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R. H. Helmholz, “The Medieval Canon Law in Scotland: Marriage and Divorce”, in A. M. Godfrey (ed.), *Miscellany Eight* [Stair Society vol. 67] (Edinburgh, 2020), pp. 95–112

<http://doi.org/10.36098/stairsoc/misc8.4>

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# THE MEDIEVAL CANON LAW IN SCOTLAND: MARRIAGE AND DIVORCE

R. H. HELMHOLZ

## INTRODUCTION

That Scots law differed substantially from the common law of England is the conclusion of virtually all historians who have taken an interest in the subject.<sup>1</sup> True, the two legal regimes shared some basic features. Scottish brieves, for instance, conformed to the overall pattern of English writs.<sup>2</sup> Some exchange of ideas also took place. However, the laws and the legal systems of the two realms were never identical. Blackstone regarded the failure to consolidate their diverse laws into a single system as one of the few flaws in the accomplishments of the reign of Edward I.<sup>3</sup> As he himself took note, the desired unification did not take place. The divergence lasted. In particular, lawyers north of the Tweed drew frequently upon the abundant resources of Roman law's *Corpus iuris civilis*.<sup>4</sup> Those south of the Border did not. Most English common lawyers regarded the civil law with suspicion; Scottish lawyers with admiration. Differences in law outlasted the union of the two realms, both at the accession to the English throne of the Scottish King James in 1603 and in the

- 1 See, e.g., O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History: Sources and Institutions*, 3rd edn (London, 2000), pp. 164–6, 228–48; J. H. Baker, *An Introduction to English Legal History*, 5th edn (Oxford, 2019), pp. 40–1; Andrew R. C. Simpson, “The Scottish common law: origins and development, c. 1124–c. 1500”, in Heikki Pihlajamäki, Markus D. Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford, 2018), pp. 450–73; Antonio Padoa-Schioppa, *A History of Law in Europe from the Early Middle Ages to the Twentieth Century* (Cambridge, 2017), pp. 400–1.
- 2 Hector L. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), pp. 136–87; Peter Stein, *Roman Law in Scotland* [Ius Romanum Medii Aevi, Pt V: 13b] (Milan, 1968), also published in his *The Character and Influence of the Roman Civil Law: Historical Essays* (London and Ronceverte, WV, 1988), pp. 269–317.
- 3 William Blackstone, *Commentaries on the Laws of England*, Lib. IV, c. 33 (\*420) (Oxford, 2016), vol. 4, pp. 620.
- 4 See, e.g., Gero Dolezalek, “French legal literature quoted by Scottish lawyers 1550–1650”, in Bernard d’Alteroche, Florence Demoulin-Auzary, Olivier Descamps and Franck Roumy (eds), *Mélanges en l’honneur d’Anne Lefebvre-Teillard* (Paris, 2009), pp. 375–91; and idem, “Introduction”, in *Scotland under Jus Commune, Volume One*, Stair Society vol. 55 (Edinburgh, 2010), pp. 3–11, and “The Court of Session as a *Ius Commune* court”, in Hector L. MacQueen (ed.), *Miscellany Four*, Stair Society vol. 49 (Edinburgh, 2002), pp. 51–84. See also Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (Athens, GA and London, 1993), pp. 36–56; William Gordon, “Roman law in Scotland”, in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995), pp. 13–40.

wake of the Parliamentary Union of 1707.<sup>5</sup> Indeed, even to the present day they have not entirely disappeared.<sup>6</sup>

An exception to this history of difference, one which has long been recognised, is that of the law of the medieval church, the canon law.<sup>7</sup> It was a unified system, one of significant and seemingly equal force in these two realms prior to the Protestant Reformation. Following the European pattern, at a date before the end of the Middle Ages, bishops in both England and Scotland had established standing courts. In them, men trained in the European *ius commune* applied the law they found in the *Corpus iuris canonici*. That famous source of ecclesiastical law contained Gratian's *Decretum* (c. 1140), the *Liber Extra* of Pope Gregory IX (1234), the *Liber Sextus* of Boniface VIII (1298), and a few later and smaller collections of conciliar decrees and papal decretals.<sup>8</sup> Its extensive coverage, together with the commentaries that accompanied it, provided ample resources for canon lawyers, who put the rules found there into effect in ecclesiastical courts throughout Europe. During the Middle Ages, the same law thus applied everywhere within the reach of the papacy and the Latin church,<sup>9</sup> and the appellate jurisdiction exercised by the auditors of the papal court in Rome stood ready to speak with authority, resolving doubts, settling inconsistencies and suppressing local aberrations.<sup>10</sup> These formidable authorities were in place, seemingly designed to secure legal uniformity in ecclesiastical courts throughout Western Europe.

Although the effect of the medieval canon law's unitary authority is undoubted as a matter of principle, we know that in modern legal practice the way things turn out to be on the ground can sometimes be quite different from what the statute books declare.<sup>11</sup> This modern phenomenon has a past. Some recent research has raised the question of whether the uniformity apparently called for in the canonical texts was actually carried into effect in Europe's ecclesiastical courts. The original scholarly investigations of

5 Brian Leveck, *The Formation of the British State: England, Scotland and Union, 1603–1701* (Oxford, 1987), pp. 68–101; William Ferguson, *Scotland's Relations with England: A Survey to 1707* (Edinburgh, 1977), p. 41; John Finlay, "Jurisdictional complexity in post-union Scotland", in Seán Donlan and Dirk Heirbaut (eds), *The Law's Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c. 1600–1900* (Berlin, 2015), pp. 223–48.

6 J. D. Ford, "Four models of union", in Hector L. MacQueen (ed.), *Miscellany Seven*, Stair Society vol. 62 (Edinburgh, 2015), pp. 179–215.

7 Its importance in Scotland is a theme of Hector L. MacQueen, "Expectations of the law in 12th- and 13th-century Scotland", *Tijdschrift voor Rechtsgeschiedenis* 70 (2002), 279–90; see also the essays in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995). Its special relevance for American lawyers has always arisen from the similarity between the state of Louisiana and Scotland; see Shael Herman, "The fascinating legal kinship of Scotland and Louisiana", *Tulane Law Rev.* 85 (2011), 1145–81.

8 The following abbreviations are used here to refer to the texts of the Roman and the canon laws: Dig. 1.1.1 = *Digestum Justiniani*, Lib. 1, tit. 1, lex 1; Cod. 1.1.1 = *Codex Justiniani*, Lib. 1, tit. 1, lex 1; Dist. 1 c. 1 = *Decretum Gratiani*, Distinctio 1, c. 1; C. 1 q. 1 c. 1 = Causa 1, quaestio 1, c. 1; X 1.1.1 = *Decretales Gregorii IX*, Lib. 1, tit. 1, c. 1; Sext. 1.1.1 = *Liber Sextus*, Lib. 1, tit. 1, c. 1; *Gl. ord.* = *Glossa ordinaria* (standard commentary on texts).

9 It was therefore excluded from most prior comparative studies; see, e.g., Keith Stringer, "Law, governance and jurisdiction", in Keith Stringer and Angus Winchester (eds), *Northern England and Southern Scotland in the Central Middle Ages* (Woodbridge, 2017), pp. 87–136, at 87.

10 At least 104 Scottish causes and surely many more came before the Rota in Rome between 1464 and 1500; see James Robertson, "The development of the law", in Jennifer Brown (ed.), *Scottish Society in the Fifteenth Century* (New York, 1977), pp. 136–52, at 151.

11 See E. J. Cohn, "The nullity of marriage: a study in comparative law and legal reform", *Law Q. Rev.* 64 (1948), 324–40, at 326–8.

Charles Donahue have shown that in the law of marriage and divorce, a matter of the greatest moment for the medieval church, significant regional differences existed in the ways in which the canon law was applied in fact.<sup>12</sup> A few other historians have followed his lead.<sup>13</sup> None of this work has dealt with the Scottish evidence, but the discovery of diversity does raise relevant questions about the effect of the church's law in all of Europe's ecclesiastical tribunals. A possible example of such divergence is the question of whether or not the exercise of jurisdiction by the ecclesiastical courts of pre-Reformation Scotland differed in any significant ways from what occurred in courts south of the Border. What judges decide depends in some measure on the cases that are brought before them – and this sturdy aspect of law practice may have led to variation in these neighbouring regimes. The law of marriage and divorce is an essential part of the story. It is the subject of this article.

### THE CANON LAW

A preliminary subject – one not often enough addressed by legal historians – is the question of whether the formal canon law itself left room for regional diversity. At first sight, to suppose that it did appears quite wrong-headed – certainly not for the regulation of marriage and divorce.<sup>14</sup> The church's law on this subject was identical throughout medieval Europe, and conformity with its decrees was not a matter of choice or a subject of indifference either to the makers of the church's laws or to those who presided over the courts where it was put into use.<sup>15</sup> However, a closer examination of the formal law and its interpretation does raise legitimate questions. Looked at carefully, the medieval canon laws themselves permitted, if they did not promote, a measure of diversity in the ways they were applied in practice.<sup>16</sup> There were three doors through which this road to diversity was opened up.

First, the texts found in the *Corpus iuris canonici* themselves contained evident inconsistencies. They invited disagreement and they encouraged creative

- 12 His initial foray into the subject was “English and French marriage cases: might the differences be explained by differences in the property systems?”, in Lloyd Bonfield (ed.), *Marriage, Property and Succession* (Berlin, 1992), pp. 339–66. A fuller exploration of this and other relevant aspects of the subject is also found in Charles Donahue Jr, *Law, Marriage, and Society in the Later Middle Ages* (Cambridge, 2007).
- 13 Anne Lefebvre-Teillard, “Regle et réalité dans le droit matrimonial à la fin du Moyen Âge”, *Revue de droit canonique* 30 (1980), 114–29; Robert Brentano, “Three thirteenth-century Italian cases”, in Stephan Kuttner and J. Joseph Ryan (eds), *Proceedings of the Second International Congress of Medieval Canon Law* (Vatican City, 1965), pp. 311–19; and the essays in Mia Korpiola (ed.), *Regional Variations in Matrimonial Law and Custom in Europe, 1150–1600* (Leiden, 2011).
- 14 See, e.g., James Scanlan, “Pre-Reformation canon law of marriage of the officials’ courts”, in *An Introduction to Scottish Legal History*, Stair Society vol. 20 (Edinburgh, 1958), pp. 69–89, at 69: “The particular or local law can never gainsay the general canon law”.
- 15 E.g., Innocent IV, *In V Libros Decretalium Commentaria* (Venice, 1570), at X 5.1.24 (*Qualiter et Quando*), no. 3, treating marriage causes as a special case, “ubi necesse est personas graves esse” to justify the admission and use of their testimony in ex officio proceedings; see also *Gl. ord. ad X 5.1.21* “[P]ropter dicta paucorum infamatus dici non debet, cuius opinio apud bonos et graves laesa non existit”.
- 16 Judges in matrimonial causes were given a range of discretion, for example, in leaving some matters to the conscience of the parties; the subject is nicely explored in O. F. Robinson, “Canon law and marriage”, *Juridical Rev.* (1984), 22–40, at 29–31.

interpretation. This feature of the church's law was undoubtedly present in the discordant texts found in the *Decretum Gratiani*. Indeed, the presentation (and solution) of the inconsistencies in the existing sources of the church's laws was that work's purpose. It nonetheless turned out that even the most persistent efforts at harmonisation found in the *Decretum* and in the works of its later interpreters were insufficient to eliminate this hardy feature of the church's law.

The presence of internal inconsistency actually continued even in the papal decretals that were later collected. These decretals, the supposed sources of the law's unity, sometimes actually stood as obstacles to definitive statements of the church's laws. Any perusal of the *glossa ordinaria* will demonstrate how frequently one decretal appeared to contradict another.<sup>17</sup> The canonists themselves thought so. They repeatedly called attention to the existence of discrepancies and inconsistencies in the texts. An example relevant here is the question of whether a marriage contracted by words of future consent that were accompanied by an oath was specifically enforceable.<sup>18</sup> Maybe it was. Maybe it was not. The texts in the Decretals contained both answers. Lawyers and judges had a choice to make, and either choice could be supported by the plain language of one of these two canonical texts.

On more than a few subjects like this one, the formal law of the medieval church required interpretation if it was to be put into use, and interpretations might differ from one place to another, just as they often did from one canonist to another. The *Liber Extra* was not a code in the modern sense of the word.<sup>19</sup> Nor were most of its contents legislation in the strict sense of that word. Many of the decretals found within it left room for doubt and debate about their reach. Even the question of the extent of papal powers to legislate was open to debate.<sup>20</sup> The canonists did often settle upon a *communis opinio* in the process, but this was still an opinion, not a command. Together with moral theologians of the time, they embraced Probabilism as a tool of analysis.<sup>21</sup> This feature of the church's legal system – a familiar, in fact a perennial one in the lives of lawyers – left room for some regional diversity in the ways the canon law was put into effect.<sup>22</sup>

17 K. W. Nörr, "Kontroversen legistischer Glossatoren in päpstlichen Dekretalen", *Revue de droit canonique* 29 (1979), 74–80.

18 Compare X 4.1.10 with X 4.1.17. Compare also X 4.15.2 with X 4.15.4 (dealing with marriage of impotent persons), on which see Charles Donahue, "Once more Alexander III on the consent theory of marriage", in Franck Roumy (ed.), *Proceedings of the Fifteenth International Congress of Medieval Canon Law* (Vatican City, 2020), n. 4.

19 The way the decretals were formulated, as answers to specific questions put to the reigning popes, explains a part of this characteristic; see Anne J. Duggan, "Our letters have not usually made law on such matters (Alexander III, 1169): a new look at the formation of the canon law of marriage in the twelfth century", in Joseph Goering et al. (eds), *Proceedings of the Fourteenth International Congress of Medieval Canon Law* (Vatican City, 2016), pp. 627–49.

20 See, e.g., George Conklin, "Redde singula singulis and Suum cuique tribuens: re-thinking medieval two-sword theory", in Joseph Goering et al. (eds), *Proceedings of the Fourteenth International Congress of Medieval Canon Law* (Vatican City, 2016), pp. 893–902.

21 David Ibbetson, "Authority and precedent", in Mark Godfrey (ed.), *Law and Authority in British Legal History, 1200–1900* (Cambridge, 2016), pp. 60–84, at 62–9.

22 Bruce Brasington, "Postface: the view from 2017", in Melodie H. Eichbauer and Danica Summerlin (eds), *The Use of Canon Law in Ecclesiastical Administration, 1000–1234* (Leiden and Boston, MA, 2019), pp. 221–31; Jochen Johrendt and Harald Müller (eds), *Römisches Zentrum und kirchliche Peripherie* (Berlin and New York, 2008).

Second, the formal canon law itself permitted the application of some customary local usages. Subject to tests of rationality and longevity, custom was a legitimate source of law.<sup>23</sup> It might shape what happened in diocesan courts even if it was neither mandated nor justified by the texts in the *Corpus iuris canonici* themselves.<sup>24</sup> These local customs stood together with what was called the *stylus curiae*, the particular usages of individual consistory courts.<sup>25</sup> They left room for diversity in practice. For instance, some ecclesiastical courts routinely used money fines in disciplinary matters. Others did not.<sup>26</sup> They made use of public penance instead. The offices held by the men who served in the church's courts also varied in different regions.<sup>27</sup> Some courts appointed promoters of justice. Some did not. So did the fees to be paid for specific court actions vary from one place to another.<sup>28</sup> In the substantive law, tithing customs were another persistent example of the force of long-continued and discordant practice throughout European lands.<sup>29</sup> The method for the payment of tithes could differ from place to place without being unlawful. So could some jurisdictional questions receive different answers in different parts of Europe without running afoul of the formal canon law.<sup>30</sup> Oblations owed to the clergy in European parishes were mostly matters of local custom.<sup>31</sup> The papal courts in Rome seem to have found no substantial reason to attempt to bring them into harmony.

A significant example of diversity, found in both England and Scotland, was the church's jurisdiction over last wills and testaments.<sup>32</sup> Its place in practice

- 23 *Gl. ord. ad Dist. 8 c. 7*. See also the many references to the canonical texts in Gabriel Le Bras, Charles Lefebvre and Jacqueline Rambaud, *L'âge classique, 1140–1378: Sources et théorie du droit* (Paris, 1965), pp. 532–57. See also Antonio Padoa-Schioppa, *Italia ed Europa nella storia del diritto* (Bologna, 2003), pp. 196–8.
- 24 See, e.g., Henricus de Segusio (Hostiensis) (d. 1271), *Summa aurea* (Venice, 1574), Lib. I, tit. De consuetudine, no. 1, defining custom in the canon law as “Ius quoddam moribus institutum quod pro lege accipitur cum deficit lex” and as “usus rationabilis, competente tempore praescriptus vel firmatus”.
- 25 Albericus de Rosate, *Dictionarium iuris tam civilis quam canonici* (Venice, 1573), p. 787: “Stylus curiae facit ius”, citing Panormitanus, *Commentaria ad X 1.2.11* (c. *Ex literis*) and several other medieval commentators. For the Scottish equivalent, see A. M. Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (Leiden and Boston, MA, 2009), pp. 179–80.
- 26 The legality of the routine use of these monetary mulcts was open to dispute; see Julius Clarus (d. 1575), *Liber sententiarum receptorum V § Practica criminalis*, Quaest. 80 (Venice, 1580), f. 209.
- 27 Compare Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (Oxford, 1952), pp. 37–49, with Anne Lefebvre-Teillard, *Les officialités à la veille du Concile de Trente* (Paris, 1973), pp. 32–41.
- 28 An English example with extensive lists of various fees from the English diocese of Hereford is now found in Worcester Record Office, MS 777.713, BA 2090, pp. 97–9.
- 29 See, e.g., Dorothy Owen, *The Medieval Canon Law: Teaching, Literature and Transmission* (Cambridge, 1990), pp. 53–7.
- 30 André Vauchez, “Conclusion”, in A. Paravicini Bagliani and Véronique Pasche (eds), *La parrocchia nel Medio Evo: Economia, Scambi, Solidarietà* (Rome, 1995), pp. 305–15.
- 31 E.g., Vicar of Suthwell c. Congrest et al. (Lincoln 1518), Lincolnshire Record Office, MS Cj/2, f. 67 (dispute over payment of a parochial clerk between the vicar and parishioners).
- 32 See Brian Ferme, *Canon Law in Late Medieval England: A Study of William Lyndwood's Provinciale with particular reference to Testamentary Law* (Rome, 1996), pp. 55–77; Michael Sheehan, *The Will in Medieval England from the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Toronto, 1963), pp. 163–76. For Scotland, see Gordon Donaldson, “The church courts”, in *Introduction to Scottish Legal History*, pp. 363–73; and A. E. Anton, “Medieval Scottish executors and the courts spiritual”, *Juridical Rev.* 67 (1955), 129–54.

was justified by immemorial custom, not by what was found in the texts of the *Corpus iuris canonici*. Of course, all these examples were not outright violations of canonical principles, but neither were they spelled out in its texts. They were not in force everywhere in Europe, and they differed in substance from some of the rules found within the formal law.<sup>33</sup> The strength of this aspect of local practice is particularly well illustrated by a ruling of Pope Boniface VIII, sometimes described as the most assertive of the medieval popes. Despite invocation of the oft-repeated dictum that Christ had claimed to stand for the truth, not for the custom,<sup>34</sup> Boniface held that an otherwise valid local custom remained in force even if it was contrary to a newly enacted constitution unless it was specifically mentioned and abrogated by the new constitution. His ruling on the subject was taken into the *Corpus iuris canonici*.<sup>35</sup>

Third, the church's law left open the possibility of enactment of diverse laws by local legislation, and virtually everywhere provincial and diocesan synods acted in response to that opening.<sup>36</sup> They adopted supplementary rules meant to govern the conduct of men and women, including the laity, who lived within diocesan boundaries.<sup>37</sup> Sumptuary laws designed to regulate the dress and conduct of the laity in fourteenth-century Italy provide one example.<sup>38</sup> They appeared in Italian diocesan statutes and amplified the activities of the southern courts over what is found, for instance, in the medieval courts of either England or Scotland, where no such extension of the church's law occurred. The jurisdiction over defamation exercised by the English ecclesiastical courts provides another example; it had its origins in a provincial constitution of the Council of Oxford of 1222.<sup>39</sup> The same jurisdiction over this subject was not found in all parts of Europe. In much the same fashion, the church's testamentary jurisdiction in Scotland was supported and shaped by a decree enacted in a provincial synod.<sup>40</sup> As noted above, this was no part of the ordinary jurisdiction exercised by many of the ecclesiastical courts on the Continent. Local statutes thus filled gaps in the coverage of the *Corpus iuris canonici*.

33 A valuable recognition of the relevance of this feature of the canon law in Scotland is R. K. Hannay, "Some questions regarding Scotland and the canon law", *Juridical Rev.* 49 (1937), 25–34.

34 Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA, 1983), pp. 112–13.

35 Sext. 1.2.1.

36 Their importance is supported by the sixteenth-century canonist and author of a treatise on the subject, Henricus de Bottis (d. 1544), *Tractatus de synodo episcopali et de statutis episcopis synodalibus* (Lyon, 1529), f. 1, contrasting the common neglect of the decrees of general councils with the frequent use of synodal legislation, which "frequenter et quasi quotidie in practica curiarum ecclesiasticarum versetur".

37 See Charles Donahue Jr, "Thoughts on diocesan statutes: England and France, 1200–1500", in Uta-Renate Blumenthal, Anders Winroth and Peter Landau (eds), *Canon Law, Religion, and Politics: Liber Amicorum Robert Somerville* (Washington, DC, 2012), pp. 253–71.

38 See, e.g., Richard Trexler, *Synodal Law in Florence and Fiesole, 1306–1518* (Vatican City, 1971), pp. 105–6.

39 See F. M. Powicke and C. R. Cheney (eds), *Councils and Synods with Other Documents relating to the English Church II: 1205–1313* (Oxford, 1964), I, p. 107; it was known in practice by its incipit: *Ex auctoritate dei patris*.

40 Declaration of Provincial Synod and General Council, 1420, in David Patrick (ed.), *Statutes of the Scottish Church 1225–1559*, Scottish History Society, vol. 54 (Edinburgh, 1907), pp. 80–2.

### LOCAL HABITS AND TEMPORAL RESTRICTIONS

Although not themselves a part of the *Corpus iuris canonici*, local rules and practices in most European lands shaped the jurisdictional reach of the canon law in diocesan courts. These limitations were an enduring fact of life. Administration of the canon law also met the force of restrictive legislation and the assertion of powers of supervision by kings and princes. Almost everywhere, there was resistance to the extent of the church's claims to jurisdictional competence on the part of rulers, their lawyers and other governmental officials.<sup>41</sup> In canonical theory, for instance, the church had a right to correct all sinful behaviour – an Open Sesame for virtually unlimited ecclesiastical jurisdiction.<sup>42</sup> Except within the confessional, that claim was resisted virtually everywhere. Popes and bishops could protest, and they sometimes did. But they and the litigants in their courts could not ignore the restrictions against which they protested. In England, royal writs of prohibition and *praemunire* were the primary means used to restrain the exercise of ecclesiastical jurisdiction within boundaries set by traditional practice.<sup>43</sup> Other lands had similar vehicles. They shared the same broad purpose, although they differed in their details.<sup>44</sup> Scotland's law in the years around 1500 was only one example of many European regimes.<sup>45</sup> This inevitable fact of life made a difference in the extent to which the canon law could be put into effect, and this led to local variations in the nature of the jurisdiction in the courts where the canon law applied.

Finally, there is the related question of the indirect effects which local customs and local laws could have on the exercise of ecclesiastical jurisdiction. It was this possibility that first attracted the attention of Professor Donahue. Local habits or customary practices, as in the manner of entering into marriage, making arrangements for dowry payments, or passing property from one generation to another, might have made a difference in the nature of the causes brought before the consistory courts. The medieval canon law did not contain formal requirements for entry into marriage, such as those the Catholic Church enacted at the Council of Trent or those most nations have adopted today. The validity of medieval marriage contracts was treated as a matter of private law in the same sense that most of the

41 Scottish restrictions are indicated in Alice Taylor (ed.), *The Laws of Medieval Scotland: Legal compilations from the thirteenth and fourteenth centuries*, Stair Society vol. 66 (Edinburgh, 2019), pp. 414–15, 484–7.

42 For Scotland, see the discussion in Godfrey, *Civil Justice in Renaissance Scotland*, pp. 260–4.

43 The basic works on this subject are G. B. Flahiff, "The writ of prohibition to Court Christian in the thirteenth century, Part 1", *Mediaeval Studies* 6 (1944), 261–313; Part 2, *ibid.* 7 (1945), 229–90; and Charles M. Gray, *The Writ of Prohibition: Jurisdiction in Early Modern English Law* (New York, 1994).

44 See, e.g., F. Cheyette, "La justice et le pouvoir royal à la fin du Moyen Âge français", *Revue historique de droit français et étranger*, 4th ser. 40 (1962), 373–94.

45 See Ian Hamilton Shearer (ed.), *Selected Cases from Acta Dominorum Concillii et Sessionis*, Stair Society vol. 14 (Edinburgh, 1951), nos 22–9. To most modern commentators, the situation in Scotland seems to have been only slightly more muted than in England: see W. D. H. Sellar, "Promise", in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland, Volume 2* (Oxford, 2000), pp. 262–6; James Pfander and Daniel Birk, "Article III and the Scottish judiciary", *Harvard Law Rev.* 124 (2011), 1613–87, at 1621; Marinell Ash, "The church in the reign of Alexander III", in Norman Reid (ed.), *Scotland in the Reign of Alexander III 1249–1286* (Edinburgh, 1990), pp. 31–52.



law of contracts is today.<sup>46</sup> This meant that long-standing habits among the people and their assumptions about entry into marriage could matter in determining the actual shape of marriage litigation.<sup>47</sup>

All these factors, when taken together, render legitimate an inquiry into the extent to which the English and the Scottish churches diverged (or coincided) in applying the formal law of marriage and divorce, putting the canons into practice within their diocesan courts. This article makes no pretence of contributing to the subject of the development of a national system of Scottish law courts.<sup>48</sup> That is a field no outsider should enter.<sup>49</sup> But there is room for an inquiry of the narrower sort offered here.

It seems certain that ecclesiastical tribunals of some sort did come into existence in medieval Scotland before the Reformation, although it has proved impossible to say exactly when. The presence and influence of Scottish men who had studied the canon law is well attested,<sup>50</sup> and the general opinion of historians has been that these canonists played a significant part in resolving legal disputes of all kinds during the Middle Ages.<sup>51</sup> This led finally to the creation of consistory courts. This article's coverage is necessarily limited, however, to what can be shown by an investigation of the ecclesiastical records that have survived.<sup>52</sup> Almost all of the relevant sources that have come down to us are from the sixteenth century in the years before the Scottish Reformation.

### THE SCOTTISH COURT RECORDS

Several prior studies based upon the records of the causes heard in Scotland's ecclesiastical courts have been either printed or described in detail in books and

- 46 David d'Avray and Werner Menski, "Authenticating marriage in a comparative global perspective", *Rechtsgeschichte – Legal History* 27 (2019), 71–89.
- 47 See the essays relating to marriage in Véronique Beaulande-Barraud and Martine Charageat (eds), *Les officialités dans l'Europe médiévale et moderne* (Turnhout, 2014), pp. 227–309.
- 48 See J. D. Ford, "Epistolary control of the College of Justice in Scotland", and Mark Godfrey, "Control and the constitutional accountability of the College of Justice in Scotland, 1532–1626", in Ignacio Czeguhn, José Antonio López Nevot and Antonio Sánchez Aranda (eds), *Control of Supreme Courts in Early Modern Europe* (Berlin, 2018), pp. 63–88, 117–48.
- 49 For the present state of knowledge, see A. M. Godfrey, *Civil Justice in Renaissance Scotland*, and Andrew R. C. Simpson, "The Scottish common law: origins and development, c. 1124–c. 1500", in *Oxford Handbook of European Legal History*, pp. 450–73.
- 50 See Hector MacQueen, "The king's council and Church courts in later medieval Scotland", in *Ius Romanum – Ius Commune – Ius Hodiernum: Studies in honour of Eltjo J. H. Schrage on the occasion of his 65th birthday* (Amsterdam and Aalen, 2010), pp. 277–87; and D. N. MacCormick, *Lawyers in their Social Setting: Wilson Memorial Lectures*, University of Edinburgh (Edinburgh, 1976), pp. 154–7.
- 51 See, e.g., Peter Landau, "The origin of civil procedure", in *Canon Law, Religion and Politics*, pp. 136–43; Hector MacQueen, "Expectations of the law"; see also James Brundage, "The practice of canon law", in Wilfried Hartmann and Kenneth Pennington (eds), *History of Courts and Procedure in Medieval Canon Law* (Washington, DC, 2016), pp. 51–73, at 62–3.
- 52 That Scottish ecclesiastical courts existed earlier is supported by the existence of men titled *Officiales* for several Scottish dioceses. It was the term normally used for judges of ecclesiastical courts. See D. E. R. Watt, *Fasti Ecclesiae Scoticanæ Medii Aevi ad annum 1638* (Edinburgh, 1969), *passim*. However, the term was also used for more general purposes, and its use does not prove the existence of the courts over which officials later presided, at least without some further demonstration of their existence. See David Smith, "The *officialis* of the bishop in twelfth- and thirteenth-century England: problems of terminology", in M. J. Franklin and Christopher Harper-Bill (eds), *Medieval Ecclesiastical Studies in Honour of Dorothy M. Owen* (Woodbridge, 1995), pp. 201–30.

articles.<sup>53</sup> The largest collection of records that shed light on this subject, however, remains in manuscript, kept in the national archives in Edinburgh. These records are the most informative source of what can be known about the exercise of ecclesiastical jurisdiction in Scotland before the Reformation. All nine volumes of extant records come from the sixteenth century. We do not have earlier records compiled of the activities of the diocesan courts.<sup>54</sup> They have not survived. Long ago, Cosmo Innes described the date of their creation only as “when court business became large and constant”<sup>55</sup> – and modern treatments of the subject often leave the exact chronology equally uncertain.<sup>56</sup> What we do know is that during the Middle Ages and after, Scottish students had regular recourse to continental universities to secure an education in Roman and canon laws. Their presence in medieval Scotland and their importance to settling legal disputes from an early date has been established, but the absence of systematic court records means that we cannot be certain in describing exactly what they did or the courts in which they acted. A common opinion among historians has been to acknowledge the likelihood of the importance of these men but to leave the rest to cautious speculation.<sup>57</sup>

The fact remains that the only regular volumes of surviving records span the years 1513 to 1555. Five of them are act books that contain the records of the individual causes brought before the church’s courts. Normally they record the procedural steps taken in each cause, meaning that finding information about their subject and progress can require leafing through several folios in each. Four of the nine, however, are books of sentences, for the most part the definitive sentences that recorded the outcomes of the causes found in the act books.<sup>58</sup> A few of these sentences, however, were interlocutory in nature; that is, they were determinations of preliminary matters raised during the course of litigation. Samples of each are found in the Abbotsford Club volume referenced above.<sup>59</sup>

The surviving record evidence from the Scottish courts is thus appreciably smaller than that found in the English archives, which contain ecclesiastical court records dating back to the thirteenth century and which had become quite copious for the sixteenth.<sup>60</sup> The equivalent Scottish evidence is smaller in bulk than what

53 See Lord Cooper (ed.), *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944); *Liber Officialis Sancti Andree* (Edinburgh, 1845); Simon D. Ollivant, *The Court of the Official in Pre-Reformation Scotland*, Stair Society vol. 34 (Edinburgh, 1982); and Gordon Donaldson, *Scottish Church History* (Edinburgh, 1985), pp. 40–50.

54 The medieval records from Aberdeen, if any, were apparently destroyed by fire; see David Stevenson, “The commissary court of Aberdeen in 1650”, in W. D. H. Sellar (ed.), *Miscellany Two*, Stair Society vol. 35 (Edinburgh, 1984), pp. 144–8, at 145.

55 Cosmo Innes, *Lectures on Scotch Legal Antiquities* (Edinburgh, 1872), p. 181.

56 See Ollivant, *Court of the Official*, pp. 41–9.

57 See John Cairns, “Historical introduction”, in *A History of Private Law in Scotland, Volume 1*, pp. 14–184, at 29–31, 45–7, 68–74; Nan Wilson, “The Scottish bar: the evolution of the Faculty of Advocates in its historical setting”, *Louisiana Law Rev.* 28 (1968), 235–57.

58 The predominance of sentences in the surviving evidence is not unique to Scotland; see Cyriel Vleeschouwers and Monique van Melkebeek (eds), *Registres de sentences de l’officialité de Cambrai (1438–1453)* (Brussels, 1998).

59 *Liber Officialis Sancti Andree*, pp. 141–70.

60 They are listed and described in Charles Donahue Jr (ed.), *The Records of the Medieval Ecclesiastical Courts Part II: England* (Berlin, 1994).

has been discovered so far in the episcopal archives in France, Germany and Italy.<sup>61</sup> The Scottish evidence most approximates to the situation in Scandinavian lands.<sup>62</sup> Only two Scottish dioceses are represented in what has survived, one of them largely through that of the court for the archdeaconry of Lothian. There is also a fragment of an act book of the commissary of the chapel royal in Stirling. By far the greatest part of what remains, kept in these archives, is smaller in bulk than what is found in most other European lands. It is not, however, without interest or value, particularly when approached from a comparative perspective. It does include a not inconsiderable store of cases involving early marriage contracts. Although not all concerned with litigation in the church's courts, they shed valuable light on some of the marriages that would later come before the church's courts.<sup>63</sup> The subject of matrimonial law thus makes a good vantage point for taking a comparative look at the canon law's enforcement.

### THE SIMILARITIES

Most discoverable aspects of procedural practice employed in the Scottish ecclesiastical courts appear to have been identical with those used elsewhere, in fact throughout the European courts of the church. The definitive sentences found in all these locations have virtually identical features. No contrast with the English evidence here. The documents introduced and the system of proof used in practice were those of the European *ius commune*. So far as one can tell from the records, the learned authorities cited in support of the arguments made in Scottish litigation were the same as those that prevailed in the courts to the south.

On the specific topic of relevance to the law of marriage, the most prominent and meaningful substantive similarity between the disputes that came before the Scottish ecclesiastical courts and before those in England lies in the character of the marriages that gave rise to litigation. The canon law of the time defined marriage as a contract between a man and a woman who had used words of present or future consent.<sup>64</sup> Like most contracts, matrimonial contracts could be entered into without the intervention of a notary or the participation of a priest. Blessing of the nuptial union in a church was possible and widely practised, but in the eyes of the law it merely added publicity and honesty to what otherwise was an agreement between two consenting adults. Publication of banns or solemnisation brought the participants into full conformity with the church's law, but they added nothing that was essential for the union's validity. Likewise, parental consent and the exchange of gifts were normal parts of marriage, but the essence of entry into marriage was the exchange of consent by the couple. Each said: "I take thee as my

61 See Charles Donahue Jr (ed.), *The Records of the Medieval Ecclesiastical Courts Part I: The Continent* (Berlin, 1989).

62 See, e.g., Mia Korpiola, *Between Betrothal and Bedding: Marriage Formation in Sweden 1200–1600* (Leiden and Boston, MA, 2009), pp. 281, 385–6; Agnes Arnórsdóttir, "Two models of marriage? Canon law and Icelandic marriage practice in the later Middle Ages", in Mia Korpiola (ed.), *Nordic Perspectives on Medieval Canon Law* (Matthis Caloniuss Society, 2, 1999), pp. 79–90.

63 See Heather Parker, "Family, finances, and free will marriage contracts, Scotland, c. 1380–1500", *Scottish Archives* 18 (2012), 10–24.

64 E.g., "I take thee ..." as opposed to "I shall take thee".

spouse” or some close variant of these words. This was true in Scotland, as it was true in England.<sup>65</sup> What was then called “handfasting” – the joining of hands by the couple when entering into the marriage – was a familiar name for this process on both sides of the Border.<sup>66</sup> And insofar as we can rely on the surviving records, it was this sort of entry into marriage that came most often before the Scottish consistory courts.<sup>67</sup> Proving the existence of these contracts was the lawyer’s problem. Proof normally depended upon oral testimony, and it was subject to all the infirmities that accompany all humans, the personal interests of the parties and the witnesses among them. Added to this, some legal problems more strictly defined had to be considered in the courts – determining the meaning of ambiguous language, deciding whether the contract had been entered into freely, and assessing the effects of conditions that were sometimes added to marriage negotiations all came into play. These were among the persistent problems faced by the judges and lawyers engaged in matrimonial litigation in the two realms. As far as we can tell from the available records, these ecclesiastical lawyers appear to have dealt with them in much the same fashion on both sides of the Border.

### THE DISSIMILARITIES

Seven noticeable differences between Scottish and English matrimonial causes appear in the records. The first is that north of the Border, the dominant purpose for bringing a matrimonial cause before an ecclesiastical court was to secure a divorce. In those to the south, it was to secure enforcement of an existing clandestine marriage contract. The Scottish records show that most pursuers invoked one of the many impediments available under the canon law in an attempt to secure release from an existing marriage. Lack of free consent, a close kinship relationship, or insufficient age at the time of the marriage were the most frequently alleged diriment impediments. This pattern stands in marked contrast to the English evidence, in which the dominant purpose for initiating procedure before one of the church’s courts was to secure enforcement of an oral marriage contract. In fact, the English pattern proves to have been the dominant purpose of litigation in most of the litigation brought before the church’s courts in the other parts of Europe that have been investigated.<sup>68</sup> Not so in Scotland.

These suits for divorce had two names in the Scottish records. One was styled a *causa matrimonialis tendens ad divorcium*. The other was styled simply a *causa divorcii*. What the substantive difference between these was, if there was one, cannot easily be

65 The English evidence on this point is found in R. H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge, 1974); the depositions of witnesses from which that book draws many of its conclusions are unfortunately not found in the surviving Scottish records.

66 A. E. Anton, “Handfasting in Scotland”, *Scottish Historical Rev.* 37 (1958), 89–102. Compare Richerdson c. Joycye (Durham, 1563), in James Raine (ed.), *Depositions and other Ecclesiastical Proceedings from the Courts of Durham* (Publications of the Surtees Society, 21, 1847), pp. 78–9.

67 W. D. H. Sellar, “Marriage by cohabitation with habit and repute: review and requiem?”, in D. L. Carey Miller and D. W. Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (Edinburgh, 1992), pp. 117–36.

68 E.g., Daniela Lombardi, *Matrimoni di antico regime* (Bologna, 2001), pp. 169–72; Lefebvre-Teillard, *Les officialités à la veille du Concile de Trente*, pp. 164–79.

discerned in the surviving records, but it seems likely that one was thought to exist.<sup>69</sup> The separate terms were used consistently in referring to specific divorce causes. In one cause, the record which had first described one of these disputes as simply a *causa divorcii* was later amended to describe it as a *causa matrimonialis tendens ad divorcium*.<sup>70</sup> The scribe simply crossed out the original designation and substituted the latter. He must have had a reason.

Whichever form was used, however, it appears that the claimants who commonly initiated matrimonial litigation in Scotland were seeking to be freed from an existing union. The same result is found for the official's court for the archdeaconry of Lothian, part of the diocese of St Andrews, between 1512 and 1552. The number of sentences in divorce causes there dwarfs that for causes brought to establish the existence of a valid contract of marriage.<sup>71</sup> Admitting the existence of an existing marriage or at least one contracted by words of present consent, the pursuer in these causes sought a divorce *a vinculo* – what we now would call an annulment with freedom to remarry. In successful cases, the sentence thus recorded the invalidity, stating: “We separate and divorce the said A. and B. declaring them to be divorced, [and] granting [them] licence to marry elsewhere in the Lord”.<sup>72</sup>

In addition, there are indications that the same preponderance of true divorce causes outlasted the Reformation,<sup>73</sup> even that this aspect of practice was enlarged by the decision to allow divorce for adultery or even for malicious desertion with permission to remarry for the innocent party.<sup>74</sup> The only obvious caution in accepting the force of this evidence on the Scottish pattern is that litigation brought to secure a divorce was more likely to reach definitive sentence and to have been put into formal collections than was litigation brought to enforce a clandestine marriage contract. It had more immediate secular consequences. Even admitting this reason for caution, the contrast between the Scottish evidence and that which has survived from elsewhere seems too strong to be explained by habits of record-keeping.

Second, a noteworthy and distinct characteristic of the Scottish matrimonial litigation is that the majority of divorce causes involved the impediments of consanguinity and affinity, rather than the other grounds for annulment that were available under the medieval law. A traditional criticism of the medieval church's law

69 A possibility is that the first was used to distinguish it from a “*causa sevitie ad divorcium tendens*” (an attempt to secure a divorce *a mensa et thoro*, i.e. a separation, because of the other spouse's habitual cruelty), as in *Maranta Broune c. Alexander Broune* (1547), CH5/2/1, f. 145.

70 *David Achesone c. Elizabeth Ramsey* (1534), National Records of Scotland (hereafter abbreviated NRS), CH5/3/1, f. 217v.

71 *Liber Officialis Sancti Andree*, pp. liii–lv.

72 E.g., *Andrew Wilson c. M. Brown* (1534), NRS, CH5/3/1, f. 221: “Propterea prefata pretensa sponsalia carnali copula subsecuta inter dictos A et M derimenda essent cassanda prout cassamus ac ipso M et A ab invicem separamus et divorciamus et divorciandos fore decernimus et alibi nubendi licenciam in domino damus”.

73 “Introduction”, James Kirk (ed.), *The Records of the Synod of Lothian and Tweeddale, 1589–1596, 1640–1649*, Stair Society vol. 30 (Edinburgh, 1977), pp. xiii–xvii.

74 K. M. Brown et al. (eds), *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007–20), A1573/4/2 (date accessed: 8 February 2020). See also Thomas M. Green, *The Spiritual Jurisdiction in Reformation Scotland: A Legal History* (Edinburgh, 2019), p. 51; Lord Bankton, *Institute of the Laws of Scotland*, Lib. I, tit. 5, § 1, Stair Society vol. 41 (Edinburgh, 1993), pp. 106–12; J. J. Robertson, “Canon law as a source”, in David M. Walker (ed.), *Stair Tercentenary Studies*, Stair Society vol. 33 (Edinburgh, 1981), pp. 117–27.

on this subject is that it made dissolution of existing marriages too easy to obtain, because of the breadth of its kinship disqualifications. Securing a divorce, it has seemed to sceptical historians, would require little more than some genealogical research. That criticism, however likely it may seem, has not been borne out by the research that has been done in ecclesiastical court records during the last fifty years. But, for Scotland, there may be something to it. The preponderance of divorce petitions based on the existence of prohibited degrees of affinity and consanguinity suggests as much.<sup>75</sup>

Here again, the evidence could be more complete. There are no surviving Scottish cause papers, and the existing act books cannot be uncritically relied upon to measure the realities. Only occasionally do they reveal the underlying facts of each cause they recorded. With that reservation, however, the dominance of questions involving the prohibited degrees in the books of sentences is quite startling if one begins with the normal patterns of medieval litigation found elsewhere. Whereas in the records of most lands, an existing marriage (or pre-contract) appeared most often as the impediment alleged in suits brought to contest the existence of a marriage,<sup>76</sup> in Scotland this was true in only a minority of the surviving causes. Lumping together the impediments alleged in all the causes in the Lothian book of sentences, here are the figures. There were twenty involving an existing marriage (that is, that one of the parties was already married); twenty-four involving direct kinship disqualification between the parties (that is, that they themselves were related by close ties of affinity or consanguinity); and fifty-five involving pre-existing sexual relations between one of the parties and someone related to the other.

The last of these figures is particularly noteworthy. Impediments to marriage arose not simply from blood or marriage ties. They also arose from sexual intercourse between one of the contracting parties and anyone who was related by blood or marriage to the other.<sup>77</sup> A man could secure a divorce on the grounds of existing affinity, for example, if he could show that he himself had had prior sexual relations with a woman who was related to his wife.<sup>78</sup> A woman could do the same. Their rights were identical, at least on this score. What Maitland called “the efficient cause” of affinity was no more than that<sup>79</sup> – and, to judge by the Scottish

75 The admittedly scant evidence from the medieval period supports this conclusion; see Paul C. Ferguson, *Medieval Papal Representatives in Scotland: Legates, Nuncios and Judges-Delegate 1125–1286*, Stair Society vol. 45 (Edinburgh, 1997), pp. 157–9.

76 See Cecilia Cristellon, *Charitas versus eros: il matrimonio, la Chiesa e i suoi giudici nella Venezia del Rinascimento* (Florence, 2005), pp. 108–11; see also citation in Donahue, *Law, Marriage and Society*, p. 630; Marie-Ange Valazza Tricarico, “L’officialité de Genève et quelques cas de bigamie à la fin du Moyen Âge: l’empêchement de lien”, *Zeitschrift für Schweizerische Kirchengeschichte* 89 (1995), 99–118.

77 See John C. Barry (ed.), *William Hay’s Lectures on Marriage*, Stair Society vol. 24 (Edinburgh, 1967), p. 210: “Affinitas est quoddam vinculum persone ad personam contractum ex carnali copula cum persona alteri persone consanguinea” (apparently a quote from Duns Scotus).

78 E.g., Robert Bos’ c. Christiana Avery (1551), NRS, CH5/2/1, f. 238, in which a divorce was secured on the grounds that the man had had prior sexual relations with the sister of the mother of the woman he had married.

79 F. Pollock and F. W. Maitland, *History of English Law before the time of Edward I* (Cambridge, 1968 reissue), I, p. 389; see also Marie-Bernadette Bruguière, “Canon law and French royal weddings”, in Stanley Chodorow (ed.), *Proceedings of the Eighth International Congress of Medieval Canon Law* (Vatican City, 1992), pp. 473–96, at 475 (describing the extensive affinity-based impediments as “juridical logic run mad”). Similar is the judgement of James Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago, 1987), p. 193.

evidence, what he dismissed as “the idle ingenuities” of the canonists appear to have made a significant difference in Scotland. However little they were invoked in practice in most parts of Europe, in this northern kingdom they were used quite frequently. Perhaps the relatively modest size of the Scottish population made this possible. In 1554, Archbishop Hamilton famously complained about the difficulty the Scottish gentry had in finding partners in marriage who were outside the circle of some form of affinity or consanguinity.<sup>80</sup> The marriage contracts that survive can be read to confirm the truth of his complaint.<sup>81</sup> Still, it is difficult to move confidently beyond speculation in drawing firm conclusions from what the surviving evidence shows.<sup>82</sup>

One additional cautionary note: the figures just given for the Lothian book do not add up to 138 sentences. This is because, in a few instances, the sentence did not state the grounds, and one cannot put these causes into any single category. Likewise, a few divorces were secured for other reasons – impotence, for example, or coercion serious enough to have distorted the will of a responsible man or woman.<sup>83</sup> Moreover, there were also matrimonial causes in this book that did not seek either to establish a marriage’s existence or to undo it. A suit brought to secure a monetary payment for the “deflowering” of a maiden is an example. So too are several causes seeking a divorce *a mensa et thoro* – what we would now call a judicial separation without freedom to remarry.<sup>84</sup> These have not been counted as among the 138. Even when all the adjustments have been made, however, the predominance and apparent frequency with which marriages were dissolved for reasons of consanguinity or affinity in Scotland does contrast markedly with what has been found for England and for the other European lands whose records have been studied so far.

Third, and perhaps even more striking in light of the canon law’s requirements in the law of proof, most Scottish claims for divorce *a vinculo* found in the records of sentences in fact succeeded. Existing marriages were dissolved, and the parties were given licence to marry anew. This characteristic stands in contrast to what has been shown for most European courts, although research on this point has not been

80 See F. P. Walton, “The courts of the officials and the commissary courts, 1512–1830”, in *An Introductory Survey of the Sources and Literature of Scots Law*, Stair Society vol. 1 (Edinburgh, 1936), pp. 133–53, at 136. See also the letter from Pope Urban V to the bishop of Argyll in W. H. Bliss and J. A. Twemlow (eds), *Calendar of Entries in the Papal Registers relating to Great Britain and Ireland: Volume 4, 1362–1404* (London, 1902), pp. 53–9, at 56 (allowing a marriage dispensation to a Scottish petitioner because of a “dearth of nobles” available for suitable matrimony); and Gordon Donaldson and C. Macrae (eds), *St Andrews Formulare, 1514–1546 Volume One*, Stair Society vol. 7 (Edinburgh, 1942), nn. 99–100.

81 See Parker, “Family, finances, and free will”, 23: “On occasion, couples treated the church bureaucracy as a de facto divorce court, suppressing dispensations and discovering new links between a husband and wife”.

82 The great majority of Scottish marriage dispensations from 1511 to 1547, at least as found in one local record, were for the fourth degree of consanguinity (eight of eleven); see Terese Maley and Walter Elliot (eds), *Selkirk Protocol Books 1511–1547*, Stair Society vol. 40 (Edinburgh, 1993).

83 Mailvill c. Hepburne (1516), NRS, CH5/3/1, f. 44v. I found only three instances of petitions for a judicial separation: Hepburne c. Levingstone (1515), NRS, CH5/3/1, f. 16; Blacater c. Ramsay (1515), *ibid.* f. 134v; Bathgait c. Bell (1539), *ibid.* f. 301.

84 Gardin c. Lammye (1543), NRS, CH5/2/1, f. 41; Boyis c. Mortoune (1522), NRS, CH5/3/1, f. 102.

as explicit as it has been on the nature of the claims that were litigated.<sup>85</sup> Of the causes brought to secure a divorce *a vinculo* in the Scottish register, however, only six in the earliest book of sentences were decided in favour of the defender because the alleged impediment had not been sufficiently proven. This finding supports the criticism that divorce for marriage within the prohibited degrees offered a common “exit” from an unhappy or inconvenient marriage. Three other books of sentences have survived, and for all of them a negative sentence in a Scottish divorce cause was a rarity. They did exist, just as actions to enforce matrimonial contracts did come before the Scottish courts.<sup>86</sup> But there were not many of them.

If this feature was representative of matrimonial practice in the northern kingdom, what once was widely assumed about the cynical use of impediments based upon kinship to dissolve long-established marriages may have been the fact in Scotland.<sup>87</sup> The evidence may suggest it.<sup>88</sup> Learned commentators then and now have remarked on the slow progress by which the canon law’s requirements took hold among the Scots.<sup>89</sup> Older habits of freedom in contracting and undoing marriage died a very slow death. It would be an interesting discovery to arrive at a percentage figure of success in these pre-Reformation Scottish cases and to compare it with the percentage of successful petitions for annulment in modern Catholic marriage tribunals. By reputation at least, both are quite high – suspiciously so.

Fourth, most of the marriages at issue in the Scottish court books were alleged to have been contracted by *verba de futuro* rather than by *verba de praesenti*. This is a feature found in a few, although not many, European courts.<sup>90</sup> The difference was never absolute; espousals in the future tense were sometimes alleged in suits brought before most European ecclesiastical courts. On the basis of what we know so far, however, the Scottish litigation seems to have been in the minority in this respect. On this point, marriages between Scots contracted by words of future consent were the norm, whereas the opposite was true in England.

From a strictly legal point of view, it turns out that this particular aspect of Scottish practice did not matter very much. That was because the allegation of a *verba de futuro* contract in Scotland was almost invariably joined with the allegation that the

85 Perhaps the closest similarity has been found for parts of the Low Countries; see Monique Vleeschouwers-van Melkebeek, “Incestuous marriages: formal rules and social practice in the southern Burgundian Netherlands”, in Isabel Davis, Miriam Müller and Sarah Rees Jones (eds), *Love, Marriage, and Family Ties in the Later Middle Ages* (Turnhout, 2003), pp. 77–94; the author concludes that the presence of the *promotor* or procurator fiscal was decisive, but even in the Low Countries the level of success for divorce petitions was lower than it was in the Scottish records.

86 *Louranstoun c. Rouch* (1516–20), NRS, CH5/3/1, f. 72.

87 See Brundage, *Law, Sex, and Christian Society*, p. 193.

88 See the evidence collected and analysed in W. D. H. Sellar, “Marriage, divorce and concubinage in Gaelic Scotland”, *Transactions of the Gaelic Society of Inverness* 51 (1981), 464–93.

89 See W. F. Skene, *The Highlanders of Scotland*, ed. Alexander MacBain (Stirling, 1902), pp. 108–9; see also “Aberdeen Kirk Session 1562”, in John Stuart (ed.), *Selections from the Records of the Kirk Session, Presbytery, and Synod of Aberdeen* (Spalding Club, 1846), p. 11 (attempt to prevent the persistent habit of contracting marriages for a certain number of years, after which the unions would cease unless renewed).

90 See, e.g., Monique Vleeschouwers-van Melkebeek, “Aspects du lien matrimonial dans le *Liber Sententiarum de Bruxelles* (1448–1459)”, *Tijdschrift voor Rechtsgeschiedenis* 53 (1985), 43–93, at 50–67; Jean François Poudret, “Symbolisme et réalisme dans les mariages clandestins Valaisans à la veille du Concile de Trente”, in Bernard d’Alteroche et al. (eds), *Mélanges en l’honneur d’Anne Lefebvre-Teillard* (Paris, 2009), pp. 839–49, at 847.



promises of marriage had been followed by consummation: *matrimonium per verba de futuro carnali copula subsecuta*. This was the allegation most commonly found in the Scottish matrimonial litigation, and for most practical purposes it amounted to the equivalent of a marriage contracted by words of present consent.<sup>91</sup> Of course, the actual words used are hidden from us in the great majority of the Scottish causes. No depositions from the witnesses survive, and the sentences give us only the result. The exact words the parties used would therefore have been irrelevant in most causes brought to secure a Scottish divorce.

It is not altogether easy to account for this feature of Scottish practice. Perhaps it was simply the fact. It may be that the normal way of contracting marriage in Scotland was to use words of the future tense. Historians should not become so sophisticated that they assume that legal records routinely contain information that is false. Sometimes they do, but not always. In fact, one archbishop of St Andrews in the early sixteenth century himself made reference to the “evil customs or rather corruptions” by which couples contracted by words of future consent, then passed quickly to carnal union without either banns or solemnities.<sup>92</sup> He appears to have been fully aware of what the surviving records only suggest.

Admitting that, another explanation is possible. The lawyers who framed the pleading in the Scottish matrimonial causes may have alleged only the bare minimum necessary to serve the interests of their clients. Where cohabitation had followed, the marriage would have been fully proved. Because it made no legal difference to the outcome of a dispute, they chose not to enter the difficult and troublesome arena of interpreting the words the parties had spoken. Lawyers do not usually take on the obligation of proving more than they have to. Lawyerly caution could thus explain the nature of the claims that were made. This is, of course, no more than a guess on my part and perhaps a cynical one at that. It is nonetheless a possibility drawn from what the surviving sentences show.

Fifth, counting the parties who brought litigation before the Scottish courts produces a slight predominance in favour of men acting as pursuers. In the earliest book of sentences, eighty suits for divorce (both divorce *a vinculo* and divorce *a mensa et thoro*) were begun by men; only fifty-three were by women. This stands in contrast to what has been found elsewhere. Professor Donahue’s examination of fifteenth-century matrimonial causes from York, for example, produced a preponderance of female pursuers by seventy-six to forty-seven.<sup>93</sup> Professor van Melkebeek discovered ninety-four causes involving “self-divorce” in fifteenth-century Flanders in which the result could be known. Of these, fully eighty-six were brought by women.<sup>94</sup>

91 X 4.1.15.

92 Synodal Constitutions (1516 × 1520), no. 10, in *Statutes of the Scottish Church 1225–1559*, p. 267.

93 Donahue, *Law, Marriage and Society*, p. 82 (Table 3/6); and see his “Female plaintiffs in marriage cases in the court of York in the later Middle Ages: what can we learn from the numbers?”, in Sue Sheridan Walker (ed.), *Wife and Widow in Medieval England* (Ann Arbor, MI, 1993), pp. 183–213. Similar are the findings in Christina Deutsch, *Eheberichtbarkeit im Bistum Regensburg (1480–1538)* (Cologne, 2005), p. 313; Christian Schwab, *Das Augsburger Offizialatsregister (1348–1352)* (Cologne, 2001), pp. 67 and 71–89; and Ana de Zaballa Beascoechea, “Indian marriage before and after the Council of Trent: from pre-Hispanic marriage to Christian marriage in New Spain”, *Rechtsgeschichte – Legal History* 27 (2019), 90–104.

94 Monique Vleeschouwers-van Melkebeek, “Self-divorce in fifteenth-century Flanders”, *Tijdschrift voor Rechtsgeschiedenis* 68 (2000), 83–98, at 86.

For this feature of Scottish practice, a purely legal explanation is certainly possible. Causes brought to establish the existence of a marriage were sometimes quite different in kind from those seeking a divorce. In the latter, where the parties were agreed about the outcome, as they were more likely to be than they would have been in suits contesting a marriage's existence, it would not have mattered who acted as pursuer and who as responder.<sup>95</sup> True, the *onus probandi* might have shifted from one party to the other, depending on which acted as the pursuer, but this would not normally have affected the outcome if both parties desired the same result, as they might well have done in many divorce causes. The burden of proving the diriment impediment would have been the same no matter which party assumed it. This, however, is speculation too. In the end, one must leave the question open.

Sixth, more of the Scottish litigants seem to have come from the upper orders of society than the men and women who appeared in the court records of most other lands. There are Scottish knights and ladies, a few countesses and earls, and other members of nobility found in the Scottish court records.<sup>96</sup> In most parts of Europe, including England, most matrimonial causes involving the upper orders of society did not make their way into the ordinary records of the consistory courts. They seem usually to have been handled by special commission or sometimes by direct access to the papal court. In sixteenth-century Scotland, by contrast, they appeared as litigants before the ordinary ecclesiastical courts.

Seventh, the medieval ecclesiastical courts in Scotland held a more extensive jurisdiction over collateral matters related to marriage than did their English counterparts. Matters involving the payment or return of dowries, gifts made in consideration of marriage, and post-divorce alimony were all dealt with as a routine matter by the medieval Scottish tribunals.<sup>97</sup> In England, the first two came within the exclusive jurisdiction of the common law courts, and the third was essentially a creation of the late sixteenth century. Not so north of the Border. In a Scottish cause from 1542, for example, the sentence in a divorce decree included restitution of the dowry and of the gifts made in consideration of a marriage that was being dissolved.<sup>98</sup> In a similar dispute heard the next year, the result of a divorce decree stated that the result was to include restitution of all matrimonial property.<sup>99</sup> South of the Border, these claims would all have been dealt with – though not very well – by the courts of the English common law.<sup>100</sup>

95 It might have mattered, however, for deciding which party would be obliged to pay court costs, of course, but that could have been settled by agreement between the parties. Also, none of the sentences mentioned the taxation of expenses as part of the proceedings.

96 See causes in NRS, CH5/3/1, at fos 109, 144, 180, 227, 265v.

97 A. E. Anton, "The effects of marriage upon property in Scots law", *Modern Law Rev.* 19 (1956), 653–68.

98 E.g., John Edmonstone c. Joneta Logane (1522), NRS, CH5/3/1, f. 87v: "Et quicquid alter alteri dederit dotis aut donationis causa propter nuptias iterum restituendum fore decernimus".

99 Joneta Bittoun c. Simon Pretnam (1543), NRS, CH5/2/1, f. 57.

100 See, e.g., Blackstone, *Commentaries*, Lib. II, c. 29 (\*430). That the division had its roots in the Middle Ages is shown in Lord Cooper (ed.), *Regiam Majestatem and Quoniam Attachiamenta*, Stair Society vol. 11 (Edinburgh, 1947), p. 35, and also in Taylor (ed.), *The Laws of Medieval Scotland*, p. 94 (no. 8).

## CONCLUSION

Most of the substantive law of marriage survived the Reformation in Scotland.<sup>101</sup> Jurisdiction over marriage and divorce was given to newly created courts, but the law put into effect within them remained largely the same. Petitions for divorce continued to be brought as they had been, although apparently without quite the same frequency in their new home.<sup>102</sup> Scotland was also one of the last European countries to give up the medieval law by which valid marriage could be contracted by the mutual exchange of verbal consent by a man and a woman.<sup>103</sup> Though reviled by many and seemingly abolished as a source of authority by more than one statute, the greater part of the substantive canon law found in the *Corpus iuris canonici* outlasted papal authority in the Scottish law of marriage and divorce, as indeed it did in England. The extent of the continued knowledge and use of canonical commentaries on this part of the *ius commune* in Scotland is a matter of record.<sup>104</sup>

The pattern of litigation nevertheless seems to have differed in these two kingdoms, both before and after the Reformation. For centuries, some of the details and even the character of the canon law on this subject were materially affected by Scottish needs and Scottish traditions. Professor Donahue's demonstration that the substantive law of marriage could be enforced in different ways – reflecting different social conditions and different local customs – is thus borne out by the Scottish record evidence from the years before the Reformation. Some of the specific conclusions reached above are admittedly mixtures of fact and speculation. They assume that the patterns of the early sixteenth century mirrored what had gone before. I hope this is legitimate speculation, but at the very least I can say with reasonable confidence that the existing Scottish evidence supports the conclusion that the enforcement of the medieval church's law of marriage and divorce did admit of significant regional variations. In this area of the law, the ecclesiastical courts in Scotland and England followed the direction of the same laws, but they found themselves travelling along some quite divergent paths.

101 The major change was opening wider the possibility for divorce. Adultery and desertion, if proved, were made sufficient to give rise to a decree of dissolution; see Chalmer c. Lumisdene (1561), in Peter G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich, Vol. 1*, Stair Society vol. 21 (Edinburgh, 1962), p. 99; W. D. H. Sellar, "Marriage, divorce and the forbidden degrees: canon law and Scots law", in W. N. Osborough (ed.), *Explorations in Law and History* (Dublin, 1995), pp. 59–82, at 71–3.

102 Leah Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separation, 1684–1830* (Edinburgh, 1998), pp. 13–29; and idem, *Promises, Promises: Marriage Litigation in Scotland 1698–1830* (Edinburgh, 2003) (covering the consequences of the continuation of informality in the inception of marriage). See also Margo Todd, "Consistories", in Charles Parker and Gretchen Starr-Lebeau (eds), *Judging Faith, Punishing Sin: Inquisitions and Consistories in the Early Modern World* (Cambridge, 2017), pp. 40–51; E. J. Cohn, "The nullity of marriage: a study in comparative law and legal reform", *Law Q. Rev.* 64 (1948), 324–40 and 533–44; Jane Mair, "Marriage: a lasting relationship", in Mark Mulhorn (ed.), *Scottish Life and Society, Volume 13: The Law* (Edinburgh, 2012), pp. 704–22.

103 It did not fully occur until 1940. See Brian Dempsey, "The Marriage (Scotland) Bill 1755", in Hector L. MacQueen (ed.), *Miscellany Six*, Stair Society vol. 54 (Edinburgh, 2009), pp. 75–115; see also the intermediate amendments to the law, traced in Eric Clive and John Wilson, *The Law of Husband and Wife in Scotland* (Edinburgh, 1974), pp. 440–5.

104 See Robertson, "Canon law as a source", pp. 112–36.