

Undoing the Marriage: The Resort to Annulment

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According to the 1662 Book of Common Prayer, the presiding clergyman is required to command the bride and groom

that if either of you know any impediment, why ye may not be lawfully joined together in Matrimony, ye do now confess it. For be ye well assured, that so many as are coupled together otherwise than God's Word doth allow are not joined together by God; neither is their Matrimony lawful.

This injunction reflects the way in which the Established Church united both spiritual and legal considerations. As one eighteenth-century clergyman argued, 'God cannot be said to join two Persons in Marriage, but when this is done by certain legal means'.¹ The lawfulness of the marriage depended not merely on the parties being free to marry but on compliance with certain forms. The argument that God could join a couple in marriage without the formalities being observed met with the response that '[i]f God descends Miraculously, to Marry any Man or Woman, he Supersedes the Laws [...] but if not, then God has Ordain'd

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all Persons to be Married, as the Legal Christian Forms of their Country appoint'.²

But what of those who failed to comply with those forms? The annulment of a marriage after it had been celebrated reflected a double lawlessness: first, the failure of the parties to comply with the requirements of the law; and secondly, the retroactive invalidating of the marriage, which would be deemed void from its inception. This meant that the entire relationship between the parties had been lawless and rendered any children they might have had illegitimate.

A third level of lawlessness also appears from the case-law generated by petitions to annul marriages on the basis of non-compliance with the required formalities. This was the strategic use of the legislative requirements by both husbands and wives. By invoking some failure to comply with the formal requirements at the time of the marriage, they could escape from its bonds, sometimes many years after the ceremony had taken place. Its lawlessness lay in the fact that this was certainly not what Parliament had intended when it passed the legislation. Individuals were relying on the strict letter of one law—that of the law of nullity—to achieve a result that the law did not otherwise allow save in a very limited range of circumstances—in effect, divorce.

This chapter will consider these three types of lawlessness in turn. But before examining the way in which this area of the law was used—and abused—it needs to be set in the context of the law of nullity more generally.

THE LAW OF NULLITY

The law of nullity is of course designed to work before marriage, by preventing certain marriages from taking place. As *The lady's law* (1737) pointed out, couples were only able to contract marriage if they were 'not disabled to enter into that State by their near Relation to each other, Infancy, Precontract or Impotency'.³ Or, of course, a pre-existing spouse. The familiar ritual of calling the banns invited those present in the congregation to declare their knowledge of any just cause or impediment that should prevent the marriage from going ahead. The invitation was repeated before the marriage took place. And one does find occasional examples of such objections being made, not only in the pages of novels,⁴ but also in contemporary diaries⁵ and even occasionally in the

register of marriages. Less dramatically, the law played a preventative role in deterring others from matrimony altogether.

So was there much resort to annulment *after* marriage? There were of course couples who managed to marry despite there being some impediment to their union, only to find its validity being challenged at a later stage. There was also one ground for annulment that offered scope for undoing the marriage, that of impotency. Technically such impotency had to exist at the date of the marriage: as one text put it ‘when Disability happens after marriage, he or she that remains Potent, shall not be permitted to quit the impotent Person, but be compelled to bear the Discommodity, as well as any other ill fortune in life’.⁶ But of course the bride and groom were not meant to test their sexual compatibility before the wedding, and well into the eighteenth century might still risk the censure of the church courts for doing so.⁷ So the inability of either spouse to consummate the marriage provided a means of escaping from marriage—although the relative rarity of such suits should not lead us to infer that most couples found sexual fulfilment in marriage. Only one act of intercourse was required for the marriage to be consummated in the eyes of the law, and even if this minimal level of sexual satisfaction was not achieved there were obvious difficulties in seeking an annulment. As one contemporary commentator put it, many

chuse rather from the humanity of their tempers, and the modesty of their dispositions, to submit to an uncomfortable life in misery all their days, than bring themselves or their partners to lasting shame, and be recorded with disgrace, by having the matter litigated before a public court.⁸

More significant, however—certainly in the number of cases to rely on it—was a ground for annulment that only emerged in the mid-eighteenth century. Prior to the Clandestine Marriages Act of 1753, the only requirement for a valid marriage was that it be celebrated by an Anglican clergyman: all other requirements were simply directory rather than mandatory and their lack did not invalidate the wedding.⁹ The Clandestine Marriages Act, by contrast, set out certain formalities that were required for a valid marriage and decreed that non-compliance rendered the marriage void.

Since the demands of the 1753 Act have been much exaggerated, it is worth looking at what it did and did not require.¹⁰ The legislation, which came into force on 25 March 1754, required that every marriage

be preceded by the calling of the banns or the obtaining of a licence, and celebrated in the parish where at least one of the parties was resident. The former required the intended marriage to be announced on three successive Sundays in the parish or parishes where the parties were resident, while the latter was a more private (but more expensive) procedure that involved the person obtaining the licence to swear that there was no impediment to the marriage and that all necessary consents had been obtained, usually on penalty of paying a large sum if this turned out to be untrue. A failure either to have the banns called or to obtain a licence was expressly stated to invalidate the marriage; marriages celebrated in any place other than a church or public (and Anglican) chapel were also stated to be void.¹¹ In addition, the marriages of minors (those under the age of twenty-one) who married by licence without the consent of their parents or guardians were void.¹² Marriages of minors by banns, by contrast, perhaps on account of their greater publicity, were valid in the absence of active *dissent*: if a parent actually forbade the banns, this negated their publication,¹³ but if a marriage went ahead without parental knowledge, it would be valid.

Other provisions of the Act were merely directory. Although the Act stated that the parties should marry in their parish of residence, section 10 went on to provide that a marriage could not be invalidated on the basis that the parties had in fact been resident elsewhere. Other parts of the Act were less explicit, but their directory nature can be inferred from the absence of any annulling clause. So, although the statute specified that the marriage be conducted in the presence of two witnesses, who should then sign the register, the absence of such witnesses did not render the marriage void. Indeed, a complete failure to register the marriage did not affect its validity (although the subsequent destruction of the register would expose the offender to harsh penalties). Similarly, the level of detail to which the Act descended when describing the form that the registers should take should not disguise the fact that no marriage could ever have been invalidated simply because it was not recorded in a book with ruled pages.¹⁴

THE LAWLESSNESS OF NON-COMPLIANCE

As with other aspects of the law of nullity, the requirements set out in the 1753 Act were intended to operate prospectively. The sanction of invalidity was intended to ensure that couples complied with the law: ideally, it would never need to be invoked. Incumbents do appear to have been

reasonably assiduous in ensuring that even the directory requirements of the new law were observed. One very visible result of the Act was that record-keeping improved considerably.¹⁵ The claim made by one eighteenth-century commentator that ‘a regular form for the enrolment of marriage has been universally adopted and approved’¹⁶ was perhaps something of an exaggeration,¹⁷ but those parishes that did not have a separate printed marriage book were very much in the minority.

Another consequence was an increase in the number of marriages celebrated in those parishes that had previously lost out to places that conducted clandestine ceremonies. This was particularly marked in London, where prior to the 1753 Act many couples had taken advantage of the option of being married by parsons operating out of the Fleet prison.¹⁸ A survey conducted in the early 1760s found that almost all London parishes had witnessed an increase in the number of marriages celebrated after the Act: at St. Clement Danes, for example, the number more than doubled,¹⁹ while at St. James Westminster the rise was even more dramatic.²⁰ More broadly, Snell’s survey of 18,442 marriages from 69 parishes in 8 counties found that all counties showed a dramatic reduction in the number of ‘foreign’ marriages—those clandestine marriages where both parties came from outside the parish and concluded that ‘Hardwicke’s Act... shows itself to have been highly effective over all counties’.²¹

While some incumbents grumbled against the Act, complaints about their parishioners’ non-compliance with its requirements might well turn out to have another source. In 1765, for example, the Rector of Hinton Ampner, Thomas Wingfield DD, expressed the wish that the 1753 Act should be repealed, ‘because I think it is attended with very bad consequences, having not had any one marriage for more than seven years, the time that I have been rector of this parish’.²² While it was true that since his induction as Rector of the parish on 28 April 1758 he had not personally celebrated a single marriage, this did not mean that the parishioners of Hinton Ampner were choosing not to marry, but rather that they were turning to other clergymen to conduct their marriage. James Richardson, the curate, solemnised one marriage while Wingfield was absent from the parish, and marriages have been traced in other parishes for other couples. Given that marriages had been celebrated in Hinton Ampner in 1755 and 1756—after the Act came into force on 25 March 1754 but before Wingfield’s arrival in 1758—it seems to have been Wingfield himself, rather than the Act, that was responsible for the sudden decline in marriages celebrated there.²³

Most couples, indeed, seem to have been entirely law abiding. Despite the claims of certain scholars that couples regularly ignored the 1753 Act and lived together unwed, cohort studies of a variety of different types of communities across England and Wales confirm that the vast majority of couples married in church, as they were required to do.²⁴

Of course, ascertaining whether couples complied with *all* of the requirements of the Act is more difficult. There were certainly occasions where a couple realised shortly after the marriage that they had not observed the exact requirements, and had their marriage resolemented. One such was recorded in the register of the Hampshire parish of Oakley in 1768: it was noted that ‘thro’ a mistaken conformity to the Rubrick in the Common Prayer Book²⁵ the banns of marriage between Thomas Small and Jenny Benman had been published on Easter day, Easter Monday, and Easter Tuesday (3, 4 and 5 April), with the marriage taking place two days later on 7 April. It went on to explain that ‘upon perusing the Marriage Act ... which orders the banns to be published on three Sundays, it was thought proper to publish the banns afresh on the 1st and 2nd Sundays after Easter’ and the marriage was again solemnised. In this case any lawlessness was of short duration: the banns were called for the second time on 10 and 17 April and the marriage was re-solemnised on 18 April.

For some contemporaries, however, *any* marriage that did not comply with the strict requirements of the Act was regarded as lawless. Thus we find one William Garnett annotating the marriage register of the Westmorland parish of Middleton-in-Lonsdale with the complaint that Robert Whittington and Mary Greenall had first of all married without banns being published in Middleton Chapel and—upon being threatened by the incumbent—had then married again in Middleton after being resident in Lancashire for a couple of months—‘which marriage, considering their absence out of ye Parish so long, could not be lawful by ye said Act’.²⁶ Yet, while the second marriage had not been conducted according to the strict letter of the law either, it would nonetheless have been impossible to challenge it on the basis of non-residence.

As these examples show, where there was cause for concern about the validity of the marriage, a further ceremony might well be held. When John Page married Ann Dunkley in West Haddon in 1816—by licence, and with her father’s consent—it was noted that ‘[t]his couple had eloped and said to have been married in London, but the father of the woman wished to have them remarried’.²⁷

Nonetheless, there were sufficient failures to comply with the law to generate a body of case-law examining whether the result was to invalidate the marriage.

THE LAWLESSNESS OF THE INVALIDATED MARRIAGE

If a marriage was annulled on the basis that the parties had failed to comply with the crucial requirements of the 1753 Act, continued cohabitation between the parties—and indeed the entire marital relationship—would be regarded as unlawful, at least in the sense of being illegitimate if not by this time likely to expose the parties to punishment.²⁸ This was something to which the church courts, which had retained the jurisdiction to determine the validity or otherwise of marriages, attached considerable weight: in *Bowzer v Ricketts* (1795), where the suit to annul the marriage was brought by the husband's father, it was noted that it was in the best interests of both parties that the suit should proceed so that 'they might know the exact relation in which they stand to each other'.²⁹ Sir William Scott, the judge in this case, noted that the sentence of the court was declaratory only: if the marriage was void under the terms of the Act then this remained the case whether or not the case proceeded to a final decision. It was therefore proper, he concluded, that 'the parties should know their situation in the early state of their cohabitation'.³⁰

Equally, where the spouse failed to satisfy the court that there had been some flaw in the marriage, the court would express the hope that the parties would be reconciled. In *Hodgkinson v Wilkie* (1795),³¹ for example, the court was doubtful as to whether the wife had been of age at the time of the wedding but held that in any case her mother had consented. Sir William Scott expressed the hope 'that it has been by some unhappy mistake alone that she has been led to attack a marriage bond which the laws and the religion of this country hold to be perfectly valid, and that she will see the necessity of returning to her duty under the connexion which she has formed'.³² In other words, if the marriage proved to be lawful then continued cohabitation was required, if not, any cohabitation had been unlawful.

So what can the case law on this topic tell us about the resort to the option of nullity after marriage? One surprising finding is that suits for nullity were often brought by husbands and wives themselves. The Clandestine Marriages Act of 1753 is often discussed in terms of its effect on parental power, but an examination of the litigants in the

reported cases reveals that it was not usually aggrieved parents who were responsible for bringing the suit to have the marriage annulled. Of the 37 reported cases heard between 1795 and 1825,³³ only 8 were brought by a parent, while 13 were brought by the husband and 14 by the wife. Nor was there always a sharp distinction between the two; in *Cockburn v Garnault* (1792),³⁴ the suit was instituted by the wife's father and continued by her when she came of age.

As one would expect, parents tended to bring suits to annul the marriage fairly soon after it had taken place. In *Bridgewater v Crutchley*,³⁵ for example, the marriage had been very short lived. The facts of the case reveal a romantic elopement: in the early hours of 23 March 1822, her eighteenth birthday, Charlotte Hayward had climbed out of her window and travelled to Merthyr, arriving at seven in the morning. Since by law the marriage could not take place until eight, there was time for the party to enjoy breakfast before making their way to the church. This also gave the groom, Joseph Crutchley, the chance to speak to the local curate, one Mr. Jones, who agreed to perform the ceremony. Joseph produced the licence that he had already procured—which misleadingly swore both that Charlotte was of age and so did not need parental consent, and that she was resident in the parish of Merthyr itself. The marriage accordingly took place and the new Mr. and Mrs. Crutchley, together with Charlotte's faithful Webb, who had accompanied her, set off in the chaise for Hereford. In the meantime, Charlotte's flight had been discovered and her brother Augustus, together with a Mr. Bridgewater, immediately set out in pursuit—but in the wrong direction. The cunning couple had planted a note which told the Haywards that Charlotte and Joseph were to be married at Carmarthen—around fifty miles away to the west. But the ruse was swiftly discovered and the men followed the real route of the couple, arriving in Hereford later in the evening. Despite the bridal pair decamping from their first hotel to another when they suspected that they had been followed, their pursuers arrived at their new location 'so close after them, that the coffee, which [...] they had ordered upon their arrival, had not yet at that time been served up'. Charlotte was persuaded to return to her mother's home, and found herself back there little more than 24 hours after setting out. As the judge noted, 'she has since resided there with her mother, without any suggested intercourse or communication with Crutchley'.³⁶ Her mother almost instantly instigated a suit to have the marriage annulled. Within a year, the Arches Court had confirmed the marriage to be void.

Similarly, if less dramatically, in *Pouget v Tomkins* (1812),³⁷ it would appear that the couple had had little time to enjoy their married life together: the bride was the maid to the groom's grandmother, and they did not have the chance to set up home together after the ceremony took place since they were attempting to keep the marriage a secret. The marriage was annulled less than two years after the wedding had taken place, and there is no indication from the case that it ever existed in more than name. In the similar case of *Meddowcroft v Gregory*³⁸ the wedding of William Meddowcroft and Mary Gregory took place on 28 February 1815; however, the pair do not seem to have lived together openly, since his uncle removed him from his lodgings upon hearing of the attachment and did not discover that the wedding had taken place until the following November—after which a petition was made to the Consistory Court and the marriage annulled the following July.

Indeed, all of the cases brought by parents were heard a relatively short time after the marriage had taken place. George Bowzer married Jane Ricketts in January 1794³⁹ and judgment was given just over a year later, on 3 March 1795. And in the case of Augustus Frederick Blyth, who had married Sarah Soden in September 1821,⁴⁰ the process was still speedier, with the Consistory Court handing down its judgment on 28 June 1822.⁴¹ In such cases the parties had little opportunity to enjoy life after marriage.⁴²

There are also a couple of cases brought shortly after the wedding by individuals who had discovered that their spouses were not quite as they had represented themselves to be: in *Ewing v Wheatley*⁴³ the marriage had been celebrated on 19 November 1813,⁴⁴ and judgment in the case was handed down at the start of May the following year. That the wife's attempt to repudiate the marriage was not immediate can be deduced from the fact that the evidence before the court included two letters written after the wedding that were delicately described by the judge as 'perfectly nuptial'.⁴⁵ It was presumably after this that she discovered that he should not have described himself as 'esquire' when they married, since, as it was put to the court, 'that title belongs properly to persons of good state and quality, whereas he was a person of low condition, and assumed that description only to assist his fraudulent object of getting possession of the lady for the sake of her fortune'.⁴⁶ There was also a relatively short period of time between the marriage of Anthony Frankland and Ann Ross at St. Paul's church in Covent Garden on 14 October 1803,⁴⁷ and the Consistory Court of London handing down a

sentence of annulment on 29 May 1805.⁴⁸ In this case the court was less explicit as to the fraud that had been practised on the husband, merely alluding elliptically to her conduct, condition and situation, and implying that prior knowledge of it might well have dissuaded Frankland from marrying her.

More usually though, where the suit was brought by either the husband or wife, some considerable time had elapsed since the marriage took place. In 1815 Sir William Scott felt that the fact that the marriage under challenge had lasted sixteen years was ‘startling’⁴⁹ but in the years that followed some still longer unions were brought before the court. In *Hayes v Watts* (1819),⁵⁰ for example, the marriage had lasted 18 years before the wife brought a suit to annul it, citing the fact that her mother’s consent to her marriage had not been valid: her mother was not, as it had been assumed, a widow as her father was still alive. Since, as long as he was still alive—even if, as in this case, he was in America—it was his consent alone that could validate the marriage, the court had no option but to annul it, noting that either of the parties had a right to a declaratory sentence stating that their marriage had been void and that it was ‘a duty this Court owes to the public to declare the situation of the parties’.⁵¹

Husbands too might suddenly reveal that they were not of full age at the time of the marriage. In *Johnston v Parker*⁵² the couple had married in 1796. Nanette Parker was under sixteen at the time but her father was present at the marriage and consented to the union. After 22 years of marriage and the birth of 7 children, the husband instituted a suit to annul the marriage on the basis that *he* had been underage at the time. The court scrutinised the evidence very closely, noting that the length of the relationship ‘forms a strong call on the circumspection of the court to see that the evidence is complete’.⁵³ It proved to be irrefutable and the marriage was pronounced to be void, the presiding judge noting that it was ‘better to stop at any time, lest the continuance of the marriage should involve the interest of a greater number of persons, for there is no time in which it will not affect the interests of parties’.⁵⁴

THE LAWLESSNESS OF INVOKING THE LAW

Despite the eventual grant of annulments in relation to these long-lasting marriages, the courts were generally more receptive to applications by parents than by a husband or wife. As Sir William Wynne pointed out in the case of *Osborn v Goldham*, which came before the Court of Arches

in 1808, when the wife instituted a suit for nullity twelve years after the wedding, it was ‘not the intent of the Act to annul a marriage of this kind, the object of it was to prevent minors from being drawn in without the consent of their parents’.⁵⁵ The importance of upholding the lawfulness of the marriage wherever possible was emphasised by Sir John Nicholl in *Smith v Huson* (1811):

Where a marriage has been solemnized, the law strongly presumes that all the legal requisites have been complied with. This presumption is not less favourable where there is no particular disparity in the age or situation of the parties—where the marriage has not been hastily entered into—where there is no appearance of either of the parties having been surprised or inveigled into the contract, and consequently where the object and policy of the statute cannot have been violated.⁵⁶

The courts were particularly averse to claims of nullity brought by a spouse who had obtained the licence prior to the marriage by committing perjury. The impact that an annulment would have on the parties—rendering their previous cohabitation lawless—meant that the court did not look kindly on such suits.

In the case of *Agg v Davies*,⁵⁷ for example, the fact that a number of years had elapsed between the marriage of John Agg and Jane Davies in 1806 and his subsequent proceedings to annul the marriage on the basis of her minority strongly suggests that this case was an attempt to find a solution to a marriage that had broken. What the litigation also shows is just how reluctant the ecclesiastical courts were to allow the law of nullity to be used in this way.

The marriage had taken place in the church of St. Mary in Swansea on 1 February 1806. Rather than having the banns called in the local church, John had obtained a licence and had been required to swear on oath that there was no impediment to the marriage. Since the law declared that the marriage of a minor by licence without parental consent would be void, the implication was either that Jane was of age or that her father had consented. Eight years later, John alleged that neither condition had been fulfilled: that Jane had been, in fact, underage at the date of the wedding, and that her father had not given his consent.

The first of these allegations would seem to be incontrovertible. The family bible recorded that Jane had been born on 17 May 1785, even specifying the time of birth. But the court was not satisfied with this

evidence. The judge, Sir John Nicholl, pointed out that the usual way of proving the age of one of the parties would be to rely on the public record made in the parish's baptismal register and held that the onus was on John to prove that no such entry existed (waving aside the evidence of the father that his daughter had been privately baptised at home and had never been received into the Church of England). It was also objected that the entry of Jane's birth in the bible had not been made contemporaneously: it had instead been copied by Jane's father from an entry made in another, smaller Bible by a neighbour. And not only had this Bible been lost, but the neighbour who had made the original entry had died. The fact that a later mistake had been erased and corrected was seized on as showing 'how little reliance is to be placed on a transcript made by ignorant persons of this kind',⁵⁸ the judge noting, for good measure, that the father 'was of a low condition in life, the mate of a coasting vessel; seamen are not accurate'.⁵⁹ And, not content with disparaging the accuracy of an entire profession—and one that involved making precise calculations in order to navigate—the judge was even willing to cast aspersions on the virtue of Jane's mother. He hinted that she might have had good reason to make out that Jane—her eldest daughter—was in fact younger than she really was. But there was no evidence that the marriage of Jane's parents had taken place less than nine months before her birth or that her conception might correspond with a period when John Davies had been at sea. And so, concluded the judge, 'I am left in doubt – there is not that precise and satisfactory proof which convinces the Court that the minority of the woman is established'.⁶⁰

Just for good measure, however, he went on to consider whether Jane's father had in fact given his consent to the marriage—in which case it would not matter whether or not she had been underage at the time of the marriage. The evidence given by Jane's father John suggests that both sides were keen to end the marriage. Once again, he had been at sea at the time that the crucial events had taken place. But he told the court in unequivocal terms that the marriage had taken place without his consent. Not only had he not consented, he had informed John Agg that he would not give his consent the very night before he set out on his voyage. And upon his return he had never stated explicitly that the marriage met with his approbation. He did, however, acknowledge to the court that his refusal of consent was motivated by the fact that John Agg's own father disapproved of the match, and 'not from any dislike of the man'.⁶¹ This proved crucial. Instead of holding that this evidence established that

no consent had been given, the judge construed it as evidence of a conditional consent. His reasoning ran as follows: Jane's father might have been willing to consent if John's own father had approved of the marriage, and so the court should assume that consent had been given in these terms. This was, of course, pure speculation and the judge had to resort to hypothesising about what might have happened:

It is quite consistent with this evidence that he might have told Agg if he could get the consent of his friends, he would not object; or he might have left authority to this effect with his wife; and I think such a conditional consent would have been sufficient.⁶²

Equally unconvincing were the judge's reasons for supposing that this had actually happened. He laid great stress on the fact that the father had omitted to take certain steps—he had not, for example, ordered John to break off the connexion, nor had he left instructions with his wife to prevent the marriage. And it was even suggested that the circumstances of the marriage itself justified the inference that consent had been given, on the basis that it was celebrated in the parties' own parish church, and not clandestinely. One might have thought, however, that a more salient point was that it was only celebrated once the father was safely seaborne.

One final justification for assuming that the father had consented was that he had failed to evince the customary surprise and regret of a deceived father on learning that the marriage had taken place. Had John Davies wished to take steps to annul the marriage when he returned to Swansea in the spring of 1806, there is little doubt that the court would have interpreted the facts in the case very differently.

So in this case we seem to have the parties to a marriage doing their best to free themselves from it by the only legal means available to them, and a judge equally determined that they should not misuse the law of nullity for this purpose. Whether John and Jane made the best of it and remained together or lived separately we do not know: a 66-year-old Jane Agg from Swansea was living alone in the 1851 census,⁶³ but the years between remain tantalisingly unreconstructable.

In other cases, however, we can follow the parties beyond the sentence of the court. The case of *Sullivan v Sullivan* (1819),⁶⁴ provides a fascinating case study of what might happen after a marriage was declared to be valid despite legal challenge—and how a declaration of a marriage's lawfulness might be the precursor to a new type of lawlessness.

The suit for nullity was brought by the father of the groom, seventeen-year-old John Augustus Sullivan. The marriage had taken place by banns in a parish to which neither party belonged. The elder Mr. Sullivan had thus had no advance notice of the wedding and had been unable to forbid the calling of the banns. Under the terms of the Act, he could not challenge it on the basis that the groom was underage, nor on the fact of the banns having been called in the wrong parish, and so had to resort to the argument that the banns had not been properly published, and so by inference had not been called at all. In this case, however, the claim that the banns had not been properly published was based on the fact that an additional middle name had been added to the *bride's* name: although she was usually known as Maria Oldacre, the banns had been published in the name of Maria *Holmes* Oldacre. Scott rejected the suggestion that this had been a deliberate fraud to conceal her identity, since her parents approved the match, noting that '[t]hey must have been bunglers indeed if they placed the fraud not in the name which required to be concealed, but in that which needed no concealment'.⁶⁵

The judgment reveals the differences in age, rank and condition that had motivated John's father to try to have the marriage set aside. Maria was a little older than her husband, by three years in fact, which as the judge observed was 'no very revolting disproportion',⁶⁶ although it would have been preferable had this been the other way round. The disparity in rank was greater: John had been educated at Eton and was preparing to go on to university, while Maria's father managed a pack of hounds, albeit a well-known one. And Maria was, in addition, illegitimate, her parents only having married four months after her birth. In the eyes of the judge, these differences might well pose a risk to the success of the marriage, 'for [...] it is not to be denied that two persons coming together with very different educations and systems of manners and habits are not likely to have that correspondence and harmony of mind, without which the comfort of a married life cannot exist'.⁶⁷ But, he concluded, in a flight of romantic rhetoric, 'the passion which leads to marriage is apt to overleap these distinctions, and that marriage levels them all, both in legal and moral consideration'.⁶⁸ Moreover, Maria was still young enough to be 'susceptible of better impressions'.⁶⁹

John's father, however, was clearly not convinced that Maria was a suitable wife for his son. He appealed to the Court of Arches—which

in 1819 simply confirmed Scott's decision, holding that the explanation given for the use of the extra name was satisfactory.⁷⁰ He then appealed to the highest court with jurisdiction in ecclesiastical matters, the High Court of Delegates—only for it, too, to dismiss the father's case.

But although the father may have failed in his attempts to have the marriage annulled, he did succeed in separating the young couple, and eventually in bringing the marriage to an end. Although John and Maria had cohabited for a short while after the ceremony—Mr. Sullivan being initially unaware of the legal means of challenging its validity—before the end of the year legal proceedings had begun and John had been sent abroad by his father to await the outcome. The Consistory Court handed down its judgment in June 1818. It was another year before the Court of Arches affirmed its decision. And then there was the appeal to the High Court of Delegates.

While the case was still pending, John and Maria agreed to separate. Perhaps his ardour had cooled for the wife he had not seen for three years, perhaps he was pressurised into it by his family, who had joined him on the Continent. Whatever his motivation, once he had attained his majority in 1819, he executed an agreement by which it was declared that they would live separately and she would receive an annuity of £500, with a further sum of £1000 being settled on her.

Five years later, in February 1824, the High Court of Delegates finally dismissed the case. It had not been necessary for the court to consider the details of the case: it appears that there had been no action by the parties beyond the initial appeal by the father and reply by Maria. But by this time Maria had clearly given up any hope of making a life with John, whatever the legal outcome. In 1821 she had begun to live with another man, one Henry Gouldney. They had tried to keep their relationship secret—living in a secluded spot and forbidding tradespeople from approaching the house. But their relationship was discovered by the Sullivans, and it scarcely needed the birth of two children to prove that Maria had committed adultery.

John then sought a divorce *a mensâ et thoro* from the ecclesiastical court on the ground of his wife's adultery. The case came before Sir John Nicoll—who five years earlier had declared in favour of the validity of the marriage, noting how the reputation of Maria would suffer were he to resolve otherwise. This time he was less sympathetic: 'what is there, let me ask, to justify the wife's violation of her marriage vow; and so to

deprive the husband [...] of that remedy to which the wife's infidelity plainly intitles a husband under ordinary circumstances?'.⁷¹

Maria had two answers to this: first, her husband's desertion, and second, the terms of the separation agreement. But neither argument was accepted by the court. It was pointed out that in the eyes of the law neither party could have deserted the other while the litigation about the validity of the marriage was ongoing, for the simple reason that they should not cohabit while the validity of their marriage was uncertain. Rather than seeking the company of another man during this period of uncertainty, she should have used it 'to qualify herself... by mental and moral improvement, for the husband's future society'.⁷² And although the deed of separation had declared that Maria would be free of John's control, and might choose where she lived, as if she was sole and unmarried, it was held that this did not constitute a licence for her to live with whom she chose. Indeed, Sir John pointed out that the cloak of clandestinity with which she had surrounded her relationship with Mr. Gouldney rather suggested that she knew perfectly well that she was not at liberty to act as she chose.

The court thus pronounced the decree of divorce. But a divorce *a mensâ et thoro* did not bring the marriage to an end; it simply allowed the parties to live separately. It was, however, an essential precondition to a private Act of Parliament dissolving the marriage, and in 1825 the marriage of John Augustus Sullivan and Maria Oldacre was finally brought to an end.⁷³

Whether or not John went on to make a more suitable match we do not know, but at least the divorce freed Maria to make her union with Henry Goldney lawful, which she speedily proceeded to do, marrying him in July of that year.⁷⁴

CONCLUSION

There were undoubtedly some couples who flouted the law, who lived together in a union that was, in legal terms, no different from concubinage, or who adopted a strategic rather than purposive approach to legal requirements. Yet it should of course be borne in mind that the number of marriages that were challenged before the courts was tiny when compared to the thousands celebrated each year without incident. While

lawlessness lends itself to the demands of narrative more easily than dull conformity, it should not be forgotten that for the vast majority of couples the lawfulness of their marriage was a crucial consideration.

NOTES

1. Henry Gally, *Some Considerations upon Clandestine Marriages* (London, 1750), 124.
2. Ralph Lambert, *An answer to a late pamphlet, entitl'd A Vindication of marriage, as solemnized by Presbyterians in the north of Ireland* (Dublin, 1704), 10.
3. *The lady's law; or, a treatise of feme covert's* (London, 1737), 25.
4. See e.g. Fanny Burney, *Cecilia* (Oxford: Oxford World Classics 1999; first published 1782), in which the ceremony of marriage between the titular heroine and Mortimer Delville is interrupted by an objection and the clergyman refuses to proceed.
5. See e.g. *The Diary of Thomas Turner, 1754–1765*, ed. David Vaisey (Oxford: Oxford University Press, 1984), in which a Sussex churchwarden, Thomas Turner, recorded how on 23 October 1757 Anne Stevenson forbade the banns of marriage between Richard Parker and Mary Vinal, claiming that he had promised to marry her. In this case though, the objection may actually have hastened the marriage: Mary told the churchwardens that she was with child by Richard and within three days they had facilitated the marriage by procuring a licence.
6. *The lady's law*, 26–27.
7. See e.g. Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600–2010* (Cambridge: Cambridge University Press, 2012), Chap. 2.
8. Peter Annet, *Social bliss considered: in marriage and divorce; cohabiting unmarried and public whoring* (London, 1749), 46–47.
9. Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge: Cambridge University Press, 2009), Chap. 2.
10. For a detailed account see further Probert, *Marriage Law and Practice*, Chap. 6.
11. Section 8.
12. Section 11.
13. Section 1.
14. As required by Section 24.

15. Donald John Steel, *National Index of Parish Registers: Vol. I Sources of Births, Marriages and Deaths Before 1837* (London: Society of Genealogists, 1968), 34; Edward Anthony Wrigley and Roger S. Schofield, *The Population History of England 1541–1871: A reconstruction* (Cambridge: Cambridge University Press, 1989), 30.
16. James Lucas, *An impartial inquiry into the present state of parochial registers; charitable funds; taxation and parish rates* (Leeds, 1791), 13–14.
17. For examples of non-compliance, see *The Parish Registers and Parochial Documents in the Archdeaconry of Winchester*, ed. William Andrew Fearon and John Foster Williams (Winchester: Warren & Son, 1909), 10.
18. See Roger Lee Brown, 'The Rise and Fall of the Fleet Marriage', in R.B. Outhwaite, *Marriage and Society* (London: Europa, 1981), 117–136; William Reginald Ward, *Parson and Parish in Eighteenth-Century Surrey: Replies to Bishops' Visitations* (Guilford: Surrey Record Society, 1994), 6, in which the incumbent of Battersea commented that '[t]he reason why our marriages are so few is because of the evil practice of marrying at the Fleet in a clandestine and scandalous manner'.
19. Lambeth Palace Library, Fulham Papers, Terrick 6, fol. 2.
20. Ibid., fol. 3. See further Rebecca Probert and Liam D'Arcy Brown, 'The Clandestine Marriages Act of 1753 in action: investigating a contemporary complaint' *Local Population Studies*, 83 (2009): 66–69.
21. Keith Snell, 'English rural societies and geographical marital endogamy, 1700–1837' *Economic History Review* 55: 2 (2002): 262–298 (274).
22. William Reginald Ward (ed.), *Parson and Parish in Eighteenth-Century Hampshire: Replies to Bishops' Visitations* (Winchester: Hampshire County Council, 1995), 193.
23. See further Probert and D'Arcy Brown, 'The Clandestine Marriages Act of 1753 in action'.
24. See e.g. Probert, *Marriage Law and Practice*, Chap. 7; Rebecca Probert and Liam D'Arcy-Brown, 'Westmorland Weddings: A Study of the 1787 Census', *Family and Community History* 16: 1 (2013): 32–44; R. Probert and L. D'Arcy-Brown 'Catholics and the Clandestine Marriages Act of 1753', *Local Population Studies* 83 (2008): 78–82.
25. Quoted in *The Parish Registers and Parochial Documents in the Archdeaconry of Winchester*, ed. William Andrews Fearon and John Foster Williams (Winchester: Warren & Son, 1909), 27.
26. *The Registers of Middleton-in-Lonsdale*, ed. Col. J.F. Haswell (Penrith: Cumberland and Westmorland Parish Registers Society, 1925), 50.
27. Quoted in Steel, *National Index of Parish Registers: Vol. I*, 66.

28. The ecclesiastical courts had more or less ceased to punish cohabiting couples for fornication by the 1770s: see Probert, *The Changing Legal Regulation of Cohabitation*, Chap. 2.
29. *Bowzer, as Guardian of his son v Ricketts, falsely calling herself Bowzer* (1795) 161 *English Reports* 529; 1 Hag. Con. 212, 214.
30. *Ibid.*
31. *Hodgkinson, Falsely Called Wilkie, v Wilkie* (1795) 161 *English Reports* 546; 1 Hag. Con. 262.
32. *Ibid.*, 268.
33. Case reporting in this period was still somewhat unsystematic and dependent on individual initiative; happily, the existence of a series of reports for the ecclesiastical courts coincides with the period that saw the most litigation on this point: see Lawrence Stone, *Road to Divorce* (Oxford: Oxford University Press, 1990), Table 1.8.
34. *Cockburn v Garnault* (1792) 161 *English Reports* 608; 1 Hag. Con. 435n.
35. *Bridgwater, formerly Hayward, v Crutchley* (1823) 162 *English Reports* 167; 1 Add 473.
36. *Ibid.*, 478.
37. *Pouget v Tomkins* (1812) 161 *English Reports* 695; 2 Hag. Con 142.
38. *Meddowcroft v Gregory* (1816) 161 *English Reports* 717; 2 Hag. Con 207.
39. London Metropolitan Archives, Saint Marylebone, Register of banns of marriage, P89/MRY1, Item 285.
40. [Ancestry.com](https://www.ancestry.com). *London, England, Extracted Parish Records* [database online]. Provo, UT, USA: Ancestry.com Operations Inc., 2001.
41. *Blyth, formerly Soden, v Blyth* (1822) 162 *English Reports* 109; 1 Add 312.
42. See also *Cockburn v Garnault* (1792) 161 *English Reports* 608; 1 Hag. Con. 435n., in which the marriage had taken place in December 1790 and the case was heard in 1792.
43. *Ewing, falsely called Wheatley, v Wheatley* (1814) 161 *English Reports* 709; 2 Hag. Con. 175.
44. London Metropolitan Archives, Saint Marylebone, Register of marriages, P89/MRY1, Item 184.
45. *Ewing v Wheatley*, 185.
46. *Ibid.*, 182.
47. London Metropolitan Archives, Saint Paul, Covent Garden: Westminster, Transcript of Baptisms, Marriages and Burials, 1803 Apr–1804 Mar, DL/t Item, 098/002/02.

48. *Frankland v Nicholson* (1805) 105 *English Reports* 607; 3 M. & S. 259n.
49. *Jones, falsely called Robinson, v Robinson* (1815) 161 *English Reports* 1146; 2 Phill. Ecc. 285.
50. *Hayes, falsely called Watts, v Watts* (1819) 161 *English Reports* 1252; 3 Phill. Ecc. 43.
51. *Ibid.*, 44.
52. *Johnston v Parker, falsely called Johnston* (1819) 161 *English Reports* 1251; 3 Phill. Ecc. 39
53. *Ibid.*, 41.
54. *Ibid.*
55. *Osborn v Goldham*, Arches Court of Canterbury, Dec. 12, 1808, reported in 161 *English Reports* 990; 1 Phill. Ecc. 298n.
56. *Smith v Huson, falsely called Smith* (1811) 161 *English Reports* 987; 1 Phill. Ecc. 287, 294.
57. *Agg v Davies, falsely calling herself Agg* (1816) 161 *English Reports* 1164; 2 Phill. Ecc. 341.
58. *Ibid.*, 347.
59. *Ibid.*, 346.
60. *Ibid.*, 348.
61. *Ibid.*, 343.
62. *Ibid.*, 348–349.
63. *Census Returns of England and Wales, 1851*, TNA, HO107/1500; fol 33, 7.
64. *Sullivan v Sullivan, falsely called Oldacre* (1819) 161 *English Reports* 728; 2 Hag. Con. 238.
65. *Ibid.*, 261.
66. *Ibid.*, 244.
67. *Ibid.*, 245.
68. *Ibid.*
69. *Ibid.*, 245.
70. *Sullivan v Oldacre, falsely called Sullivan* (1819) 161 *English Reports* 1253; 3 Phill. Ecc. 45.
71. (1824) 162 *English Reports* 303; 2 Add 299, 301.
72. *Ibid.*, 305.
73. 6 Geo 4 c. 80.
74. *London Metropolitan Archives*, Saint George, Bloomsbury, Register of marriages, P82/GEO1, Item 023, recording the marriage of Henry Gabriel Goldney to Maria Holmes Oldaker on 23 July 1825.

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