

**Mediaeval Sources in Translation 41**

Raymond of Penyafort

SUMMA ON MARRIAGE



## **SUMMA ON MARRIAGE**

After compiling and organizing a major collection of Church law, 1234, Raymond of Penyafort drew on that collection to compose a comprehensive summary of the teaching of marriage. He did this to aid his Dominican brothers in the hearing of confessions where numerous problems touching on marriage would have been encountered. After dealing with the ideas of engagement and marriage, Raymond treats of the impediments to a valid marriage. These were conditions whose presence made a marriage null and void, such as force in giving consent, the impossibility of sexual intercourse, and prohibited degrees of relationship. The work concludes with an overview of such matters as procedures for obtaining a separation because of adultery, the legitimacy of children, and dowries. This translation of Raymond's Summa on Marriage offers students and scholars alike a unique view of a comprehensive presentation of the medieval teaching on marriage—learned in content, practical in orientation.

**Raymond of Penyafort**

**Summa on Marriage**

Translated with an Introduction by

Pierre J. Payer



Pontifical Institute of Mediaeval Studies

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## Introduction

Raymond of Penyafort (ca. 1180-1275) was born in Catalonia in the vicinity of Barcelona where he studied and later taught the basic arts course in the cathedral school. He went on to study and teach law at the famous centre of Bologna (see below, Title 25, introd.). Shortly after returning to Barcelona Raymond entered the Dominican order (ca. 1223).

Raymond's subsequent life might best be characterized as one of service – service to his order and service to the Church. On entering the Dominican order Raymond wrote a summary account of penance to help his Dominican confreres and others in resolving doubts and unravelling knotty questions that might arise in hearing confessions.<sup>1</sup> This was by far the most significant and influential practical work on penance and confession until the end of the century. Then John of Freiburg, O.P. made over Raymond's summa, wedding Raymond and Thomas Aquinas into a juridico-theological synthesis that set the style for such works for centuries.<sup>2</sup>

In 1230 Raymond was called to the papal court of Gregory IX (1227-1241) as confessor and papal penitentiary. However, his great service was in acceding to Gregory's request to compile a collection of law out of Gregory's own constitutions and decretals and those of his predecessors.<sup>3</sup> This was a significant, officially sanctioned collection of ecclesiastical law. Raymond seems to have completed the task in 1234 and Gregory IX promulgated the collection (known today as the *Decretals of Gregory IX*) on 5 September 1234, acknowledging his "dear son, brother Raymond."<sup>4</sup>

<sup>1</sup> Raymond of Penyafort, *Summa de poenitentia*, edited by X. Ochoa and A. Díez, Universa bibliotheca iuris, vol. 1, tomus B (Rome, 1976) col. 277. See M. Michèle Mulchahey, "First the Bow Is Bent in Study . . ." *Dominican Education before 1350*, Studies and Texts, 132 (Toronto, 1998) pp. 533-539.

<sup>2</sup> See A. Walz, "Si. Raymundi de Penyafort auctoritas in re poenitentiali," *Angelicum* 12 (1935): 346-396 (pp. 373-396 re influence); Leonard E. Boyle, "The *Summa confessorum* of John of Freiburg and the Popularization of the Moral Teaching of St. Thomas and of Some of His Contemporaries," in *St. Thomas Aquinas, 1274-1974. Commemorative Studies*, ed. A. Maurer, et al. (Toronto, 1974) vol. 2, pp. 245-268.

<sup>3</sup> See S. Kuttner, "Raymond of Peñafort as editor. The 'decretals' and 'constitutions' of Gregory IX," *Bulletin of Medieval Canon Law*, n.s. 12 (1982): 65-80.

<sup>4</sup> Gregory IX, Letter "Rex pacificus," in X (col. 2-4).

Shortly after leaving the papal household Raymond reluctantly accepted election to be Master General of his order. He provided an important service to the Dominicans in revising their constitutions and when completed he resigned after just two years (1240). On returning to Spain Raymond seems to have spent the rest of his life in the missionary service of the Church to the Moors and the Jews. To advance this work he encouraged the Dominicans to establish linguistic schools in Arabic and Hebrew.<sup>5</sup> In the same spirit he had Thomas Aquinas compose the *Summa contra Gentiles*, a presentation of the rational grounds of the Christian faith.<sup>6</sup>

Curiously, Raymond did not include a treatment of marriage in his early account of penance. “Curiously” because numerous issues touching on marriage would certainly arise in the confessions of ordinary Christians, e.g., conditions for legitimate engagements and marriages, the intricate types of prohibited relationships of consanguinity and affinity, and proper and improper marital sexual relations. It is generally believed by contemporary scholars that for marriage questions Raymond assumed his readers would have had recourse to a popular work on marriage by the canonist Tancred. In fact, Tancred’s *Summa de matrimonio* was appended to Raymond’s work in several manuscripts, perhaps added by Raymond himself.<sup>7</sup> Both Raymond and Tancred grounded themselves largely on Gratian’s *Decretum* (ca. 1140) and various collections of ecclesiastical law compiled after Gratian.<sup>8</sup>

Raymond took advantage of his own labours on the *Decretals* to update his earlier summa on penance. Further, with the fourth book of the *Decretals* providing a contemporary collection of law on marriage, Tancred’s work was no longer adequate. Consequently, at the same time Raymond composed a summa on marriage that can, not incorrectly, be seen as a complete revision and updating of Tancred’s *Summa de matrimonio*.<sup>9</sup> By 1241 the second edition of

<sup>5</sup> See Mulchahey, “*First the Bow Is Bent in Study ...*”, pp. 344-348.

<sup>6</sup> For orientation to biographical and bibliographical material see Giulio Silano, “Raymond of Peñafort, S.,” *Dictionary of the Middle Ages* 10, pp. 266-267; P. Stenger, “Raymond of Peñafort, St.,” *New Catholic Encyclopedia* 12, p. 105.

<sup>7</sup> See Raymond of Penyafort, *Summa de matrimonio*, edited by X. Ochoa and A. Díez, *Universa bibliotheca iuris*, vol. 1, tomus C (Rome, 1978) Prolegomena, pp. CXX-CXXI; Tancred, *Summa de matrimonio*, ed. Agathon Wunderlich (Göttingen, 1841); L. Chevallier, “Tancredus,” *DDC* 7 (1965): 1146-1165;

<sup>8</sup> See, *Quinque Compilationes antiquae nec non Collectio canonum Lipsiensis*, ed. Aemilius Friedberg (Leipzig, 1882; reprint Graz, 1956).

<sup>9</sup> See Raymond of Penyafort, *Summa de matrimonio*, Prolegomena, pp. CXX-CXXII (relation to Tancred). Raymond’s editors are at pains to counter the view that he plagiarized Tancred (*ibid.*, pp. CXXII-CXXIV). Of course, an accusation of plagiarism is anachronistic. However, a parallel reading of Tancred and Raymond cannot avoid being struck by Raymond’s adherence to Tancred’s material, order, titles, wording, references, and Raymond did not even see fit to alter Tancred’s personal conclusion. Kuttner’s claim that Raymond’s *Summa de matrimonio* is



Raymond's work on penance and his account of marriage were adorned with an insightful and helpful gloss by William of Rennes, O.P.<sup>10</sup> Raymond's accounts of penance and marriage played a significant role in the education of future Dominican priests and provided an important resource for the exercise of their pastoral ministry. I suspect the remark of one Dominican author of an instructional manual for those destined for the pastoral ministry is representative of a general attitude. When Simon of Hinton deals with marriage in his *Ad instructionem iuniorum* (1260 x 1262) he says that he does not have to say a great deal about it because Raymond deals with it sufficiently. Clearly, the assumption is that Raymond's account would be available for consultation and so there would be no need to repeat it.<sup>11</sup>

The 1603 edition of Raymond presents his composition as one work, with the treatment of marriage constituting its fourth book. Such a conception is not unusual, being reflected in manuscripts and in early editions. However, does it reflect Raymond's conception? His recent editors are insistent that the treatment of marriage was not conceived of as a fourth book of the summa on penance, but as a separate composition. Contemporary scholars seem to accept this view and it is suggested by Raymond's own words, "after the small summa on penance I have offered to the honour of God and the progress of souls a special treatise on marriage."<sup>12</sup> Besides, Raymond did seem to conceive of his work as a revision of Tancred's work, which was an independent composition.

If that is the case, what ought the title of this separate composition to be? This is a notoriously difficult question to answer for many medieval works whose manuscripts were often graced with different titles by different copyists. The editors list fifteen titles in alphabetical order with references to at least one

simply a reworking of Tancred is a fair judgment [S. Kuttner, *Repertorium der Kanonistik (1140-1234)*. *Prodomus corporis glossarum*, t. 1, Studi e testi, 71 (Vatican City, 1937) p. 445]. The principal reworking was Raymond's replacing the decretal references to the compilations created after Gratian with references to the same decretals as they appear in the *Decretals* of Gregory IX. A refined analysis of Raymond's originality would require a superior edition of Tancred. See Amédée Teetaert, "Summa de matrimonio de Saint Raymund de Penyaafort," *Jus pontificium* 9 (1929): 54-61, 228-234, 312-322.

<sup>10</sup> See Mulchahey, "First the Bow Is Bent in Study ...," p. 542; R. Naz, "Guillaume de Rennes," *DDC* 5, col. 1080. The gloss was added to numerous manuscripts of Raymond and accompanied the printed editions of his work.

<sup>11</sup> Simon of Hinton, *Ad instructionem iuniorum*, among the works of Jean Gerson, *Compendium theologiae breve et utile*, Opera omnia (Antwerp, 1706) vol. 1, col. 290-291. See Jean Gerson, *Oeuvres complètes. 1. Introduction générale*, ed. P. Glorieux (Paris, 1960) p. 41; A. Dondaine, "La Somme de Simon de Hinton," *RTAM* 9 (1937): 5-22, 205-218.

<sup>12</sup> Below, Preface. See *Summa Sti. Raymundi de Peniafort Barcinonensis Ord. Praedicator. De poenitentia et matrimonio cum glossis Ioannis de Friburgo* [i.e., the gloss of William of Rennes, not John of Freiburg] (Rome, 1603; rpt. Gregg, 1967); Raymond of Penyaafort, *Summa de matrimonio*, Prolegomena, pp. CXV-CXVIII.

manuscript for each usage. Their conclusion is that “the true title of the work seems to be *Summa de matrimonio*.”<sup>13</sup> Most of the manuscripts use this title and Raymond himself refers to the work under that title. Again, it might be expected that if Raymond was providing a revision of Tancred, he would use Tancred’s title.

As he notes in his preface Raymond’s goal was to help resolve doubts and confusions about marriage that often arise in the context of penance and confession.<sup>14</sup> He says he will deal with three areas, but a more refined analysis can detect six broad topics:

1. Engagements (title 1)
2. Marriage (title 2)
3. Impediments to marriage (titles 3-18)
4. Legal procedure in marriage cases (titles 19-23)
5. The legitimacy of children (title 24)
6. Dowries and gifts in view of marriage (title 25).

By the time of Raymond’s writing marriage was well under ecclesiastical jurisdiction both as to the determination of the conditions for a valid marriage as well as to the legal procedures devised to deal with issues arising from the application of those conditions. From this point of view marriage must be conceived of as a legal entity governed by an intricate set of rules and regulations. Of course marriage was much more, involving love, affection, respect, the raising of children to the honour of God. However, these desirable features had to rest on the firm foundation of a valid marriage, which was determined by ecclesiastical law.<sup>15</sup> I have been speaking of ecclesiastical laws, but it should be noted that while all of these laws received ecclesiastical expression they were not all of purely ecclesiastical origin. Raymond notes this on several occasions. For example, he introduces his treatment of the impediment of error about a person in this manner, “First, the impediment of error about a person. Unlike several impediments, it excludes consent by its very nature, not through the regulation of the Church ...” (T. 3.1).

These laws were to be found in the collection of Gratian (ca. 1140) and collections of constitutions and papal letters after Gratian up to pope Hon-

<sup>13</sup> Raymond of Penyafort, *Summa de matrimonio*, Prolegomena, p. CXIX.

<sup>14</sup> I suspect the work would be beyond the financial and intellectual resources of most ordinary parish priests. It would be more useful and accessible to the higher clergy (e.g., bishops, archdeacons, deans) and to academics (the use of Raymond in Dominican schools). It would, in the language of Innocent III and Honorius III in the introduction to the third and fifth compilations, be useful “both in [making] judgments and in the schools” (“tam in iudiciis quam in scholis”). *Quinque compilationes antiquae*, pp. 105, 151.

<sup>15</sup> For an excellent summary see Michael M. Sheehan, “Family and Marriage, Western European,” *Dictionary of the Middle Ages* 4, pp. 608-612. For the early thirteenth century see James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago, 1987) pp. 325-80, 405-16.

orius III (1216-1227). The latter were gathered over time into five principal collections known as the *Quinque compilationes antiquae* (*Five Ancient Compilations*).<sup>16</sup> Raymond, at the behest of pope Gregory IX, brought this process to a close with his compilations of the *Decretals of Gregory IX*, incorporating much from the five previous compilations, from Gregory, and from other material deemed relevant by Raymond.

Raymond's *Summa on Marriage*, building on Tancred and drawing on his own work on the decretals, presents a fine summary of the current law on marriage. The first three quarters of the work focuses on the central requirements for valid engagements (Title 1) and marriage (T. 2). Free consent was central to this medieval view of marriage. Seven was considered the minimum age required for the promise of future marriage (engagements). Even if an earlier engagement was made by parents, it had to be ratified in some clear way by the party involved on reaching the age for engagements. Following an ancient tradition age differentiation was required for marriage – twelve for girls, fourteen for boys. In his discussion of marriage Raymond diverges from his mainly legal approach to discuss the goods of marriage and how they are said to excuse marital sexual relations (T. 2.12-13).

About half of Raymond's *summa* deals with the diriment impediments to marriage, that is, the basic conditions whose presence invalidates marriage and dissolves those already undertaken. These impediments focus principally on three areas. First, that of freedom of consent, which is undermined by force (T. 11) or by an error in regard to the identity of the person one chooses to marry (T. 3). A second impediment was called impotence by Raymond, the impossibility of engaging in sexual intercourse (T. 16), as a pre-existing condition before the marriage. Given the centrality of procreation to the purpose of marriage, clearly impotence would undermine this very possibility. Finally, the third area embraced the whole range of relationships that determined eligibility for marriage: blood relationships (T. 6), relationships through marriage (T. 15), spiritual relationships arising from baptism or confirmation (T. 7), legal relations through adoption (T. 8). The work concludes with legal refinements on the separation or reunion of marriages (T. 19-22), the identification of legitimate and illegitimate children (T. 24), and dowries (T. 25).

Raymond's *Summa on Marriage* faithfully captures the core idea of marriage as a divine institution (T.2.5-6), whose realization in the world was governed by ecclesiastical laws. The work translated below presents the author's marshalling and interpretation of those laws and provides constant reference to the legal sources on which the teaching depends. He did not make the law, he presented and interpreted it. The *Summa on Marriage* offers contemporary

<sup>16</sup> See Brundage, *Law, Sex, and Christian Society*, pp. 326-327.

readers a reliable picture of the basic medieval conception of marriage and the conditions required for its validity. For readers who do not read Latin, this translation is the only such work available in English.

An appendix and two indexes have been added to the translation. The appendix presents parallels between Raymond's treatment in his *Summa on Marriage* and Thomas Aquinas' treatment of marriage in his early commentary on the *Sentences* of Peter Lombard. Particularly on the subject of marriage one encounters in Aquinas a balanced synthesis of theology, Aristotelian philosophy, and ecclesiastical law. Raymond of Penyafort seems to have been a source for some of the ecclesiastical law. The appendix does not claim unreservedly that Aquinas used Raymond, but I believe the parallels between the two authors are sufficiently striking to justify presenting them in tabular form. In some cases the parallels perhaps reflect no more than a common tradition shared by canonists and theologians alike, e.g., the definitions of consanguinity, affinity, spiritual relationship, and the mnemonic verses associated with those subjects. In other cases the parallels suggest a use of Raymond by Aquinas, e.g., the four ways of contracting engagements (T. 1.1), the seven cases in which an adulteress wife cannot be dismissed by her husband (T. 22.3). It will be noted that this appendix also provides references to the Supplement of Aquinas' *Summa of Theology*. After his death the Supplement was made up of passages from Aquinas' commentary on the *Sentences* of Peter Lombard in an effort to compensate for the unfinished *Summa of Theology*. Since the Supplement has been published as part of the *Summa of Theology*, it has been translated into English.

The "Index of Legal References" provides an overview of Raymond's use of both ecclesiastical and Roman law. This index can be used in conjunction with Professor Brundage's "Index of Legal Sources" to compare Raymond's use and interpretation with other medieval writers cited by Brundage.<sup>17</sup>

With few exceptions references in the translation are to Roman law and to Gratian and the *Decretals of Gregory IX*. Roman law has been well served by translators (see list of abbreviations). Unfortunately, the same cannot be said for ecclesiastical or canon law. References to the latter are made to the standard edition by Friedberg (see list of abbreviations).<sup>18</sup>

<sup>17</sup> Brundage, *Law, Sex, and Christian Society*, pp. 663-674.

<sup>18</sup> The legal exceptions are to the older *Compilationes antiquae* in Title 10 (*Quinque Compilationes antiquae nec non Collectio canonum Lipsiensis*, ed. Aemilius Friedberg [Leipzig, 1882; reprint Graz, 1956]) and to the canonist Huguccio, *Summa decretorum* in Title 10.6 and Title 14.2. For Huguccio I used the manuscript, Admont, Stiftsbibliothek 7, fols. 2ra-500rb; see A. M. Stickler, "Uguccio de Pise," *DDC* 7 (1965) cols. 1355-1362; Kenneth Pennington, "Huguccio," *Dictionary of the Middle Ages*, 6, pp. 327-328.

## NOTE ON THE EDITION

The reader who wishes to consult Raymond's *summa* in the original Latin has two main alternatives, each with its own merits and limitations. The *editio princeps* was printed in Rome in 1603 under the title *Summa Sancti Raymundi de Peniafort, Barcinonensis, Ordinis praedicator, De poenitentia et matrimonio, cum glossis Ioannis de Friburgo*. The text, accompanied by the mid-thirteenth-century commentry of William of Rennes (and not John of Freiburg as stated on the title page), has served as the basis for the study of Raymond's work ever since. It was conveniently reprinted by Gregg Press (Farnborough, UK) in 1967.

In 1978 a new edition was produced by X. Ochoa and A. Díez.<sup>19</sup> Several criticisms have been levelled at this edition (as well as editions of other works by Raymond of Penyafort in the series): (1) failure to provide an adequate critical edition based on a consideration of all the manuscripts, their interrelations, and transmission;<sup>20</sup> (2) a not entirely faithful rendering even of the few manuscripts used;<sup>21</sup> (3) the practice of relegating Raymond's supporting references to footnotes.<sup>22</sup>

These criticisms are appropriate, and readers of the Latin text and the translation ought to be aware of them. The first criticism cannot be gainsaid, although one might question the practicality of providing a traditional critical edition of a work represented by hundreds of manuscripts. The second criticism is a function of the skill and care of the editors. Ordinary readers have no way of assessing such skill and care unless they have the relevant manuscripts to hand. One must assume the adequacy of the transcriptions of edited texts.<sup>23</sup> Thorough technical reviews will either justify the assumption or provide cautions about the adequacy of the transcription.

The third criticism is also well-taken. The thirteenth century had no system of footnoting so authors ran their supporting references in the body of the text. To relegate these references to numbered footnotes in an edition of the Latin text does do a disservice to the edition and does not properly reflect Raymond's methodology. However, I believe things are otherwise for an English translation. In this case, to leave Raymond's references in the body of the text

<sup>19</sup> Raymond of Penyafort, *Summa de matrimonio*, edited by X. Ochoa and A. Díez, *Universa bibliotheca iuris*, vol. 1, tomus C (Rome, 1978).

<sup>20</sup> See Stephan Kuttner, "On the Method of Editing Medieval Authors," *The Jurist* 37 (1977): 385-386. This is a general comment on the series *Universa bibliotheca iuris*.

<sup>21</sup> See James A. Brundage's review, *The Jurist* 39 (1979): 516. Brundage does not address the *Summa de matrimonio* but pays "special attention" (p. 514) to the *Summa de poenitentia* by way of illustrating his critique of both editions.

<sup>22</sup> Kuttner, "On the Method of Editing Medieval Authors," p. 385.

<sup>23</sup> Brundage review, *The Jurist* 39 (1979): 516.

would be far too distracting to the modern English reader, who is probably more interested in the content of Raymond's argument than in the supporting documentation. For that reason Raymond's sources have been moved to numbered footnotes (marked by "RdeP"). Those who are interested in the sources can easily find them by consulting the notes. Raymond used standard medieval abbreviations in his references ("Extra" and "ff"), which are reproduced in the notes; these references are followed by their modern forms in square brackets. The footnotes to the translation also incorporate modern comments by the translator and others, also in square brackets.

Raymond of Penyafort, O.P.

Summa on Marriage





## [Preface]

Since doubts, yes sometimes even apparent confusions about marriage frequently arise in the penitential forum, after the small summa on penance<sup>24</sup> I have offered to the honour of God and for the progress of souls a special treatise on marriage. It discusses in an orderly way first engagements and marriage, second the fifteen impediments to marriage,<sup>25</sup> third how one deals with preserving or dissolving a marriage, children (particularly legitimate children), and dowries and marriage gifts. I have inserted titles in appropriate places and diverse doubtful matters relevant to the individual titles.

## [INDEX OF TITLES]

- I. Engagements
- II. Marriage
- III. Error about a person
- IV. The impediment of condition
- V. [The impediment of] vow
- VI. Carnal relationship
- VII. Spiritual relationship
- VIII. Legal relationship
- IX. The impediment of crime
- X. Dissimilar religion
- XI. The impediment of violence or fear
- XII. The impediment of orders

<sup>24</sup> [This is a reference to Raymond's own, *Summa de paenitentia*, edited by X. Ochoa and A. Díez, *Universa bibliotheca iuris*, vol. 1, tome B (Rome, 1976). I take Raymond's reference to be to the work in general and not to its title.]

<sup>25</sup> [See below Title 1.16 where Raymond notes there are fourteen impediments (12 that both impede a marriage from being contracted and break off one already contracted, and two that impede a marriage from being contracted but do not break off one already contracted). See Bernard of Pavia (ca. 1198), who says there are fourteen impediments, *Summa de matrimonio III*, in *Faventini episcopi Summa Decretalium*, edited by E. A. T. Laspeyres (Regensberg, 1860; Graz, 1956) p. 287. See Tancred (1210 x 1214), *Summa de matrimonio*, edited by Agathon Wunderlich (Göttingen, 1841) Title 15 (p. 17).]

- XIII. The impediment of bond
- XIV. The justice of the public good
- XV. Affinity
- XVI. The impossibility of intercourse
- XVII. The impediment of feast days
- XVIII. Marriage contracted against the prohibition of the Church
- XIX. How and when a woman can bring suit against someone as being her husband or seek the restoration of a husband if she was despoiled, and conversely
- XX. Divorce on account of consanguinity or another perpetual impediment
- XXI. How an accusation is to be made against a marriage
- XXII. Divorce on account of fornication
- XXIII. The number of witnesses both in matrimony as well as in other cases
- XXIV. Who are legitimate children and who are not
- XXV. Dowries and gifts in view of marriage

## Title I Engagements

Engagements must be dealt with first since engagements customarily precede marriage. So we must look at: what engagements are; the etymology of the word; how they are contracted; at what age they can be contracted; the effect of engagements; whether engagements can be broken.

1. An engagement is a promise of future marriage.<sup>26</sup> The term “sponsalia” (engagement) is from “spondendo” (pledging), that is, promising.

Engagements are contracted in four ways: sometimes by a mere promise; sometimes by giving an engagement pledge; sometimes with the addition of an engagement ring; sometimes with the addition of an oath.

By a mere promise, when a man says, “I will take you as my wife,” and the woman replies, “I will take you as my husband,” or equivalent words. When they are contracted in that way through words in the future tense, they are true engagements. But if they are contracted through words in the present tense, because the man says “I take you as my wife” and she “I take you as my husband” or they use similar words that signify the mutual consent of both in the present tense, for example when he says, “I consent to you as to my wife” and she says the same, or “From this time I will hold on to and have you for my wife, and I will keep faith with you as my wife,” and the wife in turn speaks similarly to the man, these are called engagements about the present, but improperly. It is truly a marriage, so that, even though he does not know her carnally, neither is allowed to marry another, and if he should, even if he knows the second carnally, he must be separated from her and be compelled to return to the first.<sup>27</sup>

Again, they are contracted by giving an engagement pledge such as money or other things.<sup>28</sup>

The pledge of an engagement ring, which is popularly called an engagement but is properly called a pledge, is dealt with in [Gratian].<sup>29</sup>

<sup>26</sup> RdeP: 30 q. 5 “Nostrates” [*Decretum* C. 30 q.5 c.3]; ff. *de sponsalibus*, Lex 1 [*Dig.* 23.1.1].

<sup>27</sup> RdeP: Extra *de sponsalibus*, “Ex parte E. mulieris” [X 4.1.9], “Si inter virum” [X 4.1.31]; *de sponsa duorum*, c. 1 et c. ult. [X 4.4.1 and 5].

<sup>28</sup> RdeP: C. *de sponsalibus*, Lex “Arris” [*Code* 5.1.3].

<sup>29</sup> RdeP: 27 q. 2 “Si quis desponsaverit” [*Decretum* C. 27 q.2 c.15].

The oath is dealt with at Extra *de sponsalibus*, “De illis,”<sup>30</sup> “Praeterea.”<sup>31</sup>

2. An examination of the age at which engagements can be contracted follows. They can be contracted after the seventh year because then both boys and girls are said to have discretion, and engagements are usually attractive to them then.<sup>32</sup>

But if they or their parents in their name contract an engagement before the seventh year, they accomplish nothing.<sup>33</sup> Even though they are contracted before age seven or in the cradle, if, when they reach the age of seven, they begin to find the engagement attractive, it takes effect from that time, so that even if the espoused male does not know her carnally, he cannot have her blood relative as a wife, or vice versa.<sup>34</sup>

Otherwise, the appropriate age for a girl to contract marriage is twelve, for a boy it is fourteen.<sup>35</sup> And if they are united beforehand, there is no marriage.

3. Some questions can be raised here. Suppose a pre-pubescent boy and girl contract marriage with words in the present tense. The question is whether there is any effect, for it seems that marriage was not contracted because of the age impediment, nor engagement because the form of the words is not suited to engagement but to marriage.

For this I make a distinction: either they only intend to contract marriage with these words and not an engagement, or they intend simply to contract what they can, as if they said, “If what I am doing has no effect in the sense I am doing it, let it have the effect that it can.” In the first case there is no effect – no marriage because they are unable to marry, no engagement because that is not their intent. In the second case, however, an engagement in reference to the future stands. These texts can be understood in this way.<sup>36</sup>

4. Suppose that children before age seven contract an engagement or a marriage through words in the present tense; or after age seven before puberty they are joined matrimonially through words in the present tense. In the case of the first children, are engagements confirmed by such an act after age seven? Or in the case of the others is marriage confirmed with the onset of puberty?

<sup>30</sup> [X 4.1.5].

<sup>31</sup> [X 4.1.12].

<sup>32</sup> RdeP: Extra *de desponsatione impuberum*, “Litteras” [X 4.2.4].

<sup>33</sup> RdeP: 30 q. 2 “Ubi non est consensus” [*Decretum* C. 30 q.2 c.1].

<sup>34</sup> RdeP: Extra *de desponsatione impuberum*, “Litteras” [X 4.2.4], “Accessit” [X 4.2.5], “Duo pueri” [X 4.2.12].

<sup>35</sup> RdeP: Extra *de desponsatione impuberum*, “Puberes” [X 4.2.3], “Continebatur” [X 4.2. 6].

<sup>36</sup> RdeP: Extra *de desponsatione impuberum*, “Tuae nobis” [X 4.2.14]; et arg. Extra *eodem titulo*, “Duo pueri” [X 4.2.12], et Extra *de conditionibus apposis*, “Super eo” [X 4.5.5].

To this you should say that if, on reaching the legal age, they understand what was done and expressly consider it valid or even tacitly (which is presumed from the sole fact that they do not contradict it) the engagement or marriage seems to be ratified, particularly if they were residing together.<sup>37</sup> Again, and on the basis of the same laws, I believe [the same] if the parents contracted the engagement or marriage for their children, or in the name of the children.<sup>38</sup>

5. Suppose an adult male contracts through words in the present tense with a minor girl, who, however, is close to marriageable age, or vice versa; or suppose two who are pre-pubescent but close to puberty contract. Does the marriage stand?

Say that if prudence supplies for age and they have joined carnally by mutual consent, or if from the bodily development they exhibit it appears they are capable of carnal union, the marriage stands.<sup>39</sup> I said “by mutual consent” because if there was intercourse through violence and the girl was unwilling, she would not seem to prejudice herself thereby.<sup>40</sup>

It also seems they should not be more than six months from puberty, even though the other things I spoke of above are present.<sup>41</sup> Several teachers say this unconditionally<sup>42</sup> and I believe it is true, unless they joined carnally with common consent. Then I believe it safer to judge in favour of the marriage, even if they were more than six months from the legal age.<sup>43</sup>

#### THE EFFECT OF ENGAGEMENTS

6. Next the effect of engagements is examined. Note that engagements are contracted sometimes conditionally, sometimes unconditionally.<sup>44</sup> See below [Title 4.3] for what must be held on this matter.<sup>45</sup>

<sup>37</sup> RdeP: Extra *De desponsatione impuberum*, “Litteras” [X 4.2.4], “Accessit” [X 4.2.5], “Duo pueri” [X 4.2.12]; Extra *de conditionibus appositis*, “Super eo” [X 4.5.5].

<sup>38</sup> RdeP: These are relevant: 32 q. 2 “Non omnis” [*Decretum* C. 32 q.2 c.12], et § “Cum ergo” [*Decretum* C. 32 q.2 d.p.c.12].

<sup>39</sup> RdeP: Extra *de desponsatione impuberum*, “Puberes” [X 4.2.3], “Continebatur” [X 4.2.6], “A nobis” [X 4.2.8], “De illis” (secundo) [X 4.2.9], “Attestationes” [X 4.2.10], “Ex litteris” [X 4.2.11]; Extra *de sponsalibus*, c. ult. [X 4.1.32].

<sup>40</sup> RdeP: As in “Continebatur” [X 4.2.6]; 32 q. 5 “Proposito” [*Decretum* C. 32 q.5 c.4], “Ad Dominum” [*Decretum* C. 32 q.5 c.7].

<sup>41</sup> RdeP: Arg. Extra *de desponsatione impuberum*, “Continebatur” [X 4.2.6], “Tuae” [X 4.2.14]; ff. *de excusationibus tutorum*, “Non tamen” [*Dig.* 27.1.17].

<sup>42</sup> Text: *simpliciter*

<sup>43</sup> RdeP: Extra *de desponsatione impuberum*, “A nobis” [X 4.2.8], “De illis” [X 4.2.9].

<sup>44</sup> Text: *pure*.

<sup>45</sup> RdeP: *De impedimento conditionis*, § “Circa conditiones” [p. 34].

In sum, it must not be overlooked that although engagements can be contracted under the condition that a promised sum of money will be paid, as was said, nonetheless money cannot be promised as a matter of penalty. If it were, the promise of a penalty does not stand nor can it be sought; for example, if it were said, “If I do not contract with you, I will give you a hundred marks,” since the addition of the penalty has no weight because marriages ought to be free.<sup>46</sup>

If engagements are unconditionally<sup>47</sup> contracted, either both are of majority age, that is, adults, or both minors below age twelve or fourteen and over seven, or one is of majority age and the other a minor. In such cases the engagements stand, since, if they do not because they were not seven years old, they can seek release before the time of puberty.<sup>48</sup>

If both are of majority of age and they added oaths and afterwards one wishes to withdraw, disregarding the many varied opinions that have been written on the matter and saving a better judgment, I believe that if it can be presumed with probability that through a sentence of excommunication he would be induced to keep the oath, or perhaps war or serious scandal is feared unless the oath is kept, and even if he contracted under duress, nevertheless if uxoricide or a similar danger is not likely to be feared he must be compelled to it by ecclesiastical censure. Otherwise, it would not be medicinal excommunication but deadly, and this ought not to be.<sup>49</sup> Whether by punishing or by pardoning, it is surely only a question of correcting the life of men.<sup>50</sup> Since force is apt to have difficult outcomes, particularly in marriages, the person wishing to withdraw should be admonished rather than forced.<sup>51</sup> It is the same as when a person in mortal sin is not forced to do penance because of the danger that is feared.

Again, if such a one were excommunicated and afterwards contracts with another through words in the present tense, penance should be enjoined on him for the bad faith and obstinacy. He should also be absolved, although he makes no satisfaction for that for which he was excommunicated as he is unable to make satisfaction since the engagement is dissolved because of the

<sup>46</sup> RdeP: Extra *de sponsalibus*, “Requisivit” [X 4.1.17], et c. “Gemma” [X 4.1.29].

<sup>47</sup> Text: *pure*

<sup>48</sup> RdeP: Extra *de desponsatione impuberum*, “Accessit” [X 4.2.5].

<sup>49</sup> RdeP: 2 q. 1 “Multi” [*Decretum* C. 2 q.1 c.18].

<sup>50</sup> RdeP: 23 q. 5 “Prodest” [*Decretum* C. 23 q.5 c.4]. And these can be understood in this way: Extra *de sponsalibus*, “Ex litteris” (secundo) [X 4.1.10], and Extra *de desponsatione impuberum*, “Ubi non est consensus” [X 4.2.2].

<sup>51</sup> RdeP: Extra *de sponsalibus*, “Requisivit” [X 4.1.17], “Cum locum” [X 4.1.14]; Extra *de sponsa duorum*, c. ult. [X 4.4.5].

added bond of marriage, which is stronger.<sup>52</sup>

In the other two cases, the one who is of majority age or whoever reaches adulthood first is bound to wait until the minor reaches the legal age for contracting marriage. Then, if the one who was a minor at the time when the engagement was contracted (or both if both were minors) should protest or refuse to consent, they can be separated from each other by a judgment of the Church.<sup>53</sup> Nevertheless, some understand these decretals differently, but what I said seems closer to the truth and the text itself clearly indicates it.

But can one who is already pubescent or of majority age and who contracted an engagement or marriage with a pre-pubescent withdraw when the one who was a minor wishes to finalize the marriage on reaching the legal age? You should say no because, from the fact that he once consented to it, he cannot dissent further.<sup>54</sup> Nevertheless, do not understand that the marriage is binding, since it is not whole because there has been no mutual consent. But he is obliged by his promise to contract.

7. Finally, we must see whether engagements can be dissolved. Note that engagements once contracted always hold and bind in such a way that if an engaged person enters into an engagement afterwards with another he must be compelled to return to the first.<sup>55</sup> This fails in cases in which engagements are dissolved.

The first case is if one of the engaged should transfer to religious life. One can do this before intercourse even if the other is unwilling. The one remaining in the world is released from the engagement bond even if it was an engagement about the present.<sup>56</sup>

The second is when one of the engaged is not available because he moved to another region. The woman is free after receiving penance for perjury or for a broken promise if it was her fault that the marriage was not finalized.<sup>57</sup>

The third is if one of the engaged after contracting the engagement catches leprosy or paralysis, or loses eyes or nose, or something more unsightly happens.<sup>58</sup>

The fourth is if affinity arises, for example because the male who was engaged knew a female blood relative of his betrothed, or vice versa.<sup>59</sup> Public

<sup>52</sup> RdeP: Extra *de sponsalibus*, “De illis” [X 4.1.5].

<sup>53</sup> RdeP: Extra *de desponsatione impuberum*, “De illis” (primº) [X 4.2.7], “A nobis” [X 4.2.8].

<sup>54</sup> RdeP: Extra *de desponsatione impuberum*, “De illis” (primº) [X 4.2.7].

<sup>55</sup> RdeP: Extra *de sponsalibus*, “Sicut ex litteris” [X 4.1.22].

<sup>56</sup> RdeP: Extra *de conversione coniugatorum*, “Verum” [X 3.32.2], “Ex publico” [X 3.32.7].

<sup>57</sup> RdeP: Extra *de sponsalibus*, “De illis autem” [X 4.1.5].

<sup>58</sup> RdeP: Extra *de coniugio leprosoorum*, “Litteras” [X 4.8.3]; Extra *de iureiurando*, “Quemadmodum” [X 2.24.25].

<sup>59</sup> RdeP: 27 q. 2 “Si quis sponsam filii” [*Decretum* C. 27 q.2 c.32].

report is enough to prove this.<sup>60</sup>

The fifth is if they mutually absolve each other.<sup>61</sup> However, some do not agree with this case and say this is not a decretal or it is understood as comparative permission.<sup>62</sup>

The sixth is if one of them fornicated.<sup>63</sup>

The seventh is when the woman engaged in reference to the future, or the male, contracts with another through words in the present tense, or through words in the future tense and intercourse follows. Then the first engagement is dissolved on account of the greater added bond. But he ought to do penance for bad faith or promise.<sup>64</sup> But what if he simply contracts an engagement in reference to the future with the first and similarly with the second in reference to the future, but an oath is added? I believe that he should return to the first and do penance for the perjury that he committed by swearing an illicit oath. An oath cannot be a bond in an act of iniquity.<sup>65</sup>

The eighth case is when a minor reaches adulthood and asks to be absolved from the engagement bond and to be given freedom to marry another.<sup>66</sup>

And note that all these cases except the first, namely when one wishes to enter religious life, must be understood only of engagements in reference to the future, because then they are truly and unconditionally<sup>67</sup> called engagements. Again, in two of the aforesaid cases engagements are dissolved by the law itself – when one enters religious life, and when marriage is contracted with another man or woman. In the other cases they must be dissolved through a judgment of the Church.

<sup>60</sup> RdeP: Extra *de consanguinitate et affinitate*, “Super eo” [X 4.14.2].

<sup>61</sup> RdeP: Extra *de sponsalibus*, “Praeterea” [X 4.1.2].

<sup>62</sup> [X 4.1.2. The idea behind comparative permission is that between two evils one has ‘permission’ to do the lesser evil to avoid a greater evil. For the expression “comparativa permissio” see *Ordinary Gloss* on Gratian, *Decretum* C. 33 q.2 c.9, ad. v. *adulterium*. The text in question here (X 4.1.2) suggests such permission when it claims that the engagement can be broken off lest there would be a worse result from honouring it, such as hating the wife whom the man marries.]

<sup>63</sup> RdeP: Extra *de iureiurando*, “Quemadmodum” [X 2.24.25].

<sup>64</sup> RdeP: Extra *de sponsalibus*, “Si inter virum” [X 4.1.31]; and *de sponsa duorum*, c. 1 [X 4.4.1].

<sup>65</sup> RdeP: Extra *de iureiurando*, “Quanto” [X 2.24.18]; Extra *de sponsalibus*, “Sicut ex litteris” [X 4.1.22]; 22 q. 4: “Break faith in evil promises. Change the resolve in a shameful vow” [*Decretum* C. 22 q.4 c.5].

<sup>66</sup> RdeP: Extra *de desponsatione impuberum*, “De illis” (primo) [X 4.2.7], et c. “A nobis” [X 4.2.8].

<sup>67</sup> Text: *pure*