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978-0-521-87728-2 - Law, Marriage, and Society in the Later Middle Ages: Arguments
About Marriage in Five Courts

Charles Donahue

Excerpt

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Introduction

The law of marriage of Western Europe in the Middle Ages was canon law, and it was complicated. The basic principles, however, of that law from the late twelfth century into the sixteenth were deceptively simple: (1) Present consent freely exchanged between a man and a woman capable of marriage makes a marriage that is indissoluble so long as both of them live, unless, prior to the consummation of the marriage, one of them chooses to enter the religious life. (2) Future consent freely exchanged between a man and a woman capable of marriage makes an absolutely indissoluble marriage so long as both of them live, if, subsequent to the exchange of future consent and prior to the formation of another marriage, the couple who have exchanged future consent have sexual intercourse with each other. (3) Any Christian man is capable of marrying any Christian woman so long as: (a) both are over the age of puberty and capable of sexual intercourse; (b) neither was previously married to someone who is still alive; (c) neither has taken a solemn vow of chastity, and the man is not in major orders (subdeacon, deacon, priest, or bishop), and (d) they are not too closely related to each other.¹ This last requirement was, indeed, complicated, but I will argue in this book that it was not so important socially as it used to be – and to some extent still is – thought to be.

These rules, and particularly the first two, can first be seen clearly in a series of decisions, known as decretals, rendered by Pope Alexander III (1159–81). The story of their origin and development is the topic for another book. Suffice it to say here that while research over the last 30 years points to academic and papal predecessors of Alexander who anticipated, to some extent, his decisions and to the importance of both academics and popes who followed Alexander in ensuring the acceptance of these rules, it has, at least in my view, confirmed

¹ See Ch 1, at nn. 13–72, for further details.

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the pivotal role that Alexander played. I therefore feel comfortable calling the first two of them ‘Alexander’s rules’.²

The striking thing about Alexander’s rules on the formation of marriage is not what they require but what they do not require. Although, as we shall see, the church strongly encouraged couples to solemnize their marriages, no solemnity or ceremony of any sort was necessary to contract a valid marriage.³ There did not even have to be witnesses to the exchange of consent if both parties admitted that it took place and if the rights of third parties were not involved. Further, in an age characterized by arranged marriages and elaborate provisions in the secular law for feudal consents to be given to marriages, it is striking to find that Alexander required the consent of no one other than the parties themselves for the validity of the marriage.⁴ Finally, in an age also characterized by class consciousness, it is surprising to discover that the only significant restrictions on the capacity of persons to choose marriage partners were the rules prohibiting the marriage of close relatives.⁵

In marked contrast to what seems to be reflected in Alexander’s rules, marriage in the twelfth and in the three subsequent centuries, not only as a matter of secular law but also as a matter of social fact, was not the exclusive concern of the parties to the marriage. Family, financial, and feudal concerns at all levels of society and also political and military concerns at the upper levels of society dictated, in many instances, marriage choice.⁶ There is evidence that the choice of the parties, particularly of the woman, was hardly considered in many marriage dealings.⁷ Legal and literary evidence and that of diplomatic history combine to attest to these facts. For example, in many parts of England the daughter (and in some cases the son) of a man who held land by unfree tenure could not be married unless the tenant made a payment, known as *merchet*, to his lord.⁸ Much of the land held by free tenure was subject to the lord’s right of wardship and marriage, which, at the very least, meant that he could give in marriage (or sell the right to give in marriage) an infant heir or heiress, and may at times have meant that he had to consent to the marriage of any female tenant and the female child or close female relative of a male tenant.⁹ The extensive records concerning dower and *maritagium* attest to the importance of the financial elements in marriages.¹⁰ This impression is confirmed by literary

² The formulation of the first rule was not completely clear until the pontificate of Innocent III (1198–1215). See Ch 1, at nn. 5–6.

³ Donahue, “Policy,” 259–60.

⁴ *Id.*, 256–7, and sources cited.

⁵ Disc. T&C no. 1.

⁶ Lit. T&C no. 2.

⁷ Duby, “Les ‘Jeunes’,” 839, quoted T&C no. 3.

⁸ Lit. T&C no. 4.

⁹ See Holdsworth, *History of English Law*, 3:61–6, and sources cited; Pollock and Maitland, *History of English Law*, 1:318–29.

¹⁰ See *id.*, 2:15–16, 420–8; Milsom, *Historical Foundations*, 167–72, and sources cited in both.

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evidence, a striking example of which may be found in the *Paston Letters*.¹¹ The importance of marriage as a device for securing political and military alliances in the upper levels of society is too well known to need documentation.¹²

The preceding paragraphs were drawn from an article written more than 30 years ago, as the age of the references (a fact now buried in the Bibliography) shows.¹³ That article also complained that social historians had to do better than Howard's *History of Matrimonial Institutions* if legal historians were properly to do their jobs. The last thirty years have seen an explosion of studies of medieval marriage and the family. There is so much that one can hardly keep up with it. The late Georges Duby, whose work in this area was just beginning 30 years ago, produced two books and a number of articles on the topic.¹⁴ In his view, two 'models' of marriage were competing in the period from roughly 1050 to 1300: a secular one that was built on the lineage, sought tightly to control marriage choice, and had a tendency to marry in; and an ecclesiastical one that was unconcerned with lineage, emphasized the choice of the marrying couple rather than that of their families or lords, and insisted on exogamy. A recent work carries Duby's idea into the fourteenth and fifteenth centuries and argues that at least among the nobility, the tension between these two models of marriage persisted.¹⁵ Having announced in a pioneering article on marriage cases in the Ely act book of the late fourteenth century that the attitudes toward marriage revealed in the book were "astonishingly individualistic," the late Michael Sheehan proceeded subtly to outline all of the factors that were likely to go into marriage choices in later medieval England.¹⁶ He came to the conclusion that families, and in some places and for some people, lords, played an important role and that runaway marriages, though possible, were perhaps not that common. Others have emphasized the theme of a uniquely English individualism, but the tendency in the literature, which seems, for the most part, to deal with a slightly later period, is to emphasize a similarity if not a sameness between England and at least the northwestern parts the Continent with regard to family structure and marriage choice.¹⁷ While the recent literature quite rightly emphasizes differences across class, temporal, and geographical lines, the basic point of the previous paragraph has been confirmed. Marriage in the twelfth and in the three subsequent centuries was not the exclusive concern of the marriage parties, and this was true at every level of society for which we have records.¹⁸

¹¹ See, e.g., *Paston Letters* 2:347–9 (no. 607), 363–6 (no. 617).

¹² See literature cited in n. 6; cf. Duby, "Lignage, noblesse, et chevalerie."

¹³ Donahue, "Policy," 256–7.

¹⁴ Duby, *Chevalier*; Duby, *Medieval Marriage*; Duby, *Mâle Moyen Age* (a collection of essays).

¹⁵ Ribordy, *Faire les noces*.

¹⁶ Compare Sheehan, "Formation," 76, with Sheehan, "Choice of Marriage Partner."

¹⁷ Lit. T&C no. 5.

¹⁸ See Hanawalt, *Ties That Bound*, esp. 197–204; Bennett, *Women in the Medieval English Countryside*.

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The article then asked what the effect of Alexander's rules was on this social pattern. It noted that until recently the only way in which we could study the effect of Alexander's rules was by drawing inferences from theological and legal commentary and conciliar legislation. The chief evil the rules led to, at least as perceived by commentators throughout the Middle Ages and into the sixteenth century, was clandestine marriages. 'Clandestine marriage' is a troublesome term because it can mean a number of things: a marriage that cannot be proved for a lack of witnesses or other evidence, a marriage that can be proved but lacks any ceremony *in facie ecclesie*, or a marriage celebrated *in facie* but lacking some element of the prescribed ceremony, for example, banns. These are distinctions to which we will have to return, but that clandestine marriages were of concern can be seen by the outpouring of legislation against such marriages in both general and local councils from before the time of Alexander until the council of Trent.¹⁹

A whole complex of pastoral, governmental, and jurisprudential reasons combined to stimulate the concern with clandestine marriages. For the secular law it was important that who was married to whom be a matter of public knowledge so that the complex of property rights and duties that arose out of the married state might be determined with reasonable certainty.²⁰ For a church that was prepared to punish fornication and adultery through a system of public criminal law, the same knowledge was also desirable. Further, since marriage was a sacrament, the church had an interest in seeing to it that the parties were in fact capable of matrimony, that they did not enter into it lightly, and that their entry into the state of matrimony be accompanied by ceremonies, such as the blessing and the nuptial mass, which befitted the sacrament.²¹ Further, 'occult' clandestine marriages led to two highly undesirable results: They permitted an unscrupulous man to have sexual relations with a woman after an exchange of words of marital consent and later free himself from the consequences of the relationship by perjuring himself and denying that the words were ever exchanged.²² Further, those who entered into an occult marriage relationship, even in good faith, and later publicly married others would be compelled by the church to live a state of adultery; the public marriage would be enforced when the previous union could not be proven. Both of these consequences were the result of the insistence of the external forum on independent witnesses to prove the exchange of present consent, a rule that created an undesirable tension between the external and internal fora.²³ This tension could also occur where the clandestine union was not occult but where the words exchanged were ambiguous or imperfectly remembered by the witnesses.²⁴

¹⁹ See Ch 1, at nn. 73–88.

²⁰ See Pollock and Maitland, *History of English Law*, 2:374–84.

²¹ Howard, *History of Matrimonial Institutions*, 1:291–314.

²² *Id.* at 350, citing Whitford, *Werke for Householders*.

²³ Ref. T&C no. 6.

²⁴ See Howard, *History of Matrimonial Institutions*, 1:340–4; Luther, *Von Ehesachen*, 102–3, in *Werke* 23.

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All of these objections to clandestine marriages were serious ones. The desire to ensure that the parties were capable of matrimony, that is, that there were no impediments, was the most frequently cited reason for legislation against clandestine marriages, but each of the other reasons probably provided some motivating force for these legislative efforts. There is one further objection, however, which may have been critical: The availability of clandestine marriage permitted persons, if they were sufficiently desperate, to escape from the complex of family, financial, and feudal concerns that surrounded marriage and to enter into a valid marriage without the consent of their families or their lords, and even without their families or lords knowing about it.²⁵ The most familiar evidence of this phenomenon is literary, the legend of Romeo and Juliet, which originates in pre-Tridentine Italy.²⁶ But the most striking evidence that this particular effect of Alexander's rules on the formation of marriage was among the chief objections to these rules may be seen in the history of the Tridentine decree *Tametsi*.²⁷ The delegates of the king of France to the council were instructed to press for a rule that would make the consent of the parents of the marriage parties (if the parties were under parental power) a necessary element for a valid marriage. The earlier drafts of the decree contain this requirement. Only in the final draft of *Tametsi* did the council omit this requirement and return to what we might suggest is the spirit of Alexander's rules by providing that promulgation of the banns might be dispensed with where there was reason to fear force.²⁸

This evidence is well known and was well known 30 years ago. What the earlier article sought to do was to begin to explore another body of material, the records of the ecclesiastical courts themselves, to determine whether they provided evidence that Alexander's rules had the effect that we suspected on *a priori* grounds they might have had and that at least some contemporaries thought that they had. At the time, relatively little work had been done on the records of those courts. R. H. Helmholz had written a dissertation on marriage litigation in the English ecclesiastical courts, which was to appear as a monograph; Michael Sheehan had written an article on marriage litigation in the only surviving medieval register of the Ely consistory court; I had begun some work on the cause papers of the York consistory.²⁹ On the basis of this evidence, I concluded, somewhat rashly I now confess, that Alexander's rules did have the effect of breaking down, at least in some instances, the control that families had over marriage choice and, even more rashly, that Alexander had intended them to have this effect.

There was more pioneering work contemporaneous with the article. Anne Lefebvre had written, and by the time the article was published, had published,

²⁵ Disc. T&C no. 7.

²⁶ Disc. T&C no. 8.

²⁷ See Epilogue and Conclusion, at nn. 1–5.

²⁸ Council of Trent, sess. 24, *Canones super reformatione matrimonii*, c. 1 (*Tametsi*), in *Decrees of the Ecumenical Councils*, 2:756.

²⁹ Helmholz, *Marriage Litigation*; Sheehan, "Formation"; Donahue, "Policy," 261–6.

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a dissertation on the French ecclesiastical courts in the later Middle Ages, and Beatrice Gottlieb was writing, and by the time the article was published, had finished, a dissertation on marriage litigation in two northern French dioceses.³⁰ Gottlieb argued that the objection to clandestine marriage in the sixteenth century was political rather than social. The cases did not reveal many runaway marriages. There had been one in the Montmorency family that may have accounted for the edict of Henry II on the topic in 1557, but ordinary people were getting married in the ordinary way, normally with the advice and consent of their families and friends. Lefebvre had not concentrated on the issue of clandestine marriage, but what she reported about the French cases in her period looked very different from what those of us who had been working in England saw.

Clearly, a systematic comparison of the English and French material was called for. At first, I attempted a survey of all the surviving French medieval records and published the preliminary results of that survey, including some comparisons with England.³¹ I became dissatisfied with the approach of that article, however, because the more that I got into the records, the more I realized that a very large variety of situations was revealed in them. The issue of control of marriage choice was there, sometimes on the face of the record, sometimes so close behind it that it could, without too much speculation, be inferred. There were, however, many other social situations in which medieval men and women invoked Alexander's rules or had them invoked against them. Again, sometimes these situations were obvious on the face of the record, and sometimes, again without too much speculation, they could be inferred. In short, medieval marriage cases illustrate a wide variety of legal problems and social situations. If one looks for it, one can find evidence to support almost any proposition about the effect of Alexander's rules, particularly if one is satisfied with the evidence of one or a few cases.

Perhaps one should be satisfied with the particular.³² Human experience is extraordinarily varied, and the relationship between the law and that experience is anything but simple. But the mind seeks to impose patterns on the variety, to understand the experience by grouping like cases to see if larger patterns can be discerned. Fortunately, the litigation experience in medieval marriage cases can be organized into distinct categories; perhaps the underlying social experience can be so organized as well. Unfortunately, in order to do so, we are going to have to make use of numbers – 'statistics' is probably too grand a term for it.

The reasons for the need to use numbers are simple. While the surviving records of the later medieval ecclesiastical courts are not so extensive as those of the English secular royal courts or even the French secular courts, there are, when added up, records of thousands of medieval ecclesiastical marriage

³⁰ Lefebvre-Teillard, *Officialités*; Gottlieb, *Getting Married*.

³¹ Donahue, "Canon Law and Social Practice."

³² The next four paragraphs are derived from Donahue, "Female Plaintiffs."

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cases.³³ A lifetime is too short for one person to read all of them, and the laborers are few. The only hope for getting some idea of the whole is to sample them and to describe them numerically. Skimming over the material and picking out what seem to be the most interesting records may yield an answer to certain kinds of questions, such as when a form or an idea first appeared, or when a form or an idea became part of the regular practice of a court. But the answers to these questions may benefit from the greater precision that numbers can give: When the form or idea first appeared, did it begin slowly or did it spread rapidly? What do we mean when we say that a form or idea was the 'regular' practice of a court? Underlying both questions is an implicit quantitative statement, a percentage of total cases, or of total surviving cases. Words such as 'slowly', 'rapidly', and 'regular' are proxies for a judgment about what underlying numerical measures indicate.

When we come to ask the question, moreover, of what effect the activities of the court had on society and of what effect society, as opposed to, or in addition to, the academic law, had on the behavior of the courts, the question 'how much' becomes even more critical. In a legal system, such as medieval canon law, where decisions in individual cases were not meant to set precedents for the decisions of other cases, the range of possible cases and possible solutions was wide indeed. One can find in the records of the medieval ecclesiastical courts disputes involving a great variety of social situations and support for a wide range of propositions about the law. Unless one is simply to list all the possibilities, one must generalize, and generalization ought to involve a commitment to what was normal and what was abnormal. We should also try to discern how what was normal changed over time, how what was normal became abnormal, and vice versa.

Finally, use of quantitative methods helps us to avoid the fascination of the 'interesting' case. There are many interesting cases in the records of the medieval ecclesiastical courts. They are made more interesting by the fact that in many of them, particularly in England, the depositions have survived. We can thus hear ordinary men and women of the Middle Ages speaking about their ordinary experiences. The dangers of relying on such evidence are substantial. Witnesses frequently told lies, and the process of redacting the testimony into a legal record involved considerable distortions. For historians who cannot resist the temptation to use deposition evidence, quantitative analysis is the penance for succumbing to that temptation. Quantitative evidence allows us to control the deposition evidence, to see which witnesses were telling normal lies and which abnormal, and to see whether the way in which the witness tells his or her story is more likely to be a product of the witness or of the clerk who recorded the testimony.

Because we cannot examine all the cases in all the courts, we must sample, and since the samples are unlikely to be random, we must be careful of the biases built into the samples. After a brief chapter in which we outline the

³³ See Donahue, ed., *Records* 1, 2; disc. T&C no. 9.

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underlying rules and institutions (Chapter 1) and another in which we discuss in depth four English cases that have left unusually full records (Chapter 2), we begin with marriage cases in the consistory court of York in the fourteenth and fifteenth centuries. Our earliest record dates from 120 years after Alexander's death, our latest from 320 years after his death. Since our purpose is to try to determine the social effect of Alexander's rules, starting so late calls for some explanation. There are earlier records, but all the runs of records earlier than this date have some factor about them that leads us to doubt whether we are getting a typical run of marriage cases, much less of marriages. In England, the earliest runs of ecclesiastical court records come from the court of Canterbury in the thirteenth century (and this may be the earliest extensive documentation that exists anywhere). The Canterbury records are not, however, a good group of records to use for numerical analysis. They were probably preselected by the monks of Canterbury to serve as a muniment of their title to exercise vacancy jurisdiction;³⁴ they cover a wide range of cases, and rarely does the same type of case appear more than once. Further, the court of Canterbury was an appellate court, the most prestigious ecclesiastical court in England. We would expect, and indeed we find, a disproportionately large number of people of wealth and status litigating in that court.

By contrast, the court of York was both the appellate court for the northern province and the first instance court for the diocese of York. There is thus in the York records a much wider sample of types of litigants. Further, so far as we can tell, the survival of the records of the court was not determined by a desire to illustrate anything other than the records of the court. Finally, the records survive in loose papers rather than solely in the act books or registers that are the sole surviving records for so many other medieval ecclesiastical courts. We thus have for this court what the parties, their proctors and, to some extent, their witnesses chose to present to the court, rather than what some clerk of the court decided to write down. Experience with other medieval ecclesiastical court archives in the British Isles and in continental Europe suggests that this is the best set of such records yet to be discovered.

The three chapters on York (Chapters 3, 4, and 5) establish a pattern for the rest of the book. We begin with numbers (Chapter 3): What kinds of cases did the court hear? What kinds of marriage cases did it hear? What was the nature of the claims and defenses made? What was the gender ratio of the litigants, and what was their success ratio? We then try to burrow more deeply into the cases. We look at those from the fourteenth century (Chapter 4) to see if we can combine the legal arguments that were made with what the depositions are saying into what we call 'story-patterns'. While no two stories are exactly alike, definite patterns do emerge. We will not argue that these patterns tell us the 'true story' of any given case, but we will argue that they represent, to some extent, the social expression of medieval people when they came to dispute about marriage. We will also argue that the stories being told are not so far away

³⁴ *Select Canterbury Cases*, introd., 35–7.

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from the experience of the judges that they would regard them as implausible or impossible. The final chapter on York (Chapter 5) looks at the fifteenth-century cases to determine what was different about the story-patterns in that century.

Chapter 6 deals with the court of Ely from 1374 to 1381. The reasons for the choice of Ely are fairly straightforward. The register that records the cases is remarkably full and well kept. It has already been analyzed in a way that allows us to control the large amount of data it contains.³⁵ The diocese was small and, for the most part, rural, and in marked contrast to York, the court heard quite a few marriage cases *ex officio* (i.e., roughly corresponding to our criminal procedure). We hear less of the stories that the litigants were telling than we do at York, but we hear something. We also get a very good idea, perhaps better than we do at York, of the course of the litigation. Because of the nature of the record, the story that we tell for Ely is more a story of the litigants' reactions to what the court did and to what they did to each other in court, but there is some evidence of extrajudicial behavior.

The work with Ely prepares us for our work with Paris (Chapter 7). Here, too, all we have is a register and, unfortunately, not one as well kept as that at Ely. The Paris register is close to contemporary with the Ely register (November of 1384 to September of 1387), and it reveals a very different kind of court from that of Ely. While it is difficult to penetrate behind this register to the social realm, a few dramatic cases emerge, and, probably more important, a pattern of litigation that suggests quite different marriage practices from those that prevailed at both York and Ely. To what extent those practices are only the practices of those who litigated or are those of the wider society, a court register cannot tell, but there are enough cases in the register to suggest that the difference in practice probably extended beyond the court into the wider society.

Our last courts are those of the diocese of Cambrai, which has left a series of registers from the mid-fifteenth-century court at Cambrai (1438–53) and one very large one from the separate court at Brussels in an overlapping and slightly later period (1448–59) (Chapters 8 and 9). These are registers of sentences only. There are so many sentences that we had to sample them. It takes quite a bit of effort to figure out what is going on at the legal level in these sentences, but it seems to be worth the effort. It takes even more effort to figure out what may be going on socially, because we hear only the voice of the judge, not that of the parties, nor even, as in the Ely and Paris registers, the voice of the parties as reported by the registrar. The sentences were, however, rendered by four different judges, each of whom had a distinctive style. We learn less about what the parties to the cases in Cambrai diocese were arguing, but we learn as much or more about the judges' attitudes toward the facts that they found. What seems to lie behind the Cambrai cases is not the same as what seems to

³⁵ Stentz, *Calendar*.

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lie behind the Paris cases, but it is closer to Paris than it is to York and Ely in most important respects.

While all five courts were courts of the official (chief judge) of a bishop (archbishop in the case of York), there are some institutional differences among them that it is well to flag at the beginning, because we will have to explore the extent to which the institutional differences account for the differences that we see in the records. The official was not the only judge of the court at York, Ely, and Paris. At York and Ely there were commissaries general of the official and occasional appointments of special commissaries to hear particular cases; at Paris there was an auditor (perhaps two), though we know little about his activities in this period. At Cambrai, and eventually Brussels, the official is the only judge of the court of whom we hear. In all four dioceses there were lesser ecclesiastical courts that had some jurisdiction over marriage matters, at least such matters as broadly conceived. Once more, it is at Cambrai and Brussels where we hear the least of such jurisdictions. Professional lawyers, proctors and advocates, were available to assist the parties, at least in instance (civil) litigation, at York, Ely, and Paris. There were probably proctors and advocates at Cambrai and Brussels, though we hear nothing of them in our records.³⁶ The courts of Paris, Cambrai, and Brussels had promotors, professional prosecutors of office (criminal) cases. York and Ely had no promotors.

After the chapters on the diocese of Cambrai, we deal with two substantive issues largely excluded from consideration in the chapters that deal with the individual courts: separation issues (Chapter 10), where we find a marked difference between the practice of the English courts and those on the Continent, and issues about consanguinity and affinity (Chapter 11). These latter do not play a very large role at York and Paris, but they do play a large role in one court not in the group, and they play a somewhat significant role at Ely and in Cambrai diocese. We conclude with an attempt to put all our findings together and to suggest some lines for further research (Chapter 12).

There is a methodological problem with the approach taken by this book, one to which we will return in a number of places but which it is well to confront at the beginning. Disputed marriages are, in most times and most places, a rather small subset of the number of marriages; certainly that is what most married couples or couples contemplating marriage have hoped would be the case. In addition, the number of disputed marriages that find their way into a court sufficiently sophisticated to leave a record is, in many times and places (and there are good reasons for thinking that the Middle Ages in Western Europe, even the late Middle Ages was one such time and place), a rather small subset of the number of disputed marriages. The problem is well known to social historians and students of the relationship of contemporary law and society. It is the danger of generalizing from ‘trouble cases’ or of ‘writing social history from

³⁶ They certainly existed by the seventeenth century. See *Ancienne procédure ecclésiastique*, 37–8, 42–3.