matrimony.”¹⁷ 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 Siricius¹⁸ 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)] in which it is laid down as is written here.

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

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

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

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

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

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

Canon 48: *What is raptus?*

Raptus is illicit intercourse, so called from ‘corrupt’; hence he who takes possession by *raptus*, is taking delight in *stuprum*.¹⁹

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

¹⁶ Above, C.27 q.2 c.1.

¹⁷ Above, C.27 q.2 c.5.

¹⁸ This would seem to be a reference to C.27 q.2 c.50, below.

¹⁹ A sexual crime, normally implying corruption of a virgin.

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

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

Gratian: What joined to the end of the chapter, “even if it is clear that force was brought to bear on them by their *raptores*,”²⁰ was added because some *raptae* expose themselves to *raptus* and some are violently abducted. In whatever way they are *raptae*, they are to returned to thier previous [espoused]. This woman [in the hypothetical], however, is counted not among those *raptae* but among the espoused, and therefore she is not to be taken away from this man [her current husband] and returned to the previous one. § 1. There follow other authorities in which she is prohibited from marrying a second man and is ordered to return to her prior vows. For Pope Siricius says to Himerius bishop of Tarragona [Ep. 1.4].

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

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

Gratian: But by this authority Siricius prohibits a woman from going to second vows who has been led to her espouser’s house and with her espoused has been veiled and blessed. The parting of such partners violates the blessing which the priest has placed on those about to be married. And therefore the marriage we are talking about in the instant case is not forbidden by this authority. §1. Again, that [statement] of Pope Eusebius,²¹ “It is not permitted for the parents to hand over an espoused girl to another man,” is likewise to be understood of one so espoused, that is, one veiled with her espoused and blessed. Again, the statement of Gregory is objected,²² “A woman who is separated from her husband on the ground of frigidity [rightly, impotence] and married to another, if the man afterwards knows another woman, the [first] woman is to taken from her second [husband] and returned to the first.” But this [objection] is to be solved in the same way, to wit, because she was blessed together with him.

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

[CD trans.]

DISTINCTION 26

The Institution of and Reason for Marriage

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

The Double Institution of Marriage

The institution of marriage is double. The first was in Paradise as a position and duty where there was an unstained bridal chamber and honorable nuptials; conception was without burning passion and birth was without pain. The second was outside of Paradise as a remedy to avoid unlawful emotion. The first was to multiply nature; the second to cut off nature and control vice. Even before sin God said: “Increase and multiply”; and He said it after sin when almost all men had been consumed in the flood. That marriage was

²⁰ See above, C.27 q.2 c.46.

²¹ Above, C.27 q.2 c.27.

²² In fact, by an unknown author; see C.33 q.1 c.2.

instituted before sin as a position and duty and after sin was granted as a remedy, Augustine states when he says: “What is a position and duty for the well, is a remedy for the sick.” The sickness of incontinence, which is in mortal flesh because of sin, is taken away by the honesty of nuptials lest flesh fall into the ruin of passionate acts. If the first men had not sinned, they and their successors would not have had drives of the flesh and the burning of lust, and just as any good work is noble, so their intercourse itself would have been good and noble. Since, however, the deadly law of concupiscence clings to our bodies because of sin without which there would be no intercourse, intercourse is evil and reprehensible unless excused by the good of marriage.

* * *

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

* * *

DISTINCTION 27

The Efficient Cause of Matrimony

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

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

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

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

When does the marriage begin? That the espousals in which the conjugal pact is expressed result in married parties, the evidence of the Saints shows: Ambrose says: “When the marriage begins, the name of marriage is adopted; when the woman is joined to the man there is marriage, not when she is carnally known by the man.” Isidore: “The parties are called married from the first oath of espousal, even though there has as yet been no intercourse between them.” Augustine: “She is called a wife from the first oath of espousal

though she has not slept with her husband nor is about to. It is not swearing falsely nor lying to call it marriage where there is not, nor is about to be, any intercourse. Because of a faithful marriage Mary and Joseph deserve to be called the parents of Christ, not only his mother, but also his father, as the husband of his mother; this is a matter of the mind not of flesh.” From this clearly it is to be inferred that from the time of voluntary marital consent (which alone makes the marriage) the espoused are truly married.

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

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

That husband or wife cannot profess celibacy without the other's consent. Married parties, however, cannot do this. A man may not choose the better life without the consent of his wife and vice versa. For this reason Gregory writes to the patrician Theotista: “There are those who say marriage ought to be dissolved because of religion. Know you the truth, even if human law allows it, nevertheless divine law prohibits it. If both should lead the celibate life who should venture to accuse them for this? For we have many religious men who lead celibate lives with their spouses and afterwards came under the rule of the Holy Church. If, however, the man seeks celibacy and the woman does not follow, or if the wife seeks it and the man objects, the marriage cannot be divided, for it is written: ‘The wife does not have power over her body but the husband; likewise the man does not have power over his body but the wife’.” [There follow a number of other quotations to the same effect all of which are to be found in Gratian, C.27, q.2, c.21, 22, 23.] Augustine says: “If you abstain without the consent of your wife, you give her a license to commit fornication, and her sin will be imputed to your abstinence.” Thus Nicholas observes: “Queen Thieaberga wrote us that she wished to lay aside her regal dignity and intercourse and would content herself with a private life alone. We wrote her that she could not do it unless her husband Lothar chose the same life.” From this it is plain that it does married parties no good to profess continence or to take up the religious garb unless there is a common consent, and if they do it, the act ought to be revoked. But espoused persons can choose the monastic life without the common agreement. For this reason it seems that there has been no marriage between espoused parties.

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

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

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

The term "espoused" is used in other ways. A woman is called espoused who is espoused to a man in such a way that present consent has not occurred, but future espousal. In this fashion this decree is to be understood: "If anyone takes [in the same sense as in Deuteronomy] the espoused of his son and afterwards the son marries her, let the father not have a wife nor the woman a husband, but let the son take another wife if he did not know of his father's crime." If she was his wife, if in the espousal there was a marital pact, then he would not be allowed to marry another. Moreover the punishment for an adulterer, not marrying, is inflicted rigorously so that others may fear it. The same council says: "Whoever espouses a wife and provides a dower but has not been able to have sexual relations with her [this is apparently not a case of impossibility but simply a case which the espoused has had other, more pressing, matters], if his brother secretly corrupts her and renders her pregnant so that she cannot be married to the lawful man, nevertheless the brother cannot have the espoused of his brother; but if the adulterer and adulteress will sustain the punishment of fornication, licit marriage shall not be refused to them." This espousal should be understood as one in which there is no present consent of marriage, otherwise they would not be allowed to choose other marriages. In this fashion also this decree should be understood: "It was decreed by the council that if a man took another's espoused by force, he should be punished with public penance and should remain without hope of marriage. If the woman did not consent to the same crime, she should not be denied the privilege of marrying another." It seems that this was a betrothal without the pact of present marriage and therefore not a marriage because the woman was permitted to marry another even though her espoused was living. For there are future marriage pacts out of which the parties are called espoused but are not married, and there are present marriage pacts which make the espoused married. . . .

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

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

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

C. DECRETALS OF ALEXANDER III (1159–1181) AND INNOCENT III (1198–1216)

[CD trans. (mostly)]

1. VENIENS ... B (BEFORE 1170)

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

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

— NOTES —

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

2. What are the facts of this case?

3. What is the significance of the ring?

2. SICUT ROMANA (2 JUNE 1173 OR 2 JUNE 1174)

[1 Comp. 4.4.5(7) (WH 944 (f); Donahue, *Marriage Decretals* at 83, 96, 103–4).]

Alexander III to William, archbishop of Sens:

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

3. EX LITTERIS (5 FEB. 1175 X 5 FEB. 1181)

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

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

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

Afterwards some got suspicious that the above-said R. wanted to break his vows and take up others. The matter was brought to examination of the above-said archbishop who prohibited under threat of anathema, as we understand from his letter, the man from taking up other vows before the matter was fully brought to light. But he, contemptuous of the prohibition which had been laid down, took to wife solemnly in the face of the church the daughter of V., Matilda by name. (Afterwards the two women and the man being brought before the archbishop, the above-said R. publicly confessed that he had contracted marriage with Maria, as it is described above, and that the afterwards had taken the other one misled by wicked suggestion. Maria, on her part, continuously asserted that her father did not stir up the quarrel of his own will. She asserted that except for the oath of contracting marriage, there was nothing binding between herself and the above-said R., and that she was not bound to the oath [simply] he had left her whom he took as a second wife.¹) Since, however, she had asked that the above-said R. be restored to her as her proper husband and since the archbishop wished to know about the first marriage because the women said that there was an impediment of consanguinity, for which reason the vice of incest was feared as much as that of adultery, the above-said Maria appealed to the Holy See and asked that her appeal be heard before the feast of the Circumcision [January 1]. Deferring to this appeal the archbishop laid a very strict interdict upon Maria upon peril of her soul and threat of excommunication that she not marry anyone until this cause be brought to its proper end either before us or before judges delegate from the Holy See. She, nonetheless, trusting in the remedy of her appeal married another, by the name of V. Called before the archbishop on this account, she refused to appear because of the appeal which she had taken.

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

— **NOTES** —

1. When this decretal was reduced to the official text by Raymond of Peñafort, he omitted many of the facts including the matter enclosed in parentheses. He also added the word “future” at the point indicated in the text with an asterisk. Why?
2. If both Maria and R. want to marry someone else, why is there a case here at all?
3. What sanctions were available to enforce both the mesne rulings and the ultimate judgment in this case?

4.LICET PRAETER SOLITUM (PROB. 1169 X 1179, PHPS. 1176 OR 1177)

[X 4.4.3 (WH 620 (a and b); Donahue, *Marriage Decretals* at 84, 96, 105–6, 119).]

Alexander III to Romualdus, archbishop of Salerno:

Although we are engaged more than usual, indeed much more than usual, in various matters of business so that it is not easy for us to answer any consultations, nevertheless on account of that particular regard we have towards to you and on account of fraternal love, we are compelled to reveal to you, although we are

¹ This last sentence is difficult, and may be corrupt.

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 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.

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

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

— **NOTES** —

1. If marriages are made by consent, why is the priest or the official with witnesses necessary?
2. If present consent makes a marriage, why may those who have not had intercourse abandon the marriage to enter the religious life leaving the other partner with a cold bed, while those who have had intercourse may not?
3. How does the form of this decretal differ from *Veniens ... B* (C1) and *Sicut Romana* (C2)?
4. Where does the reference to “one flesh” come from? Why does Alexander use it?
5. Why did Raymond of Peñafort leave out the matter in parentheses?

5.SIGNIFICASTI (1159 X 1181)

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

Alexander III to the Bishop of Norwich:

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

— **NOTES** —

1. If the translation here seems more fluent, the translator is not Donahue but the great F.W. Maitland. F. Pollock and F. Maitland, *History of English Law* 2d ed. (Cambridge, Eng. 1898) 2:371.
2. How does the holding of this decretal differ from *Veniens ... B* (C1) and *Ex litteris* (C3)? From *Licet praeter solitum* (C4)?

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

6.SOLLICITUDINI (1166 X 1181)

[1 Comp. 4.5.4(6) (WH 991(a); Donahue, *Marriage Decretals* at 83, 103).]

Alexander III to bishop Gerard of Padua

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

7.VENIENS AD NOS (1176 X 1181)

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

Alexander III to the Bishop of Norwich:

William, the bearer of this document, came to us 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.

— NOTES —

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

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

8.TUAS DUDUM (1200)

[X 4.4.5]

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 previously was done *de iure* cannot be nullified.

9.QUOD NOBIS (18 OCT. 1170 X 19 SEP. 1171)

[X 4.3.1 (WH 819; Donahue, *Marriage Decretals* at 91, 103).]

Alexander III to the bishop of Beauvais:

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

10.TUAE NOBIS (1206)

[X 4.2.14.]

Innocent III to the bishop of Halberstadt (?):

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

11.CUM INHIBITO (1215)

[X 4.3.3.]

Innocent III in the general council.²

Although the prohibition of the conjugal bond has been revoked in the last three degrees, in other degrees we want it strictly observed.³ 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.

² This is the 51st canon of the Fourth Lateran Council. The translation here is from G. Alberigo *et al*, ed., *Conciliorum oecumenicorum decreta* (3d. ed. 1972) 258, but the version given in the *Liber Extra* does not differ in substance. The prohibition of clandestine marriage and the concomitant requirement of the publication of banns was repeated, sometimes in the form of the decree of the Lateran Council, sometimes in a locally composed form, in over thirty pieces of English conciliar legislation and episcopal decrees between 1200 and 1342. Similar legislation may be found in France and in other areas as well.

³ 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.

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.

D. EXTRACTS FROM CIVILIAN GLOSSATORS ON MARRIAGE

1. JUSTINIAN'S *INSTITUTES* 1.10PR, 10.11 WITH THE ACCURSIAN GLOSS

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

Roman citizens² are joined together in lawful wedlock when they are united according to law,³ the man having reached years of puberty,⁴ and the woman being of marriageable age,⁵ whether they be independent⁶ or dependent: provided that, in the latter case, they must have the consent of the parents in whose power they respectively are,⁷ the necessity of which, and even of its being given⁸ before the marriage takes place, is recognized no less by natural reason⁹ than by law.¹⁰ Hence the question¹¹ has arisen, can¹² the daughter or

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

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

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

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

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

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

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

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

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

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

¹¹ Because consent of the father is required. Ac.

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

son of a lunatic lawfully contract marriage? and as the doubt still remained with regard to the son,¹³ [our decision¹⁴ by which]¹⁵, like the daughter, the son of a lunatic¹⁶ might marry even without the intervention of his father, according to the mode¹⁷ prescribed by our constitution. . . .

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

2.EXTRACTS FROM THE ORDINARY GLOSS ON D.23.2.5-7

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

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

¹⁵ Decision. Ac.

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

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

¹⁸ There can be enumerated fourteen ways with those which we have in this title. First is by reason of slavery, as above [JI.1.10.pr] and [C.5.5.3]. The second is by reason of age, like males younger than 14 years and women younger than 12, as above [JI.1.10.pr]. The third is by reason of blood, which is divided into three: ascendants, descendants and collaterals, as above [JI.1.10.1, 2, 3, 4]. The fourth is by reason of adoption, as above [JI.1.10.1, 2], at the end of both sections. The fifth is by reason of affinity, present, past or future, as above [JI.1.10.6, 7, 9]. The sixth is by reason of matrimony, for if he has one woman he is not permitted to have another at the same time; if he does, he is infamous, as above [JI.1.10.6, 7] and [C.9.9.18]. The seventh is through the *senatusconsultum* which prohibits [marriage] between a tutor and a curator and their sons and a woman who was once their child or adult ward or that of their father, as [in C.5.6.1]. The eighth is by the *lex Julia et Papia*, sc. between senators and their children, and freedwomen or others of low condition, as [in D.23.2.23] and [C.5.4.28], which chapter today is corrected as in [Nov.78.3]. The ninth way is between a governor and one put under him, by reason of jurisdiction, as [in C.5.4.6] and [C.5.7.1]. The tenth is by constitution of the prince, as with her whom someone has taken from the sacred font, as [in C.5.4.26 *in fi.*], which is observed also of the godmother, although that is not so provided in our law. The eleventh is by reason of honesty, as above [JI.1.10.9] and [D.23.2.12]. There is also a twelfth, by reason of orders annexed, as with clerks in holy orders, as in [Nov.6.5] and in [Nov.123.14]. There is also a thirteenth, as in monks, *conversi*, nuns, although they are not in holy orders, as in [Nov.5.8] and in [Nov.22.5]. There is also a fourteenth, as in a ravished woman who marries her own ravisher, as [in Nov.143]. Ac.

[CD trans.]¹

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

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

5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter² or by messenger, if she is led to his house. But where she is absent,³ she cannot⁴ be married by letter or by messenger because she must be led⁵ to her husband's house, not her own, since the former is, as it were, the domicile of the marriage.

6. ULPIAN, *Sabinus*, book 85: Finally according to Cinna, where a man married a woman in her absence,⁶ and on his way back from dinner⁷ by the side of the Tiber, he died, it was held⁸ that she ought to mourn for him as his wife.

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

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

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

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

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

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

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

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

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

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

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

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

NOTES ON FURTHER CIVILIAN MATERIAL ON MARRIAGE

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

1. *Summae on the Code*:

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

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

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

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

... And certainly nuptials are a joining of souls and (understand not out of necessity) of bodies. For it is not the deflowering of virginity that makes marriage but the conjugal pact. And coition does not institute marriage but consent alone. ... For the interpreters of the law held that even a man, perhaps he was going to school at Rome, who returning from a feast, not the wedding feast, fell into the Tiber, his wife having been led to his house, say at Tybule, by the man's messenger, is to be mourned by that woman, and in this case the woman, though a virgin, has her dowry and the dotal action. ... [A reference to D.23.2.5, above.]

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

2. *Brocardia, notabilia*:

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

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

3. *Epitomes, abbreviations, vocabularies*:

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

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

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

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

E. A NOTE ON SOURCES: NICHOLAS I TO THE BULGARIANS

Nicholas I to the Bulgarians (866), c. 3

in *Monumenta Germaniae historica. Epistolarum tomus 6: Epistolae Merovingici et Karolini aevi*, vol. 4
Ernst Perels, ed., *Nicholai Papae epistolae*, no. 94, pp. 569–70 [CD trans.; boldface supplied]

Obviously the material in the previous subsections of this section is derived from many different sources some legal, some only vaguely legal, from many different centuries prior to the twelfth. Any attempt to trace them all, or even the ones that seem to be critical, would quickly get out of hand. We offer here just one, the section on marriage in the letter of Nicholas I to the Bulgarians, and ask some questions about its use in the twelfth century.

What follows is a part of a long letter written in 866 by Pope Nicholas I (pope, 858–867) to Boris, khan of the Bulgarians, who had just become a Christian. Both German and Greek missionaries were at work in Bulgaria, and whether the new Christians would ultimately prove loyal to Rome or to Constantinople was in doubt. Nicholas wrote this letter to try to persuade Boris to become a Latin-rite Christian. In this effort, he was, ultimately, unsuccessful. The passage in the letter on marriage is important both because it tells us something of Roman marriage ceremonies in the middle of the ninth century and because it indicates that the Greek Church was already maintaining that a church ceremony was necessary for a valid Christian marriage. They maintain that position to this day, and the position is quite different from that ultimately adopted by Alexander III in the twelfth century.¹

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,² 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*³ 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,⁴ 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.⁵ And the nuptial feast having been celebrated, they direct their way to leading an undivided life thereafter,⁶ 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

¹ On the letter and its importance for fixing the date at which the Greek church adopted its view of marriage, see A. Laiou, “Consensus Faciat Nuptias — Et Non: Pope Nicholas I’s Responsa to the Bulgarians as a Source for Byzantine Marriage Customs,” *Rechtshistorisches Journal*, 4 (1985) 189–201.

² 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).

³ *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.

⁴ 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).

⁵ Nicholas does not say how these crowns differ from those that he says the Greeks wear and the Romans do not.

⁶ 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.”

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 at stake suffices according to the laws.**⁷ **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.”**⁸

NOTES AND QUESTIONS

This is obviously an important text on the topic of the formation of marriage. (Only a portion of the parts of the letter that concern marriage is given here.) Gratian cites different pieces of it no less than six times over the course of his *Concordance of Discordant Canons*.⁹ Our concern here is with fragment given in boldface, which Gratian cites in the course of C.27, q.2 (c.2, above, pp. 3–3). It is not until the *dictum* after c. 45 (above, pp. 11–11) that Gratian is ready to deal with the considerable difficulty that the text poses (although he does not quote it again, but he quotes similar texts) to his theory that marriages are not perfected (and made indissoluble) until the parties have had intercourse.

Peter Lombard also quotes Nicholas I in his discussion of marriage in his *Sentences* (4.27, above, p. 13).

Examine the original passage from Nicholas I carefully and the uses made of the passage by Gratian and Peter Lombard. Then consider the following questions:

(1) In the light of the known purposes of Nicholas I’s letter to the Bulgarians, why do you think that he included the passage given above in boldface?

(2) When we take the passage out of context (as Gratian did), what difficulties does it pose for Gratian’s theory of marriage? How does he get around these difficulties?

(3) It seems fairly obvious why Peter Lombard cites the passage, granted his theory of marriage. Is the passage sufficient to support Peter Lombard’s theory of marriage?

(4) How would you evaluate the following statement: “In the light of what Nicholas I said about marriage in the mid-ninth century, Alexander III’s ultimate resolution of the law of Church about marriage seems less innovative than might at first appear. It’s really just warmed-over Nicholas I.”

(5) What do the answers to questions (1) through (4) tell us about how law and legal institutions had developed from the middle of the ninth century to the end of the twelfth?

⁷ 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.

⁸ 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.

⁹ C.30 q.2 c.1 (c. 2 of the letter); C.30 q.5. c.3 (c.3, the portion given above up to the boldface); C. 27 q.2 c.2 (c. 3, the portion given above in boldface); C. 333, q.4 c.11 (c. 48); D.28 c.17 (c.70); C.32 q.5. c. 22 (c. 96).