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ARTICLE

CANONICAL REMEDIES IN MEDIEVAL MARRIAGE LAW: THE CONTRIBUTIONS OF LEGAL PRACTICE

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I. INTRODUCTION

Thirty-five years and more ago, I was a graduate student studying medieval history at the University of California, Berkeley. I noticed that a seminar in the history of the canon law of marriage was being offered in the law school by a visiting professor, John T. Noonan, Jr. Even then, he was something of a celebrity among academics, and enrolling in the seminar seemed like a good idea for a student slightly at loose ends. So I did. It was. The seminar turned out to be a life-changing experience. Its effects are with me to this day, as I hope this short article will demonstrate.

All of us students had to write papers for the seminar, as a matter of course. My memory of the experience is admittedly not crystal clear, but my firm recollection is that the instructor picked all the topics. We students were no doubt too ignorant to think of any ourselves. One of those he picked had to do with the sanctions and remedies available in the law of marriage. He did not assign this topic to me. It went to one of the other students instead, who (as I remember) did not find much to say about it. But I have never forgotten the topic. It has stayed with me as a subject of interest and a possibility for research in working with the records of the English ecclesiastical courts, in which it turns out, I have made something of a specialty in my later academic work. So, when I received an invitation to contribute to a symposium in honor of John Noonan, I thought of it as a natural topic.

It is an interesting one. A natural assumption, fostered by examining the texts of Gratian's *Decretum* and the Gregorian Decretals, which contained the fundamental law of the medieval church, is that the ecclesiastical

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courts could issue sentences affirming or invalidating contracts of marriage, and back them up by sentences of excommunication if the parties refused to conform their conduct with those sentences. Where lay men and women openly committed offences against the church's marital standards—adultery would be the typical example—the courts might order them to do public penance before being readmitted to the company of Christians.[1] That was about the end of it. The range of sanctions and remedies was restricted by the limited nature of the medieval church's coercive jurisdiction.[2]

This depiction is consistent with the evidence in the archives in one sense. The primary matrimonial jurisdiction of the courts of the medieval church in England dealt with the validation and enforcement of private contracts of marriage. No more than the exchange of words of present consent, whether or not entered into in church, was all that was required to constitute an indissoluble marriage under the law of the church, and many private contracts were in fact brought before the courts of the church for purposes of enforcement.[3] Likewise, the primary disciplinary task of the ecclesiastical courts was to discipline men and women who violated standards connected with this matrimonial regime, chiefly in their sexual conduct, by means of public penance, which usually consisted of a public humiliation before the congregation in one's parish church.

Although this depiction captures the heart of ecclesiastical jurisdiction over marriage, it is also oversimplified. Viewed from the perspective of the English medieval court records, it underestimates the scope of remedies available in practice. In fact, the courts' responses to violations of the me-

1. *See generally* Mary C. Mansfield, *The Humiliation of Sinners: Public Penance in Thirteenth-Century France* (Cornell U. Press 1995).

2. Regular ecclesiastical courts were established in England during the thirteenth century; each bishop had a court, staffed by a small group of professional lawyers called proctors and advocates and presided over by a university-trained judge called the *officialis*. These courts met roughly every three weeks and exercised exclusive jurisdiction over most aspects of the law of marriage and divorce, applying the canon law. In England, the church retained that jurisdiction into the nineteenth century. For an introduction to the subject, see Anne Tarver, *Church Court Records: An Introduction for Family and Local Historians* (Phillimore & Co. Ltd. 1995).

3. The scholarly literature on this subject is recent, extensive, and informative. *See e.g.* Eric Carlson, *Marriage and the English Reformation* (Blackwell Publishers 1994); David Cressy, *Birth, Marriage, and Death: Ritual, Religion, and the Life-Cycle in Tudor and Stuart England* 233-376 (Oxford U. Press 1997); P. J. P. Goldberg, *Women, Work, and Life Cycle in a Medieval Economy* 203-66 (Clarendon Press 1992); R. H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge U. Press 1974); Ralph Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570*, 55-88 (Oxford U. Press 1979); Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640* (Cambridge U. Press 1987); Diana O'Hara, *Courtship and Constraint: Rethinking the Making of Marriage in Tudor England* (Manchester U. Press 2000); Frederik Pedersen, *Marriage Disputes in Medieval England* (The Hambledon Press 2000); Michael M. Sheehan, CSB, *Marriage, Family, and Law in Medieval Europe: Collected Studies* (James K. Farge ed., U. of Toronto Press 1996). For the broader history of the subject, *see generally* Christopher N.L. Brooke, *The Medieval Idea of Marriage* (Oxford U. Press 1989); James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (The U. of Chi. Press 1987); John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Westminster John Knox Press 1997).

dieval church's family law were more varied and subtle than the normal depiction allows. Indeed it is correct to speak of a degree of flexibility, even inventiveness on the part of the men who administered the law of the church in the spiritual courts. Not all of their inventiveness appeals to modern tastes. A little of it seems quite repressive. Their judgments were not always ours. And, in any event, the differences should not prevent modern observers from taking fuller account of the character of the canon law as it was actually applied in practice.

II. The Evidence

The courts of the medieval church were not limited to issuing sentences for and against the validity of particular marriage contracts. They made regular use of ancillary remedies to reinforce their jurisdiction over these contracts. Mandates issued to the parties not to contract any other marriage pending litigation over the validity of a claimed matrimonial contract, provide one example. For instance, when Margery Grunditch was sued in the court of the archdeacon of Chester in 1530 to establish a marriage contract, the court scribe noted an initial order: "And the judge then warned [her] not to contract marriage with any other man *pendent lite* and not to leave the archidiaconal jurisdiction out of fear or for any other cause."[4] Authorized, or at least mentioned, in a short title in the *Decretales Gregorii IX* (X 4.16.1-3), these admonitions were meant to avoid practical obstacles to enforcement of the church's law.[5] The obstacles were of a quite immediate and practical kind. Who will continue a suit to enforce a marriage contract knowing that the potential defendant is already fully united with another partner, in fact living with that partner? Some plaintiffs will, no doubt, but not all. This remedy provided an immediate and practical incentive designed to secure obedience to the church's law. It penalized parties who sought to make a "short cut" around the jurisdiction of the courts.

A more extreme form of procedure with basically the same goal, one used with regularity though not great frequency in English practice, was the sequestration of parties to matrimonial litigation. It was virtually always limited to the women involved. When, for example, Anthony Mennell sued Anne Malevery before the Court of the Dean and Chapter of York Minster in 1520, alleging a matrimonial contract between them, he also asked that she be "kept under strict sequestration." He gave as his reasons that "the parents of the women have made threats against her to prevent her from telling the truth," and also that a certain John Brown "had access to the

4. Cheshire Record Office, Chester, Act book EDC, 1/4, f.29 (1530).

5. *See e.g.* Ludley c. Smithe (Gloucester 1561), Gloucestershire Record Office, Act book GDR 17, p. 221 ("[Cui] dominus inhibuit quod non contrahat matrimonium cum aliquo alio viro pendent lite et si de facto contraxerit quod illud solempnizari non procuret etc.").

woman in the interim."[6] Ordinarily sequestration was a remedy applied to the income from vacant churches or the assets of decedents' estates. The assets belonging were put into the hands of a fiduciary to be administered pending resolution of a dispute over claims to the church or probate of the will. Sequestration was a way of making certain that one party to litigation did not gain an unfair advantage over the other by taking the assets before his rights had been established. The same underlying reason—it appears—was thought to apply in disputes between two claimants for a woman's hand in marriage.[7] Better to sequester the woman than to allow one of them to gain unfair, or at least premature, access to her.[8] At least so it seemed to the lawyers who made use of the practice.[9]

Still another procedure created to secure enforcement of the court's decrees was the penal bond with conditional defeasance. Taken from practice in the English common law, the terms of penal bonds were in effect a confession of judgment; they provided that the party would pay a considerable amount of money to the ecclesiastical official on a date certain. However, the bonds were defeasible, so that no money would be owed if the parties had obeyed the orders of a court by that date.[10] Since the bonds were required of the parties during their first appearance before the court, and since execution was automatic unless the parties proved the compliance that would call for defeasance, use of the bonds provided a strong and immediate incentive for fulfilling the church's matrimonial law.[11] The canons of 1604 went so far as to require that all parties seeking a judicial separation from bed and board enter into a penal bond not to remarry as a condition to receiving the separation.[12] This usage can probably not be called creative in anything but a lawyer's sense of that word. It was simply borrowed from secular law. However, its use does show the variety of procedural remedies adopted by the ecclesiastical courts in matrimonial causes.

The same variety was true of the orders issued by the English ecclesiastical courts after sentence. The courts were not limited to simple declara-

6. Borthwick Institute, York, Act book D/C.AB.2, f.242 (1520).

7. In Mennell c. Maleverey (York 1520), Borthwick Institute, York, Act book D/C.AB.2, f. 242 (Sequestration was sought "pro eo quod parentes mulieris intulerunt minas ei quominus dicta Anna possit dicere veritatem.").

8. *See* Memo from a seventeenth century English ecclesiastical lawyer's notebook, MS. D/ED/O 42, pp. 118-20, (c. 1600) (reading located at the Berkshire Record Office) (citing Andreas Gail, *Practicarum Observationum Libri Duo*, Lib. 1, Obs. 112, no. 15 (1587)). My edition, published in Turin in 1595, fully supports that position.

9. *See* Trinity College, Dublin, MS. 598, f. 29 (c. 1600) (supplying an additional motive, "conservatio virginitatis").

10. *See e.g.* A. W. B. Simpson, *The Penal Bond with Conditional Defeasance*, 82 Law Q. Rev. 392 (1966).

11. The practice was also mentioned in a contemporary proctor's notebook, MS. EDR F/5/45, p. 186 (manuscript located at the Cambridge University Library, Ely Diocesan Records).

12. *See* canon 107, in *The Anglican Canons 1529-1947*, 406-07 (Gerald Bray ed., Boydell Press 1998).

tions of the validity (or invalidity) of matrimonial contracts. Of course, such declarations about validity were made; indeed they lay at the heart of the church's jurisdiction over matrimonial causes. However, the orders based upon them were often particularized according to individual circumstance. For example, a mandate issued to the claimant who had failed to prove the existence of a marriage sometimes expressly imposed silence upon that party. In 1306 a woman named Joan Hastings sued Nicholas Oriel before the court of the archbishop of Canterbury, alleging that he had entered into a matrimonial contract with her. Her suit failed for want of proof, and after so declaring by sentence, the judge "imposed perpetual silence about the contract raised before us by the aforesaid Joan."[13] The losing party was specifically directed not to make any further noise about the marriage. It was an obvious attempt to still public clamor and to permit the winning parties to live in peace.

When, however, a marriage had been affirmatively established as a result of the trial, the courts made particularized orders in the other direction—requiring the parties to fulfill the duties that went with marriage. Mandates directing defendants to adhere to the other and also to treat the other with marital affection in bed and table were thus issued to those whose marriage had been established. Thus, Richard Sheriff and his wife Joan were summoned to appear before the court of the bishop of Lincoln in 1516 and charged with living apart. When he could provide no valid reason for deserting her, he was ordered "henceforth to receive Joan as his wife and to treat her with marital favor in the best fashion he can and to provide her with conjugal obsequies."[14] Similarly, when Agnes Curteys was found guilty of unlawfully leaving her husband Hugh, she was ordered, "from henceforth not to fly from the same husband, but rather to obey her husband as is proper."[15] The ecclesiastical courts were by no means hesitant about ordering parties to pay "the marital debt."[16] Specific performance of matrimonial contracts, as we might say, was not thought incompatible with the law of the church or contrary to the dignity of individual choice.

The range of orders used by the courts was, if anything, even wider in prosecutions brought against those who had offended against the church's rules about sexual misconduct. Conviction of fornication or adultery typically entailed not just public penance, but also taking an oath that from thenceforth the couple (if that is the right description) would meet only in public places and at appropriate times of the day. When Robert Basage and Emma Thorif were found guilty in the court of the Dean and Chapter of Lincoln in 1338 of repeated acts of adultery, besides an assignment of pub-

13. Lambeth Palace Library, London, MS. 244, fols. 44v, 49v (1306).

14. Lincolnshire Archives Office, Lincoln, Act book Cj/2, f. 13 (1516).

15. *Id.* at Act book Cj/2, f. 75v (1519).

16. *See* Elizabeth M. Makowski, *The Conjugal Debt and Medieval Canon Law*, 3 J. Medieval History 99 (1977).

lic penance, they were ordered specifically not to meet with the other in any suspect place under penalty of major excommunication.[17] In some extreme cases the judges issued orders of limited banishment—that is the offending party was required to leave the parish.[18] Such orders were sometimes made against women who cohabited with the parochial clergy,[19] a sanction that punishes the wrong person according to modern lights, but one that was properly meant to end a scandal of clerical concubinage according to the *communis opinio* of the time.

One sanction the English courts did *not* use should also be mentioned, particularly since it was employed so frequently in some places on the Continent. That is the imposition of monetary fines on convicted offenders, sometimes in the form of providing enough money to constitute a dowry for the dishonored woman. Although an occasional exaction of monetary penalties exists in the surviving records,[20] they were in fact very rare. Public penance was the rule. Whether under pressure from the royal courts or because it was more seemly, the English courts did not turn their jurisdiction over sexual offenses into a directly profitable enterprise. If a defendant wished to compound for his offense by making a money payment and so avoid a humiliating public penance before his neighbors in his parish church, the initiative had to come from the defendant himself.

Moving now from procedure to the substantive remedies made available in the English ecclesiastical courts, one can also speak of a degree of adaptability over the centuries that is not evident in the canonical texts themselves. Here I can speak only briefly about them. One, invented probably in the thirteenth century, was the use of conditional marriage contracts—the objects being to promote marriage and to discourage fornication.[21] Abjuration *sub pena nubendi*, as the practice was called, required couples convicted of repeated fornication to enter into a marriage contract by words of present consent, but conditioned upon recurrence of future sexual relations between them. In 1374, for example, a couple that

17. *See Lower Ecclesiastical Jurisdiction in Late-Medieval England* 67 (L. R. Poos ed., Oxford U. Press 2001).

18. *E.g.* Ex officio c. Wilson (York 1519), Borthwick Institute, York, Act book D/C.AB.2, f. 222 ("[M]onita fuit sub pena excommunicationis quod exeat a civitate et de cetero non maneat infra civitatem.").

19. *See also* the egregious example where a priest's concubine was ordered to leave the diocese permanently, and the priest was suspended from his office for six months. Ex officio c. Wilkins (Canterbury 1498), in *The Register of John Morton: Archbishop of Canterbury* vol. II, 146 (Christopher Harper-Bill ed., The Canterbury & York Socy., The Boydell Press 1991).

20. Ex officio c. Burgeys (Canterbury 1304), Lambeth Palace Library, MS. 244, f. 60 ("et sub pena x librarum in subsidium terre sancte solvendarum."). *See generally* Brundage, *supra* n. 3, at 459-63.

21. The practice was first authorized by a series of diocesan statutes, the earliest surviving of which comes from the 1220s. *See* 1 *Councils & Synods with other Documents Relating to the English Church*, 134 (Winchester I, c. 54, 1224), 385 (Salisbury II, c. 53, 1238 x 1244), 631 (London I, c. 3, 1245 x 1259, but ascribing origin to the time of Roger Niger, bishop 1229-41) (F. M. Powicke & C. R. Cheney eds., 1964).

had "been often fined by the official of the archdeacon of Ely" for fornication, were required to enter into one of these conditional contracts, no doubt because they were repeat offenders.[22] Thus, if they "lapsed" again, they were automatically married under the canon law. The condition would have been fulfilled. This coercive practice was given up gradually over the course of the later Middle Ages; it came to be considered a contrary to the liberty that ought to inhere in marriage, and from our perspective, it was certainly that. I mention it only as an example of the kind of freedom the church's legal system allowed to local initiative. So far as I have been able to discover, it was not part of the formal canon law.[23]

A second example—and a more attractive one, even though its modern successor has come under a cloud during recent years—was the invention of alimony in matrimonial litigation. The early canon law, following the Roman law, had treated alimony as a provisional monetary award made in favor of women during a matrimonial cause—in other words it lasted only until the outcome of the litigation had been determined. This harmed the woman who was divorced, either from bed and board in what we would call a judicial separation or more permanently after a suit in which a diriment impediment to an existing union had been established. She had to fall back upon her family for support. Beginning in the sixteenth century, the English ecclesiastical courts, beginning with the courts of High Commission, expanded this provisional kind of award. The awards became the means of supporting women who had once had husbands but no longer did—thus they could be permanent awards in appropriate cases. For example, in 1554 Elizabeth and John Fylde were granted a divorce *a mensa et thoro* by the diocesan court at Gloucester, the grounds being that he had sought to poison her. The judge added an order, "that the same John pay 8 d. weekly to the aforesaid Elizabeth for food and clothing during their joint natural lives."[24] So far as the sources give a reason for this expansion, it depended on an assessment by the ecclesiastical lawyers of the likely relative needs of the parties.[25] The development was controversial at the time. It led to complaints in Parliament that the availability of alimony was encouraging wives to be "disobedient and contemptuous" towards their husbands,[26] but the granting of alimony in matrimonial cases became standard practice in the courts and was at length absorbed by the common law courts themselves.

22. Cambridge University Library, Cambridge, EDR Act book D/2/1, f. 12 (1374).

23. *See generally* R. H. Helmholz, *Abjuration sub pena nubendi in the Church Courts of Medieval England*, 32 The Jurist 80 (1972).

24. Gloucestershire Record Office, Gloucester, Act book GDR 7B, p. 396 (1554).

25. Prior practice was said to offer "slender relief for distressed wives." See the exposition in a tract entitled "The Cheife Branches of the Commission," Borthwick Institute, MS. HC.Misc.9.

26. *Proceedings in Parliament 1610* vol. 2, 265 (Elizabeth Read Foster ed., Yale U. Press 1966); Sir Edward Powell's Case (CP 1641), March 80 (pl 119); *see also Lady Alimony, or the Alimony Lady* (London 1659), Act 2, sc. 2.

A third example of inventiveness in remedies being made available is the creation of a remedy for what was called "jactitation of marriage." The term "jactitation" means false boasting about something the speaker knows to be false, and actions brought against those who had made such "boasts" by claiming to have married someone else began to be entertained by the English ecclesiastical courts from at least the late fifteenth century forwards.[27] A successful private suit established the plaintiff's right to marry someone else. An unsuccessful suit established either that no boast had been made or that plaintiff and defendant had entered into a valid marriage. For instance, in 1502 a woman named Margery Heyner was cited to appear in one of the courts of the bishop of London. The charge was "that she is boasting that she had contracted marriage with Thomas Risley, to the prejudice of a marriage between him and another, although she did not so contract." In answer, Margery alleged that she had in fact contracted with Thomas, but the judge held that the "words did not suffice to impede [Risley's] contract."[28] The roots of this form of action clearly belong in the *ius commune*. The most common reference point was a text in the Roman law *Codex* which made it unlawful to denigrate the status of a free man by calling him unfree.[29] It declared that unless a speaker who claimed that a person was of servile condition could prove it, perpetual silence was to be enjoined on him. This was regarded as a legitimate exception to the rule that no person could be forced to bring a lawsuit; the plaintiff was simply requiring the "boaster" to substantiate his boast.[30] The action was not necessarily linked to marriage—indeed it lay closer to the law of defamation. Nonetheless, the jurists perceived in the Code's text a principal that all false assertions diminishing the status of another should be stilled. To claim that a marriage existed, when in truth it did not, diminished the status of the other person by making it harder for that person to contract another marriage. Hence a remedy should be made available to the person injured. So it seemed, at any rate, to some ecclesiastical lawyers, and by the middle years of the sixteenth century, jactitation of marriage was assuming a regular form it would retain until the twentieth century.[31]

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27. It was found earlier in at least one part of the Continent. *See* Christian Schwab, *Das Augsburger Offizialatsregister (1348-1352)*: Ein Dokument geistlicher Diözesangerichtsbarkeit; Edition und Untersuchung 112 (Böhlau Verlag GmbH & Cie 2001).

28. Guildhall Library, London, MS. 9064/10, f. 5 (1502).

29. COD. 7.14.5.

30. This is the substance of the treatment in Nicholaus Boerius, *Decisiones*, at Dec. 255, nos. 7-12; Matthaeus de Afflictis, *Decisiones Neapolitanes*, at Dec. 268, nos. 2-4 (1604); Sebastianus Vantius, *De nullitatibus processuum*, tit. *Ex defectu processus*, no. 65 (1567).

31. According to the *London Times*, the last action for jactitation occurred in 1968; it was removed from the English statute books shortly thereafter. Frances Gibb, *Rose Petals in the Turnups Decide Fate of a Marriage*, The London Times (Feb. 5, 1991) (available at LEXIS, Nexis Library, TTimes file).

III. Conclusion

I hope you can see from these examples that the hands of the courts where the canon law of marriage was put into practice were not so limited as examination of the formal law on the subject has suggested to critics. The church's law on the formation of marriage scarcely changed between 1200 and the Council of Trent—in England even longer—but this is not the whole story. John Noonan's suggestion of looking at the remedies available under the canon law of marriage and divorce has opened up a wider and truer understanding of the history of the subject. It included experimentation and variety as well as stability.