PART XVI. SAMPLE STATUTES AND HOMOLOGATIONS

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A. COUNCIL OF TRENT, DECREE *TAMETSI* CONCERNING THE REFORM OF MATRIMONY (1563)†

in *The Decrees of the Council of Trent* (H. J. Schroeder trans. 1941) 183–90

C.1: The form prescribed in the Lateran contracting marriage is renewed; bishops may dispense with the publication of the banns; whoever contracts marriage otherwise than in the presence of the pastor and of two or three witnesses, does so invalidly.—

Although it is not to be doubted that clandestine marriages made with the free consent of the contracting parties are valid and true marriages so long as the Church has not declared them invalid,[1] and consequently that those persons are justly to be condemned, as the holy council does condemn them with anathema, who deny that they are true and valid, and those also who falsely assert that marriages contracted by children [minors] without the consent of the parents are invalid, nevertheless the holy Church of God has for very just reasons at all time detested and forbidden them.[2] But while the holy council recognizes that by reason of man's disobedience those prohibitions are no longer of any avail, and considers the grave sins which arise from clandestine marriages, especially the sins of those who continue in the state of damnation, when having left the first wife with whom they contracted secretly, they publicly marry another and live her in continual adultery, and since the Church which does not judge what is hidden, cannot correct this evil unless a more efficacious remedy is applied, therefore, following in the footsteps of the holy Lateran Council celebrated under Innocent III,[3] it commands that in the future, before a marriage is contracted, the pastor of the contracting parties shall publicly announce three times in the church, during the celebration of the mass on three successive festival days, between whom marriage is to be contracted; after which publications, if no legitimate impediment is revealed, the marriage may be proceeded with in the presence of the people, where the parish priest, after having questioned the man and woman and having heard their mutual consent, shall either say: "I join you together in matrimony, in the name of the Father, and of the Son, and of the Holy Ghost," or he may use other words , according to the accepted rite of each province.

But if at some time there should be a probable suspicion that a marriage might be maliciously hindered if so many publications precede it, then either one publication only may be made or the marriage may be celebrated forthwith in the presence of the parish priest and of two or three witnesses. Then before its consummation the publications shall be made in the church, so that if any impediments exist they may be the more easily discovered, unless the ordinary shall deem it advisable to dispense with the publications, which the holy council leaves to his prudence and judgment.

Those who shall attempt to contract marriage otherwise than in the presence of the parish priest or of another priest authorized by the parish priest or by the ordinary and in the presence of two or three witnesses, the holy council renders absolutely incapable of thus contracting marriage and declares such contracts invalid and null, as by the present decree it invalidates and annuls them. Moreover, it commands that the parish priest or another priest who shall have been present at a contract of this kind with less than the prescribed number of witnesses, also the witnesses who shall have been present without the parish priest or another priest, and also the contracting parties themselves, shall at the discretion of the ordinary be severely punished. Furthermore, the same holy council exhorts the betrothed parties not to live together in the same house until they have received the sacerdotal blessing in the church;[4] and it decrees that the blessing is to be given by their own parish priest, and permission to impart it cannot be given except by the parish priest

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[1] [X 4.3.2]

[2] [C.30 q.5 c.3; C32 q.2 c.13; C.35 q.6 c.2; X 4.18.3]

[3] [X 4.3.3]

[4] [C.30 q.5 c. 2, 3, 5; C.35 qq.2–3 c.19]

himself or by the ordinary, any custom, even though immemorial, which ought rather to be called a corruption, or any privilege notwithstanding.

But if any attempt to unite in marriage or bless the betrothed of another parish without the permission of their parish priest, he shall, even though he may plead that his action was based on a privilege or immemorial custom, remain ipso jure suspended until absolved by the ordinary of that parish priest who ought to have been present at the marriage or from whom the blessing ought to have been received. The parish priest shall have a book in which he shall record the names of the persons united in marriage and of the witnesses, and also the day on which and the place where the marriage was contracted, and this book he shall carefully preserve.

Finally, the holy council exhorts the betrothed that before they contract marriage, or at least three days before its consummation, they carefully confess their sins and approach devoutly the most holy sacrament of the Eucharist. If any provinces have in this matter other laudable customs and ceremonies in addition to the aforesaid, the holy council wishes earnestly that they be by all means retained. And that those so salutary regulations may no remain unknown to anyone, it commands all ordinaries that they as soon as possible see to it that this decree be published and explained to the people in all the parish churches of their dioceses, and that this be done very often during the first year and after that as often as they shall deem it advisable. It decrees, moreover, that this decree shall begin to take effect in every parish at the expiration of thirty days, to be reckoned from the day of its first publication in that church.

B. ORDONNANCES CONCERNING MARRIAGE

1. ORDONNANCE OF BLOIS (MAY, 1579), ARTS. 40–44

in *Recueil des grandes ordonnances, édits et déclarations des rois de France* (Pijon ed., Toulouse, 1786) 173–4 [CD trans.]

An ordinance of Henri II promulgated in February 1556 denounced clandestine marriages and extended to the whole country the custom in some regions authorizing parents to disinherit their children who married without parental consent. *Recueil géneral des anciennnes lois français* (Isambert ed., Paris, 1829) 16:520 n.1. The French reacted to the decree *Tametsi* almost immediately. They refused to promulgate the decree in France, but three other pieces of legislation were promulgated on the topic before the famous *ordonnance* of Blois, which follows. *Ibid.* A good genral account of the whole story may be found in B. Diefendorf, *Paris City Councillors in the Sixteenth Century* (Princeton, 1983).

40. To obviate the abuse and inconvenience which arise from clandestine marriages, we have ordained and ordain that our subjects of whatever estate, quality or condition they may be cannot validly contract marriage without the precedent proclamation of banns made on three different feast days with fitting interval—of which one cannot obtain a dispensation, except after the making of the first proclamation and that only for some urgent or legitimate cause and at the request of the principal and nearest common relatives of the contracting parties—after which banns they shall be espoused publicly. And so that there may be witness of the form which was observed at said marriages, four persons at least, worthy of faith, shall assist, of which a register will be made, everything under the penalties prescribed by the councils. We enjoin cures, vicars or others to inquire carefully about the quality of those who propose to marry, and if they are *filiifamilias* (*enfans de famille*) or are in the power of another, we forbid them strictly not to proceed to the celebration of said marriages, if the consent of the fathers, mothers, tutors, curators, does not appear to them, on the penalty of being punished as promoters (*fauteurs*) of rape.

41. We wish that the *ordonnances* previously made against children contracting marriage without the consent of their fathers, mothers, tutors and curators be kept, even that one which permits disinheritance in this case.

42. And nonetheless, we wish that those who are found to have suborned a son or daughter younger than twenty-five years under pretext of marriage or other color, without the will, knowledge, grace and express consent of the fathers, mothers and of the tutors be punished by death, without hope of grace and pardon, notwithstanding all the consents that the said minors can allege afterwards that they gave to the said rape, at

the time or subsequently. And likewise there shall be punished extraordinarily all those who shall have participated in the said rape and who shall have offered counsel, comfort and aid, in whatever manner it might be.

43. We forbid all tutors from agreeing or consenting to the marriage of their minors except with the advice and consent of their closest relatives, on pain of extraordinary punishment.

44. Likewise we forbid all notaries, under pain of corporal punishment, from enacting or receiving any promises of marriage by words of the present tense.

2. ORDONNANCE (CODE MICHAUD) (JANUARY, 1629), ARTS. 39–40

in *Recueil géneral des anciennnes lois français* (Isambert ed., Paris, 1829) 16:234–5 [CD trans.]

For reasons that should seem obvious upon reading them, the provisions of the *ordonnance* of Blois on the formation of marriage proved unsatisfactory. Henri III issued two amendments to them, in 1580 and 1583. Henri IV issued another one in 1606. Isambert, p. 520 n.1. The first effort in the reign of Louis XIII is contained in a *grande ordonnance* compiled during the chancellorship of Michel de Marillac, and known from his name as the *Code Michaud*.

39. The *ordonnance* of Blois, concerning clandestine marriages shall be strictly observed, and adding to it we will that all marriages contracted contrary to the tenor of the said ordinance be declared not validly contracted, forbidding all parish priests and other priests both secular or regular, under penalty of an arbitrary fine, from celebrating any marriage of persons who are not their parishioners without the permission of their parish priests or of the diocesan bishop, notwithstanding all privileges to the contrary. And judges of the ecclesiastical courts will be bound to judge cases concerning such marriages in conformity with this article.

40. We prohibit all judges, even those of the court of the church, from in the future receiving any proof by witnesses and others other than by writing of the fact of marriage, except and excepting, [cases] between peasants [*personnes de village*], of low or vile condition, requiring, nonetheless, that the proof cannot be admitted except that of the closest relatives of one or the other party, and of the minimum number of six.

3. DECLARATION CONCERNING THE FORMALITIES OF MARRIAGE, THE QUALITIES REQUIRED, THE CRIME OF RAPE, ETC. (26 NOVEMBER 1639)

in *Recueil géneral des anciennnes lois français* (Isambert ed., Paris, 1829) 16:520–24 [CD trans.]

Louis XIII turned his attention to the issue again ten years later under his chancellor Paul Séguier. This *ordonnance* is particularly notable for its statement of policy at the beginning. Although it was amended on six different occasions by Louis XIV (Isambert, p. 520 n.1), it, together with the *ordonnance* Blois, formed the basis of French secular law of marriage-formation until the end of the *ancien régime*.

Louis, etc. Since marriages are the seminary of states, the source and origin of civil society, the basis of families, which compose the republic, which are used as the principles around which its policies are founded, and within which the natural reverence of children toward their parents is the bond of the lawful obedience of subjects to their sovereigns, the kings our predecessors have therefore determined that it is worthy of their concern to make laws concerning their [marriages'] public order, their external propriety, their honesty and their dignity. To this end they have prescribed that marriages be publicly celebrated in the face of the church, with all the proper solemnities and ceremonies that have been prescribed as essential by the holy councils, and by them declared to be not only necessary as a matter of command but also necessary for the sacrament. But in addition to the penalties laid down by the councils, some of our predecessors have allowed fathers and mothers to disinherit their children who contract clandestine marriages without their consent and to revoke each and every gift and advantage that they have made to them. But although this ordinance was founded on the first commandment of the second table, concerning the honor and reverence due to parents, it has not been strong enough to stop the course of evil and disorder that has troubled the quiet of so many families and has flayed their honor by unequal alliances, alliances that are frequently shameful and infamous. This has given rise to other ordinances which require the proclamation of banns, the presence of the parish priest of the parties, and the presence of witnesses at the nuptial blessing, with

penalties against parish priests, vicars and others who proceed to the celebration of the marriages of children of families without it being apparent to them that the fathers and mothers, tutors and curators have consented, under penalty of being punished as promoters of the crime of rape, just like the authors and accomplices of such unlawful marriages.

Nonetheless, whatever order that has been brought to bear up to now in order to reestablish the public honesty even of such important acts, the license of the age, the depravity of its morals have always prevailed over our ordinances, which are so holy and so salutary. Their strength and observation has often been relaxed by fathers and mothers who waive their particular offense, though they cannot waive that done to the public laws. For this reason, not being able to endure any more that our ordinances be so violated, not that the holiness of such a great sacrament, which is the mystical sign of the union of Christ with his church, be unworthily profaned, and seeing also, to our great regret, and to the prejudice of our state, that the majority of families in our realm remain troubled by subornation and carrying away of their children, who themselves find the ruin of their fortunes in these unlawful joinings, we have resolved to set up the severity of the laws in opposition to the frequency of these evils and to restrain by the terror of new penalties those whom neither the fear nor the reverence of divine and human laws can stop, having in this no purpose other than to sanctify marriage, to control the morals of our subjects, and to prevent the crime of rape from serving any more in the future from leading step by step to the formation of advantageous marriages.

For these reasons, having had deliberation with our council about this matter, and with the advice of it, and of our certain knowledge, full power and royal authority, we have laid down and ordained, and do lay down and ordain that which follows:

1. We will that article 40 of the *ordonnance* of Blois, concerning clandestine marriages, be strictly kept, and interpreting it, we ordain that the proclamation of banns be made by the parish priest of each of the contracting parties with the consent of the fathers, mothers, tutors, or curators, if they are children of families or in the power of another. And that at the celebration of the marriage four witnesses worthy of faith shall assist, in addition to the parish priest who will receive the consent of the parties and join them in marriage following the form practiced in the church. We make very explicit prohibition to all priests, both secular and regular, not to celebrate any marriage except one between their true and ordinary parishioners, without the written permission of the parish priests of the parties or of the diocesan bishop, notwithstanding immemorial customs and privileges that can be alleged to the contrary. And we order that there will be made a good and faithful register, both of marriages and of the publication of the banns, or of dispensations, and of the permissions which shall have been granted.

2. The content of the edict of the year 1556 and that of articles 41, 42, 43, and 44 of the *ordonnance* of Blois shall be observed, and adding to it we ordain that the penalty of rape shall be continue to be incurred, notwithstanding the consent that may be thereafter obtained from the father, mother, tutor or curator, derogating expressly from the customs that permit children to marry after the age of twenty years without the consent of their fathers. And we have declared and declare that widows, sons, and daughters less than twenty five years, who shall have contracted marriage against the tenor of the aforesaid ordinances, to be deprived and to lose status by that fact alone, along with the children born of them and their heirs, unworthy and incapable of succession from their fathers, mothers and grandparents, and from all others direct and collateral, [deprived] as well of the rights and advantages which they can acquire by contracts of marriage and by testaments by the customs and laws of our realm, even of the right of *légitim*,[5] and the dispositions that shall be made to the prejudice of this our ordinance, be it in favor of the persons so married or by them to the profit of the children born from these marriages, [will be] null, and of no effect and value. We wish that the things so given, legated or transported, on whatsoever pretext, remain in this case acquired irrevocably by our fisc, so that we can dispose of them in favor of hospitals or other works. We enjoin sons who are greater than thirty years of age and daughters who exceed twenty-five to require in writing the

[5] I am unclear whether this refers to legitimacy, in the sense that the children will be regarded as bastards, or to *légitim*, in the sense of a fixed minimum share in an inheritance. I suspect that it is the former.

advice and counsel of the their fathers and mothers to marry, under penalty of being disinherited by them in accordance with the edict of 1556.[6]

3. We declare, in conformance with the holy decrees and canonical constitutions that marriages made between widows, sons and daughters of whatever age and condition they may be and those who have ravished and carried them away are not validly contracted, nor by the passage of time nor by the consent of the persons ravished or of their fathers, mothers, tutors or curators can they be confirmed so long as the person ravished is in possession of ravisher. And despite the fact that under pretext of majority she[7] gives a new consent to marry with the ravisher after having been set at liberty, we declare her, together with the children born of such marriage, unworthy, incapable of *légitim*, and of all successions direct and collateral which could come to them, under whatever title it may be, in conformance with what we have ordained against persons ravished by subornation, and [we declare] the relatives who have assisted, given counsel, and favored the said marriages and their heirs incapable of succeeding directly or indirectly to the said widows, sons and daughters. We enjoin very firmly our general proctors and their substitutes to make all pursuits necessary against the ravishers and their accomplices, notwithstanding that there is no complaint about it by a civil party, and [we enjoin] our judges to punish the culpable with the penalty of death and confiscation of goods, having first taken from them the reparations from them that ought to be made, without it being possible that that penalty can be moderated. We forbid all our subjects of whatever quality and condition they may be, from giving favor or refuge to those so guilty, from retaining the persons carried away, under penalty of being punished as accomplices and they and their heirs must pay the reparations adjudged, jointly and severally (*solidairement*), and they must be deprived of their offices and governments if they have any, of which they incur deprivation by a single act of contravention of this prohibition.

4. And so that everyone may recognize how much we detest all sorts of rapes, we prohibit very strictly princes and lords from appealing to us to grant letters to the end of rehabilitating those whom we have declared incapable of successions; [we prohibit] our secretaries of state from signing them, our very dear and loyal chancellor from sealing them, and all judges should have no regard for them, in case that, by importunity or otherwise, any have been impetrated from us, we willing that notwithstanding such derogations or dispenses, the penalties contained in our ordinances be executed.

5. Desiring to remedy the abuse which is beginning to be introduced in our realm by those who keep their marriages secret and hidden during their lives, inconsistent with the respect due such a great sacrament, we ordain that all those over the age of majority contract their marriages publicly, and in the face of the church, with the solemnities prescribed by the *ordonnance* of Blois, and we declare that the children which are born of these marriages that the parties have held until now, or will in the future keep, hidden during their life—which smack more of the shame of concubinage than the dignity of a marriage—incapable of all successions, along with their posterity.

6. We will that the same penalty apply to children who are born of women whom the fathers have kept and whom they espouse when they are at the end of their lives, as well as children procreated by those who marry after they have been condemned to death, even by sentences rendered by our judges in default, if before their death they have not been remitted to the first state, following the laws prescribed by our ordinances.

7. We prohibit all judges, even those of the church, from receiving proof by witnesses of promises of marriage, nor otherwise than by writing, which shall be set down in the presence of four close relatives of one or the other of the parties, even if they are of base condition.

Given, etc.

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[6] There would seem to be a gap here in the provisions for men between the ages of twenty-five and thirty.

[7] The referent here is *personne*, so it could be referring to both men and women.

C. COUTUMES DE LA PRÉVOSTÉ ET VICOMTÉ DE PARIS (1580)

in Bourdot de Richebourg, *Nouveau coutumier générale* III (Paris, 1724) 29–55 [CD trans.]

Tit. 1—On Fiefs (art. 1–72)

Tit. 2—On Quit-rents (*censives*) and seigneurial rights (73–87)

Tit. 3—Which goods are movable and which immovables (88–95)

art. 91. Fish being in a pond or in a ditch is regarded as immovable; but when it is in a shop (*boutique*) or reservoir, it is regarded as a movable.

Tit. 4—On Plaint in case of seisin and of novelty and simple seisin (91–98)

Tit. 5—On Personal actions and on *hypotheque* (99–112)

Tit. 6—On Prescription (113–128)

Tit. 7—On *retrait lignagier* (129–159)

Tit. 8—Judgments, executions, gages (160–183)

Tit. 9—On Servitudes and reports of juries (184–219)

Tit. 10—Community of goods (220–246)

Tit. 11—On Dower (247–264)

Tit. 12—On Guardianship of nobles and bourgeois (265–271)

Tit. 13—On Gifts and mutual gift (272–288)

Tit. 14—On Testaments and their execution (289–298)

Tit. 15—Of Succession in the direct line and in the collateral (299–344)

Tit. 16—Of Public proclamations [*criées*] (345–362)

D. ORDONNANCE DU ROI POUR LA PROCÉDURE CIVILE (APRIL 1667) TIT. 22–23

in *Recueil des grandes ordonnances, édits et déclarations des rois de France* (Pijon ed., Toulouse, 1786) 428–90 [CD trans.]

Tit. 1: Observation of the ordinances

Tit. 2: Adjournments

Tit. 3: Delays upon citations and adjournments

Tit. 4: Presentations [of the parties before the court]

Tit. 5: Holidays and defaults in civil matters

Tit. 6: Fines for non-prosecution

Tit. 7: Delays for deliberation

Tit. 8: Sureties

Tit. 9: Dilatory exceptions and the abrogation of views and showings

Tit. 10: Interrogatories about facts and articles

Tit. 11: Delays and procedures in the court of Parlemnt, Great Council, court of Aides, in first instance and case[s] of appeal

Tit. 12: Compulsory process and examination of documents

Tit. 13: Abolition of inquest to examine in the future and inquest *par turbes*

Tit. 14: Contestation in the case [*litis contestatio*]

Tit. 15: Procedure in possessory actions about benefices and royal rights

Tit. 16: The form of procedure before judges and consuls of merchants

Tit. 17: Summary matters

Tit. 18: Complaints [about violence] and restitution

Tit. 19: Sequestrations, commissaries, guardians of fruits and movables

Tit. 20: Facts which are subject to verbal or literal proofs

Tit. 21: [Judicial] visitation of places, taxes of officers who go on commission, nomination and reports of experts

Tit. 22: Inquests

art. 3: After the reproaches have been made against the witnesses, or after the delay to make them has passed, the matter will be brought to the audience [of the judge] without making any act or procedure for reception of the inquest, and there will no longer be any methods of [proving] nullity by writing, save proposing them in the audience or by exception, if it is a process in writing.

art. 5: The witnesses will be cited to depose and the party to see them swear by ordinance of the judge, without a commission to the clerk [*greffe*].

art. 11: The relatives and in-laws of the parties, up to the children of cousins issue of full-sibs inclusively cannot be witnesses in civil matters to depose in their favor or against them, and their depositions shall be rejected.

art. 14: At the beginning of the deposition, mention shall be made of the name, surname, age, quality and residence of the witness, of the oath that he took, if he is a servant or domestic, relative or in-law of one or another of the parties, and in what degree.

art. 15: The witnesses cannot depose in the presence of the parties, nor in the presence of other witnesses, to inquests that are not made in the audience, but they shall be heard separately, without there being anyone there other than the judge or commissary who is making the inquest and he who writes the deposition.

art. 16: When the deposition of the witness is finished, it shall be read to him, and he shall then be asked if it contains the truth, and if he persists, he shall sign the deposition, and in case that he does not know how and cannot sign, he will so declare, and mention shall be made of this on the minute and on the full-copy.

art. 17: The judges or commissaries shall write down everything that the witness wants to say about the fact at issue between the parties, without withholding anything of the circumstances.

art. 18: If the witness adds to, or subtracts from, or changes anything in his deposition, it shall be written in appendixes with references in the margin, which shall be signed by the judge and the witness, if he knows how to sign, without it being possible to give any faith to interlineations or to references which are not signed, and if the witness does not know how to sign, mention shall be made of it in the minute and on the full-copy.

[Another 18 articles concern how copies of the depositions are to be made.]

Tit. 23: Reproaches against witnesses

art. 1: Reproaches against witnesses shall be circumstantial and pertinent and not in vague and general terms; otherwise they will be rejected.

art. 2: If it is alleged in the reproaches that the witnesses have been imprisoned, subject to decree, condemned or taken by justice, the facts will be regarded as calumny if they are not justified before the judgment of the process by the calendar of imprisonment, decrees, condemnations or other acts.

art. 3: He who has had the inquest made can, if it seems good to him, furnish answers to the reproaches, and the responses will be provided to the party, otherwise we forbid that they be considered; all this without delaying the judgment.

art. 4: Judges cannot appoint the parties to inform them about the matter of the reproaches unless they have examined the process [and determined] that the means of reproach are pertinent and reasonable.

art. 5: The reproaches of the witnesses will be judged before the process and if they are found pertinent and that they are sufficiently justified, the depositions will not be taken.

art. 6: We forbid proctors from furnishing any reproach against witnesses if the reproaches are not signed by the party, or if they cannot show a special written power given to them to propose them.

Tit. 24: Recusations of judges

Tit. 25: *Prises à partie* [this seems to be technical term for the judge taking sides in a case by refusing to proceed]

Tit. 26: The form for proceeding to judgment and to pronouncements

Tit. 27: Execution of judgments

Tit. 28: Receipt of property security

Tit. 29: Rendering of accounts

Tit. 30: Liquidation of fruits

Tit. 31: Costs

Tit. 32: The taxation and liquidation of damages and interest

Tit. 33: Seizures and executions, and sales of goods, grain, beasts and movable things

Tit. 34: Discharge of constraint by body [civil arrest for debt]

Tit. 35: Civil requests [motions to reopen a judgment