

LEGAL HISTORY OF THE MORGANATIC MARRIAGE

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NO SOCIETY as far as we know has ever existed in which a man might marry whom he pleased. The reasons for restricting marriage have been many and various, but one of them has at different times been the fact that in the estimation of the governing group, some people were not good enough to marry some other people, especially not good enough to marry the members of the governing group. This judgment of not-good-enough is a psychological reaction that offers no difficulties to analysts. Whenever any group is politically or economically dominant, it tends to express its feeling of power by the creation of a caste system. It also involves more or less conscious religious elements, especially when the people not-good-enough are members of a different even if neighboring community. Instead of dealing with a growing caste system we are then within the orbit of endogamy, the lovely anthropological word which explains so much by the mere sound of its syllables.¹

That people must marry within a group whether it is a civil unit, a clan, a social group, a religious society, does not ordinarily mean in the early stages of civilized society that sex relations are forbidden outside of that group. But it does mean as a rule that the children born of non-sanctioned unions are in some way illegitimate, which in ancient society implied merely that they had no right of succession and that they did not share the citizenship or rank or political privileges of their father and sometimes not even that of their mother.

The Greeks, as usual, had a word for this. They called the right to contract a marriage which would result in legitimate offspring, *epigamia*.² In most cases they limited *epigamia* to full citizens of the same community but granted it to individuals of other cities as a privilege, sometimes to

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¹ Cf. for the relation between anthropological research and ancient law on this question, Meyer, H., *Friedelehe und Mutterrecht*, 47 *Zeit. Sav. St. Germ. Abt.* 198 ff.; and Westrup, C. W., *Über den Brautkauf im Altertum*, 42 *Z. f. Vergl. Rechtsw.* 47 (1927).

² Cf. Thalheim, s.v. *epigamia*, Pauly-Wissowa, *Realenz.* VI. 62-63; Hruza, E., *Beitr. zur Gesch. des gr. und röm. Familienrechts.* II, 1940. Weiss, Egon, *Griechisches Privatrecht* (1923) pp. 185-189.

entire communities. But we do not know that they restricted it otherwise, nor do we see signs of a caste developing by means of this restriction.³

Still we cannot be quite sure.⁴ In Athens, for example, full citizenship was attainable only by presentation of a child to the *phratry*, a distinctly religious type of communal organization. If the phrateres declined to accept the child because it was ill-born⁵—if, for example, they questioned the citizenship of the mother—there was no means of reviewing this decision in pre-Cleisthenic Athens; and as it is likely that the phratries were dominated in early days by the nobles—the Eupatridae, *i.e.*, the well-fathered—it might easily have been the case that they would reject as ill-born the child of a Eupatrid and a commoner. While it is likely enough that they would have done so, the process had not gone far when Athens became first a timocracy under Solon and then an unadulterated democracy under Cleisthenes. Even in the Solonic constitution when there were distinct classes of citizenship, all Athenians had epigamia with one another.⁶

In Rome there is a credible historical tradition that a deliberate attempt was made at the time the Twelve Tables were promulgated in 450 B.C. to deny *connubium*—the Roman equivalent of epigamia—between the patricians and the plebeians. The attempt roused immediate and violent antagonism and a law, the *lex Canuleia*, almost immediately afterwards established, or reestablished, full *connubium* between Roman citizens.⁷

³ In Rhodes, the children of a citizen and foreigner seemed to form a special class, the *matroxenoi*, Pollux, III, 21; Schol. on Eur. Alc. 989. Cf. Inscr. Gr. XII, 1, 766, 12.

⁴ Cf. Oehler, s.v. Eupatridae, Pauly-Wissowa, Realenz. VI, 1164-1166; Whibley, L., Greek Oligarchies, App. B.; Lécrivain, Ch., s.v. Eupatridae; Daremberg-Saglio, Dict. II, 859.

⁵ In Sparta, there is a dubiously authenticated tradition that *kakogamion*, "ill-marriage," was a punishable offense. Aristo ap. Stob. Flor. lxxvii, 16; Pollux, III, 48, VIII, 40; Aelian, Var. Hist. VII, VI, 4. The "ill-marriage" was further declared to be based on eugenic reasons. The prohibition against foreign marriages was also included. Similar suggestions of suitability in marriages are found as might be expected in Aristotle, Pol. IV and Plato, Legg. VI, 773, B-E.

⁶ Two Athenian demes, *i.e.*, districts, Pallene and Hagnus, are said not to have had *connubium* with each other. Plutarch, Thes. 13.

⁷ The origin of the provision of the Twelve Tables and the occasion of the *lex Canuleia* have aroused a great deal of controversy. It is briefly summarized in Corbett, P. E., The Roman Law of Marriage pp. 30-31 (1930). All the relevant literature is indicated by Berger s.v. *lex Canuleia*, Pauly-Wiss. Realenz, 12, 2; 2339-40. I incline to the traditional view against that of Mommsen and Karlowa, which has found much favor, that the Twelve Tables formulated a long existing legal impediment. Cf. also Bernhoeft, in 8 2 f. Vergl. Rechtsw. 10 ff., and 10 ib. 300 ff.

For full discussion of this and all other matters dealing with the Roman law of marriage, it may be well to cite the recent article on *matrimonium* by Gunkel, W. in the Pauly-Wiss. Realenz. 14, 1; 2259-2286, and the standard works of Rossbach, Untersuchungen über die röm. Ehe (1853); Jörs, Paul, Die Ehegesetze des Augustus, in Fest. f. Mommsen (1893); and

But it is none the less in Rome that we must seek the beginnings of the theory that certain persons are not quite good enough to marry others, the germs, that is, of the feudal *disparagium*, the *Misheirat*, the misalliance, and the relatively modern morganatic marriage. It begins, apparently, with the famous *lex Iulia de maritandis ordinibus* of 18 B.C., when for the first time a special sort of misalliance is declared to be not merely unbecoming, but quite void as a marriage.⁸

This misalliance is between a senator or the son or grandson of a senator and a freedwoman, or an actress or the daughter of an actor or actress. A free born person of any rank was forbidden to marry a prostitute or a procuress or the freedwoman of a procurer or procuress or an adulteress or a woman convicted of a crime or an actress.

It is extremely likely that the underlying idea was not the notion—real enough as a social feeling in ancient as in modern times—that there was a fundamental distinction between ex-slaves and the upper ranks of Roman society, so that an inferior category of genes would be introduced into the blood of noble Romans by the admixture. The prohibition seems in part to be determined by a sex taboo.⁹ Prostitutes are excluded, as are women likely to have been prostitutes, like the slaves of a procurer. The same was probably true for actresses or former actresses *qui artem ludicram fecerint*, since female actresses were really dancers or mountebanks or pantomimists who were nearly all prostitutes as well. The provision against adulteresses applied only to women taken in adultery—and almost certainly divorced for that reason. That convicts were included may have been due to the same consideration. As far as freedwomen were concerned, it was assumed that female slaves were at their master's disposal and that consequently, if not exactly prostitutes, they had suffered what was thought of as a physical as well as moral degradation. Evidently such women were not so degraded as to be incapable of marriage at all. They could marry non-senators, although we may suppose respectable non-senatorial families did

Gesch. des röm. Rechts. 194. The old study by Brissonius, B., *De Ritu nupt. et iure connub.* is still usable. Brini, *Matrimonio e divorzio nel diritto romano* (1887-1889); Lécrivain, Ch., s.v. *matrimonium*, Dar.-Sagl. Dict. des Ant. III, 1654 ff.

⁸ Cf. Schiller, A. A., *Lex Papia-Poppaea*, in Pauly-Wiss., Realenz. Supp. 6, pp. 227-231 (1935); Duff, A.M., *Freedmen in the Early Roman Empire*, 60-62, 235-236 (1928).

⁹ The terminology of the Biblical prohibitions in Leviticus, XVIII, indicates that some sexual relations by themselves rendered a woman unfit for proper marriage relations. We may compare the conduct of David to the concubines that had been publicly taken by Absalom. 2 Sam., 20, 3. The purpose of Augustus in this part of his legislation is fully discussed by Hugh Last, *Cambridge Ancient History*, X, 425-465, ff. Cf. Kübler, B., *Röm. Rechtsgeschichte* 238 ff. (1926); Schultz, Fr., *Principles of Roman Law* 120-121 (Eng. tr. by M. Wolff, 1936).

not favor such marriages. And all women, even prostitutes, could marry freedmen.

That a sex stigma rather than low rank was at the bottom of the *lex Iulia* would be in accordance with the general policy of the Augustan legislation. But as far as the senators were concerned, it was also a definite attempt to create a socially better class because it applied to the children of actors or actresses and forbade unions of senatorial women—daughters or agnatic granddaughters or great-granddaughters—with men of the stigmatized classes. Augustus may have wished to create a new class of “well-fathered” persons who would be almost certain to attempt the establishment of a hereditary caste.

Some addition or modification of the law was made by a *senatus-consultum* under Marcus;¹⁰ and under Constantine, the upper class was extended to praefects and perfectissimi and to certain provincial magistrates.¹¹ The prohibited group was made to include a *humilis et abjecta*, more clearly specified as any one of the classes already described, and in addition the daughter of a slave or freedwoman, even if freeborn herself, a tavern-keeper or the daughter of a tavern-keeper, or the daughter of a gladiator. A definite social cleavage had long been made in the Roman law of the Empire between the *honestiores* and the *humiliores*, and although no general barrier to intermarriage between these classes was created in set terms, it is clear that this constitution of Constantine almost makes such a barrier.¹²

Under Theodosius, a special constitution rendered void the marriage of any Roman citizen with a barbarian.¹³ At that time, however, Roman citizenship was universal for all free persons living within the limits of the empire. This included the utmost diversity of racial origin. Barbarian consequently designated primarily Persians or Parthians, the hereditary enemy across the Euphrates and the savage nomads, who were successfully breaking into the northern confines. The prohibition of such marriages is part of a national policy just as the prohibition of a marriage between Christians and Jews in later times was part of a religious policy.¹⁴

¹⁰ Dig. 23, 1, 16; 23, 2, 16. v. Savigny, F. C., *System des heut. röm. Rechts*. Vol. 2, App. VII; Corbett, P. J., *Roman Law of Marriage* 36.

¹¹ Cod. Just. V, 27, 1 (336 A.D.).

¹² For the distinction cf. the article by Julian, C., *Honestiores humiliores*, in Dar. Saggio, *Dict. des Ant.* III, 235-236. I may refer to my article, *Roman Theories of Equality*, 38 *Pol. Science Q.* 280-285.

¹³ Dated in 370 or 373 A.D. The prohibition was general *cuiuscumque ordinis aut loci fuerint*, and the punishment was capital.

¹⁴ Cod. Theod. IX, 7, 5. Cod. Just. I, 9, 6 (388 A.D.).

In neither case, any more than in the regulations contained in the Old Testament, does a caste sentiment come into play.

The constitution of Theodosius lapsed or was repealed since it does not appear in the Code of Justinian. And in general the later empire, while it created a new system of bureaucracy with an elaborately organized hierarchy of officials, found the enforcement of even the *lex Iulia* too difficult. At any rate, under Justinus and Justinian, the rule of the *lex Iulia* about non-senators and former actresses was abrogated and by a Novel of Justinian, senators—and doubtless the group added by Constantine—might marry even freedwomen, if an *instrumentum dotale*, about equivalent to a marriage settlement, was entered into.¹⁵

There was, accordingly, through the Roman empire an impediment of marriage that depended on rank. Another institution, however, had grown up which might well be more nearly the ancestor of the morganatic marriage than the Roman *matrimonium* proper. This was the concubinate.¹⁶

The Greek concubine, the *pallake*, was not a wife in any sense. She was usually a slave, and if a freedwoman, she remained a member of a household where there was also a legitimate housewife. Indeed it is doubtful whether an unmarried man could have a *pallake*. The institution took the place of the polygamy of most East-Mediterranean people, which was generally officially rejected among the Greeks.¹⁷

The Romans took over the word as *paelex* (*pellex*) but dealt with the

¹⁵ Nov. 117, 6 (542 A.D.).

¹⁶ Cf. Paul Meyer, *Das röm. Konkubinat* (1895); and Leonhard, R., s.v. *Concubinatus*, Pauly-Wiss. Realenz. IV, 835-838; Gide, Paul, *De la condition de l'enfant naturel et de la concubine* (1880) (repr. in 1885 in *Cond. Pr. de la femme* 543-585); Busolt-Swoboda, *Gr. Staatskunde* 940-942 (Müllers Hand. 3d ed. 1926); Heineccius, J. G., *Ant. Rom. Synt.* 259-263 (ed. Haubold 1822); Id., *Elementa Iuris Germ.* I, §§ 309, 310 (1751). The rule that in general the woman takes her husband's rank, whether it was higher or lower than the one she was born in was fundamental in the Roman law outside of the provisions already mentioned, C. Just. 12, 1, 13 and D. 1, 9, 8.

¹⁷ Hruza, E., *Polygamie und Pellikat* (1894). For the Greek concubinate cf. Caillemer, E, s.v. *concupinatus*, *Dar. Saglio*, *Dict. des Ant.* I, 2, pp. 1434-1436; Beauchet, L., *Hist. Dr. Pr. de la Rép. Ath.* I, 82-107 (1897); Philippi, Ad., *Beit. Gesch. att.-Bürgerrechts*, 79-143 (1870); Buermann, *Drei Studien auf dem Geb. des Att. Rechts* 380, 578 seq. (1878) (*Jahr. f. kl. Phil. Suppl.* IX). The Greeks referred to the monogamy which characterized them and the Egyptians as distinguished from other Orientals. In Athens, monogamy was said to have been established by Cecrops, *Clearch. ap. Athen. Deipn.* XIII, 2, 55 D; Herodotus, II, 92. Cf., however, the cases cited by Humbert, G., s.v. *bigamia*, in *Dar. Saglio Dict. Ant.* I, 710-711. In Egypt, of course, monogamy was qualified by widespread concubinage. For the marriage in Roman Egypt, cf. Nietzold, Joh., *Die Ehe in Ägypten zur pt. röm. Zeit.* (1903); and Arangio-Ruiz, V., *Persone e famiglia nel diritto dei papiri* (1930). *Pubb. Un. Cattolica del Sacro Cuore*, xxvi. Müller, O., *Untersuchungen zur Gesch. des att. Bürgerrechts*, *Neue Jahrbücher f. kl. Phil. Suppl.* xxv, pp. 607 ff.; Savage, C. A., *The Athenian family* (1907).

matter somewhat differently. An Athenian did not lose caste by taking a pallake in addition to his wife. A Roman did. Doubtless the much higher position of the Roman matron was responsible for this difference.

But the concubine was not a paelex. The concubinate was monogamous, like matrimonium. The impediments of relationship existed as in marriage. It was ended only by a quasi-divorce—to be sure, often a one-sided dismissal. Misconduct of the concubine was adultery. Still since the relationship was not a marriage, the children were not legitimate, they did not come under the *patria potestas* nor succeed on intestacy, there was no dowry and gifts to the concubine or her children were sharply restricted.

The capital point is that the concubine regularly was a freedwoman of her quasi-husband. And, in general, it may be said that the institution grew out of the restrictions made statutory by the lex Julia and subsequent enactments, though long existent in practice. Women who could not be wives by reason of lowly station could be concubines.

Not only was the institution legally recognized, but it was regarded with approval under special circumstances. A widower with children acted properly when he took a concubine instead of a wife.¹⁸ In this way, he avoided giving his children a stepmother, who was a traditional bugaboo in ancient as in modern times; he prevented the same children from being prejudiced in their inheritance; and—it is explicitly declared—he protected his second wife, who was usually much younger than himself, from the rancor and hostility of those who claimed a vested interest in the inheritance. They were not likely to be bitter against a concededly inferior person who could be no rival to them in rank or property.

In a special case, that of a Roman magistrate and a woman of his province, the reason assigned was again the protection of the woman. The magistrate could not secure control of her property by way of dowry.¹⁹

The concubinate had, therefore, a real social function. A concubine was different from a wife only in rank and the special admixture of respect and affection which constituted in theory the roman *dilectus maritalis*.²⁰ Her husband—the term was quite proper—was her admitted superior.

This was the situation at the time when the imperial authority was fast disappearing in the Western Mediterranean. In the obscurity that en-

¹⁸ Cf. Ulpian, D. 25, 7, 1, pr; *cum honestius sit patrono libertam concubinam quam matrem-familias habere*. Cf. Capitolinus, Vita Marci, c. 29., and Vita Anton. c. 8. Heineccius, Antiq. Iur. Rom., p. 262, *ne liberis inducerent novercam*.

¹⁹ D. 23, 2, 65, pr; 24, 1, 3, 1; 34, 9, 2, 1.

²⁰ Paul, 1. Sent. II, 20, 1; D. 24, 1, 3, 1. *Nihil interest nisi dignitate*.

velopes the social and legal history of the following two and a half centuries we cannot tell how clear a recollection of these regulations remained when Italy, Germany, France and Spain were governed partly by barbarian chieftains under various tribal systems, partly by Roman local magistrates subordinate to these chieftains, and partly by Christian bishops who acknowledged the authority of the Pope.

Concubinage existed among a great many Germanic peoples. In some cases the concubine was a *paelex*, a secondary or inferior wife taken into the household in addition to the wife proper. That was obviously opposed to church practice and doctrine and was forbidden by a constitution of Constantine. But the concubine of an unmarried man was a person with an accepted status. Church Councils tolerated it, if they cannot be said to have approved it, and among the Germanic peoples generally the position of such a concubine was about what it was in the later Roman law.²¹

The custom of trial-marriage, "hand-fasting," doubtless played a part among the non-Roman northern tribes.²² The woman would be taken as a concubine and married if a son was born, or if after a few years, the husband—usually a man of rank and power—wished to change her status for any reason.

It is extremely likely that the concubine was a person of an inferior class. But there is nothing that legally prevented a marriage between any free man and any free woman, and concubinage in consequence was a matter of deliberate choice, at any rate of the husband.

No special ceremony was requisite in order to effect the union of a man with his concubine. It was, however, long an open question whether any special ceremony was necessary for marriage at all—at least, before the Council of Trent. The received opinion was that no ceremony was essential and that mutual consent, whether *per verba de praesenti* or *per verba*

²¹ Concubinage was not officially abolished in the Holy Roman Empire until 1577. The Council of Trent had already forbidden it in 1563; *cf.* Paolo Sarpi, *Hist. Conc. Trid.* I, 708; Pallavicini, *Hist. Conc. Trid.* XXIII, cap. 8. It had been forbidden in Byzantium by a Novel of Leo, N. 91. Even Grotius thought that the concubinate although undesirable was not immoral. *Cf.* Cocceji, S., *Jur., Civ.*, *Contr.* II, 211-212. Pothier, *Oeuvres*, VI, pars. 6-10 (ed. Bugnet, 1861). For Christian concubinage in general *cf.* the article by David S. Schaff in *Hastings' Encyclopedia of Religion and Ethics*, III, 817-819. That men living in concubinage might be admitted to communion was expressly declared by the Council of Toledo, *Mansi Conc.* III, 1001, and by the Council of Tribur in 895 A.D. *Cf.* Hefele, *Konziliengeschichte*, IV, 556. This same Council announced that a full marriage could be contracted only between equals. *Cf.* also article by Gaynor, H. A., s.v. concubinage in the *Catholic Encyclopedia*.

²² "Hand-fasting" is properly any sort of contract to marry, "spousals," and is used in the sense mentioned in the text in the famous incident in Scott's, *The Monastery*, ch. XXXV, where the period of trial is declared to be for a year and a day.

de futuro cum copula, constituted a marriage. A religious duty to celebrate it *in facie ecclesiae* was imposed but its violation subjected the offender to spiritual penalties only. The validity of the marriage was not affected.

None the less the triumph of this doctrine did not, as is sometimes stated, automatically turn all cases of concubinage into formal marriages.²³ In the first place, concubinage existed continuously in those times and places in which the validity of a consensual marriage had not been questioned; and secondly if the contract itself determined the status, that would even more definitely indicate that the resulting union was concubinage and not marriage. Besides, there is specific evidence that even after the consensual marriage was generally accepted, it needed a specific act of the parties to change the status.²⁴ The Church, to be sure, encouraged men to marry their concubines, but, as we have seen, did not absolutely forbid the relationship in the case of unmarried men, particularly in the case of widowers with children. The secular laws of many communities—especially in Italy—similarly legalized this kind of concubinage unless it was a mere cover for prostitution. It was even suggested in the Fourteenth Century that a freer permission of concubinage might check the spread of sexual perversion.²⁵

There is an occasional reference in the records to "legitimate concubines." These were usually serfs, but the term is quite general in the statutes of Florence of 1415.²⁶

That the concubine did not take the husband's rank is obvious. And if there were children, these likewise had no claim on their father's position or his property. But they were definitely recognized as children both of their father and their mother and in many places a kind of deferred succession, if there were no legitimate children, was granted them. Indeed, the term "natural" children seems to be particularly applied to them,²⁷ since the children of casual and concededly illicit unions had no relationship whatever to their father, nor, in England, to their mother.

Concubinage, in other words, was a definite status. It needed no solemnization. Indeed, it is hard to suppose that any ritual either established by usage or sanctioned by religion, would have been proper, much less neces-

²³ Brissaud, J., *History of French Private Law* 160 (tr. Howell 1912).

²⁴ Brissaud, *op. cit.*, p. 160, n. 4.

²⁵ Pertile, A., *Storia del Diritto Italiano* III, 370-372 (2d ed. 1894), esp. p. 372, n. 13.

²⁶ Pertile, A., *op. cit.*, p. 372, n. 14, *Statut. Flor.* 1415, II, 126.

²⁷ For the position of "natural children," *cf.* C. Theod. IV, 6, 7, and C. Just. 5, 27. Ordinarily, to be sure, "natural" children were not distinguished from illegitimate children in general, Gaius, I, 64. D. 1, 5, 19.

sary. But it did depend on a definite agreement. The obligations of fidelity on the one side and maintenance on the other, were certainly assumed, and the children, while not fully legitimate, were not bastards, in the Roman sense of *spurii*.

But it does not appear that there was any absence of *connubium* between men of the upper feudal ranks and those of the lower, or even wholly without rank, provided both were free. And apparently certain classes of serfs were included. It was possible, therefore, for any of the feudal magnates, the *capitanei* of the Libri Feudorum, or even for any prince, to marry a free woman of the humblest class, if he desired to do so, and it was the agreement express or implied between them, not the parity or disparity of rank, that determined whether the union was marriage or concubinage.

As the feudal system became firmer in its outlines, and the social classes more definitely stratified, marriage between persons of different rank created new difficulties. Testamentary disposition was limited to movable goods. In the most important types of property it may be said that a man's kinsmen had an indestructible expectancy which was almost a present interest. This would inevitably give rise to a sharp opposition to unequal marriages, in which the party of higher rank would be likely to suffer in property as well as in position, since in the case of equal marriages the resulting property relations were largely determined by contracts or treaties in which all persons concerned had some voice. A definite opposition was created to "unequal" marriages and a technical word created for them, *disparagium*,²⁸ *disparagement*, the *misalliance* or *misheirat* of later law.

Such a union was very different from concubinage. The *disparagium* was a perfectly valid marriage in every sense but one which the parties should not have entered into or should not have been permitted to enter into. Concubinage, on the other hand, was an inferior type of marriage relatively unstable, even if it was partially protected by secular and canon law.

²⁸ Bracton, f. 89. Fleta, i, 13. Rastell, *Termes de la Ley*, s.v. *disparagement*. In later times, it was expressly stated in *Termes de la Ley*, that not merely lower rank, but physical disease or sterility constituted *disparagement*, as in the Spartan *kakogamion* (*supra*, note 5). The diseases specified are "leprosie, French-pox, falling-sickness or such like." We may note, therefore, that this sort of *disparagement* as an impediment to marriage anticipates in a measure the ultra-modern suggestion of eugenic marriage laws. That this was a general rule appears from Craig, *Jus Feudale II* (Clyde's translation), D. 21, 27. Cf. Littleton, 2, 4, par. 109; Cowell, *Institutes*, T. de nuptiis, c. 6. A reference to *disparagement* was found in many model grants. Cf. Madox, *Th. Form. Angl.*, p. 366. For the whole subject, see the article in Ducange, *Gloss. s.v. disparagium*.

The importance of disparagium in medieval society and law can hardly be overestimated. It was intimately associated with the feudal incident of marriage (*maritagium*).²⁹ The right of the feudal lord to dispose of the hand of the minor heirs and heiresses or the widows of his vassals was a valuable property right and frequently abused by high-handed lords. The abuse consisted largely in a sort of a legalized blackmail. An objectionable match was proposed and the ward or widow required to buy it off. A number of striking examples of this appear in our records.³⁰

But the objectionable character in these cases was based on personal liking or disliking. The *maritagium* was definitely limited to persons of a rank equal to that of the ward. Anything less was *disparagium* and was sharply forbidden. But, although forbidden, if a marriage followed, it was generally valid. The lord had been guilty of a serious wrong for which redress could be had from the overlord. The punishment might be a fine, or forfeiture of the *maritagium* over this particular tenancy. But the validity of the marriage was not affected.

Disparagium loomed so large to the feudal landholders that Magna Carta regulates it with considerable detail and emphasis.³¹ It was a major grievance, since if the king was guilty of it, there was no normal redress. It was so prominently in the minds of men that almost the only contemporary reference to John's Charter singles this out as the one reform demanded and obtained under it.³² But the *disparagium* created by a voluntary union of persons of unequal rank—even when it was widely unequal—was left to social reprehension. The law took no account of it. As a matter of fact even a *disparagium* which took place with the consent of the ward was void of penalty. The feudal lord who could persuade his

²⁹ Cf. Ducange, s.v. *maritagium*, where the principal passages from Glanvil on are given. The *maritagium* is much discussed in any discussion of the Feudal system. Its abuse in the form of the sale of the right was a burning issue under Henry VIII. The best and fullest account of *maritagium* is to be found in Craig's, *Jus Feudale*, II, D. 21; now available in Lord Clyde's translation. The Church at all times opposed it. *Videtur contra iuris naturalis et iuris divini regulas introducta*, Craig, op. cit., II, D. 21, 2.

³⁰ Cf. Madox, *Hist. of the Exchequer*, I, 324, 515, 565; McKechnie, W. S., *Magna Carta* 62-63, 212-213 (2d ed.). In 1200, the widow of Ralph of Cornhill offered the King 200 marks (£133, a very considerable sum) as well as two hawks and three palfreys, not to marry Godfrey of Louvain, who had offered the King 400 marks for her hand. In the Worcester Eyre for 1221, Avelina de Oilli paid the Archbishop of York, who owned her marriage, 100 marks for having married without his leave one Richard, *quia idem Ricardus fuit vicinus eiusdem et ipsa amavit eum ita quod eum cepit in virum*. *Rolls of the Justices in Eyre*, Selden Soc. Vol. 53, p. 528.

³¹ John's Charter, c. 6; cf. the full discussion in McKechnie's edition of Magna Carta, pp. 212-214 (2d ed.). It was again regulated in the Statute of Merton (c. 20 Henry III, c. 6).

³² *Histoire des ducs* (A.D. 149-150) quoted in McKechnie, W. S., *Magna Carta* 123 (2d ed.).

ward—if over fourteen—to marry beneath him or her did not lose his *maritagium* or suffer in any way.³³

It must be remembered the constantly recurring attempt of a nobility to become a caste failed pretty generally in Europe. In most of the continental countries there was a sub-nobility of officials and rich families who frequently intermarried with the upper feudal ranks. In England, the guild-merchants were scarcely beneath the knights and barons and the rise of new families from mercantile and even servile beginnings is a constantly observable phenomenon. Doubtless, the theoretical equality of all Christians, usually formally asserted even when differences in rank are enumerated, played a large part in this situation.³⁴

The notion of disparagement as it appears in the ancient Norman custom adds an idea of considerable importance.³⁵ The right sort of a marriage, a *mariage suffisant*, is one in which a dowry is given with the woman. The use of the Latin *dos* for both dowry and dower and the similarity in sound of these two terms has caused in some instances a serious confusion.³⁶

The dowry came from the wife's family. It had a definite historical relation with the claim—usually merely a moral claim—of a daughter to some share in her father's inheritance.³⁷ The constitution of a dowry made the marriage what it was originally and what it remained in feudally thinking Europe until modern times—a treaty between two families. An *instrumentum dotale*, it has been pointed out, changed concubinage into a marriage.³⁸

But if the wife was without a family in the feudal sense, no such treaty

³³ Fleta, I, 13, 3.

³⁴ Bracton, f. 5 b.; Fleta, I, 5, 4.

³⁵ Tres Anc. Cont. I. Si les frères les poent marier sans disparagier soi de leur moeble sans terre ou de terre sans moeble cen leur doit suffire.

³⁶ Cf. the frequent *dos a marito accepta* in the Latin formulation of the *leges barbarorum*; Lex Vis. IV, 5, 2 (M. G. H., Legg. I, i, 199); Lex Burg. M. G. H. Legg. II, i, 93, 10; 144, 11. In most Latin versions of the common law dower, *dos* is the usual translation. Cf. Glanvil, VI, 1.

³⁷ This is implied in the Tres Anc. Cont. Cf. note 35 *supra*.

³⁸ The Emperor Majorian in 458 declared a marriage without a dowry to be void. Post-Theod. Nov. Maior. VI, 9 (ed. Mommsen-Meyer), II, 166. He demanded *par condicio* in the economic sense between the spouses in order to encourage large families and provide for them properly. The enactment was repealed shortly after by Leo and Severus in 463, *abrogatis capitibus iniustis legis d. Maiorani* (Nov. Sev. I, 1, edd. Mommsen-Meyer, II, 199). When we find in the Leg. Vis. M. G. H., Legg. I, i, 131, 10, *sine dote coniugium ne fiat*, the *dos* is in this case the dower. Cf. in general the excellent study of Lemaire, A., *Origine de la règle, nul-lum sine dote fiat conjugium*, in Mél. Paul Fournier, pp. 415-424 (1929).

was possible. And to be without a family might mean not merely servile status, but also membership in a family group that could not furnish an adequate dowry. What would, therefore, be an undoubted marriage if there were a dowry, raises some doubt if there were none.

The dowry was in a way the chief protection of a wife in the Roman law at all stages. Divorce by mutual consent was legal but divorce by unilateral repudiation was permitted only for certain causes. Evidently, however, if the husband desired a divorce, his desire would quickly enough create the mutual consent necessary for a divorce without reasons assigned. If there was a divorce, the husband who had had unrestricted control over most of the dotal property must account for it and the difficulties of doing so must have acted as a powerful deterrent to marital repudiation. An undowered wife on the contrary had no such protection.

Since, in effect, the real difference legally between a concubine and a wife was the fact that the concubine could be dismissed almost at will, an undowered wife without reference to any agreement as to her status would be in no better position than a concubine, since she was *de facto* as much subject to arbitrary dismissal as a concubine would be.

There was, however, a wholly different matrimonial property right which lay at the basis of the later dower (French *douaire*).³⁹ This was the ancient institution of the *Morgengabe*.⁴⁰ There is no reason to doubt that the obvious etymology is the correct one. It was a "morning gift"—the only doubt being whether it was a gift given the bride on the morning of her wedding day or on the morning after.⁴¹ It was frequently said to be the latter and to be in consequence of what medieval custom solemnly

³⁹ Glanvil discusses gifts which are like the Roman *dos*, dowry, but which he carefully distinguishes from what he calls the *dos*, *i.e.*, the dower, VII, i (Woodbine's ed. pp. 96 seq.). Cf. for the use of *dos* for *morgengabe* in the Anglo-Saxon laws, Liebermann, F., *Gesetze der Angelsachsen*, II, 293 s.v. *Aussteuer*, p. 588 s.v. *Morgengabe*. Kemble, J. M., *Cod. Dipl. Aev. Sax.* I, CX. Cf. the double use of *dos* in the *Leg. Sax.*, Tit. 47-48.

⁴⁰ The *Morgengabe* has been fully studied in all histories of medieval law. All the earlier discussions are summarized and examined in Schröder, R., *Geschichte des ehelichen Güterrechts in Deutschland*, I, pp. 84-112, II, 242-250 (1863-1871), and in the same author's *Lehrbuch der Deut. Rechtsg.* 307-319, 728-731 (3d ed. 1898); Pertile, A., *Storia del Diritto Italiano* 312-349 (2d ed. 1894); Brissaud, J., *Hist. of French Private Law*, 754-755 (tr. Howell 1912); Salvioli, G., *Storia del Dir. Ital.* 450-459 (8th ed. 1921); Grimm, Jac., *Deutsche Rechtsalt.* I, 606-619. Cf. the texts and formulas cited in Viollet, P., *Hist. du dr. civ. fr.* 774, notes 2 and 3; Heusler, Andr., *Inst. des deut. Privatr.* II, pp. 287-289, 296; Loersch, H., and Schroeder, R., *Urkunden Nos.* 69, 184, 190 (1874); v. Schulze, J. F., *Lehrb. der deutschen Reichs- und Rechtsg.* 510 (6th ed. 1892).

⁴¹ It is extremely likely that the gift was made before the actual marriage, since otherwise in most places at customary law it would be void. Loisel, *Inst. Cout.* I, II, XXV, 127. *Donation en mariage ne vaut*. But although promised before, it was usually not acquired unless the marriage was consummated. *Au coucher gagne la femme son douaire*. Loisel, 140.

enough called *pretium virginitatis*.⁴² The institution is spread over the whole world. It was known to the Greeks as the *anakalypteria*, the "unveiling" gift, and was given a divine origin.⁴³ It was particularly common among the Germanic tribes and was fully developed among the Anglo-Saxons.⁴⁴

A real *pretium virginitatis* or *pudicitiae* may be involved in this institution or in the still older *Wittum*⁴⁵ which seems to have its roots in the purchase of a woman from her parents. But if the morgengabe had any such connection, direct or indirect, this was not its only aspect. When we meet it, it has a different and very important social and economic function.

Among the Germanic peoples originally the dowry proper was unknown.⁴⁶ When it was introduced later largely by contact with the Romans, it remained unusual and unsystematized. A woman, therefore, who married and who by this marriage came under the control, *mundium*,⁴⁷ of her husband, was unprotected except by the fact that her own kinsmen might raise the feud, if she were mistreated. But she was particularly unprotected, if her husband died either without children or during her children's minority. Above all, in the case of a second marriage of a widower, the children of the first marriage, as in the case of ancient society, would be likely to be in sharp opposition to the second wife both before and after the husband's death.

All this contributed to give the morgengabe a great importance in the economics of family life. If the gift were the substantial one of lands or permanent feudal interests in tenures or offices, the wife was protected against divorce and safeguarded on widowhood.

We find, as a matter of fact, extremely extensive gifts granted as morgengaben and the institution grew so rapidly that on the one hand a fixed

⁴² In the Dialogue, II, 18 (Hughes, Crum, Johnson ed., p. 151), it is declared that a widow is responsible to the Exchequer, *sic tamen ut doti eius parcatur, quia premium pudoris est*. The *dos*, here, is of course the dower or morgengabe. According to Coke, On Littleton, par. 31a, the phrase is a quotation from William of Occam. The idea seems to have been furthered by the canonists rather than the secular lawyers. The latter lay stress on the practical purposes of the dower.

⁴³ Caillemer, E., in Dar. Saglio, Dict. des Ant. I, 261; Pollux, II, 36; That the *anakalypteria* are a *pretium virginitatis* is specifically declared by Hesychius, s. v.

⁴⁴ Cf. Liebermann, F., Gesetze der Angelsachsen, II, 588 v. Amira, Karl., Altgermanisches Obligationsrecht, II, 649-653.

⁴⁵ Liebermann, F., Gesetze der Angelsachsen, II, 739; Hazeltine, H., Zur Gesch. der Eheschliessung n. angels. R. (1905) (Festgabe f. B. Hübler); Schroeder, R., Gesch. des ehel. Güterr., I, 43-63, 145-154; 169-172 (1863); Grimm, J., Deutsche Rechtsalt. 586-587 (4th ed.).

⁴⁶ Tacitus, Germ. C. XVIII., *dotem non uxor marito sed uxori maritus offert*.

⁴⁷ Cf. the passages cited above in note 46.

portion became customary and, on the other, the senile affection of elderly bridegrooms was frequently abused.⁴⁸ It became necessary to limit the amount of the morgengabe to a definite proportion, usually the one customary in the region. One third or one quarter is often found as the limit.⁴⁹

It is clear, therefore, that the morgengabe would render a dotal system unnecessary since it performed more or less the same economic function. And, as a matter of fact, in the "lands of the customary law," including Normandy and England, the dowry proper was sporadic and irregular, while the morgengabe developed into a dower (*douaire*) of one third which was much the commonest share.

But the morgengabe would become all the more necessary, if, as was almost inevitable, the husband became either the unqualified owner of the dowry or if his control of it was subject to no obligation to account. In that case, the wife's position would, on her widowhood, be doubly bad, because she had no share in her husband's estate and her own property might be irretrievably lost. The morgengabe or dower appreciably remedied the situation.

Evidently, the morgengabe could be given to a concubine. But if it consisted of substantial property, feudal property, we may be sure that two groups of persons would watch a transaction of this sort with extremely jealous eyes. One group would be the feudal lords who heartily disapproved of any gifts by their vassals of property held by them; and the other would consist of the husband's kinsmen who would thereby lose their expectancy of succession to that property.

None the less, property was given to concubines.⁵⁰ The gift was really the gift of a right of succession, since while the union lasted, the concubine's property, like the wife's, was under the control and management of her husband. But if the concubine was dismissed she obviously took the property with her and this possibility not only protected her to some extent, but created the background for the development of a new institution.

Justice and reason seemed to demand that a concubine on her husband's death should have some economic protection, just as a widow had it. But, again as in the case of a widow, she needed this protection only during her life-time. When she died what became of the morgengabe? If

⁴⁸ Pertile, A., *Storia del Diritto Italiano*, III, 319 (2d ed.). Cf. esp. *ibid.*, n. 38.

⁴⁹ In Lombardy it was one quarter. Pertile, A., *op. cit.*, III, 319. Cf. Lemaire, A., *Les origines de la communauté des biens*, *Rev. Hist. de dr. fr.* 584-645 (1928).

⁵⁰ Brissaud, J., *Hist. of Fr. Pr. Law* (Howell tr.) 161, n. 2. Cf. Plaitus, *Stichus* 562.

it was an outright gift, it went to her kinsmen. But in the case of both wife and concubine, it was doubtless expressly provided that, on that contingency, the property reverted.

Clearly this did not cover the case of a dismissal of the concubine. If she lost her morgengabe, it would merely mean that she never received it, because while her husband lived he controlled it. If she took it with her, it would not revert.

In this way the ground was prepared for a new type of union intermediate between the concubinage and marriage proper. It would need merely a single incident to make concubinage a real marriage. This incident was indestructibility, since divorce of a valid marriage was unknown. And if concubinage were turned into an indissoluble marriage, the objection of kinsmen to it, based on the danger of a permanent alienation of property, would no longer hold.

The addition of this incident would leave unchanged the other incidents of concubinage, the fact that the wife did not receive her husband's rank and that the children of the union did not succeed to their father's position or property. Since concubinage was not a mere accidental development, but one that performed a social function, the retention of these incidents was a necessary element.

We have scarcely controvertible authority that such an institution, *i.e.*, a form of marital union, as indissoluble as marriage and with some of the incidents of concubinage, grew up in at least two places. One was Milan at some time before 1100 and the other consisted of an indefinite region supposed to be governed by an imaginary Salic law.

The passage of the *Libri Feudorum* is one chief authority:⁵¹

A man had a son born of a wife of noble rank. After the latter's death, being unable to contain, he married another woman of lesser rank. But being unwilling to live in sin, he married her with this agreement (*ea lege*) that neither she nor her children should have more of their father's property than he stated at the time of the spousal; to wit, ten pounds or whatever he wished to state when he married her. This at Milan is called "taking a wife *ad morganaticam*,"⁵² and in other places, "taking a wife by Salic law."⁵³

⁵¹ For some account of this collection and its great importance *cf.* my *Handbook of Anglo-American Legal History*, pp. 145-146. The best text is that of Lehmann, Karl, *Das Lang. Lehnrecht* 160 (1896). *Cf.* particularly the admirably full discussion of Besta, Enrico, *Storia del Diritto Ital.* I, 1, pp. 438-452 (1923). There are very few glosses on this chapter, and the most concise and valuable commentary on it is still that of Cujas (Cujacius) in *11. feud. comm.* III, 32 (ed. 1840, Vol. 10, pp. 974-976). Cujas finds the germ of the Morgengabe in the Byzantine *hypobolon*; *Leo. Nov.* 181; *Steph. Thes. G. L. s.v.*, 8, 495-496.

⁵² It has long been noted that the extant custumal of Milan says nothing of this institution.

⁵³ The citation indicates that the "Salic law" here referred to is not the formulated *Lex Salica*, one of the oldest of the *leges barbarorum*, but that the expression is merely a phrase of

The man died after children were born of this wife. They do not succeed to his general property, if there are other children, and not to his feudal estate, even if there are no other, because although they are legitimate, none the less they have no right of succession to a fief. They do however succeed their father in his other property, if there are no children of a previous marriage. They even succeed their brothers, if the latter die without issue, by the custom of Milan.⁵⁴

We may disregard the slightly sanctimonious *non valens continere*, since it is little more than a Biblical tag that a clerical draughtsman felt obligatory.⁵⁵ We may note, however, that the situation is the same as that which in Roman society seemed to justify concubinage. It is the case of a widow who had married a woman of proper rank as his first wife. But the essence of the marriage is the emphasis on the agreement. The matter is regulated by a specific contract (*ea lege*).⁵⁶

The phrase *ad morganaticam* occurs here apparently for the first time. It is a very strange one. That *morganatica* is a corruption of *morgengabica* was an early conjecture. It goes back at least to the early Renaissance.⁵⁷ Philologically it is unexceptionable. But the syntax of the phrase itself is not clear. We must suppose an ellipsis of a more or less extensive sort and it will be noticed that it is the whole phrase "*accipere uxorem ad morganaticam*" which is said to be a Milanese expression.

If *morganatica* means *morgengabica*, the ellipsis is a very definite one. Evidently this type of marriage could not be distinguished from others by the presence of a *morgengabe* which was not merely usual but in some places essential to the existence of any marriage at all. The Milanese phrase must have meant that in these marriages there was no dowry and no succession *unde vir et uxor* and that the wife had rights *ad morgengabiam* (*proprietatem solam*) only to the property given to her as *morgengabe*. Some expression meaning "exclusively" is essential, and since the phrase

ordinary speech by which this institution, like the famous rule of succession to the throne, was ascribed to an ancient and authoritative source. Cf. v. Thudichum, Fr. Sala, Sala-Gau, Lex Salica 75 seq. (1895).

⁵⁴ Libri Feudorum, II, 29.

⁵⁵ I Corinth, 7, 9. Paul, as is well known, uses the phrase of any type of marriage.

⁵⁶ Even the Codex Iuris Canonici (Can. 1112) while declaring in general that all marriages make the woman fully the wife of her husband, adds the qualification, *nisi iure speciali aliud cautum sit*. The purpose of the reservation seems to be that of admitting a morganatic marriage where it is still valid by secular law, as in Germany and Austria, for reigning families.

Some Feudists took the fact that the marriage was a widower's second marriage to be the essential characteristic of the morganatic marriage, Craig, Jus Feudale, II, D. 12, 28.

⁵⁷ The literature on the morganatic marriage is extensive. It is cited fully in Stobbe's Handbuch des deutschen Privatr. IV, 214. Most of the special treatises there mentioned were not available to me. Cf. further the discussion in Pertile, A., Storia del Diritto Italiano, III, p. 335; Mohl, Staatsrecht, II, pp. 131; Dieck, s.v. Eheschliessung, Ersch und Gruber, Enz. I, Vol. 31, pp. 321 ff.

taken into the *Libri Feudorum* omits it, we might have assumed that the morgengabe as a general incident of marriage had practically disappeared in Lombardy. But, as a matter of fact, that does not seem to be the case. Indeed, the morgengabe (*morgincaſ*), *donum matutinale*, grew out of all reasonable proportions in Lombardy and had to be particularly restricted by a statute of Liutprand and other Lombard kings.⁵⁸

The morganatic marriage mentioned in the *Libri Feudorum* was the marriage of a widower with a woman of lower rank. This is given as an illustration. The essential characteristics seem to lie in the fact that the special situation created was the result of a special agreement. There was no reason why non-nobles could not marry on such terms, or persons of equal rank, and instances of this sort are known. That the ritual in these cases, if the marriage was publicly celebrated, involved the use of the left hand instead of the right, seems to have been a widespread custom and created the phrase "left-handed" applied both to the marriage and to the descendants of the union.⁵⁹ But the left hand was no more a necessary part of the ceremony than the "mantle" was in the case of legitimated children.⁶⁰

The morganatic marriage was, therefore, not concubinage because it was indissoluble. Nor again was it a misalliance, or *disparagium*, which was a full marriage with all the incidents of marriage, but one that might involve a legal or social penalty on those who took part in it.

In later Europe, as the feudal states of Germany and Italy grew into sovereign principalities, the segregation of these princes into a real caste became more and more an established doctrine. General or special family laws (*Hausgesetze*)⁶¹ provided severe penalties for *disparagium*, or declared that a *disparaging* marriage was *ipso facto* morganatic or even void. The

⁵⁸ Pertile, A., *Storia del dir. ital.* III, 317-320. The edict of Liutprand was of the year 717 A.D.

⁵⁹ The right hand was prescribed by the formulas of the marriage ritual. But there is no evidence that if the right hand were used instead of the left, this would change a morganatic marriage into one of full rank.

⁶⁰ Schröder, R., *Lehr. d. deutsch. Rechtsg.* 732. Grimm, Jac., *Deutsche Rechtsalt.* I, 220 (4th ed.). Beaumanoir, Ph., *Cout. de Beauvoisis* ch. 18. The term was said to be derived from the legitimation of Hercules by Juno, Diodorus, 4, 39.

⁶¹ Pütter, J. St., *Über Misheiraten teutscher Fürsten und Grafen* (1796); Moser, J. J., *Familienstaatsrecht*, pt. 2. (Both these books are known to me only by being frequently cited.) v. Schulte, J. F., *Lehrbuch der deutschen Reichs- und Rechtsgeschichte* 515-517 (1892); Waitz, G., *Deutsche Verfassungsgeschichte* I, 194-196 (3d ed.); Schröder, Richard, *Lehrbuch der deutschen Rechtsgeschichte* 457-462 (3d ed. 1898); id., *Zur Lehre von der Ebenbürtigkeit in dem Sachsenspiegel*, *Z. f. Rechtsg.* 3, pp. 461 ff. Cf. further, Göhrum, Chr. G., *Gesch. Darstellung der Ebenbürtigkeit* (1846); v. Minnigerode, *Ebenbürt und Echtheit* (1912). (Both these last books were unavailable to me.) Danz, J. E. F., *Über Familiengesetze des deut. hoh. Adels* (1792).

solidarity of this group of noble families increased considerably after the rise of absolutistic theories of sovereignty in the Renaissance. It did not show itself in Italy to any notable extent where the "despots" were far too much concerned with establishing and exercising their power to lay stress on the purity of their blood or the privileges of their class. Indeed unmistakable illegitimacy and low origin were scarcely taken seriously in the Italy of the Fifteenth and Sixteenth Centuries.

In France after Francis I, a definite sense of the disparity between royal blood and any non-royal shows itself. Francis tells Clement VII, the Medici pope, that his niece Catherine is not quite a fit person for the Dauphin to marry, although he accepts her finally. And Catherine's treatment by both Francis and Henry II indicated their conviction that the marriage had demeaned them.⁶²

But on the whole, the feeling of parity and disparity on the marriage of sovereign princes⁶³ was more pronounced among the teeming quasi-sovereign princelets of Germany before and after the Peace of Westphalia than even in France, and took on a definite legal color in Germany quite early. The penalties for disparagium were nothing less than savage⁶⁴ and the qualifications introduced by means of the morganatic marriage seem on the whole to have been rarely applied.

Disparagium was resented as an affront to a class. When it was the husband who was of lower rank, it was resented by his wife's kinsmen and peers as an even greater stigma. Economic interests played a larger part here than in the converse case, since the property rights over a wife's property were immediate as well as prospective.

In England, the emphasis laid on disparagement in Magna Carta yielded under the early decay of feudalism and the gradual and steady rise in the social and political importance of the merchant class. The penalties in the case of disparagium continued so far as the feudal lord was concerned, but they seem never to have existed if the disparaging marriage was voluntary on both sides. Feudal incidents decreased in importance after the War of the Roses and were finally completely abolished in 1660.⁶⁵

⁶² Ordinarily the rule applied, *ubi ingenuus ingenuam ducat, nullum est disparagium*.

⁶³ It is especially regulated in the Code of Frederick the Great, I, 2, 3, 3.

⁶⁴ Cf. the execution in 1416 of the famous Agnes Bernauer for having married the son of the Duke of Bavaria. Danz, J. E. F. *Über Familiengesetze des deutschen hohen Adels* 216 (1792). Cf. also Dieck's excellent article on *Missheurath* in Weiske's *Rechtslexikon*, Vol. 7, pp. 215-223 (1847), where among other sources there is frequent reference to the Fifteenth Century treatise of Peter of Andlau, *de imperio rom. Germ.*, who speaks of the rule as *Alamannis inveteratus usus*, II, 12, (ed. Strasb.), p. 117.

⁶⁵ 12 Charles II, c. 14.

From that time, and for most purposes long before, the only sanction against disparagement was social disapproval, a quite inadequate sanction in the rapidly shifting economic equilibrium of English social classes during the Sixteenth and Seventeenth Centuries, but effective enough when a new equilibrium was gained.

As far as the morganatic marriage is concerned, there is no evidence that it ever existed in England in any form. The union of John of Gaunt and Catherine Swynford was open concubinage and her children had to be legitimated by an Act of Parliament. There seems to be no trace of any special terms in a consensual marriage, by which the wife or the children were declared to lose their right either in the rank or the estate of the father. Grants in free marriage as well as the later estate-tail could be limited to the children of a particular wife so that a subsequent wife or her children would not share in it but this could apparently not be done by an arrangement between the spouses themselves.

As we might expect, however, despite the fact that disparagement seems never to have involved any legal disability when it was voluntary, misalliances in which there was a striking difference in rank between the parties were extremely rare in England. But they did occur even in royal marriages, both in England and Scotland,⁶⁶ and such objections as were made were easily overborne. The only restrictions made by law as to royal marriage in England were those imposed by the Bill of Rights of 1689⁶⁷ and by the Royal Marriage Act of 1772.⁶⁸ By the former, if the king married a Roman Catholic, the throne is automatically vacated. If any heir to the throne marries a Catholic his right to succeed is forfeited. But in both cases the marriage itself is perfectly valid.

The Royal Marriage Act of 1772, occasioned by the marriage of the Duke of Cumberland, brother of George III, rendered void any marriage of a descendant of George II except with the assent of the king, or in special cases of Parliament. As a matter of fact, it was not till the Hanoverian dynasty, that the German notion of a separate caste created by ruling sovereigns—a caste that could admit no other group to connubium, no matter how noble or illustrious—was first brought into England. It was very much resented by the English nobility, many of whom regarded the reigning family with undisguised contempt, but it was maintained until the situation created by the World War of 1914-1918.

⁶⁶ Four of Henry VIII's marriages were with his own subjects. Robert II of Scotland twice married his subjects and his father David II married Margaret Logie, a commoner, from whom he later sought to be divorced.

⁶⁷ 1 William and Mary 2, c. 2; 6 Anne, c. 41.

⁶⁸ 12 Geo. 3, c. 11.

In France, which by tradition had a prouder and more arrogantly exclusive nobility than any other country, the situation was very much the same as in England. Marriages between the nobility, even the most illustrious houses, and the upper ranks of the non-noble classes, the financiers and public officials, the *noblesse de la robe*, were extremely common.⁶⁹ Indeed, at the height of the supremacy of the Ancien Regime, in the early eighteenth century, it is demonstrable that more than half the nobility were the children of such disparaging unions, or were recently ennobled themselves.

There was, however, a vestige of the tradition that actual servants, the successors of the medieval serfs, could not contract a valid marriage with persons of the upper classes. This tradition is mentioned only to be rejected in an Eighteenth Century decision, which declares that the invalidity of disparaging marriages applies only to members of the royal family or such other persons of rank in whose marriages the state as a whole has an interest.⁷⁰

But in Germany, as has been said, an entire branch of law dealt with the family rights of the more than one hundred sovereign families that remained in the shadowy Holy Roman Empire.⁷¹ When this ended formally in 1806, many of them ceased to be sovereign without losing their caste-privilege of intermarriage with reigning houses and among them the rules of disparagement and of morganatic marriages continued to be strictly enforced.

In 1786, the Emperor Joseph II officially abolished morganatic marriages.⁷² But this could apply only to Austria and the Austrian dominions. Nor did it apply to the imperial family itself as a recent situation indicates.⁷³

⁶⁹ A French encyclopedia of the eighteenth century, *Enc. des Arts et M \acute tiers*, Vol. 22, p. 252 (1780), thinks of the morganatic marriage as exclusively German and calls it *cette loi gothique et vraiment barbare*, and considers it to be based on a *pr \acute jug \acute e absurde ridicule et inhumain*; Pothier, *Oeuvres*, 6, p. 5, regards it as an exclusively German custom.

⁷⁰ Cf. the article *mariages des princes du sang* in *Dict. de droit et de Prat.* ii, p. 189 (1769), where it is suggested that the rule applied only to presumptive heirs to the throne.

⁷¹ There was even a popular rhyme to describe the morganatic marriage; *Heirat ins Blut aber nicht in Stand und Gut*. The "conscience" marriage was practically interchangeable with the morganatic marriage. Cf. Dieck, *Die Gewissensehe* (1837) (not seen); Escriche, *Dicc. de la leg. espagn. s.v. matrimonio de consciencia*. The marriages of princes is regulated in *Novis. Recop.* 10, 2, 9, Par. 11. The letter of Benedict XIV, *Satis vobis comperthum*, expressed great disapproval of the practice.

⁷² The words of the decree are: *Nur Ahnenstolz und gesellschaftliche Vorurtheile haben die "mariages de conscience" erfinden machen*.

⁷³ It will be remembered that the Austrian heir-apparent who was assassinated at Serayevo in 1914 was morganatically married, and that his still living oldest son, the Duke of Hohenburg, had no claim to the throne.

It is curious that a serious attempt was made in Germany during the early Nineteenth Century to generalize the morganatic marriage in order to permit middle class professional men to be respectably provided with housekeepers and with female attention without involving the property rights of their family or impairing their sense of social superiority to the class of workmen and small shopkeepers. It met with little response, but the fact that it could be seriously discussed is itself significant.

Evidently both morganatic marriages and disparagement are feudal conceptions and would reappear whenever any new form of social organization stratifies social classes to any extent. The various attempts made in the United States to establish a social aristocracy indicates that even a state founded on democratic principles is not immune from this tendency. Marriages which are "unequal" from any point of view have still a considerable news value, which proves a persistent popular interest. This interest, to be sure, is in general one of cordial approval since the breach of the disparagement taboo has been a favorite romantic motif since King Cophetua made his most disparaging choice. The legend would scarcely have permitted him to offer the lady morganatic marriage.