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# Clandestine Marriage in the Diocese of Rochester during the Mid-fourteenth Century

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The twelfth century marked an important stage in the evolution of canon law, and the establishment of a functioning system of ecclesiastical jurisdictions throughout much of Western Europe. Both were crucial elements in the process whereby the Church, acting under a variety of pressures, came to take increasing responsibility for the definition and regulation of marriage as well as a widening disciplinary role in the daily lives of the laity. In the area of marriage, the synthesis by Alexander III of existing sacramental and legal opinion in 1163 produced a doctrine in which marriage was held to be a purely consensual union. Any two legally entitled adults could form a marriage through words of mutual consent with a two-fold distinction existing in the nature and intent of these words. A binding and immediately effective union was created through the exchange of words of present consent (*per verba de presenti*). Publicity, solemnization *in facie ecclesie*, and indeed consummation added nothing to the essential validity of such a contract. On the other hand, words of future consent (*per verba de futuro*) expressed only an intention to marry; but if these were followed by sexual intercourse they took on the status, and all the legal consequences, of a *de presenti* contract.

The Alexandrine synthesis was disseminated through conciliar and synodal legislation, and a system of control and regulation was established both to discourage the making of marriage contracts which circumvented the Church's requirements of publicity and to monitor closely the process leading to

the exchange of consent. Canon 51 of the Fourth Lateran Council gave general effect to much of the existing local and provincial legislation on this subject.<sup>1</sup> Banns of marriage were to be published on three successive Sundays or feast days to allow potential objections to be raised. Those ignoring this requirement were to be excommunicated, and a priest blessing an unpublicized union could be suspended for up to three years. However, a marriage contracted without these requirements remained valid unless a diriment condition was present. The presence or absence of the banns therefore became the acid test of whether a marriage was held to be clandestine or not. As such, clandestinity became a legal catch-all encompassing not only informal *de presenti* contracts which lacked all forms of publicity, and which were possibly never intended to become fully fledged unions, but also publicly solemnized marriages which infringed the requirements of canon law with regard to the place and time of the banns.<sup>2</sup>

Although clandestine contracts were held to be valid, the whole thrust of subsequent Church legislation was aimed towards discouraging their formation. The proper publication of the banns and exchange of consent *in facie ecclesie* became crucial elements in this process. In England, a flurry of synodal activity followed Lateran IV with the result that, by the close of the thirteenth century, the requirements of the banns and due solemnization were widely

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<sup>1</sup> Such as canon 11 of the Provincial Council of Westminster (M. M. Sheehan, 'Marriage theory and practice in the conciliar legislation and diocesan statutes of later medieval England', *Mediaeval Studies*, 40 (1978), 412.

<sup>2</sup> P. J. P. Goldberg, *Women, work, and life cycle in a medieval economy: women in York and Yorkshire c.1300-1520* (Oxford, 1992), 240-3; R. H. Helmholz, *Marriage litigation in medieval England* (Cambridge, 1974), 29-30; M. M. Sheehan, 'Formation and stability of marriage in fourteenth century England: the evidence of an Ely register', *Mediaeval Studies*, 33 (1973), 244.

known.<sup>3</sup> Nevertheless, such matters continued to preoccupy provincial councils during the fourteenth century. The Council of London held under Archbishop Mepham in 1329, reaffirmed canon 51 of the Lateran council, stating that it should be explained to the people in the vernacular on solemn days. The stipulation that priests should be suspended was repeated with the reminder that suspension was to be imposed even if no impediments existed to the marriage. Archbishop Stratford's provincial council of 1342 added a new twist which demonstrates both the effectiveness of the banns as a deterrent to those whose marriages were barred by some impediment, and the lengths to which individuals might go in order to circumvent the system, or bend it to their own advantage. The constitution, *Humana concupiscentia* stipulated that all those involved in irregular solemnizations were to be excommunicated. This was in order to 'deny the veil of apparent marriage' to those who knew that the proper publication of the banns would make their union impossible.<sup>4</sup>

The Church courts were one of the channels through which canon law was publicly mediated. These courts held two forms of jurisdiction: instance and *ex officio*, corresponding loosely with the modern distinction between civil and criminal litigation. On the instance side, matrimonial litigation formed an important element of the courts' work, and in later medieval England the bulk of marriage litigation was concerned with disputed, informal *de presenti* contracts and the ramifications arising from them.<sup>5</sup> The study of the records produced as

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<sup>3</sup> Sheehan, 'Marriage theory', 412-13, 433-37.

<sup>4</sup> *op. cit.*, 439-42.

a consequence of this litigation has led to a greater understanding of the dissemination and effects of canon law. In addition, questions relating to the patterns of lay behaviour and attitudes with which canon law came into contact are now being increasingly addressed with the evidence found within witnesses' depositions proving to be a particularly fertile source.<sup>6</sup> Depositions are, however, only one trace left by the progress of instance suits through the courts: Act books charted the stages by which instance suits, and other forms of business, entered a court, were prosecuted and (sometimes) came to a definitive sentence.<sup>7</sup> Act books are terse and, at first glance, uninformative documents when compared with the depositions, since they fulfilled a different, though complementary, function within the court system; but insights into marriage can be gained from their study, as Sheehan's analysis of the unusually detailed matrimonial cases from a late-fourteenth-century Ely Act book demonstrates.<sup>8</sup> Furthermore, instance litigation was not the sole mechanism by which matters relating to marriage could come before the church courts: more direct methods could be employed to ensure that the canon law requirements concerning its formation were correctly observed. *Ex officio* actions - the second aspect of the courts' jurisdiction - which provide much information on wider questions relating

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<sup>5</sup> R. H. Helmholz, *Marriage litigation*, 25-73; Sheehan, 'Formation and stability', 261-3.

<sup>6</sup> See for example: C. N. L. Brooke, *The medieval idea of marriage*, (Oxford, 1989); A. Cosgrove, 'Marriage in medieval Ireland' in: *Marriage in Ireland*, ed. A. Cosgrove (Dublin, 1985), 25-50; C. Donahue, 'The policy of Alexander the third's consent theory of marriage', in: *Proceedings of the fourth international congress of canon law*, ed. S. Kuttner (Vatican, City 1976), 251-91; C. Donahue, 'The canon law on the formation of marriage and social practice in the later middle ages', *Journal of Family History*, 8 (1983), 144-58; Goldberg, *Women, work, and life cycle*, chap. 5; Helmholz, *Marriage litigation*; D. M. Owen, 'White Annays and others', in *Medieval women: dedicated and presented to Professor Rosalind M.T. Hill on the occasion of her seventieth birthday* ed. D. Baker (Studies in Church History, Subsidia i, Oxford, 1978), 331-46.

<sup>7</sup> Helmholz, *Marriage litigation*, 7-11, 19-20.

to the sexual behaviour of the laity can also shed light on the processes by which marriages were entered into and dissolved. Prosecutions for sexual morality offences became a staple of many English and continental ecclesiastical jurisdictions during the medieval period. However, *ex officio* prosecutions against couples who had entered into clandestine marriages have not been regarded as a typical feature of the judicial practice of the English Church courts.<sup>9</sup>

One such body of Act book evidence survives from the Rochester consistory court in the middle decades of the fourteenth century. Two distinct caches of material remain. The first is a full record of consistory business conducted between April 1347 and November 1348, during Mr. Edmund Digges's tenure as Official and Hamo Hethe's episcopacy. This section of the Act book includes both matrimonial litigation, and *ex officio* prosecutions relating to the sexual delicts of clergy and laity. Some of this material has been used as background to a study of clandestine marriage in the works of Chaucer, and a general consideration of the theme of courtly love in medieval literature.<sup>10</sup> The second cache spans a slightly shorter period between June 1363 and May 1364 during William Whittlesey's episcopacy, and with John de Swinesheved probably acting as Official.<sup>11</sup> Unlike the earlier document this is a rough draft of

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<sup>8</sup> Sheehen, 'Formation and stability'.

<sup>9</sup> Donahue, 'Canon law', 148-9, 154 n. 40, 155.

<sup>10</sup> H. A. Kelly, 'Clandestine marriage and Chaucer's *Troilus*', *Viator*, 4 (1973), 435-57; H. A. Kelly, *Love and marriage in the Age of Chaucer* (Ithaca and London, 1975), 169-71.

<sup>11</sup> 'A consistory court from the diocese of Rochester, 1363-4', ed. S. Lee Parker and L. R. Poos, *English Historical Review*, 106 (1991), 652-65; *Registrum Hamonis Hethe, Diocesis Roffensis*

proceedings and records only the *ex officio* side of court sessions; because of this greatest use will be made of the earlier document.

Several details concerning the context within which the court operated emerge from a scattering of references to seafaring, service, textile working, agriculture, stock-keeping and dairying. A rough estimate of the population of the diocese places this in the region of 20,000 of which 15,000 were adolescents and adults.<sup>12</sup> Strood had a hospital and Malling a *scola* in the 1340s; the master of the *scola* was able to lend 43s. to a Hadlow man.<sup>13</sup> A further reference to moveable wealth appears in the context of a matrimonial suit. John Marchuant of Strood agreed to pay ten marks as a dowry for his daughter, while her mother promised 40s., and John Sampson, *amicus eiusdem*, pledged a total of 53s. 6d. to be paid in two instalments. At this date the value of a cow was between 8s. and 10s.<sup>14</sup> Wheat, barley and rye were grown, and three millers found themselves in disputes over tithes. Other tithe disputes reveal that woods were coppiced.<sup>15</sup> Sheep and cows were kept in possibly quite large numbers: a tithe of 30 calves was owed by an East Greenwich man. He was also to pay a tithe on the cheeses which he produced.<sup>16</sup> In 1348 a man was accused of stealing sheepskins from the sheepfold (*domo ovium*) of a local

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(1319-52), 2 vols. ed. C. Johnson (Canterbury and York Society, 48, 49 (1914-1948), 911-1043. For the Rochester Officials in general, and Digges and Swynesheved in particular, see A. L. Browne, 'The medieval officials principal of Rochester', *Archaeologia Cantiana*, 43 (1940), 29-61, esp. 45-8.

<sup>12</sup> 'A consistory court', 654.

<sup>13</sup> *Registrum*, 761-2, 985.

<sup>14</sup> *op. cit.*, 955, 974, 976.

<sup>15</sup> *op. cit.*, 985, 1043 (crops); 923, 945, 1042 (millers); 971, 1019 (coppicing).

<sup>16</sup> *op. cit.*, 968 (dispute over livestock), 974, 976 (cows), 991 (cheese and cattle).

knight, while in 1363 a man confessed to having used a toad in a bag in an attempt to cure one of his sheep of scabies.<sup>17</sup> In 1347, a Dartford man was charged with adultery with his maid, and a maid at Ash reclaimed a couple's banns the following year. Between 1363 and 1364, four male and eleven female servants came before the court. Of these fifteen, no fewer than eight were in service in Dartford. Alice servant of Henry atte Frisch of Dartford was described as a spinster, and a Thomas 'cissor' is recorded at Lee.<sup>18</sup> By this date too, the record reveals that elements of the population were highly mobile, and that the Official often had difficulty in securing their attendance in court.<sup>19</sup> A Dartford man had gone 'overseas' when charged with fornication, and another was at sea (*in mare*) when cited. Several others had connections with London or Canterbury, or were not of the Official's jurisdiction.<sup>20</sup>

As was the case in other ecclesiastical jurisdictions, matters came to the attention of the Rochester court in several ways: on the initiative of the parties concerned, either in the form of instance litigation or promoted office actions; as a result of episcopal visitations; or through the existence of common fame. The Official acted in person or through the commissary, the dean of Malling.<sup>21</sup> It is not clear if the court of the Archdeacon of Rochester took its

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<sup>17</sup> op. cit., 984; 'A consistory court', no.3.

<sup>18</sup> *Registrum*, 933, 1016; 'A consistory court', nos. 1, 5, 6, 18, 40, 41, 42, 43, 68.

<sup>19</sup> op. cit., nos. 1, 7.

<sup>20</sup> op. cit., nos. 5, 20, 21, 24, 25, 27, 57, 62, 72.

<sup>21</sup> In October 1348, a commission was issued to the Dean of Malling to act as the official's deputy. He was to hear causes and matters arising from visitations of the bishop, *ex officio* actions and instance suits (*Registrum*, 1037). An episcopal visitation had occurred before June of that year.



share of *ex officio* and instance matters which would otherwise have been dealt with by the consistory, or if it was solely concerned with cases deputed to it by the higher court.<sup>22</sup> In the 1330s, the Official and the Archdeacon were separately abjuring couples *sub pena nubendi*, and a number of individuals had been 'corrected' before the Archdeacon at some date prior to their appearance in the consistory.<sup>23</sup> Although attempts had been made from the thirteenth century onwards to restrict jurisdiction in matrimonial suits to the bishop's courts, the actual effect of this varied with time and place. At Ely matrimonial litigation was only removed from the Archdeacon's court in 1401, and in 1446, the Archdeacon's Official at Rochester had to be ordered to desist from proceeding in a matrimonial suit. Even in cases where jurisdiction was formally withdrawn, archdeacons were still able to become involved in matrimonial affairs by virtue of their office powers: requiring clandestine spouses to solemnize, investigating reclamations and forcing habitual fornicators to abjure *sub pena nubendi*.<sup>24</sup> Even without the presence of an active, rival jurisdiction, it is unlikely that the Official dealt with every occurrence of culpable behaviour. Many clandestine marriages would have probably passed unnoticed, either being quietly abandoned by those concerned or else proceeding without hindrance to solemnization *in facie ecclesie*, unless some dispute or other factor called attention to them. Another point to be made is that the statements in the Act

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<sup>22</sup> There was only one archdeaconry within the diocese of Rochester (A. H. Thompson, 'Diocesan organisation in the middle ages: archdeacons and rural deans', *Proceedings of the British Academy*, 29 (1943), 165).

<sup>23</sup> *Registrum*, 946, 975, 987, 998, 992, 1004, 1039.

<sup>24</sup> Helmholz, *Marriage litigation*, 141, 143-6, 177; Kelly, 'Clandestine marriage', 438 n.16; Sheehan, 'Formation and stability', 232-3.

book represent little more than the bare bones of the matters at issue. This can be seen in the case of John Turgys and Alice Melleres where the office action was followed by a suit brought by Alice. The two statements share certain details, such as Alice's allegation that the abjuration was made before the Archdeacon and John's contention that it was before the Official, but only the matrimonial suit records that the abjuration had been made eleven years before and that two children had been born since then.<sup>25</sup> In addition to this natural brevity, the terms employed by the court may themselves be obscuring the nature of several of the contracts at issue in both the instance and office litigation. The blanket term 'contract of marriage' is possibly too crude a grid to record the fine canon law distinction between a *de futuro* contract followed by sexual intercourse, and a *de presenti* contract.

## I

Seventeen suits concerned with some aspect of marriage litigation have left traces amongst the instance business dealt with between 1347 and 1348. Three were petitions seeking annulments, but the majority sought to establish the existence of a valid marriage, either in its own right or in preference to another.<sup>26</sup> Two of these had arisen as a direct result of office actions against couples suspected of having formed clandestine marriages. The information from these will be analysed when this particular aspect of the court's business is considered. Two of the remaining twelve reached no effective

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<sup>25</sup> *Registrum*, 946, 976.

<sup>26</sup> *op. cit.*, 931-2.

conclusion within the scope of the Act book, and a third was transformed from a matrimonial suit into one seeking alimony for the woman. Multi-party suits, in which a third party was challenging the ability of the defendants to marry, accounted for seven out of the twelve, while the remainder were petitory actions in which the plaintiff was seeking to prove that a valid marriage had been formed with the defendant. All but one of the multi-party suits had resulted from reclamations of the defendants' banns.

The instance litigation reveals details of the nature of the contracts which were at issue and some of the circumstances which surrounded their formation. Two of the five petitory actions centred on allegations of breaches of abjurations made *in forma communi*, more widely known as abjurations *sub pena nubendi*. Although these were effectively conditional *de futuro* contracts, in which a couple abjured on the condition that any future sexual congress would leave them as man and wife, they were imposed on those concerned and do not fit into the category of clandestine marriages.<sup>27</sup> Nevertheless they are of interest when considering both the problems of proof associated with this type of abjuration, and the sexual context within which marriages were formed. Joan Boghyre appeared in person to claim Walter Rokke as her legitimate husband on the grounds that he had broken the terms of an abjuration *in forma communi* through carnal knowledge in the house of Robert Homan. On her next appearance she was able to produce five witnesses, including both Robert and

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<sup>27</sup> See Helmholz, *Marriage litigation*, 172-81. Father Sheehan describes this as an 'almost Draconian form of contract' which provided the courts with a 'formidable instrument for dealing with concubinage' (Sheehan, 'Formation and stability', 255).

his wife. For his part Walter admitted making the abjuration and to having lain naked in the same bed as Joan and 'others', but he denied that sexual intercourse had taken place. Joan was able to produce two further witnesses, but the suit was left pending further action on her part.<sup>28</sup> In the second action, Alice Melleres alleged that John Turgys had forsworn her eleven years previously before the Archdeacon of Rochester. He had subsequently returned to her and had two children. John admitted that he had forsworn her, but claimed that this was before the Official. He denied any intercourse following this. Although Alice was able to produce four witnesses, including the Archdeacon, her claim was dismissed as being insufficiently founded. Alice had made an earlier allegation of a breach of an abjuration *in forma communi* after she and John had been presented on a charge of relapsing into fornication. This had been similarly unsuccessful, since she was unable to produce any witnesses.<sup>29</sup> A caveat was, however, added in the definitive sentence, leaving John to his own conscience as far as the contract was concerned indicating that an element of doubt remained in the Official's mind.<sup>30</sup> These two examples demonstrate the difficulties faced in establishing that sexual relations had occurred subsequent to an abjuration. Such problems of proof were one of the factors which ensured that the use of abjurations *in forma communi* declined in the English courts and had virtually disappeared by the end of the fifteenth century.<sup>31</sup>

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<sup>28</sup> *Registrum*, 916-7, 921-2, 928.

<sup>29</sup> *op. cit.*, 946.

<sup>30</sup> *op. cit.*, 975, 979, 982, 996, 1014-5.

<sup>31</sup> Helmholz, *Marriage litigation*, 180-1.

The other petitory actions were straight-forward suits brought to establish a marriage or promises of marriage. In April 1347, Joan Akerman initiated a *causa matrimoniali* against Reginald Webbe which was to continue for a little over a year. By July, it had been suspended until September *sub spe pacis*. However, the parties next appeared in May 1348 when an award was made to Joan in a *causa alimentacionis prolum*. Reginald admitted having had two children by her and he agreed to make provision for their maintenance.<sup>32</sup> The nature of the contract is clearer in the second suit. Ollaria Seuaere successfully sued Walter Pak on the grounds of a *de presenti* contract followed by sexual intercourse. Walter had initially confessed to the intercourse, but not the contract. However, after Ollaria had produced one witness and had stated that she would produce a second, Walter acknowledged its existence.<sup>33</sup>

The final petitory action provides an insight into the negotiations which might precede the marriages of possibly relatively well-off individuals. In September 1347, almost six months after a *causa matrimoniali* had been initiated against him, William Vyngerlith' agreed to marry Juliana Marchaunt of Strood. This was on the condition that her parents should provide a suitable dowry. They were present in court and immediately agreed to his terms.<sup>34</sup> There is no indication that the couple had slept together. The presence of all interested parties in court and the ease with which agreement was reached

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<sup>32</sup> *Registrum*, 915-6, 921, 929, 936, 943, 949, 1004. In May of the previous year Reginald had been called to respond *super alimentacione prolis* in addition to Joan's petition for marriage.

<sup>33</sup> *op. cit.*, 960.

makes it likely that the greater part of the negotiations had been conducted and settled beforehand.

Two of the multi-party suits show a similar degree of legal brinkmanship, and give an impression of the extent of effective parental control in the area of courtship and marriage. At the beginning of February 1348, Thomas Bard reclaimed the banns of Adam Pope and Agatha, daughter of John Slipes. He claimed that Agatha had been betrothed (*affidavit*) to his son Simon, then twelve-years old, before her contract of marriage with Adam. In his turn Adam, alleged betrothal followed by exchange of present consent. Agatha expressly denied this and, although Adam was able to produce two witnesses, their evidence was held to be insufficient, and the judgement went against him.<sup>35</sup> However, Adam was not finished: the parties were again in court before the end of the month after he had reclaimed Agatha and Simon's banns. He alleged that it was common knowledge (*laborat publica vox et fama*) in the parish that Simon's brother, John, had pre-contracted and slept with Agatha. Adam was able to produce four witnesses, including John, and his objection was upheld.<sup>36</sup> The limitations of the source are particularly galling here as it is impossible to know whether John had been acting with or without his father's approval.

The issue in this legally untidy case revolved around the existence of

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<sup>34</sup> op. cit., 914, 920, 927, 934, 942, 953, 955. For the terms of the dowry see above n. 14.

<sup>35</sup> op. cit., 980.

<sup>36</sup> op. cit., 991.

two clandestine contracts: a marriage made *per verba de presenti* by Adam Pope, and a pre-contract followed by intercourse on the part of John Bard. The remaining multi-party suits also reveal details of other clandestine contracts. Marion, daughter of William Taylour, reclaimed the banns of Richard Sampson and Margaret, daughter of John Helere. She alleged that Richard had formed a marriage with her which had been followed with sexual intercourse. Marion could produce no witnesses to this. Richard successfully denied the allegation, while admitting that he had formed a marriage *per verba de presenti* with Margaret.<sup>37</sup> The banns of Hamo Cadel and Margery Patrich' were reclaimed by Alice Cothen, who alleged that Hamo had promised to take her to wife (*duceret in uxorem suam legitimam*) and had then slept with her. She could produce only one witness and Hamo successfully denied her accusation.<sup>38</sup> Marion and Alice were probably jilted lovers: Richard admitted that he had been punished for fornication with Marion, although this was seven or more years before, and Hamo admitted that he had been 'corrected' on a prior occasion on account of his relationship with Alice. The exact truth of the matter cannot be ascertained from the sparse records, and was probably obscure even to the Official, especially in the case of Hamo who was left to his conscience regarding the suitability of his match with Margery. Marion, servant of John Martyn, reclaimed the banns of John Hanecok and Margaret, daughter of Felicia Peucompe on the grounds that John had formed a contract of marriage *per verba de presenti* with her and that they had pledged to have it solemnized. This does not appear to

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<sup>37</sup> op. cit., 1031.

<sup>38</sup> op. cit., 1039.

have been a prelude to sexual relations. She could, however, produce only one witness. The defendants denied the contract, but admitted that they had formed a contract of marriage between themselves which they had followed with sexual intercourse.<sup>39</sup> In the final reclamation, John Thebaud challenged the banns of John, son of George atte Noke and Joan, daughter of Simon atte Herste. He alleged that he and Joan had contracted marriage with his mother as sole witness. Joan flatly denied this stating that in no wise had she formed a contract of marriage with Thebaud or given her faith that she would do so. The defendants, however, admitted that they had formed a contract of marriage (*contractum matrimoniale*) which had been followed by sexual intercourse.<sup>40</sup> In the final multi-party suit, it was found that Joan de Oakle, after forming a contract of marriage with John Wychard, had done likewise with William atte Forde. John was able to bring two witnesses to support his claim and he was held to be married to Joan. As only the final sentence survives, it is not possible to know whether John's claim was made via a reclamation of the defendants' banns.<sup>41</sup>

Such reclamations were forcing defendants to acknowledge that they had formed valid contracts of marriage, and had therefore prejudiced the Church's system of control. All the contracts were clandestine in the broad sense of the term, and the majority of those being alleged by plaintiffs in particular lacked even the basic requirement of two witnesses. The Official's

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<sup>39</sup> op. cit., 1016.

<sup>40</sup> op. cit., 990-1.

<sup>41</sup> op. cit., 917-8.



usual reaction was to order defendants to proceed to solemnize their union if no legal impediment existed. However, the action taken in the case of John Hanecok and Felicia Peaucompe provides a foretaste of what will be encountered when the *ex officio* business of the court in this period is examined. The couple, who had followed a contract of marriage with sexual relations, abjured the `sin' until they had solemnized their marriage, and were both beaten three times around their parish church.

## II

Instance suits were not the only mechanism by which clandestine marriages were brought to light. The Official took more direct action, through his *ex officio* powers to detect, examine, and sometimes punish those who had formed clandestine contracts. The majority of these inquiries into suspected clandestine marriages were initiated between 1347 and 1348. During this period, couples were called *super contractu matrimoniali* on six occasions and *super fornicacione et contractu matrimoniali* on a further sixteen. One of the men called *super contractu matrimoniali* was later questioned concerning an unfulfilled penance with one of his lovers. He was also questioned concerning his intentions of marriage with this women and two other.<sup>42</sup> In addition fourteen of the office actions brought in connection with fornication raised the issue of the existence of a clandestine marriage. In the later period only one reference survives to a prosecution relating to a clandestine contract: Margaret

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<sup>42</sup> *op. cit.*, 998-9.

Havedmans, confessed to both fornication and 'contract'; she was beaten twice around the church.<sup>43</sup>

The precise circumstances which led to the initiation of these actions are obscure. Where a couple were presented *super fornicacione*, it seems that they were either taking the opportunity to clear their consciences or one party had decided to force the issue. Community concerns must have played some part in the first instance at least, since the tag *ut dicebatur/dicitur* is attached to most. There is also a strong probability that some were, in fact, promoted office actions, brought by the Official on behalf of a third party - possibly a disgruntled partner.<sup>44</sup> Other actions were brought against couples who, after an initial prosecution, had been slow to solemnize or whose behaviour was a source of continuing concern.<sup>45</sup> As with the records of the instance suits within the Act book these office actions generally lack details regarding the status and occupation of those involved, and the circumstances under which the contracts at issue were formed. The terminology employed by the court tends to obscure the precise nature of the contracts as well. The blanket term *contractum matrimonium* may actually be concealing the presence of *de futuro* contracts, since they became binding if followed by sexual intercourse.<sup>46</sup>

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<sup>43</sup> 'A consistory court', no. 10. An investigation was started into the ability of James Bordon to marry a certain Agnes *quam tenet*, after they had been presented on a charge of adultery. James claimed that his former wife had deserted him and was now dead and, as he could not remain chaste, he had remarried. There must be a strong presumption that his marriage with Agnes was in one way or another clandestine (op. cit., no. 69).

<sup>44</sup> See Case A in Appendix.

<sup>45</sup> See Case B in Appendix.

<sup>46</sup> See Case C in Appendix.

Despite such problems, certain patterns emerge. All the marriages were clandestine, and the majority probably lacked even the basic requirements of publicity stipulated by canon law. Five women and two men had no witnesses to the alleged contract.<sup>47</sup> Another man was on only slightly stronger ground when he produced one witness, but only one of the contracts had been adequately witnessed: Isabella Rogers was able to call three witnesses. Both became the subjects of an instance suit.<sup>48</sup> In twenty instances the contract was simply described as a 'contract of marriage'. Two of these were made conditional on there being no lawful impediments (*si de jure contrahere possent*). Both were subsequently annulled on the grounds of consanguinity.<sup>49</sup> Another couple denied the existence of a marriage, but confessed to having had sexual congress.<sup>50</sup> The remaining examples are more detailed. One revolved around the alleged infringement of the terms of an abjuration made *in forma communi*. The man categorically denied all sexual relations since the abjuration, and the woman was left to her conscience regarding marriage to another.<sup>51</sup> Three were straightforward *de presenti* contracts, in two of which those involved denied having had sexual intercourse.<sup>52</sup> In two others betrothal or trothplight had been followed by marriage, although this was categorically denied by one of the women concerned.<sup>53</sup> In the majority - twelve - promises of marriage had been followed

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<sup>47</sup> *Registrum*, 918, 937, 947, 951, 969-70, 1016, 1022.

<sup>48</sup> *op. cit.*, 962-3, 1015.

<sup>49</sup> *op. cit.*, 924, 940.

<sup>50</sup> *op. cit.*, 973.

<sup>51</sup> *op. cit.*, 995.

<sup>52</sup> *op. cit.*, 969, 992, 1015.

<sup>53</sup> *op. cit.*, 947 (*fideidacionem et matrimonium*), 969-70 (*affidavit et ipsam in uxorem suam*)

by sexual intercourse. Of these six were concerned with trothplight (*fideidacionem*) and one with betrothal (*sponsalia*).<sup>54</sup> In another the man had 'pledged himself' (*affidando*).<sup>55</sup> Three men promised to take their partners 'to wife' (*duceret in uxorem*), one of whom made this conditional on his parents' consent.<sup>56</sup> Another couple agreed to marry and solemnly bound themselves to do this (*strinxerunt fidem super eodem*).<sup>57</sup>

In three cases where the existence of a contract had been successfully denied by one of the parties, abjurations *in forma communi* were imposed and penance enjoined.<sup>58</sup> As in most examples of simple fornication this took the form of a threefold beating around the church or market. Three of the marriages were found to be invalid on the grounds of consanguinity or affinity, and those concerned received penitential beatings. In one, the couple were to be flogged three times around the church and once around the market, but in the other two, the penances were no harsher than for simple fornication.<sup>59</sup> Likewise couples were flogged in a further three cases where the marriage was successfully denied.<sup>60</sup> In the majority - twenty - a valid and binding contract of marriage was acknowledged. Those concerned abjured the 'sin' until the marriage could be solemnized on condition that no impediment emerged.

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*cepit*).

<sup>54</sup> op. cit., 918, 937, 951, 985, 1021, 1032.

<sup>55</sup> op. cit., 999.

<sup>56</sup> op. cit., 950, 967, 1026.

<sup>57</sup> op. cit., 945.

<sup>58</sup> op. cit., 951, 1016, 1021.

<sup>59</sup> op. cit., 924, 940, 1039.

<sup>60</sup> op. cit., 918, 947, 951.

Pledges of half a mark were imposed on two occasions to ensure compliance.<sup>61</sup> Where a time limit was stipulated this was usually between one and two months from the date of the court appearance.<sup>62</sup> In twelve of the twenty, penitential beatings were enjoined as if those involved were guilty of simple fornication.<sup>63</sup> There was little consistency in the imposition of such penalties: sexual intercourse had occurred in half of the examples where no penitential beatings were enjoined. It is possible that the nature of the record is acting to make individual cases appear alike, and that, in fact, different circumstances could lead to different penalties. Nevertheless the Official was treating a significant number of the clandestine marriages which appeared before him as little better than sworn fornication. This strongly reflects the sentiments of the author of an early thirteenth century English *summa* for confessors, Thomas of Chobham. Thomas felt that those contracting without due solemnity, and so circumventing the system of safeguards approved by the Church, should not be considered as married until they had undergone solemnization in church.<sup>64</sup> The action of the Official in punishing such couples is understandable given the legal confusions and difficulties which might arise.<sup>65</sup> However, it was only applied to one of the clandestine marriages which had been detected through instance litigation. Furthermore, this is a policy which tends to mark the consistory court out from

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<sup>61</sup> *op. cit.*, 946, 973.

<sup>62</sup> See Case D in Appendix.

<sup>63</sup> *Registrum*, 945-7, 950-1, 973, 981, 992-3, 1038. Two were, however, composed.

<sup>64</sup> It was stated that those contracting without due solemnity 'non debet haberi vel dici matrimonium inter eos donec iterum veniant ad ecclesiam et ibi coniungantur cum debita sollemnitate' (*Thomae de Chobham, Summa Confessorum* ed. F. Broomfield (Analecta Mediaevalia Namurcensia, 25, Louvain, 1968), 147).

<sup>65</sup> See for example: *Registrum*, 985, 998-9.

other English jurisdictions in particular its near contemporary at Ely. Here in the 1370s and 1380s, most of those who had formed clandestine marriages were not ordered to separate until solemnization could be effected. Penances were not enjoined and there were no strict deadlines relating to solemnization as was often the case at Rochester. Only when the prohibitions of *Humana concupiscentia*, concerning abuses of the banns and church solemnization, had been infringed was penance enjoined.<sup>66</sup> The impression is that the Official at Rochester was pursuing a stricter policy towards those who had formed clandestine marriages, and had been detected through office actions. This was a policy much more in accord with the letter of both Mepham's and Stratford's constitutions.<sup>67</sup>

### III

The disputes and prosecutions which resulted from clandestine marriages can - despite their apparent brevity - illuminate several features concerning the implementation of canon law and the underlying social practice of marriage within the diocese. A pattern has emerged from other studies in which exchange of consent in whatever form was followed by a period of cohabitation which usually, though not invariably, resulted in church solemnization.<sup>68</sup> Such contracts often only came to light if the wider community became scandalized, or if one of the parties became dissatisfied and sought to

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<sup>66</sup> Sheehan, 'Formation and stability', 250-1; cf. Kelly, *Love and marriage*, 170-73.

<sup>67</sup> A number of thirteenth English statutes, including one promulgated at Ely, had prescribed penitential floggings for those who had formed clandestine marriages (Sheehan, 'Marriage theory', 437-8).

<sup>68</sup> Helmholz, *Marriage litigation*, 28-31, 59; Sheehan, 'Formation and stability', 238, 243-50.

abandon the partnership or force the pace. In this case, a promoted office action would have been a cheaper alternative to the prosecution of an instance suit.<sup>69</sup> The Rochester material is itself suggestive of this pattern. Two contracts uncovered through office actions had been formed roughly eight months before they were detected, although another may have been detected in a matter of weeks.<sup>70</sup> Another couple had formed a contract of marriage shortly after they had appeared before the Archdeacon of Rochester at an unspecified date.<sup>71</sup> It was necessary to excommunicate John Richard in order to compel him to solemnize his marriage with Cecily Cam. He was absolved from the sentence of excommunication in March 1348, but ordered to regularise the marriage on pain of 20s. It was also found that he was pursuing a sexual relationship with a woman with whom he had exchanged consent after his contract to Cecily.<sup>72</sup> A woman alleged a *de presenti* contract with a promise to solemnize. The multi-party suits show that, through the use of reclamations, dissatisfied individuals were forcing defendants to admit that they had already formed binding marriages before the publication of their banns. Likewise, a couple who were called *super contractu matrimoniali* were found to have contracted marriage before having their banns read.<sup>73</sup>

A distinction may have existed in the minds of the laity between the

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<sup>69</sup> Sheehan, 'Formation and stability', 253, 261.

<sup>70</sup> *Registrum*, 956, 969, 992. The couple who appeared on 18 March 1348, claimed that their contracted had been formed three weeks before the previous *carniprivium*.

<sup>71</sup> *op. cit.*, 967, 992.

<sup>72</sup> *op. cit.*, 937, 993. John was to suffer a threefold beating around both church and market, while Joan was to be beaten three times around the church.

<sup>73</sup> *op. cit.*, 933.

effects of a *de futuro* contract, even when followed by sexual intercourse, and a *de presenti* contract. Although both were equally binding under the terms of canon law, several instances show that those involved did not subscribe to this view. Cecily Cam and Joan Taylour, presented for fornication and contract of marriage, both confessed to being trothplighted to John Richard. For his part, John admitted that he had given his faith (*strinxit fidem*) to Cecily and had then slept with her; at some later date he repeated the process with Joan. John Lyndestede was questioned on the status of his relationships with three women. He was found to have contracted *sponsalia* with Denise Vayre which he had followed with sex; he had pledged himself to Amice Teysy during her husband's lifetime; and he had made an unspecified contract of marriage with Joan Coaxes. He admitted that the contract with Joan had precedence over the other two. Sarah atte Longefrith had successively contracted with two men. Although no contract was at issue, John Beneyt slept with the cousin of the woman with whom he had formed a contract of marriage.<sup>74</sup>

These patterns of courtship and marriage can be set against the evidence of a high degree of sexual freedom provided by the office business of the court. The presence of persistent and durable relationships which lacked any form of contractual obligation, together with the use of abjurations *in forma communi*, added a practical and legal confusion to the court's dealings with clandestine marriages. The exchange of words of future consent could have

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<sup>74</sup> op. cit., 932-3.



acted as a cover for sexual relations giving them a formal, though not necessarily binding, status in the eyes of those concerned. One couple admitted to intercourse both before and after their contract of marriage, and a man `often' (*sepius*) had sexual intercourse with a woman he had promised to take as his wife.<sup>75</sup> This state of affairs was clearly open to abuse: Richard Sandre initially denied forming a contract with Agnes Adam, but when placed on oath he admitted that he had promised to take her as his wife and had then slept with her. It is possible that widows and unmarried women may have employed different courtship strategies with widows only becoming involved in *de presenti* contracts while other women were more often associated with promises of marriage. If so, this may indicate something about the relative experience of widows and the strength of their position on the marriage market.

Such habits are seen as indicative of a situation in which parental control was not an overriding feature of marriage formation. This is especially true with *de futuro* contracts which were a prelude to sexual activity.<sup>76</sup> At Rochester in the late 1340s, parental involvement appears remote. The only reference to it among the office actions is in a conditional *de futuro* contract. Robert, son of Walter Webbe promised Juliana atte Wood that he would marry her if his parents gave their consent. His deference to his parents' wishes did not prevent him from sleeping with Juliana, and subsequently being presented on a charge of habitual fornication with contract of marriage. The court found

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<sup>75</sup> op. cit., 950.

<sup>76</sup> Goldberg, *Women, work and life cycle*, 234, 243-47, 248-51; Sheehan, 'Formation and stability', 263.

that there was no reason why they should not marry and ordered them to solemnize.<sup>77</sup> The instance suits reveal slightly more about the involvement of parents in the marriages of their children. The two suits brought during February 1348 by Thomas Bard and Adam Pope demonstrate both the practical control that could be exercised over the marriage plans of children by parents, and also their potential limits. The precise circumstances of John Bard's contract with Agatha Slipes are not recorded, and so it is not possible to know if he was acting with or without his father's consent. For her part, Agatha had been able to form contracts with two brothers and was about to enter into another with a third man, which was an unsatisfactory state of affairs from both the point of view of canon law and family interest. The second example shows the involvement of - possibly well-off - parents and friends in the negotiations surrounding the financial aspects of marriage, though it is not possible to ascertain what role they had played in bringing the couple together. No members of the defendant's family appeared in court or were mentioned as part of the negotiations: the transaction was purely between the man concerned and the woman and her family.

The instance litigation brought between 1347 and 1348 demonstrates that the system of banns was functioning, and that it was providing an opportunity for individuals to exercise their right of challenge. It was nevertheless a system that could be circumvented and prejudiced; but, although

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<sup>77</sup> *Registrum*, 967.

couples often acted to prejudice or pre-empt the stages of marriage approved by the Church, they were willing to use the same system to legitimise their unions or challenge the ability of others to marry. Something of an uneasy co-existence was present in which the court provided a forum for the pursuit of disputes, and where recognition by the court or due solemnization was probably the final and most public act in a process involving several different stages and levels of mutual commitment.<sup>78</sup>

The Church was by no means a passive observer in all this and general measures were taken to ensure that marriages were correctly formed. At Rochester between 1347 and 1348 - and possibly also in the later period - this took the form of the active pursuit by the Official of some of those who had formed clandestine marriages. These office prosecutions do not appear to be linked in any way to parental pressure - which has been given as a possible explanation for their prevalence on the continent.<sup>79</sup> Recorded instances of parental involvement are few in both the relevant instance and office business, while the initiative for such prosecutions appears to have come from the Official himself or jilted lovers. At Ely too, parental involvement was negligible.<sup>80</sup> The imposition of penance on those who had formed a broad range of clandestine marriages tends to set Rochester apart from the activities of other contemporary English jurisdictions. The contrast with Ely consistory is particularly striking.

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<sup>78</sup> L. R. Poos, *A rural society after the Black Death: Essex 1350-1525* (Cambridge, 1991), 140.

<sup>79</sup> Donahue, 'Canon law', 147, 155-57; C. Donahue, 'The case of the man who fell into the Tiber: the Roman law of marriage at the time of the glossators', *American Journal of Legal History*, 22 (1978), 51-2.

Here couples found to have contracted clandestinely were not punished unless they had misused the system in order to add a dubious legality to their marriages. In more general matters, however, the Rochester Officials were adhering to general canon law principals in assigning penances for offences against sexual morality. A distinction was made between fornication, incestuous fornication and adultery were punished, with the latter two on the whole incurring harsher penalties.<sup>81</sup> This was the case in both periods for which evidence survives. With regard to clandestine marriages, the Official was using the discretion allowed to him under canon, to assign penance in some cases and not in others. This is a point already noted by Kelly in his comparison of the Rochester and Ely material.<sup>82</sup>

The picture which emerges from the Rochester Act book is a familiar one in many respects, and it shares many common features with what is known about marriage litigation in other English ecclesiastical jurisdictions. At Rochester, as elsewhere, fully fledged clandestine marriages were at issue in the litigation rather than disputes over betrothals. A high degree of freedom in the choice of marriage partners is apparent as are differences in the understanding, between Church and laity, of the legal consequences of contracts. Yet, the Official's treatment of a number of the clandestine marriages - mostly detected through office actions - leads on to less familiar terrain, at

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<sup>80</sup> Sheehan, 'Formation and stability', 263.

<sup>81</sup> A. J. Finch, 'Sexual morality and canon law: The evidence of the Rochester consistory court', *Journal of Medieval History*, 20 (1994), 273.

<sup>82</sup> Kelly, *Love and marriage*, 170f.

least within an English context. At Rochester, office actions played a leading role in the detection of clandestine contracts, as they did to a lesser degree at Ely. However, the Official went further in treating a significant proportion of otherwise valid marriages as little more than sworn fornication. The imposition of penances in these cases demonstrates an awareness of the problems which might result from clandestine contracts, and a close adherence to the letter of canon law on such matters.

## APPENDIX

### Case A

Robert Chaloner and Agnes Taylour were called *super contractu matrimoniali* after it had been alleged (*ut dicebatur*) that Robert had broken the terms of an abjuration *sub pena nubendi*. The suspicion must be that Agnes had a part in bringing the action as she alone was willing to admit to subsequent sexual intercourse. Although she was unable to prove her case, she was left to her conscience regarding marriage to another which shows that her claim was seen as having some substance (*Registrum*, 998). John de Stokebery and Alice Prois admitted before the court that they were married; but this contract was immediately challenged by Ralph Lawrie who was also present in court (*op. cit.*, 924-5).

### Case B

On July 10 1347, Robert Pertrich and Sarah widow Longefrith' confessed to a charge of fornication and contract of marriage. They were ordered to solemnize before Holy Cross day. However, on 30 July, Sarah was called on a charge of fornication and contract of marriage with John Taylour and an inquiry was initiated into which of the two marriages had precedence (*op. cit.*, 946-7, 956).

On June 18 1347, John Richard, Cecily Cam and Joan Taylour appeared before the court. Both women admitted to having formed contracts of marriage with John and to subsequent intercourse. However, the contract with Cecily was held to be the prior one. On march 18 1348, the court found that John and Cecily's marriage remained unsolemnized, and that John was continuing to

pursue his affair with Joan (op. cit., 937, 993). On February 26 1348, John Lindestede was ordered to solemnize his marriage with Denise Vayre. On April 8, he was called to explain why he had not fulfilled the terms of the penance imposed because of his adultery with Amise Teysey during her husband's life, and to make plain his matrimonial intentions towards Denise, Amise and Joan Croxes. He admitted that he had contracted with Joan prior to the other two (op. cit., 985, 998-9). On December 18 1347, John Boghele and Alice Andrew admitted a clandestine marriage and were ordered to solemnize. This order was repeated on May 21 1348 (op. cit., 973, 1008).

### **Case C**

One man called *super fornicacione et contractu matrimoniali* admitted promising to marry the woman (*duceret in uxorem suam*), and then to sleeping with her (op. cit., 1026). Another man was said to have made a *de facto* contract of marriage with a woman during her husband's lifetime. He had 'pledged himself to her' (*affidando eandem*) (op. cit., 999). A couple called *super fornicacione* admitted a contract of marriage. They then exchanged words of present consent before the court (op. cit., 1038).

### **Case D**

One couple were ordered to solemnize as soon as was possible (op. cit., 969). Three couples sentenced on 10 July 1347 were to solemnize before 14 September of that year, another couple sentenced on 29 July 1348 had to solemnize before 29 September, and a couple who had been sentenced on 26

February 1348 had to solemnize their marriage after 20 April (op. cit., 945-7, 985, 1026). This was because the celebration of marriage was prohibited during Lent and Easter. On 30 October 1347, a couple were ordered to solemnize before 30 November and on 21 May of the following year, a couple were ordered to solemnize before 24 June (op. cit., 967, 1009). There was no guarantee that the marriage would in fact be solemnized within the stipulated time. A second contract was alleged against Sarah Longefrith' within a month of her being ordered to solemnize marriage with Robert Pertrich. Two other couples were tardy in complying with the court's wishes, and in one case the new order was backed with the threat of a 20s. penalty.