

CAMBRIDGE STUDIES
IN ENGLISH LEGAL HISTORY

ROMAN CANON LAW
IN REFORMATION ENGLAND

In this book one of the world's foremost legal historians draws upon the evidence of the canon law, court records and the English common-law system to demonstrate the extent to which, contrary to received wisdom, Roman canon law survived in England after the upheavals of the Protestant Reformation.

R. H. Helmholz provides an extensive examination of the manuscript records of the ecclesiastical courts and professional literature of the English civilians. Rebutting the views of Maitland and others, he shows how the lawyers in English ecclesiastical courts continued to look to the writers of the Continent for guidance and authority in administering the system of justice they had inherited from the Middle Ages. Intellectual links between England and the Continent are shown to have survived the Reformation and the abolition of papal jurisdiction. The extent to which papal material was still used in England during the sixteenth and seventeenth centuries will interest all readers and surprise many.

Clearly and elegantly written, this book is both a companion to and development of Maitland's celebrated *Roman Canon Law in Medieval England*. It will be of great interest not only to legal and ecclesiastical specialists but to any reader seeking a wider understanding of the constitutional and intellectual context in which the English Reformation developed.

R. H. HELMHOLZ is Ruth Wyatt Rosenson Professor of Law at the University of Chicago. His previous publications include *Marriage Litigation in Medieval England*, also published (1975) in Cambridge Studies in English Legal History.

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R. H. HELMHOLZ

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the University of Chicago*



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PREFACE

The pages which follow attempt to describe the history of the canon law and the ecclesiastical courts in England during the era of the Reformation. That 'era' is here taken in an extended sense, as embracing the reigns of all the Tudor monarchs together with that of James I, or from 1485 to 1625. This choice of dates was dictated in the first instance by a desire to tell a fuller story than would be possible by concentrating simply on the years when ties between England and the papacy were cut, and also by a belief that the causes and consequences of constitutional change would be more fairly seen over the course of a longer period. Luckily, later research justified the choice. The evidence shows that this part of the history of ecclesiastical jurisdiction in England cannot be adequately described by concentrating on a few years or upon a single event.

Behind the description found in these pages lies a continuing investigation of the records of the ecclesiastical courts. By the sixteenth century these records survive in great profusion for virtually every English diocese and archdeaconry. I doubt that anyone can do more than sample this vast store. Certainly that is all I have done. The book is also based, however, on a preliminary examination of another kind of legal literature. It consists of a surprisingly large number of manuscript works written for and used in actual practice by the English civilians, the advocates and proctors who staffed the spiritual tribunals. This 'working literature', described in Chapter 4, permits a more complete look at the substance of the law enforced in the ecclesiastical courts than that afforded by the records alone. It has provided the most surprises and has changed my way of thinking about the legal history of the period in several ways.

This book is an expanded and revised version of the Maitland Lectures, delivered in Cambridge during the Lent term of 1987. The title of Maitland's famous work, *Roman Canon Law in the Church of*

England, was the obvious source of my own. Probably this was presumptuous on my part, and my original intention was to change the title when I came to commit my findings to print. However, working further on the subject made the title seem all but inevitable. For one thing, it was Maitland who established that the study of the canon law was an essential part of English legal history. It was he who most trenchantly raised many of the themes touched upon by my research. Though I have diverged from his steps in several places, it is his path that I have followed and attempted to enlarge. Also, and probably more important, this book deals primarily with the subject best expressed by his title. The history of ecclesiastical jurisdiction during the Reformation era turns out to revolve mostly around the Roman canon law. Its resilience, its vast store of resources, and the pressures put upon it during this era, furnish the central themes of this study.

In one further respect, the Lectures and now the book track the path Maitland laid out. In dealing with this then controversial subject, the great historian cautioned, 'Let us, as far as may be, stick to our legal last.' I have tried to take Maitland's words as my invariable guide. Much beyond legal history can be made of the ecclesiastical court records. Social, religious, and even economic historians have found them useful. I have none the less stuck to their legal side, and the story told here may well be thought incomplete on that account. On the other hand, it is important that someone deal with the legal issues. The ecclesiastical courts *were* courts of law. They did not simply enforce the political or religious preferences of the men who happened to hold office within them at any particular time. Concentration on legal aspects of their history has costs, but it also provides an essential part of their history.

There remains the pleasant task of thanking the many people who have helped me. To the Managers of the Maitland Memorial Fund, and in particular to Professors S. F. C. Milsom and J. H. Baker, I am deeply grateful for the invitation which led to this book. To the Master and Fellows of Trinity College, and especially to its Vice-Master, Professor Gareth Jones, I also owe a debt of gratitude. By electing me a visiting fellow commoner for 1986-7, they made my stay in Cambridge easy and interesting. In doing the research for the book, I enjoyed support provided by the Gerda Henkel Stiftung's stipend honouring Professor Helmut Coing, and also generous grants from

¹ *Roman Canon Law* 90.

the Guggenheim Memorial Foundation and the Russell Baker fund administered by the University of Chicago Law School. Professors Gerhard Casper, J. H. Baker, Peter Stein and Dr Dorothy Owen read drafts of several chapters of the book, making corrections and suggestions that I have incorporated. I have also profited from, and enjoyed, discussing the history of writs of prohibition with that subject's leading student, Professor Charles M. Gray. My greatest debt is to my father, who attended two of the Maitland Lectures, and whose example and generosity, many years before, made all of them possible.

ABBREVIATIONS

Forms of Citation: Ecclesiastical causes are given according to the name of the parties and diocesan court where the cause was in litigation, the present record repository for each being given in the list below. Common law cases are cited by their place in the nominate reports, though they may equally now be found in the reprinted *English Reports*. References to the texts of the Roman and the canon laws are given by appropriate book, title and chapter (e.g. X 1.1.1. for the first chapter of the first title of the first book of the *Liber extra* of the Gregorian Decretals). *Mutatis mutandis* the same method has been used in citation of works by commentators on the Roman canon law.

BL	British Library, London
Bath and Wells	Somerset Record Office, Taunton
Bedford	Archdeaconry Records, Bedfordshire Record Office, County Hall, Bedford
Beinecke	Beinecke Rare Book Library, Yale University, New Haven, Connecticut
Berkshire	Archdeaconry Records, Berkshire Record Office, County Hall, Reading
Bodl.	Bodleian Library, Oxford
Bristol	Bristol Record Office, The Council House, Bristol
Buckingham	Archdeaconry Records, Buckinghamshire Record Office, Aylesbury
C.P.	Court of Common Pleas
CUL	Cambridge University Library
Canterbury	Cathedral Library, Canterbury
Carlisle	Cumbria Record Office, The Castle, Carlisle
Chester	Cheshire Record Office, Chester

Chichester	West Sussex Record Office, Chichester
Co. Inst.	Edward Coke, <i>Institutes of the Laws of England</i> (1628–44)
Cornwall	Archdeaconry Records, Cornwall Record Office, County Hall, Truro
<i>Councils & Synods</i>	<i>Councils and Synods with other documents relating to the English Church II AD 1205–1313</i> , ed. F. M. Powicke and C. R. Cheney (1964)
Durham	Department of Palaeography and Diplomatic, The University, Durham
<i>E.H.R.</i>	<i>English Historical Review</i>
Ely	Ely Diocesan Records, Cambridge University Library
Essex	Archdeaconry Records, Essex Record Office, County Hall, Chelmsford
Exeter	Devon Record Office, Exeter
FLP	Free Library of Philadelphia
Folger	Folger Shakespeare Library, Washington, DC
<i>Gl. ord.</i>	<i>Glossa ordinaria</i>
Gloucester	Gloucestershire Record Office, Gloucester
Guildhall	Commissary Court Records, Guildhall Library, London
HLS	Harvard Law School Library, Cambridge, Mass.
Hereford	Hereford Record Office, The Old Barracks, Hereford
Huntingdon	Archdeaconry Records, Hertfordshire Record Office, County Hall, Hertford
K.B.	Court of King's Bench
<i>Provinciale</i>	William Lyndwood, <i>Provinciale (seu constitutiones Angliae)</i> (Oxford 1679)
LPL	Lambeth Palace Library, London
<i>L.Q.R.</i>	<i>Law Quarterly Review</i>
LI	Lincoln's Inn Library, London
Lichfield	Joint Record Office, Lichfield
Lincoln	Lincolnshire Archives Office, The Castle, Lincoln
Norwich	Norfolk Record Office, Norwich

Nottingham	Archdeaconry Records, University Library, Nottingham
Peterborough	Northamptonshire Record Office, Northampton
Rochester	Kent Archives Office, County Hall, Maidstone
<i>Roman Canon Law</i>	F. W. Maitland, <i>Roman Canon Law in the Church of England</i> (1898)
S.S.	Selden Society
Salisbury	Wiltshire Record Office, County Hall, Trowbridge
St Albans	Archdeaconry Records, Hertfordshire Record Office, County Hall, Hertford
St Asaph	Manuscripts Department, The University Library, Aberystwyth
St David's	Manuscripts Department, The University Library, Aberystwyth
Sext	Liber sextus (in <i>Corpus Juris Canonici</i>)
Strype's <i>Annals</i>	John Strype, <i>Annals of the Reformation</i> (1824 edn)
<i>T.U.I.</i>	<i>Tractatus universi iuris</i> (1584–1600)
TCD	Trinity College, Dublin
Wilkins, <i>Concilia</i>	<i>Concilia Magnae Britanniae et Hiberniae A.D. 446–1717</i> , David Wilkins edn (1737)
Winchester	Hampshire Record Office, Winchester
Worcester	Worcester (St Helen's) Record Office, Worcester
X	Liber extra (in <i>Corpus Juris Canonici</i>)
York BI	Borthwick Institute of Historical Research, York

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THE MEDIEVAL INHERITANCE

In the middle of the fifteenth century, the courts of the Church exercised jurisdiction over broad though not unlimited areas of English life. The principal boundaries of that jurisdiction must have seemed well settled at the time. At least they had been long observed, in fact since a time of dispute and settlement more than one hundred and fifty years before, during the reigns of Edward I and his son.¹ A few matters of serious contention with the courts of the King did exist, flaring into occasional dispute when the stakes were high enough. There were also many matters of disagreement that *could* have separated the courts of Church and Crown, had either side attempted to implement the full extent of its jurisdictional claims. But this did not happen. The surviving records reveal a remarkable stability in the subject matter jurisdiction of the English courts Christian.

As things stood, the ecclesiastical courts dealt with all questions involving the formation and annulment of marriage. That is, causes (the canonical word used for law suits) brought to enforce contracts of marriages entered into by words of present consent, to secure judicial separations on the grounds of adultery or cruelty, and to dissolve *de facto* marriages contracted contrary to the canonical impediments, all belonged to the courts of the Church. So too did exclusive probate jurisdiction in most parts of England. The ecclesiastical tribunals proved all last wills and testaments not involving freehold property, and they supervised the collection of the assets of decedents and the payment of debts and legacies out of those assets. Moreover, the courts of the English Church provided the sole remedy available for defamation. The royal courts offered no relief except in special

¹ See *Councils & Synods* I:107. See generally the judicious survey by Robert E. Rodes, *Lay Authority and Reformation in the English Church: Edward I to the Civil War* (1982) 12-46.

situations, and the local courts in England had themselves withdrawn from the field over the course of the fourteenth century. The ecclesiastical courts also exercised an important jurisdiction over sworn oaths or perjury. In practice this had become a means of enforcing simple contracts to which an oath had been added to the promise. And finally, the ecclesiastical courts heard causes involving tithes and what would come to be called church rates. These included suits arising out of failure to pay tithe, the tenth of the yearly increase of crops, herds, and industry which every Christian in theory owed to his parish church, and also causes dealing with the charitable oblations that the twin springs of custom and piety had fastened upon the average Englishman.

These were the five principal heads of the Church's civil or 'instance' jurisdiction. Several additional, though more minor matters, also came within the civil cognizance of the English ecclesiastical courts. One example is the suit to require payment of an annual charge upon an ecclesiastical benefice, the *causa annuae pensionis* that was cousin german to the common law's action of annuity.² Another area covered disputes about church property, things like ecclesiastical ornaments or money given for charitable uses. In terms of overall volume, however, the five categories listed above easily dominated the litigation heard in the spiritual courts. For estimating the impact of the Reformation on the canon law in England, they provide an accurate gauge of the instance side of ecclesiastical jurisdiction.

Equally important at the time, however, and equally important now for assessing what happened to ecclesiastical jurisdiction during the Reformation era, was the criminal or *ex officio* side. It consisted of causes begun, in the name of the court itself, against men and women who had publicly violated accepted norms of Christian behaviour. In England, this jurisdiction encompassed offences against morality (such as fornication or public scolding), deviations from the teachings of the Church (such as blasphemy or contempt of the clergy), and

² Pensions were defined in the canon law as a 'certain portion taken from an ecclesiastical benefice *ex causa* and *ad tempus*', as for example would be appropriate as a means of paying for having the church bells rung. See Girolamo Gigas (d. 1560), *Tractatus de pensionibus ecclesiasticis* (Venice 1542) Quest. 1, no. 1 and Quest. 3, no. 2. The connection with the action of annuity was made by an Elizabethan common lawyer in Folger MS. V.b.5, f. 177.

offences involving the fabric of individual churches (such as neglect of ornaments or disturbances within churchyards). In addition, much regulation of the large clerical estate belonged to the ecclesiastical courts, and this was normally exercised on the *ex officio* side. Simony, unlawfully holding more than one benefice, and failing to provide the laity with adequate spiritual ministrations thus came within their routine oversight.

In practice there was always some overlap between the *ex officio* and the instance sides of ecclesiastical jurisdiction. Defamation, for instance, could be raised either way, by a 'criminal' proceeding against the individual defamer or by a private suit brought on behalf of the person defamed. Moreover, a hybrid criminal proceeding initiated by a private individual existed. In this, a private individual 'promoted' the court's office jurisdiction. Despite this overlap, the distinction between the 'criminal' and civil sides remained important. Many of the courts' records were separated accordingly, and differences in procedure employed, and occasionally in the substantive law applied, followed from the nature of the jurisdiction invoked.³ The difference should be remembered at points in tracing the history of the relationship between the Reformation and ecclesiastical jurisdiction.

Probably more important for understanding this subject, however, will be a preliminary discussion of two more general aspects of the spiritual jurisdiction. There are two basic subjects. The first is the relationship of English canonical practice to the formal canon law. The second is its relationship with English common law. Maitland dealt with both in his work on the subject, and indeed they must provide principal themes for any serious study of the place of the canon law in English legal history. The first requires comparing practice with the texts found in what Maitland called 'the papal law books'. The second requires examination of specific examples of competition, conflict, and co-ordination between the two jurisdictions.

³ For descriptions of English practice, see Henry Conset, *The Practice of the Spiritual or Ecclesiastical Courts* (1685) Pt. VII, c. 2; John Ayliffe, *Parergon juris canonici Anglicani* (1727) tit. 'Of the Office of the Judge'. See also Paul Fournier, *Les Officialités au moyen âge* (1880) 275–8.

ENGLISH ECCLESIASTICAL LAW AND THE PAPAL LAW
BOOKS

This first of these two subjects led Maitland to one of his most celebrated controversies.⁴ He entered into it to combat the arguments of contemporary apologists for the Church of England. These apologists, led by Bishop Stubbs, sought to use the history of ecclesiastical jurisdiction to demonstrate the continuity of the English Church; to demonstrate (in Maitland's witty sally) that the Church of England was Protestant before the Reformation and Catholic after it. The canon law played a pivotal role in this controversy, because Bishop Stubbs and the other Anglican spokesmen argued that during the Middle Ages the English ecclesiastical courts had been able to follow a line independent of the Papacy. In their view the Reformation Settlement in fact built on established principles and was no true innovation. The men who administered the English ecclesiastical courts, they contended, had regarded the canon law of Rome with great respect, but had never felt themselves bound to apply it. They could enforce parts of the decretal law and disregard others, as suited local needs and preferences. Thus the English Reformation represented no sharp break with medieval tradition.

Maitland found little to be said in support of this position. Every piece of evidence he examined showed the medieval English Church absolutely dependent upon papal law. The evidence that supported English 'independence' all turned out to be taken from cases where the secular power constricted the ability of the ecclesiastical courts to follow the canon law.⁵ What was needed to prove the contrary argument, Maitland contended, was a situation where the ecclesiastical courts acted contrary to the formal canon law and where they were not constrained to do so by royal writs of prohibition or the threat of *Praemunire*. Of this he saw no sign. Instead, where their hands were free, the courts invariably followed the Roman canon law. Indeed, the

⁴ See *Roman Canon Law*, which collects his articles on the subject. Bishop Stubbs' views are found in *Report of the Commissioners into the Constitution and Working of the Ecclesiastical Courts*, Vol. 1 (1883). The controversy has generated a scholarly literature over the years, reviewed and added to by Charles Donahue, Jr, 'Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 years in the Light of some Records from the Church Courts', *Michigan L. Rev.* 72 (1974) 647-716. See also G. R. Elton, *F. W. Maitland* (1985) 69-79; Hermann Lutz, *Das Canon Law der Kirche von England* (1975).

⁵ See 'Church, State, and Decretals', in *Roman Canon Law* 53-5.

English ecclesiastical lawyers treated the papal decretals as 'binding statute law'. To talk of the medieval Church of England as 'departing from the church of Rome and evolving a jurisprudence of her own', Maitland argued, was contradicted by all the available evidence.⁶ Indeed it was dangerous nonsense.

It will not be the purpose of this book to enter at length into this by now ancient controversy, still less to attempt to breathe life into the argument that the English Church considered itself 'independent' of papal law during the Middle Ages. Put that way, the argument is anachronistic and even silly. Not even Stubbs took so extreme a view. And if put to choose between the positions of Maitland and Stubbs, we would certainly be right to follow Maitland. However, it *will* be my argument that the choice need not be made, at least in the stark form the original controversy took. In the years since Maitland wrote, a great deal has been discovered about the kinds of litigation actually heard in the medieval ecclesiastical courts. The record evidence which Maitland knew existed but could not himself explore has been examined. Moreover, it is also possible to take a slightly longer look at the nature of the Roman canon law than Maitland was able to manage. He himself claimed only a 'toe in the water' sort of familiarity with its traditions.⁷ A study of both of these puts the matters at issue between Stubbs and Maitland into a different light. And it is a clearer light, I think, by which to discern what happened to the Roman canon law during the era of the English Reformation.

The character of English litigation

English ecclesiastical jurisdiction as put into everyday court practice during the medieval period contained a mixture of things, some of which were almost perfectly consistent with what was found in the 'papal law books', some of which were not. The largest part fell somewhere in between. Looking seriously at this sometimes awkward, sometimes close, fit between formal law and court practice will show the difficulty of some of the assumptions both Maitland and Stubbs brought to the original controversy.

⁶ *Ibid.* 59, and 'William Lyndwood', *ibid.* 3-4.

⁷ See Maitland, 'Canon Law in England: A Reply to Dr MacColl', *E. H. R.* 16 (1901) 35-45, reprinted in *Collected Papers of Frederick William Maitland* (1911) III:145.

The law of marriage and divorce demonstrates general conformity between theory and court practice. The canon law defined a valid and indissoluble marriage as any union contracted by words of present consent.⁸ No formal ceremony, parental consent, or sexual consummation was required. The English courts enforced this consensualist view of marriage, even though it was not entirely consistent with the sentiments, or at least the habits, of the English people.⁹ The canon law texts also treated as legitimate any children born to parents whose marriage was subsequently dissolved, provided that the parents had entered into the marriage in good faith.¹⁰ The English ecclesiastical courts, here again, followed the canon law's view of legitimacy even though not all laymen would have agreed with it.¹¹ Thus, one can say that although English practice left room for a few local peculiarities, and although family law must always be subject to some bending by the desires and the needs of litigants, the canon law of marriage as found in the Decretals was regularly enforced by the English spiritual tribunals during the Middle Ages. It fits Maitland's picture of papal law as binding statute law.

The law of defamation and the law of wills, however, do not. They stood outside and even appear to have contradicted the texts of the papal law books. Defamation in medieval English practice meant the malicious imputation of a crime. If a man merely accused his neighbour of professional incompetence or fastened a personal 'defect' like illegitimacy or leprosy upon him, the Provincial Constitution enacted at the Council of Oxford in 1222, which determined the medieval English law of defamation, provided no remedy.¹² Papal decretals, however, authorized broader principles of relief. Following the Roman law's *actio iniuriarum*, decretal law allowed a legal remedy for any abusive language that caused harm to a person's reputation.¹³

No royal interest would have prevented the medieval English Church courts from enforcing this broader concept of defamation found in the papal law books. No prohibition lay to prevent a spiritual court from hearing a slander case where a mere 'defect' had been

⁸ X 4.1.31; see generally A. Esmein, *Le Mariage en droit canonique* (1891) I:95–137.

⁹ R. H. Helmholz, *Marriage Litigation in Medieval England* (1975) 27–40.

¹⁰ X 4.2.8. ¹¹ *Marriage Litigation* 98–100.

¹² Lyndwood, *Provinciale* 347 s.v. *crimen*.

¹³ X 5.36.9. This question is discussed at more length in S.S., Vol. 101 (1985) xvi–xx.

imputed or where the slanderous language had merely held the plaintiff up to 'hatred, ridicule and contempt'. However, such cases do not appear in the surviving medieval records. The law regularly applied in court practice was based on English provincial law, and this means that in the law of defamation, one does truly see ecclesiastical judges whose 'hands were free' following a rule of law contrary to that found stated in the papal law books.

Testamentary law in medieval English practice similarly diverged from what one would expect from reading the texts of the Roman canon law. Not only did the jurisdictional pattern differ from the unified system of administration and heirship followed on the Continent and sanctioned in the formal canon law,¹⁴ English practice also allowed probate of virtually any testament that could be satisfactorily proved to represent the last wishes of the decedent. Thus, the testimony of two witnesses to an oral or nuncupative will, perhaps even less, would suffice to prove the validity of a testament in England.¹⁵ This is not the regime sanctioned in the 'papal law books'. A papal decretal specifically required the presence and the testimony of both two witnesses and that of the decedent's parish priest for upholding the validity of an ordinary testament.¹⁶ By taking this more 'generous' view of testamentary validity, the English spiritual courts seem again to have been refusing to treat the papal law books as 'binding statute law'. And again, no royal court rule required this of them.

This divergence between English practice and the texts of the papal decretals never meant that the Roman canon law was irrelevant to questions involving defamation and wills in England. In fact the reverse was true. Decretal law shaped English practice at many points. Its texts could be, and were, used to answer many of the questions of legal detail upon which lawyers customarily spend their working lives. For instance, in the law of defamation the answer to the question of whether or not malice on the part of the speaker could be presumed from the character of his words came out of the Roman

¹⁴ See generally Michael M. Sheehan, *The Will in Medieval England* (1963) 163–85.

¹⁵ H. Swinburne, *Briefe Treatise of Testaments and Last Wills* (1590) Pt. 4, §§ 21:2, 21:4, 25:8.

¹⁶ X 3.26.10, 11. These testamentary formalities were even mentioned in some English synodal statutes, e.g., Statutes of Exeter II (1287) c. 50, in *Councils & Synods* II:1047. See also Jerome D. Hannan, *The Canon Law of Wills* (1934) 270–9.

canon law.¹⁷ So did the answer to the question of whether specific words in a dead man's last will and testament were legally sufficient to constitute someone as his executor.¹⁸ English ecclesiastical lawyers had no desire to be 'independent' of the Roman canon law on these and many like points. They used it consistently. Moreover, as lawyers like to do, they sought to rationalize what they did in terms of the law they found in the works of established authority, in this case the works of Continental commentators.¹⁹ Even so, it remains undeniable that on a central issue of practice in the areas of defamation and testaments, English practice was not what one would expect from enforcing the texts of the papal law books.

The law of tithes provides a good example of a gray area between the identity found in marriage law and the disparity found in the law of defamation or testaments. Tithing practice in England incorporated strong elements of local custom, some of which would have seemed 'out of step' with the formal law. At the same time, however, the practical law of tithes was also greatly informed by the canon law as interpreted by Continental canonists. Its basic requirements were defined by canonical principles, but these principles themselves left a large area in which local custom could prevail.

The medieval tithing customs of the city of London show this pattern. According to these rules, men paid a fixed and small portion of their house rent in lieu of all personal tithes. This seemed contrary to the formal canon law under which all men owed a tenth of their income,²⁰ and in fact the fifteenth-century English canonist William

¹⁷ Lyndwood, *Provinciale* 346 s.v. *maliciose*. A later example is *Medcalf c. Bishop* (Ct. of Arches 1600), Bodl. Lib. Tanner MS. 427, fols. 62–4v; among other authorities, the advocates cited texts from both the Roman and canon law, and works by Angelus de Gambilionibus (d. 1541), Bartholomeus Salicetus (d. 1412), Oldradus de Ponto (1335), Cinus de Pistoia (d. 1336), and Petrus Paulus Parisius (d. 1545). In *Benet c. Edwards* (1605), London Guildhall MS. 14488, f. 83v, only Lyndwood and Cod. 9.35.5 (*Si non convicti*) were cited for the same point.

¹⁸ *Broke & Offley c. Barret* (1584), BL Lansd. MS. 135, f. 81v–8; cited in addition to the texts were works of Gulielmus Durantis (d. 1296), Bartolus (d. 1357), Panormitanus (d. 1453), Petrus Peckius (d. 1589) and Jason de Mayno (d. 1519). The cause itself also involved other issues.

¹⁹ The discussion by J. L. Barton, in his Introduction to Christopher St German's *Doctor and Student*, ed. J. L. Barton (S.S. Vol. 91, 1974) pp. xxxviii–xxxix, is illuminating. See also Brian Ferme's article in *The Jurist* (forthcoming). For a Continental example on the question of the number of witnesses to a testament required, see, e.g., Joachim Mynsinger, *Singularium observationum iudicii imperialis camerae* (Turin 1595) Lib. I, Obs. 96.

²⁰ See Susan Brigden, 'Tithe Controversy in Reformation London', *Journal of Ecclesiastical History* 32 (1981) 44–70.

Lyndwood appears to have thought the custom invalid on that account.²¹ On the other hand, the London custom could also be defended as a valid composition or way of meeting the tithe obligation. The canon law left considerable latitude to local custom in fixing the exact manner of paying tithes, and it could be argued that the London custom was simply one more example of that latitude.²² That it reduced the amount the clergy received in tithes rendered it suspect, but not necessarily invalid.

Much the same could be said of the tithe obligation in other parts of England. As one reads through the records of litigation in the ecclesiastical courts, it quickly becomes apparent how large a share of defining the obligation local custom took. The manner of paying praedial tithes and even the existence of any duty to pay personal tithes depended upon habit and agreement as much as they did on correct interpretation of the texts of the papal law books. And this result was not primarily a matter of resistance to tithes on the part of the laity. It was what the courts of the Church themselves put into effect. English practice in the law of tithes, in other words, was something of a mixture of decretal and local customary law.

None of these four instances would have surprised a Continental canonist. He would have been able to harmonize some of them with a permissible reading of the texts of the Roman and canon laws. He would also have been used to some disjunction between legal practice and canonical texts. He would have found it even within contemporary commentaries on the canon law itself, and he would have seen much of the same situation when he looked at legal practice in other lands where the Pope's writ ran.²³ English canonical practice in the areas of defamation, tithes and testaments would not have struck him as unusual.

What might conceivably have surprised Continental canonists looking at English practice was not what ecclesiastical jurisdiction contained, but rather what it did *not* contain. The English Church exercised virtually no civil jurisdiction over the persons of the clergy. Under the canon law, only the ecclesiastical courts could hear civil

²¹ *Provinciale* 201 s.v. *negotiationum*. ²² *Ibid.*

²³ On the emotive subject of the legitimacy of payment of infeudated tithes to laymen, for example, see the comments by the Spanish canonist, Johannes de Turrecremata (d. 1468), *Commentaria super Decreto* (Lyons 1519–20) at C. 16 q. 1 c. 68 (*Quoniam quicquid*), no. 7: 'Ecclesia enim sustinet quod milites habent et dissimulat; et quamdiu ecclesia dissimulat non tenetur quis ecclesie residuum decimare.'

suits involving the clerical order. Called jurisdiction *ratione personae*, as opposed to jurisdiction *ratione materiae*, the privilege reached all litigation between parties that did not directly involve feudal tenures.²⁴ In England, except for the jurisdiction over criminous clerks that Thomas Becket had won by his martyrdom, the ecclesiastical courts themselves ignored this principle. No such causes appear in any of the act books so far discovered. The regular disregard of this aspect of the papal law is all the more striking in light of a clear decision of the Roman Rota in the 1370s that the English practice was invalid. The *domini* of the medieval Church's highest court of appeal explicitly condemned the English custom of conceding subject matter jurisdiction in suits involving clerics to the royal courts.²⁵ They held it unjustified under any canonical theory. But nothing changed as a result. English custom continued to override the canon law, even after that latter had been specifically defined by the system's highest court of appeal.

Maitland noticed this striking instance of divergence between the Roman canon law and English custom, and he described it as one more example where the King's 'strong hand' tied the hands of the English judges.²⁶ In formal terms, his view is defensible. Writs of prohibition were available to, and in fact used by, clerics sued before ecclesiastical tribunals in causes where the subject matter fell within temporal cognizance.²⁷ On the other hand, the entire absence of attempts to enforce this jurisdiction *ratione personae* from the surviving records of the ecclesiastical courts must suggest caution in fully accepting Maitland's explanation. The courts had weapons of their own to counter writs of prohibition,²⁸ and where both parties to litigation were themselves ecclesiastics, as happened with depressing frequency in actions of debt and trespass, the searcher in the court records might expect to find *some* sign of this vital canonical principle at work. At least he might have a legitimate expectation of seeing it raised. He finds signs of spirited defence of ecclesiastical jurisdiction

²⁴ X 2.2.1; see also Paul Fournier, *Les Officialités* 64–73.

²⁵ See *Decisiones antike sacre Romanae Rotae* (1509) No. 840. The *decisio* is discussed in Walter Ullmann, 'A Decision of the Rota Romana on the Benefit of Clergy in England', *Studia Gratiana* 13 (1967) 455–89.

²⁶ 'Church, State, and Decretals', in *Roman Canon Law* 62.

²⁷ G. B. Flahiff, 'The Use of Prohibitions by Clerics against Ecclesiastical Courts in England', *Mediaeval Studies* 3 (1941) 101–16.

²⁸ See 'Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian', *Minnesota L. Rev.* 60 (1976) 1011–33.

in other areas. He finds much canon law applied even though there were common law rules to the contrary.²⁹ But in this area, there is nothing. Though English bishops occasionally complained about the situation, the searcher finds little to suggest that the bishops' courts attempted to do anything about it. The canonical principle, and the 1370s Rota decision, were apparently dead letters in the English spiritual courts. Civil jurisdiction *ratione personae* remained a matter of theory only in medieval England.

In sum, examination of English ecclesiastical court records shows that in practice the judges tacitly accepted the restriction of ecclesiastical jurisdiction to one based solely on subject matter. The situation, however uncanonical, was tolerated. This means that the record evidence produces several examples where the judges whose 'hands were free' habitually left the texts found in the 'papal law books' unenforced. These divergences between law and practice at the very least invite reassessment of the original controversy between Stubbs and Maitland. Such a reassessment will not show that the ecclesiastical courts in England were 'independent' of papal direction, but it does show a different habit of mind about practice and legal rule than Maitland and his opponents brought to the original controversy.

Both sides to the original controversy thought in terms of the legal theory they knew best, that is the jurisprudence of legal positivism. Either the decretals were regarded as 'binding statute law', or the English church enjoyed an unfettered 'right of accepting some and rejecting others'.³⁰ For Maitland, as for his opponents, it must have been one or the other. When he found medieval canonists writing that a law's validity was confirmed *moribus utentium*, he concluded that the opinion could only be 'some muddled definition'. In any event it was 'most unfortunate for them'.³¹ To Maitland, the *Rota Romana* must have appeared as something like an early day House of Lords.³² He supposed that once this highest court of appeal had spoken, the diocesan courts would fall into line if they could.

That is not how things worked. The medieval canon law admitted, or at least tolerated, a disparity between formal rule and local

²⁹ See Charles Donahue, 'Roman Canon Law in the Medieval English Church', note 4 above.

³⁰ 'Church, State, and Decretals,' in *Roman Canon Law* 81.

³¹ 'William Lyndwood', *ibid.* 31. ³² *Ibid.* 43.

customary practice that was hard to grasp in the heyday of Austinian jurisprudence. Indeed it is hard to grasp today. We may be dissatisfied with the descriptive sufficiency of legal positivism, but we are still accustomed to think of law as the command of a sovereign, and we see in the medieval Church a hierarchical system ideally suited to enforce commands. The evidence, however, calls us to think again. It calls us to examine more carefully the law of the medieval Church and the scholarly traditions that grew up and flourished around it.

The character of the Roman canon law

Medieval jurists did not regard the texts of most papal decretals as 'binding statute law' in the sense meant by Maitland. This is evident in learned commentaries on the canon law. It is evident from the internal fate of some of the decretals themselves.³³ It is evident in Continental court decisions, even some of the *decisiones* of the Roman Rota itself. The judges and the canonists habitually treated many of the texts with a freedom that is incompatible with a positivist understanding of law as judicial command backed by legal sanctions.³⁴ Some of what they did could be classed as 'statutory interpretation' and would not look much different from what happens in any legal regime. However, when one looks closely at specific instances, it becomes clear that they went a good deal further than merely interpreting authoritative commands.

Instances of the freedom which medieval jurists felt in dealing with the texts abound in the literature, but a particularly instructive

³³ E.g., the decretal of Alexander III holding that security for the payment of debts by a decedent's executor must be given before burial of his body would be allowed. See X 2.28.25; *Regesta pontificum Romanorum*, No. 14312 (2nd edn P. Jaffé & S. Loewenfeld eds. 1885-8) II:410. This did not become accepted canon law; see the discussion in *Councils and Synods*, I:489, n. 1.

³⁴ See René David, Preface to English Edition, *French Law: its Structure, Sources, and Methodology*, trans. M. Kindred (1972) viii-ix: 'It is crucial to remember that for many centuries "the law" as taught in the universities was purely an ideal law . . . While the rules of the ideal law were never entirely adopted, the rules developed by the government and the courts were never regarded by scholars, or by public opinion, as the law. This concept is difficult for the common law lawyer to understand, inasmuch as the common law is tied by definition to the work of the courts.' See also Joseph Canning, *The Political Thought of Baldus de Ubaldis* (1987) 64-8; Eric Waldram Kemp, *An Introduction to Canon Law in the Church of England* (1957) 11-32; Luigi Lombardi, *Saggio sul diritto giurisprudenziale* (1967) 119-25.

example is provided by one of the questions already mentioned, on which English practice diverged from the formal texts. That is the question of how many witnesses must be present at the execution to allow a court to treat a last will and testament as legally valid. The texts of the two papal decretals on the subject seem clear enough. There must have been two trustworthy witnesses plus the parish priest present at the time an ordinary last will and testament was made for it to be probated.³⁵ If a bequest *ad pias causas* were at issue, however, then the presence and testimony of 'two or three legitimate witnesses' would suffice.³⁶

These two decretals never functioned as modern lawyers expect statutes to. In the hands of medieval commentators, they and the Roman law on the subject led to speculation, distinction, and disagreement. How many witnesses were to be required became a *quaestio dubitabilis*,³⁷ a *quaestio perdifficilis*.³⁸ On the one hand, the civil law's rules requiring the solemnity and certainty afforded by several witnesses were evidently 'just and for the common utility'. Perhaps they were to be preferred.³⁹ On the other hand, the law's paramount goal was to establish and enforce the testator's true last wishes, and the testimony of two persons or sometimes even fewer ordinarily sufficed to do this. At least in the forum of men's conscience nothing mattered except the intentions of the testator,⁴⁰ and this implied a more relaxed standard, perhaps more relaxed than that provided in the two decretals. Antonius de Butrio (d. 1408), for instance, held that the testimony of only two unimpeachable witnesses would be enough. He reasoned that the underlying rationale, 'the mind' of the decretal was what counted, and that the mention of the parish priest was a matter of accident, not substance.⁴¹ Hence two witnesses sufficed. Other canon-

³⁵ X 3.26.10.

³⁶ X 3.26.11.

³⁷ Alexander Tartagnus (d. 1477), *Consilia* (Frankfurt 1575) Lib. I, Cons. 41, no. 5.

³⁸ Franciscus Mantica (d. 1614), *Tractatus de coniecturis ultimarum voluntatum* (Turin 1631) Lib. II, tit. 14. proem.

³⁹ *Ibid.* nos. 1, 4.

⁴⁰ *Ibid.* no. 23: 'Deus non curat nisi de intentione testatoris', speaking here of the internal forum.

⁴¹ *Commentaria in quinque libros Decretalium* (Venice 1578) at X 3.26.10, no. 3: 'Ego credo quod mens istorum textuum sit quod valet testamentum etiam cum duobus testibus sive sit ad pias causas sive non . . . et quod dicit de presbytero loquitur secundum consuetudinem et accidentia facti.'

ists took a stricter view, some even holding that a higher standard than that found in the decretal should be required.⁴²

Complicating the matter, at least on the Continent, was the vexed question of which court system was the proper forum for probate and the existence of many local statutes regulating the law of succession. Testamentary law was not a strictly spiritual matter under the *ius commune*, and there was variety of approach in various parts of Europe. Commentators took these factors into account. They strove to fit the pieces together. They tried to arrive at the just solution, balancing both texts and policy. In other words, what would look to be a fairly straightforward question if one took the decretals as statutes in the modern sense in fact became a much more complicated inquiry in the hands of the medieval commentators.

Any student of the medieval Roman and canon laws must be struck by how often this situation recurred. Many important legal questions were subject to doubt, discussion and dispute. Were personal tithes owed to the clergy *iure divino*, or could they be abrogated or diminished by prescriptive non-payment?⁴³ Could a child's share of his deceased parent's estate be taken away, either wholly or in part, by statute or local custom?⁴⁴ Even many a minor point – what penalty was to be meted out to a man who had kissed a mature but unwilling virgin in the streets of Naples? – was capable of causing lengthy scholarly controversy.⁴⁵ About these, and many other questions, the *doctores* were *varii et diversi*.⁴⁶ Sir Edward Coke's complaint that the tradition of the Roman canon law tradition was a 'sea full of waves' is amply confirmed by comments of writers from within that tradition.⁴⁷ As one

⁴² The *locus classicus* for discussion of the various opinions on the subject is X 3.26.10; see, e.g., Panormitanus, *Commentaria in libros Decretalium* (Lyons 1562) ad id. He personally rejected de Butrio's solution, but argued that the presence of two additional witnesses might take the place of the parish priest. See also Angelus de Gambilionibus (d. post 1451), *Tractatus in materia testamentorum* (T.U.I. VIII:1) Pt. 1, no. 16.

⁴³ See Petrus Rebuffus (d. 1557), *Tractatus de decimis* (Antwerp 1615) Quaest. 13, nos. 43–4.

⁴⁴ Andreas Gail (d. 1587), *Observationes practicae imperialis camerae* (Turin 1595) Lib. II, Obs. 122.

⁴⁵ Matthaeus de Afflictis (d. 1510), *Decisiones sacri regii Neapolitani consilii* (Frankfurt 1616) Dec. 286.

⁴⁶ *Decisiones antiquae sacre Romanae Rotae*, No. 29.

⁴⁷ *Second Part of the Institutes of the Laws of England* (1642), Proeme, at end.

early Spanish jurist put it, 'Whenever there are *opiniones Doctorum* on any question, the question becomes a doubtful one.'⁴⁸

It is fair and important to add that out of the jurists' discussion very often a *communis opinio* emerged. It might be dissented from, but only for weighty reasons.⁴⁹ No legal system can tolerate endless uncertainty, and the existence of such an academic consensus was one way the Roman canon law avoided, or at least minimized, that danger. None the less, it did tolerate a degree of disagreement and uncertainty greater than is consistent with the vision of an ordered system of statute law and appellate courts that both Maitland and Stubbs carried into their original controversy. More could be, and was, left open to doubt and discussion. More could be, and was, left open to local customary practice.

Whether a modern student finds this feature of the *ius commune* attractive or off-putting must depend to some extent upon personal taste. Certainly it had its critics at the time. One sixteenth-century jurist wrote of the learned law, 'The worst of all (its) vices is the uncertainty that proceeds from the disputations and opinions of the commentators.'⁵⁰ The humanists said worse.⁵¹ Jeremy Taylor, the seventeenth-century English divine, who examined the canonical rule requiring all defendants to be legitimately cited as a representative example of the canonical rules discovered that, 'of this rule Porcius brings an hundred and sixteen ampliations and an hundred and four and twenty limitations'.⁵² The books of the Roman and canon law, he concluded, were 'a laborious vanity, consumptive of our time and health to no purpose'.⁵³

There was (and is) another side. All sophisticated legal systems

⁴⁸ Rodericus Suarez (fl. 1494), *Allegationes et consilia*, Alleg. 25, nos. 5–6, in *Opera omnia* (Frankfurt 1594): 'Nam quando super aliqua quaestione sunt opiniones Doctorum, ex hoc efficitur quaestio dubia. Opiniones enim Doctorum faciunt rem ambiguum.'

⁴⁹ See Helmut Coing, *Europäisches Privatrecht 1500 bis 1800* (1985) I:124–6; Luigi Lombardi, note 34.

⁵⁰ Nicolaus Vigelius (d. 1600), *Methodus universi iuris pontificii* (Basel 1577), Proem: 'Pessimum omnium vitium est ipsa legum canonumque incertitudo quae ex interpretum disputationibus ac opinionibus procedit.' See also Matthaeus de Afflictis, *Decisiones sacri regii Neapolitani consilii* (Frankfurt 1616), Dec. 1, nos. 11–14.

⁵¹ Julian H. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (1963) 18–58.

⁵² *Ductor dubitantium* (1676), p. v.

⁵³ *Ibid.* p. viii. See also the interesting contrast, found in Strype's *Annals* *551, between the 'speculation' said to be characteristic of civilian studies and the more healthful certainty characteristic of the study of divinity.

leave room for line drawing, distinction and consequent disagreement. Sometimes the lines are fine and the distinctions complex. The sixteenth-century English common law contained many such and would know many more. It may also be that, given the conditions of life in the Middle Ages, the existing Roman canon law was a more flexible and realistic system than one that pretended to leave few matters open to doubt. It provided more room for interplay between judges and those whose lives were affected by the law than one that purported to rely on unalterable rules.

Moreover, at least as it seemed to the canonists and civilians, the canon law as understood in the Middle Ages accurately portrayed the limited capabilities of all who enforced and interpreted the legal rules. None of them thought they deserved to speak with absolute certainty about the law.⁵⁴ As long as law was meant to do justice, there was reason for diffidence. Their characteristic (and to modern lawyers tedious) recitations and balancing of texts and opinions pro and con were the inevitable result. We can only recognize how normal they were in the Roman canon law, and how essential recognizing their existence is to its comprehension today.

The limitations of the positivist model of law that Maitland and his opponents brought to the subject are, if anything, more evident if one moves from academic commentaries to accounts of Continental court practice. *Decisio* 184 from the widely circulated collection of cases from the diocese of Toulouse provides a good example. This decision, from 1393, involved a question of what procedure was necessary before remitting a cleric from a temporal to an ecclesiastical court. One proctor argued against remission, basing his argument on a papal decretal found in *Liber Sextus*. However, the *decisio* continues, 'It was replied by the archbishop's court that notwithstanding the opposition of the said king's proctor the said remission ought to be made, because the said text has never been used in practice.'⁵⁵ In other words, the French ecclesiastical lawyers themselves did not feel themselves bound by the cited text, at least when it would have worked against their interests. That particular law had never been enforced.

⁵⁴ See the remarks by E. W. Kemp in *Introduction to Canon Law*, note 34, at 31-2.

⁵⁵ *Decisiones capellae Tholosanae* (1543), Quaest. 184: 'Replicatum fuit per curiam archiepiscopi quod non obstante oppositione dicti procuratoris regii debeat fieri dicta remissio quia nunquam dictus textus fuit practicus.' See also *Additio* ad Quaest. 133: 'Adde quod licet iudex ecclesiasticus possit compellere iudicem temporalem ut repellat excommunicatos ab actibus judicialibus . . . de generali consuetudine Francie istud non servatur.'

The decretal law of succession provides a second example. Its texts expressly forbade monks from securing appointments as testamentary executors, at least without the permission and exaction of a suretyship bond from their superior. Nevertheless, in some places monks customarily did so serve. Joannes Jacobus a Canibus (d. 1490), whose fifteenth-century treatise on the office of testamentary executors won its way into the *Tractatus universi iuris*, recited the formal rules against the appointment of monks at some length. 'However', he continued, 'custom admits them even without a license.'⁵⁶ Customary observance in the courts he knew thus overcame the letter of the canon law.

Robertus Maranta (d. 1540), a teacher and writer on canonical procedure, expressed a common opinion among his fellows when he noted that, 'where the *ius civile* establishes equity and the *ius canonicum* formality, the *ius civile* prevails even in the ecclesiastical forum'.⁵⁷ Under the regime he described, judges even in courts directly subject to the jurisdiction of the papacy could disregard papal decretals where the equity of the case required it. They were to prefer the canon law, however, when it embodied the fairer rule. Again, Maranta's statement illustrates that ecclesiastical lawyers seem not to have regarded the canonical texts as 'binding statute law' in the modern sense.

The canon law's tolerance for disparity between formal rule and customary practice becomes particularly clear when one examines works of the sixteenth century, from which accounts of *praxis* in the courts are more frequent than from the Middle Ages. Julius Clarus, for example, an Italian jurisconsult whose life spanned the Reformation and the Council of Trent and whose work on criminal procedure was much used in England, showed that under the law the existence of public fame against an individual must be proved before

⁵⁶ *Tractatus insignis de executoribus ultimarum voluntatum* (T.U.I. Vol. 8, Pt. 1) tit. *Antequam*, no. 31: 'licet consuetudo admittat eos etiam sine licentia'. The customary principle of interpretation, stated here at no. 44, was 'Consuetudo optima est legum interpres.' See also *Decisiones capellae Tholosanae*, *Additio* ad Quaest. 154: 'Adde quod quicquid sit de iure tamen consuetudine servatur quod maior xvii et minor xxv et femina possunt esse executores testamenti.' Compare Sext 2.1.2.

⁵⁷ *Speculum aureum et lumen advocatorum praxis civilis* (Venice 1556) Pt. III, no. 76: 'Item ubi ius civile statueret aequitatem, ius canonicum rigorem, servatur ius civile etiam in foro ecclesiastico, et non ius canonicum.' For discussion of this point, see Felinus Sandeus (d. 1503), *Commentaria in libros decretalium* (Basel 1567) at X 2.20.15 (*In causis*) no. 1; Marcus Antonius Genuensis, *Tractatus de ecclesia sive practicabilia ecclesiastica* (Rome 1620) Quaest. 176.

questioning of witnesses against him could be undertaken. He added however that, 'although this is true *de iure*, practice teaches the exact opposite, which is what is observed'.⁵⁸ In a treatise devoted to *praxis* within the archiepiscopal court of Naples, Marcus Antonius Genuensis also argued that by law at least *probatio semiplena* had to precede the examination of those accused of crimes. Many advocates, he observed, had made the point. Yet the *antiquissima observantia* of the court was to the contrary. No such initial showing was habitually made. And *ita servatur*.⁵⁹

The regime in which practice could deviate from formal rule sometimes prevailed even at the papal court itself. Octavianus Vestrius (d. 1573), whose *Introductio* to practice in the courts at Rome was widely circulated and used even in England, wrote that the requirements of the law that disqualified clerics from serving as proctors and advocates were simply not observed in Roman practice. The laws against such usage were clear enough to him. However, in fact they were being left unenforced. In contemporary practice, he wrote, the contrary rule *servatum est*.⁶⁰ Prosper Farinacius, advocate and procurator fiscal at the papal court under Paul V, described the treatment of the cardinals at the Roman court in much the same terms. Though the law required even cardinals to produce papal mandates of legation when the rights of others were concerned, *de consuetudine* no such requirement was imposed.⁶¹ It was, according to Farinacius, a custom *contra ius*, but it was what was observed in fact.

The men who wrote these descriptions of contemporary court practice were not crypto-Protestants. They would have been astonished to hear their words read as anti-papal in intent, and their

⁵⁸ *Practica criminalis* (Lyons 1661) Lib. V, Quaest. 6, no. 1: 'Sed certe quicquid sit de iure totum contrarium docet practica, quae communiter observatur.'

⁵⁹ *Praxis archiepiscopalis curiae Neapolitanae* (Rome 1609) Cap. VI, nos. 2-3: 'In contrarium se habet antiquissima observantia curiae archiepiscopalis Neapolitanae. . . . [et] ita servatur in toto orbe et urbi, etiam coram papa, quod prius constituitur reus et postea repetuntur testes.' Compare X 2.1.4.

⁶⁰ *In Romanae aulae actionem et iudiciorum mores introductio* (Cologne 1573) Lib. III, c. 4, no. 4: 'Caeterum ex tolerantia Pont. servatum est ut clerici in Romana curia advocacy et procurationis munera exerceant contra iuris regulas.' For a sophisticated analysis of theory and practice in the papal states, see Paolo Prodi, *The Papal Prince*, trans. Susan Haskins (1987) 112-15.

⁶¹ *Variarum quaestionum et communium opinionum criminalium* (Venice 1589) Lib. II, quaest. 63, c. 2, no. 64: 'ut quicquid sit de iure, de consuetudine Romanae curiae creditur cardinali alicui asserenti etiam in preiudicium alterius'. See also *Decisio* 793 (1584), in *Decisionum diversorum Rotae Romanae* (Venice 1590), for a similar example.

observations about customary court practice could be matched by their expansive statements endorsing the plenitude of papal power.⁶² Certainly they would have felt little affection for the Church of England. Its separation from the Church of Rome they would have deplored, and upon the claim that its spiritual courts had long asserted an 'independence' of the papacy they would have heaped scorn. The evidence used to suggest such independence, they would have argued, could be matched by similar evidence from France, Spain, and Italy.⁶³ And some of it would merely have demonstrated the sad fact that law as put into practice cannot always match what law should be.⁶⁴ That the Church had long tolerated the disparity would have been a sign of the weaknesses of human nature as often as it would have been an indication of desirable diversity.⁶⁵ It would not have seemed to them a legitimate argument in favour of the Protestant form of Christianity.

All of this means, not that Maitland was wrong and Stubbs was right, but that the Roman canon law in England on the eve of the Reformation shared in a characteristic common to the canon law throughout western Europe. It did not function the way we expect an appellate legal system based upon binding statute law to function. It left more scope for freedom in interpreting and developing legal principles. It left more room for judges whose 'hands were free' from temporal bindings to follow local traditions and needs, sometimes even where decretal law appeared to direct the contrary. That sort of freedom, far from making the English Church 'insular', shows that it was fully a part of Continental legal traditions.

Appreciation of this side of the medieval canon law turns out to be important – indeed essential – for understanding the effect of the Reformation on English legal practice. The civilians who practised in the ecclesiastical courts had grown up in the traditions of the Roman canon law. They were accustomed to its style of analysis. They were used to its complexities. They would not have regarded the substi-

⁶² For example, Robertus Maranta, note 57, followed the quoted statement with the common view that 'in decisionibus causarum' the authority of a papal statement was to be preferred to the authority of the Church fathers and all theologians. See *ibid.* no. 77.

⁶³ See, for example, the description of tithing practices in Andreas de Escobar (d. 1427), *Regula decimarum* (T.U.I. Vol. 15) c. *decimarum solutione* nos. 2–3.

⁶⁴ See the discussion in René David, *French Law*, note 34, xiii–ix.

⁶⁵ See Franciscus Suarez (d. 1617), *De legibus et Deo legislatore*, Lib. VII, c. 6, no. 4 (London 1679): 'Multa fieri prohibentur quae tamen facta tenent.'

tution of royal power for papal as reason for abandoning habits that were ingrained. Thus, although much customary practice simply continued throughout the Reformation era, in their eyes most of it had never been thought of as raising fundamental issues of religious or secular authority. We may see questions of papal power inevitably lurking in every corner of the Roman canon law. They did not. When the historian asks, therefore, whether there was continuity or discontinuity across the Reformation divide, he must approach the question remembering that the civilians did not share the habits of mind that we associate with legal positivism.

CANON LAW AND MEDIEVAL ENGLISH COMMON LAW

This said, it remains true that the Reformation changed the nature of relations between Church and State in important ways. The civilians did not regard their world as wholly unaffected by events of constitutional significance. A second preliminary subject of inquiry must therefore be the medieval inheritance of England's ecclesiastical courts in dealing with the courts of the English common law. Nothing was written on a blank page. Lawyers on both sides argued and thought about the scope of ecclesiastical jurisdiction in terms they had inherited from the past. The medieval evidence continued to be cited as the relevant evidence, and most of the principles of jurisdiction remained formally the same. The degree to which they were pushed is what changed.

Whether the overall relationship between the common law and the spiritual courts can best be characterized in terms of conflict or of co-operation during the medieval period is not an altogether easy question. Certainly there was some of both. Maitland's generation tended towards emphasizing the conflicts; ours tends towards the co-operation.⁶⁶ For understanding the significance of sixteenth-century developments, however, no final choice between the two need be made. It will be enough to look briefly at four salient aspects of the relationship as it existed before the start of the Tudor era.

⁶⁶ See the evidence and summary, W. R. Jones, 'Relations of the two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries,' in *Studies in Medieval and Renaissance History* (ed. William M. Bowsky, Vol. 7, 1970) 77-210.

Jurisdiction in the Middle Ages

First, there was a large measure of agreement about the extent of church's subject matter jurisdiction. The common law courts conceded to the Church the principal jurisdiction over the five kinds of 'instance' litigation outlined at the start of this chapter: marriage, probate, defamation, perjury, and tithes. Neither did the King's courts raise objections to the Church's broad *ex officio* jurisdiction over 'spiritual' crimes such as fornication, sorcery, and simony. The ecclesiastical lawyers were accustomed to hearing these causes and believed them to belong to their jurisdiction as of right and immemorial custom. Just as important, they themselves made no attempt, or little, to implement the full extent of spiritual jurisdiction claimed in 'papal law books'. They did not willingly upset a settled situation.

Many of these apparently settled boundaries were the product of long tradition and compromised controversy. They had left the Church with a jurisdiction that was in some ways smaller than in most Continental countries, but also in some ways larger. The English courts exercised no civil jurisdiction over clerics *ratione personae*, for example, but they had the right to secure the imprisonment of all excommunicated persons and to repel excommunicates from pleading in all courts, spiritual and secular.⁶⁷ In France, the opposite regime obtained. Jurisdiction there, it should be said, was equally the product of compromise and mutual toleration. There was local variation and room for change on both sides of the Channel. In neither place did the canon law hold full sway, and the exact shape of the jurisdiction which had emerged from the process took a peculiar form in each place.

Second, the common law judges claimed the exclusive right to police these jurisdictional boundaries. If an ecclesiastical court attempted to entertain a suit involving trespass to freehold property, for example, it could be prevented from doing so by the royal courts, primarily through the issuance of a royal writ of prohibition. This writ, available to parties cited by the ecclesiastical court in causes which 'touched the Crown and the royal dignity', accomplished just what their name implied.⁶⁸ They prohibited the spiritual court from

⁶⁷ Elisabeth Vodola, *Excommunication in the Middle Ages* (1986) 164–90.

⁶⁸ The fundamental work is G. B. Flahiff, 'The Writ of Prohibition to Court Christian in the Thirteenth Century' (Part 1), *Mediaeval Studies* 6 (1944) 261–313 and (Part 2), *ibid.* 7 (1945) 229–90, supplemented by my 'The Writ of Prohibition to Court Christian before 1500', *ibid.* 43 (1981) 297–314.

proceeding in a cause outside its jurisdiction, and threatened temporal penalties if the cause were continued in fact. Though indirect in the sense that they required application by one of the parties to litigation in the ecclesiastical forum, prohibitions were direct and forceful in the sense that they proclaimed that the English Crown, and not the canon law, was the ultimate arbiter of the Church's jurisdictional competence.

Medieval English ecclesiastical lawyers obeyed royal writs of prohibition. However canonically objectionable they might be, they were established parts of the legal landscape in England. The Church's officials could not wish them away. They found ways around some of them,⁶⁹ but for the most part they accepted the jurisdictional rules they found stated in the writs, and they tolerated as a fact of life that the temporal courts had the power to affect the scope of their jurisdictional competence. What they objected to most vigorously were the occasional attempts that were made to expand the reach of writs of prohibition to upset the traditional boundaries. Though they might obey the commands of the specific writ in such individual cases, they would not automatically bring their *future* conduct into line with those commands.

Third, within the traditional boundaries, the Church courts were generally free to follow their own law, that is the Roman canon law. This system differed in many particulars from the English common law. For instance, proof of facts was ordinarily accomplished by judicial evaluation of the testimony of witnesses, not by a sworn inquest of laymen as it was in the common law courts. Also, the ecclesiastical courts demanded two unimpeachable witnesses who agreed in all matters of substance to constitute satisfactory proof of most facts. No such rule obtained in the common law courts, where trial by jury was the norm. Further, married women might take part in canonical litigation, usually without the presence or even the consent of their husbands, a right the common law did not afford them. In these, and most other matters belonging to English spiritual jurisdiction, the courts of the medieval common law did not seek to intervene, still less to impose the procedural rules of the common law on the spiritual courts.

A few situations where the opposite rule obtained did exist. That is, there were a few cases where the temporal law had taken upon itself to

⁶⁹ E.g., Lyndwood, *Provinciale* 315 s.v. *perjurio*, on suits brought to enforce contracts.

direct the ecclesiastical courts to act in specific ways, and there was some thought which would justify many more.⁷⁰ Most of those which existed were created by acts of Parliament. For instance, two medieval statutes regulated, or purported to regulate, the fees payable in the ecclesiastical courts for probate of testaments.⁷¹ A statute of Edward III provided an exemption of 'great wood' of over twenty years growth from the payment of tithes.⁷² Another purported to control the spiritual courts' choice of the administrators for estates of intestates.⁷³ But these were exceptional situations, and the extent to which the statutes were enforced in the Middle Ages remains open to doubt. In the main, the common law exercised supervision over the courts of the Church only in policing established jurisdictional boundaries, not in controlling the internal workings of the Roman canon law.

Fourth, despite the settled state of ecclesiastical jurisdiction, there were a few minor areas of long-standing conflict between the ecclesiastical courts and the common law. Each of the five areas that was central to the Church's jurisdiction contained within itself some inroad into the sphere of common law jurisdiction. None of the encroachments alone represented a major threat to the royal courts. But they were an irritant. And in four of them the potential for conflict had become obvious and obnoxious to the common lawyers by the last quarter of the fifteenth century. An attack on these encroachments occurred in the years before the English Reformation. Understanding the nature and the outcome of that attack provides an essential perspective on the state of the ecclesiastical courts during the first half of the sixteenth century.

In the Church's testamentary jurisdiction, the use of the ecclesiastical courts to recover debts owed to, and owing by, decedents as part of the settlement of probate estates was an infringement of the principle that all pleas of debt were temporal in character.⁷⁴ Though most contested pleas involving testamentary debt were brought in the temporal courts, as they should have been, not all were. The records of the English spiritual courts contain many causes dealing with the debts of decedents. And as long as the courts that proved a man's will

⁷⁰ Christopher St German, *Doctor and Student*, eds. T. F. T. Plucknett & J. L. Barton (S.S. Vol. 91, 1974) 317–40.

⁷¹ 31 Edw. III st. 1, c. 4 (1357); 4 Hen. V c. 8 (1415–16).

⁷² 45 Edw. III c. 3 (1371).

⁷³ 31 Edw. III st. 1, c. 11 (1357).

⁷⁴ See 'Debt Claims and Probate Jurisdiction in Historical Perspective,' *American Journal of Legal History* 23 (1979) 70–7.

could also serve as the forum for obliging his creditors and his debtors to settle their accounts, pleas of debt would indirectly be drawn away from the temporal forum. This is what happened in medieval probate practice. It was even said in jest that a man improved his chances of recovering a debt owed to him by dying, for then there would be a choice of forum in which to recover it.

In the law of defamation, where the slanderous words imputed a temporal crime to the plaintiff, and when the defendant alleged that the words were true, the ecclesiastical courts were led indirectly to determine a purely temporal question: whether or not the plaintiff had committed the temporal crime.⁷⁵ For instance, if the defendant had said that the plaintiff was a thief and the defendant justified his words by alleging that the plaintiff had in fact stolen his goods, the ecclesiastical cause depended in part on answering the strictly temporal question of whether or not the plaintiff had committed the crime. As long as the ecclesiastical courts were allowed to entertain defamation actions of this sort, common lawyers of a strict frame of mind might think that the common law monopoly over pleas of the Crown was in danger. Publicity following ecclesiastical proceedings might indirectly affect the outcome of prosecutions in the royal courts.

On the *ex officio* side of the Church's jurisdiction, something like the same thing happened. Whether as a result of perceived weaknesses in the royal courts, or because of aggression by the spiritual courts, in the later Middle Ages crimes that would have been classed as pleas of the Crown sometimes came before the ecclesiastical courts.⁷⁶ In them, the guilt of a person publicly suspected of crimes like murder, extortion, theft, or rape was tested by compurgation or by the testimony of witnesses. Such prosecutions did not occur with great frequency, and the spiritual courts did not actually mete out punishment to those who were shown to be guilty. That lay outside their claim to corrective jurisdiction. As often as not, the purpose of the proceedings seems actually to have been to secure a public declaration of the innocence of a person publicly rumoured to have committed a crime. The challenge to the King's jurisdiction was, therefore, quite indirect. But spiritual determination of the underlying matter was theoretically in

⁷⁵ See Lyndwood, *Provinciale* 313 s.v. *purgatio admittatur*.

⁷⁶ Evidence on this point is collected in 'Crimes, Compurgation and the Courts of the Medieval Church,' *Law and History Rev.* 1 (1983) 1-26.

derogation of the rights and dignity of the Crown, and it could have had a practical effect as well. It might affect the outcome of subsequent criminal proceedings in the royal courts by its influence on local opinion.

Ecclesiastical encroachment on common law principles was most persistent and had the most far reaching consequences in what we would now call the law of contracts. The canon law held that the addition of an oath to a promise permitted spiritual courts to take jurisdiction over what would ordinarily be a purely temporal matter. They could enforce the sworn promise.⁷⁷ This meant in practice that so long as a very few words – ‘by my faith’ or some variant – were added to a promise to pay money or deliver goods, the ecclesiastical courts would entertain a suit to enforce the contract. They would order its specific performance. By the middle of the fifteenth century, this sort of litigation had come to dominate the business of most ecclesiastical courts in England.⁷⁸ It had put them in the business of petty debt collection, and it clearly violated the common law principle that pleas of debts and chattels belonged exclusively to the temporal side of things. As with the other three areas of jurisdiction, the rights of the ecclesiastical courts to jurisdiction over sworn promises rested on an apparent unwillingness by the royal courts to take active steps fully to enforce long-standing principles of the English common law.

Attacks on the Church's medieval jurisdiction

Beginning in the 1480s, all of these encroachments on the principles of the common law came under attack in the Court of King's Bench. Side-stepping the procedural limitations that had attached themselves to the medieval writ of prohibition issued by the Chancery, litigants began to make use instead of actions based on the fourteenth-century statute of *Praemunire*. That statute had originally been meant to prevent appeals to the Roman court, but under an expanded interpretation it was now read to apply also to litigation in the spiritual courts within England itself.⁷⁹ This interpretation allowed litigants

⁷⁷ Sext 2.2.3.

⁷⁸ For the prevalence of these causes, called *cause fidei lesionis seu perjurii*, see Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952) 89–92; Richard M. Wunderli, *London Church Courts and Society on the Eve of the Reformation* (1981) 104–8.

⁷⁹ A. Fitzherbert, *Abridgement* tit. praemunire, no. 5.

who had been sued in any ecclesiastical court to prevent further proceedings there and to punish those who had initiated them.⁸⁰ During the last quarter of the fifteenth century, increasing numbers of litigants who had been sued in a spiritual tribunal began to invoke the statute against both the opposing parties and the ecclesiastical officials.

The common allegation in these actions was that the proceedings in the ecclesiastical forum were being taken in derogation of the rights and dignity of the English crown, and that in consequence those who had initiated them should be liable both to damages and the criminal penalties laid out in the statute of *Praemunire*. As noted above, there was merit to that allegation. In fact, no legal defence to its substance was possible under existing common law. The allegation was true. The end result was that suing in an ecclesiastical court for testamentary debt, breach of faith, or defamation involving the imputation of a temporal crime became a dangerous thing to do. Potential plaintiffs began to look elsewhere rather than risk prosecution under the statute.

The cumulative effect of the *Praemunire* actions in the King's Bench amounted to a frontal attack on ecclesiastical jurisdiction. The reasons for the timing and even the exact history of these events are not yet perfectly understood. The explanations for what happened must count among them a greater maturity of legal thought by the English common lawyers, a consequent expansion of the possibilities inherent in common law procedure, and heightened consciousness of the division between the temporal and the spiritual spheres of human life. These are important aspects of the history of the common law, and they ought to count in any serious attempt to assess the fate of the Roman canon law in the Reformation era.

Knowledge of their existence is important in understanding the history of the Roman canon law in England, because the attacks on ecclesiastical jurisdiction were clearly important to sixteenth-century ecclesiastical lawyers. From their point of view, the assaults meant that at the turn of the century their courts were under siege. It cannot have been clear to them how far the attacks would extend, and some of the *Praemunire* actions being brought in the King's Bench suggested

⁸⁰ See J. H. Baker, Introduction to *The Reports of Sir John Spelman*, S.S. Vol. 94 (1978) 66–70; Ralph Houlbrooke, 'The Decline of Ecclesiastical Jurisdiction under the Tudors', in *Continuity and Change. Personnel and Administration of the Church of England 1500–1642*, eds. R. O'Day and F. Heal (1976) 239–57, esp. 240–3.

that they might extend very far indeed. They went much beyond correcting the traditional 'abuses' in the four areas of jurisdiction noted above. The consequences of these events for the functioning of the spiritual courts are part of the following chapter. They meant that as the Tudor age began, it looked as though the settled compromises and agreed upon rules that had long defined the Church's *de facto* jurisdictional rights might well be overthrown.

THE FORTUNES OF ECCLESIASTICAL JURISDICTION

The searcher who examines the records of the ecclesiastical courts in order to trace the fortunes of the Church's jurisdiction during the Reformation era finds that the period from the accession of the Tudors to the start of the reign of Charles I breaks roughly into three segments. The first lasted up to the start of the 'official' Henrician Reformation in 1529. These years witnessed a prolonged attack upon the Church's traditional jurisdiction and a gradual acquiescence by the ecclesiastical lawyers in jurisdictional boundaries changed to their detriment. The second period lasted from the time of the Reformation statutes until about 1570. It was a time of uncertainty about the future of the spiritual courts, continued low levels of litigation within them, and surprisingly small variation in court practice, given the dramatic swings in religious policy of the three monarchs who followed Henry VIII. The third period lasted into the reign of the first Stuart king of England. It was a time of recovery of nerve by the civilians, expansion of litigation within the courts, creation of an indigenous literature of English ecclesiastical law, and conflict with the common lawyers.

The story told by the records turns out to be neither simple nor dramatic. It has many twists and turns, and not every piece of evidence points in the same direction. Not all of it suggests the same sort of conclusion about the efficacy or the future of spiritual jurisdiction in England. Tracing the fortunes of the spiritual courts through their records of 150 years warns repeatedly against seeking the definitive historical verdict that one might expect to emerge from prolonged study of act books and cause papers. Probably a mere lawyer should tread warily in dealing with themes that touch the general history of the Reformation. Certainly he must not pontificate. Still, I think the evidence taken from the court records shows that generalizations some historians have made about the fate of the courts of the Church are partial, premature or mistaken. There were no

decisive events. What turns out to be only a temporary phenomenon can too easily be elevated into a final turning point. When this happens, later evidence seems contradictory, or at least highly inconvenient.

The overall effectiveness of the ecclesiastical courts and the Church's ability to legislate for itself, for example, has sometimes been pronounced dead in 1535.¹ It is easy to see why. The English clergy had capitulated on an important matter of principle. They had endorsed the royal supremacy over the clerical order. It seems all but inevitable that this capitulation should have affected the ecclesiastical courts decisively, and for the worse. In some ways it did, but a longer view of the evidence shows considerable signs of vigour in the Church's courts seventy-five years later. The Church was apparently even legislating for itself. The records of the end of the period show the courts enforcing purely ecclesiastical statutes with consistency and apparent effect.

On the other hand, too much should not be made of the continuation of effective ecclesiastical legislation during the reigns of Elizabeth and James I. It seems equally mistaken to treat the retention of the power to enact statutes as itself a 'decisive' event. The notion was abroad that Convocation could not legislate for the laity without the consent of Parliament. Its spread had deleterious effects upon the ability of the spiritual courts to turn legislative enactment into everyday exercise. The supremacy of the statutes passed by Parliament over the statutes passed by Convocation was also admitted, even by serious partisans of ecclesiastical jurisdiction. The balance between Church and State simply did not rest where it had been in the fifteenth century, no matter the continuity in formal structure and ability to legislate. It has seemed right, therefore, to avoid categorical judgments on subjects like the Church's independence or its power over the laity, even though this deprives the subject's history of some clear conclusions and (let it be admitted) some dramatic narrative as well.

This does not mean that the history of ecclesiastical jurisdiction in post-Reformation England lacks themes. The resilience of the Roman canon law and the attempts made by the ecclesiastical lawyers to adapt medieval practices to the changed circumstances of the Reformation era are two themes that emerge clearly from any prolonged study of

¹ See, e.g., J. J. Scarisbrick, *Henry VIII* (1968) 241–304.

the records. They will also be mine. But I should admit at the outset that not every current of historical change ran in the same direction. There was much backing and filling. I shall try to identify some of the eddies as well as the main currents.

THE EARLY TUDOR YEARS

The Tudor era began, as we have seen, with an attack on several aspects of the Church's medieval jurisdiction. Actions of *Praemunire* begun in the Court of King's Bench and to a lesser extent improved procedures for issuing writs of prohibition put the existence of the *de facto* rights of the spiritual tribunals into serious jeopardy. Important parts of their jurisdiction over defamation, testamentary debt, breach of faith, and offences against public morality were being effectively challenged by litigants, who were making use of legal machinery newly made available by the royal courts. The men who earned their livelihood in the spiritual courts had much to fret about in consequence.

Surprisingly, at the time not much attention was paid to these events. Although their cumulative effect was great, few of the actions challenging the competence of the courts of the Church seem to have startled contemporaries. The assaults were not officially sponsored, but rather the product of the initiative of individual litigants, and this may explain part of the reason so little notice of them was taken by writers during the Reformation era. Perhaps just as important, however, the actions based on the statute of *Praemunire* purported to do no more than apply traditional common law jurisdictional rules. They announced no new principles. That pleas of debt should not be permitted in the ecclesiastical courts under the 'disguise' of breach of faith, for instance, was a twelfth-century rule of the common law. It was embodied in one of Henry II's Constitutions of Clarendon.² Attacks on the Church's jurisdiction over *laesio fidei* by means of *Praemunire* actions would not, therefore, have appeared wholly novel. They were simply a more effective way of enforcing the traditional principle that any ecclesiastical jurisdiction over pleas of debts and lay chattels offended the rights of the English Crown. All that was novel was the sustained and procedurally effective nature of

² Stubbs' *Select Charters*, rev. edn H. W. C. Davis (1921) 167.

the assault.³ The new factor, in other words, was that oft stated common law principle was becoming also the fact.

It is true that occasional attempts were made to reach some previously undisputed areas of ecclesiastical competence during this period, and that in this sense what was happening was more than more stringent enforcement of traditional rules. It could be argued, for instance, that almost any suit for tithes in an ecclesiastical court violated jurisdictional principles because *severed* tithes were mere lay chattels and because all tithes had to be severed to be collected. Such an extension, if fully implemented, would have spelled the demise of the bulk of the Church's jurisdiction over tithes. Arguments to this effect, or something very like them, were in fact advanced.⁴ But they did not become the rule. The primary areas of attack, and the ones that became established legal practice, were centred in the four areas of disputed jurisdiction already outlined. That is: ecclesiastical jurisdiction over contract by *laesio fidei*, defamation for imputations of temporal crimes, the collection of testamentary debts, and *ex officio* jurisdiction dealing incidentally with pleas of the Crown. Depriving the Church of its jurisdiction over these four areas of legal practice was the principal effect of the series of late fifteenth and early sixteenth-century *Praemunire* actions.

Under the weight of these actions, the amount of litigation being heard within the ecclesiastical courts slowly contracted. However traditional the legal theory behind the assault, in fact the results were dramatic. The diocesan court at Canterbury, for example, handled 636 cases in 1482. By 1522, that number had shrunk to 223, a decline of almost two-thirds within forty years.⁵ In Lichfield's consistory court the annual volume of litigation declined from 102 to only 68 cases between 1476 and 1531.⁶ Where London's commissary court

³ See the description of the extent and range of the actions in J. H. Baker, Introduction to *Reports of Sir John Spelman* (S.S. Vol. 94, 1977) II:66-7.

⁴ E.g., *Hammond & Hammond v. Somnour* (1492), P.R.O. KB 27/925, m. 25. The plaintiffs pleaded: 'licet placita transgressionis videlicet captionis et abductionis et asportationis quorumcumque bonorum et catallorum . . . ad coronam et dignitatem domini regis specialiter et non ad forum ecclesiasticum pertineant', the defendant had nevertheless cited them 'de subtractione et perceptione decimarum fructuum'. The defendant entered a general denial, but no result survives.

⁵ Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952) 45.

⁶ See 'Assumpsit and *Fidei Laesio*', *L.Q.R.* 91 (1975) 427.

had dealt with 980 cases in 1471, by 1514 its officials had to be content with the comparatively tiny number of 143.⁷

In a few dioceses, accident or episcopal energy postponed the decline. Dr Lander has shown that the reforming efforts of Bishop Robert Sherburne at Chichester in the 1520s succeeded in maintaining that consistory court's effectiveness for a time.⁸ In the diocese of Durham, where the bishop held temporal as well as spiritual jurisdiction, the immediate impact of the *Praemunire* actions was also blunted.⁹ The consistory court there maintained its medieval jurisdiction longer than did most others to the south. However, these were special situations. The decline in volume occurred virtually everywhere, and causes in the disputed areas of jurisdiction simply disappeared from the act books during the 1520s. Even in the exceptional case where a particular court suffered little overall loss of business, suits brought for the enforcement of contracts, defamation causes involving temporal offences, testamentary debt litigation, and *ex officio* jurisdiction involving pleas of the Crown ceased to be heard.

Especially because the first of these, that for *laesio fidei*, had played such an important statistical part in English canonical practice,¹⁰ the first third of the Tudor era must be seen as one of decline and discouragement for the ecclesiastical lawyers. Their livelihood depended on the fortunes of the courts, and the courts were losing ground. Their incomes, derived in substantial part from the fees of litigation, must have suffered, and they could not have known where the attacks would end. It may well be true, as has recently been suggested, that later in the 1530s they would have been 'baffled' by some of the charges and attacks that were being levelled against the spiritual courts.¹¹ But they might have expected them. They had certainly had ample time to get used to charges and attacks in the fifty years that had gone before.

Although the ecclesiastical lawyers cannot have liked this development, and although they held out against it for a time, in the end they

⁷ Richard M. Wunderli, *London Church Courts and Society on the Eve of the Reformation* (1981) 81.

⁸ 'Church Courts and the Reformation in the Diocese of Chichester, 1500-58', in *Continuity and Change*, eds. R. O'Day and F. Heal (1976) 215-37.

⁹ This is the valuable suggestion of Ralph Houlbrooke, 'The Decline of Ecclesiastical Jurisdiction under the Tudors', *ibid.* 240.

¹⁰ See Woodcock, *Medieval Ecclesiastical Courts*, see note 5, p. 84 for statistical illustration.

¹¹ Christopher Haigh, 'Anticlericalism and the English Reformation', in *The English Reformation Revised*, ed. C. Haigh (1987) 64.

simply had to swallow it. Indeed by the 1520s they had come to enforce it themselves. In a 1524 defamation cause heard before the official of the archdeacon of Chester, for instance, the judge 'dismissed the parties to the royal forum', where the crime imputed was a secular one and where continuing the cause would have brought him into conflict with the common law rules.¹² As early as 1513 in London, the judge of the diocese's commissary court similarly dismissed the parties in a cause before him where there had been an imputation that the plaintiff was a 'false thief'.¹³ The reason was that the cause did not come within ecclesiastical jurisdiction. Practical acceptance of the common law rules thus gradually took hold. It became a fact of life within the spiritual forum.

Ecclesiastical acquiescence in, and consequent enforcement of, the common law's position is the most striking finding to emerge from the study of contemporary Church court records. It shows that, however reluctantly and at least where important principles were not at stake, English ecclesiastical lawyers prior to the Reformation themselves joined in what amounted to a collective change of mind about the division between the temporal and the spiritual sides of life. Dr Richard Cosin, the Elizabethan apologist for ecclesiastical jurisdiction, later pointed out the incongruity to which the medieval Church's claim to jurisdiction over oaths had led.¹⁴ Ordinary contracts were not spiritual matters under the canon law, and their regular enforcement under the rubric of *laesio fidei* seemed no necessary part of spiritual jurisdiction to him. In fact he thought it an abuse of a legitimate canonical principle. By 1520 or so, many ecclesiastical lawyers had come to accept that argument. At least they saw its point and, whether from compulsion or conviction, they acted upon it within their own courts.

What this development means for understanding the effect of the Reformation on the Roman canon law in England is that, as far as the Church's loss of jurisdiction is concerned, by the time the 'official' Reformation arrived, a jurisdictional reformation in the Church courts had already happened. The principal areas of jurisdiction the

¹² *Benett c. Martyn & Martyn*, Chester EDC 1/3, f. 20: 'et partes ad forum regium dimisit'. *Hobsum c. Astley & Whittill*, Chester EDC 1/3, f. 4 (1524) similarly ends: 'dimissi (sic) sunt partes ad forum regium'.

¹³ *Ex officio c. Peterson*, London Guildhall MS. 9064/11, f. 91: 'causa ista non convenit forum ecclesiasticum etc.'.

¹⁴ *An Apologie of and for Sundrie Proceedings by Jurisdiction Ecclesiastical* (London 1591) Lib. I, c. 8. and c. 14.

Church was to surrender in the sixteenth century had already been given up. And this loss had occurred not as the result of statute or government decree, but instead because of the cumulative effect of private legal actions that took advantage of an expanded reading of the medieval statute of *Praemunire*. The pages which follow will detail many ways in which the Reformation affected ecclesiastical court practice, but none of them involved the elimination of any area of the courts' medieval jurisdiction. That was already complete.

This is not to say that the Henrician Reformation and the statutes by which it was accomplished were without effect on the ecclesiastical tribunals. The extent of the courts' subject matter jurisdiction was never the sole concern of the English civilians. They had to concern themselves with the substance of the law enforced in their courts, and the Reformation statutes sometimes had an effect on that. However, the statutes themselves did not remove any aspect of spiritual jurisdiction from the courts except the right to appeal to Rome. The serious jurisdictional losses – in testamentary causes, in defamation and criminal matters, and in contract litigation – had already taken place. And they had disappeared so definitively by 1529 that they had ceased to be subjects of serious contention.

THE MIDDLE YEARS OF THE SIXTEENTH CENTURY

The English ecclesiastical courts did not quickly recover from the losses of jurisdiction that occurred during the reign of Henry VII and Henry VIII. Ralph Houlbrooke has described the middle years of the century as time when the confidence of the ecclesiastical lawyers reached a low ebb, and his description seems entirely apt to me.¹⁵ The amount of litigation in the courts remained low.¹⁶ Even the standards of record keeping in many of the diocesan courts were allowed to slide.¹⁷ The act books which were the official records of the litigation heard in the consistory courts become messy scrawls, containing less litigation than had been true fifty years before, and recording what there was less fully and faithfully.

¹⁵ See *Church Courts and the People during the English Reformation 1520–1570* (1979) 11–16. See also Margaret Bowker, *The Henrician Reformation: the Diocese of Lincoln under John Longland, 1521–1547* (1981) 86–8.

¹⁶ See Lander, 'Church Courts and the Reformation', in *Continuity and Change*, note 8, p. 231.

¹⁷ Woodcock, *Medieval Ecclesiastical Courts* 3.

These were years when the future of the Roman canon law in England was open to serious doubt. It was not simply that the dizzying doctrinal changes of Henry VIII and his three children subjected all religious questions to uncertainty. Many detailed proposals for correcting pretended abuses and for stripping the ecclesiastical courts of parts of their jurisdiction were being floated. The best known is the *Commons' Supplication against the Ordinaries* of 1532.¹⁸ It contained a laundry list of grievances against the procedures and the fees allowed in the ecclesiastical courts, and it sought their correction. There were also other and more sweeping suggestions. Dr William Petre, one of Thomas Cromwell's deputies, proposed to move all probate, defamation and tithe litigation to the temporal courts.¹⁹ Richard Pollard advocated abolishing all *ex officio* jurisdiction exercised by the Church.²⁰ Even the continued knowledge of the Roman canon law must have appeared open to doubt in the wake of the abolition of the canon law faculties at Oxford and Cambridge.²¹ The civil law faculties at the Universities themselves seem to have been kept afloat with difficulty. The number of admissions for the B.C.L. degree reached negligible proportions during the 1540s and 50s.²²

Moreover, all attempts to reinvigorate and reform the ecclesiastical law from within failed. A thoroughgoing reformation of English ecclesiastical law had been promised from 1532. A statute of that year authorized appointment of a Commission of thirty-two men, half clerical, half lay, to examine and to reformulate the ecclesiastical

¹⁸ Printed in C. H. Williams, *English Historical Documents 1485–1558* (1967) 732–6. For scholarly commentary about the background and sources of the Supplication, see J. A. Guy, *The Public Career of Sir Thomas More* (1980) 186–92; Margaret Bowker, 'Some Archdeacons' Court Books and the Commons' Supplication against the Ordinaries of 1532', in *The Study of Medieval Records: Essays in Honour of Kathleen Major*, ed. D. A. Bullough (1971) 282–316; G. R. Elton, 'The Commons' Supplication of 1532: Parliamentary Manoeuvres in the reign of Henry VIII', *E.H.R.* 66 (1951) 507–34; J. P. Cooper, 'The Supplication of the Ordinaries Reconsidered', *ibid.* 72 (1957) 616–41.

¹⁹ For what follows, see John F. Davis, *Heresy and Reformation in the South-East of England, 1520–1559* (1983) 6–17; G. R. Elton, *Reform and Renewal* (1973) 129–35; Stanford E. Lehmborg, *The Reformation Parliament* (1970) 222–3; and Hermann Lutz, *Das Canon Law der Kirche von England* (1975) 30–7.

²⁰ G. R. Elton, *ibid.* See also BL Cotton MS. Cleo. F II, fols. 241–5v, entitled 'Certen considerations why the spirituall jurisdiction wold be abrogatt and repelled or at the leest reformed.'

²¹ For the effect of this abolition, see pp. 151–3.

²² J. L. Barton, 'The Faculty of Law', in *History of the University of Oxford*, ed. James McConica (1986) III:271–2; Thomas Fuller, *The History of the University of Cambridge* [1655], eds. M. Prickett & T. Wright (1840) 225.

law.²³ The Commission met, the statute was renewed, and the Commissioners ultimately produced a document that would have materially changed, and perhaps even improved, the law administered in the spiritual courts.²⁴ But it failed of passage. The *Reformatio legum* has remained a 'might have been'.

The failure of this measure to achieve statutory form meant that the outward jurisdiction of the English courts would continue to look much as it had, subject to statutory changes and to whatever variations the pressures of litigants, the ingenuity of the civilians, and the incursions of common law judges would call into being. The same statute which established the Reform Commission specified that until the Commission could act, the existing canon law should simply continue in force, at least in so far as it was consistent with the laws and customs of the Realm and not contrary to the King's prerogative. This 'interim' provision became the permanent law of the English Church.

The absence of real reform during the most turbulent years of the English Reformation, despite serious efforts in that direction, stands as a central fact of this middle period. For the historian of the ecclesiastical courts, whose gaze must seldom rise above his prosaic records, even to the level of the heresy trials that stained these years, and who can take account of great events only when they filter down to the litigation recorded in the act books, the years between the 1520s and the 1570s seem remarkably uniform. The enormous changes in religious doctrine and worship that were occurring made much less impact on court practice than he might initially suppose. Royal writs of prohibition continued to be obeyed when they were received.²⁵ Commissioners appointed by the Crown continued to investigate and correct matters of religious belief and practice.²⁶ The act books compiled by the courts continued to look much the same; sometimes the

²³ 25 Hen. VIII c. 19 (1533); 27 Hen. VIII c. 15 (1535); 35 Hen. VIII c. 16 (1543); 3 & 4 Edw. VI c. 11 (1550), repealed 1 & 2 Phil. & Mar. c. 8 (1554).

²⁴ The modern edition is *The Reformation of the Ecclesiastical Laws*, ed. E. Cardwell (1850). For the high hopes to which the project gave rise, see James C. Spalding, 'The *Reformatio Legum Ecclesiasticarum* of 1552 and the Furthering of Discipline in England', *Church History* 39 (1970) 162–71.

²⁵ *Garret c. Gratwyck* (1557), Chichester (Archdeaconry of Lewes) Act book Ep 11/9/1, f. 114v (receipt in a tithe cause of writ of prohibition, which the record states, 'ut oportuit recepimus et obedivimus').

²⁶ York BI CP.G.683 (1556), authorization of an inquest 'ad inquirendum pro hereticis pravitatibus coram iusticiariis sive commissionariis dominorum regis et regine apud Everyngham'.

same book crossed a great doctrinal divide.²⁷ In several places even the same court officials continued in office through all the changes.²⁸ And the level of court business responded slowly if at all to the most dramatic of religious swings. It stayed as it had been: low.

Three developments only stand out. The first, and most obvious consists of the several changes caused by the abolition of papal jurisdiction. The abolition was immediately reflected in the court records. The formal style of each diocesan court, found in the act books at the beginning of many consistories, ceased to recite the authority and pontifical year of the reigning pope, sometimes substituting instead those of the English monarch.²⁹ More significant legally, the right to appeal from an English ecclesiastical court to the papal court was abolished.³⁰ Those who attempted to make such an appeal were subjected to the harsh penalties of *Praemunire*. Instead, the Reformation statutes substituted appeals to the King in Chancery and ultimately to what became the Court of Delegates.³¹ These changes were reversed under the Catholic Mary Tudor, during whose reign some act books contain the most fulsome statements of devotion to the Roman pontiff found in any of the English court records. But this movement to return to medieval practice proved to be merely an interruption.

In a constitutional sense, these were enormous legal changes, one part of the dramatic religious transformation that was occurring and of the most fundamental importance for the ecclesiastical law itself. In everyday court practice, they appear to have made much less difference. Because the law applied in the courts was based on accepted and

²⁷ E.g. St Albans Act book ASA 7/3 (1556–60); Winchester Court book CC B 11 (1557–60); York BI Act book D/C.AB.4 (1554–9).

²⁸ E.g. Robert Tayler, LL.B., was acting as commissary of the archdeacon of Lewes in both 1551 and 1554. See Chichester Act book Ep II/9/1, fols. 41 and 65. He subsequently became archdeacon himself in 1558; Francis Steer & Isabel Kirby, *Diocese of Chichester: A Catalogue of the Records* (1966) 237. See also the career of Miles Spencer, chancellor of the diocese of Norwich from 1531 to his death in 1570, described in Ralph Houlbrooke, *Church Courts and the People* 24–6 (with examples and references from other dioceses).

²⁹ The extent to which the act books recorded their basis of authority varied. For a printed but minimal example of the change, see the *acta* of 26 August 1536, in *Act Book of the Ecclesiastical Court of Whalley 1510–1538*, ed. Alice M. Cooke (Chetham Soc. N.S. Vol. 44, 1901) 185. The legal theory behind the change is discussed in E. Garth Moore and Timothy Briden, *Introduction to English Canon Law* (2nd edn 1985) 14–17.

³⁰ 24 Hen. VIII c. 12 (1532); 25 Hen. VIII c. 19 (1533).

³¹ G. I. O. Duncan, *The High Court of Delegates* (1971) 6–10, 17–20.

traditional rules, which rules had not been materially altered, the abolition of papal jurisdiction in itself had remarkably little effect on the substantive law applied in the courts.³² Even the abolition of appeals to Rome had only occasional impact on the lives of most English ecclesiastical lawyers. It simply varied the place to which appealed causes finally went, and (if the act book evidence tells the truth) from which they were usually returned for want of prosecution.

The second noteworthy development of these years was an increase in attempts to suppress religious dissent. The principle itself was, of course, very old. The ecclesiastical courts had long disciplined men and women whose public conduct or expressed opinions deviated from those approved by the Church. However, the Reformation raised the pitch of religious dissent. It inevitably brought an increase in prosecutions in its wake.³³ This was as true under Edward VI as under Philip and Mary. At least this pattern holds good for many parts of England. In a few places, even during the Catholic revival, it turns out that very few such prosecutions found their way into the act books.³⁴ It is equally true, however, that the absence of *ex officio* records from many dioceses – an absence unusual enough to suggest purposeful destruction of records found distasteful or embarrassing – prevents any complete description of these years.³⁵

At first blush it seems strange, and perhaps even perverse, to lump together the reigns of Edward IV and Mary Tudor. The two radically reversed the nature of the dissent being suppressed. Certainly, the change from Protestant to Catholic and back again produced some poignant cases not found in the records of other periods. Such is that of the woman convented before the diocesan court at Canterbury during the time of Queen Mary for having given birth to an illegitimate child. The child's father was a priest, whom she had married during Edward's reign and whom she had not unreasonably supposed to be her husband.³⁶ Adding insult to injury is a mild way to describe

³² See pp. 159–61.

³³ See the discussion in J. W. Martin, 'The First that Made Separation from the Reformed Church of England', *Archiv für Reformationsgeschichte* 77 (1986) 281–305.

³⁴ The diocese of Chester, for instance, has very few *ex officio* prosecutions for religious dissent among its act books, whereas the diocese of London has many.

³⁵ Based on Act book EDC 1/14 (1555–8). At fols. 32–32v and 51 (1555) there are proceedings to require clerics to separate themselves from their supposed wives.

³⁶ *Ex officio* c. *Seer* (1557), Canterbury (Archdeaconry) Act book Y.4.10, f. 95v. The number of *ex officio* prosecutions for dissent in this act book, which covers 1556–8, is however quite small overall.

the prosecution that was brought against her in 1557. But it is only one of the many examples of increased efforts to enforce the current religious orthodoxy that followed in the wake of the Reformation and that inevitably increased the *ex officio* side of the jurisdiction of the ecclesiastical courts. Though the story that lay behind the suit from Canterbury was different from that found during the other reigns, its legal nature was essentially the same.

The procedure used in the *ex officio* prosecutions varied little across these years. Protestant belief did not bring with it a rejection of the 'inquisitional methods' that later Protestant historians would find so repulsive. Indeed those methods were used and in a sense intensified in the new court of High Commission. In some places, even the same court officers found that they could prosecute religious opinions of very different stripe, making use of identical procedural tools. Again, relatively uniform court practice proved compatible with dramatic swings in religious belief.

The third development of the middle years of the century, and the most important, was the beginning of the enforcement of English statutes. It was the truest innovation of the period. The first clear example I have found in the act books comes from 1534, from the diocese of Coventry and Lichfield, where the Henrician statute regulating the choice of testamentary executors was enforced *eo nomine*.³⁷ Thereafter, reference to and implementation of acts of Parliament became normal parts of ecclesiastical litigation. The English civilians were required thereby to become familiar with a new, and a slowly expanding, body of statute law.

The enforcement of English statutes by the courts of the Church continued under both Edward VI and Queen Mary. Mary's Parliament repealed a number of statutes affecting the Church, thus curtailing the number that could have been enforced.³⁸ However, her Parliament did not repeal all such statutes, and in particular they did not repeal the statute which (numerically at least) most affected court practice. That was the Edwardian statute which *inter alia* allowed laymen to sue for tithes in the ecclesiastical courts.³⁹ One consequence of the dissolution of the monasteries was the wider dispersal among

³⁷ Estate of Hopkyns, Lichfield Probate Act book B/C/10/1, f. 61v, where the action was taken 'secundum tenorem statuti in parlamento domini regis facti'. The statute meant is 21 Hen. VIII c. 5 (1529).

³⁸ See 1 Ph. & Mar. cc. 2, 3, 7 (1554).

³⁹ 2 & 3 Edw. VI c. 13 (1549).

laymen of monastic assets. Among those assets were impropriated rectories, which normally carried with them the right to receive the greater tithes. As is well known, Mary did not succeed in restoring the monastic lands to the Church, and as part of her prudent policy on that score it may have seemed sensible to leave the Edwardian statute intact, despite its deviation from the letter of the Roman canon law. Its enforcement in the spiritual tribunals therefore continued under Mary.⁴⁰ Restoration of papal jurisdiction did not quite restore the *status quo ante*. Still less did it serve to revive the scope of the Church's fifteenth-century jurisdiction.

Little of the legislation that was passed during these years can be described as revolutionary from a lawyer's point of view. Its constitutional implications were dramatic; its actual effect on the substance of the law applied in the courts was not. Some of it affirmed traditional canonical rules, such as the Henrician Act forbidding the citation of persons outside the diocese where they resided or the Edwardian statute requiring attendance at one's parish church.⁴¹ The primary change worked by such statutes lay in opening up the possibility that their wording might be interpreted differently from the decretal law which had embodied the same substantive rule. That possibility ultimately became the fact, and much friction between common lawyers and the civilians followed as a consequence of it. However, that disagreement and friction did not at once affect the substance of the law applied in the ecclesiastical courts.

Some of the Reformation legislation changed prior canon law rules, usually in the direction of what must have seemed like modest and desirable reforms. For instance, the statutes extinguishing papal jurisdiction also extended the period allowed for making an appeal from ten to fifteen days.⁴² Since the ten-day period had not been enforced strictly, the change may in fact have been one of the law's periodic attempts to bring formal rules into accord with customary practice. A few of the English statutes clarified, or modified, matters which the canon law had largely left to local custom. A good example is the statute of 1529 that defined the circumstances in which mortuaries had to be paid to parish churches.⁴³ This statute did not change the

⁴⁰ See 1 & 2 Phil. & Mar. c. 8 § 17 (1554).

⁴¹ 23 Hen. VIII c. 9 (1531); 5 & 6 Edw. VI c. 1 (1552).

⁴² 25 Hen. VIII c. 19 (1533). See generally Stanford E. Lehmberg, *The Reformation Parliament* (1970) 163–9.

⁴³ 21 Hen. VIII c. 6 (1529).

nature of the mortuary payment. It merely attempted to render its collection more certain. Measures like these turn out to be characteristic of much of the Reformation legislation when it is looked at closely. Statutes made small but useful reforms in the existing ecclesiastical law.

This legislation was put into effect in the ecclesiastical courts. Its reception there forms part of the story of the relations between the ecclesiastical courts and the common law that is told in the fifth chapter of this book. From the purely jurisdictional vantage point, however, it is important again to note that except for appeals the effect of this legislation was never very great. The two areas where the Church's jurisdiction was materially altered by statute during these years, benefit of clergy and rights of sanctuary, played little role in everyday court practice. In the main, the Church's position was left intact by the Reformation statutes, and the scope of English ecclesiastical jurisdiction in 1570 stood pretty much where it had in 1529.

In sum, the evidence of the court records shows that the middle half of the sixteenth century, certainly the most crucial years for the wider history of the Reformation in England, chiefly confirmed the situation that had already arrived by the 1520s. That situation included the loss of several areas of the Church's medieval jurisdiction, a relatively low level of litigation in the areas that remained, and a failure to implement any fundamental reforms in jurisdiction or in the substantive law applied. Outwardly, the activity of the courts went on much as it had. It is a startling discovery to find that the two Tudor reigns most diametrically opposed in religious policy, Edward VI's and Mary's, produced ecclesiastical court records that look much alike.

THE REIGNS OF ELIZABETH AND JAMES I

The first years of Elizabeth's reign were of a piece with Edward VI's and Mary's. The absence of confidence among the ecclesiastical lawyers continued. As the years went by, however, the fortunes of the spiritual courts gradually revived. Litigation levels rose, and uncertainties about the future lessened. Improvements in legal practice were instituted. The Church's jurisdiction was never to return to the palmy days of the mid fifteenth century, and there were significant and intractable problems at all times during the period. But within the limits of the jurisdiction arrived at during the first quarter of the

century, the Elizabethan and Jacobean courts saw better days. I have divided the developments of these years into five positive and three negative factors. Succeeding chapters fill in necessary particulars about some of the legal changes they involved, but it seems useful first to give an outline of what happened.

Positive developments

The positive development most immediately evident to the record searcher who passes into the second decade of Elizabeth's reign is a marked improvement in the standards of record keeping. Though seemingly the most insubstantial factor, record keeping tells the searcher something about the health of an institution and even about the self-confidence of its officers. In this case it speaks of nothing but improvement. As Brian Woodcock noted in his pioneering work on the diocesan courts at Canterbury, it was in the 1570s that the registrar had begun to bring order out of the disorderly records characteristic of the middle years of the century.⁴⁴ Thereafter, the Canterbury act books and cause papers continued in well-kept and virtually unbroken sequence.

Woodcock's judgment about the Canterbury records holds true for most English dioceses. Almost everywhere act books began to be more neatly and regularly compiled.⁴⁵ Court officers kept *ex officio* and instance litigation more rigorously separated, usually by compiling separate act books for each.⁴⁶ Indexes came to be inserted at the end of some act and deposition books, facilitating subsequent reference to the causes inside.⁴⁷ Appealed causes began to be written up in the codex form widely used on the Continent, instead of the long and unwieldy rolls the English courts had habitually used during the

⁴⁴ *Medieval Ecclesiastical Courts* 3, and the introduction to his handlist of the commissary court records, Canterbury Cathedral Library. The best guide to ecclesiastical records is Dorothy M. Owen, *The Records of the Established Church in England* (1970).

⁴⁵ See the comments by David M. Smith, 'The York Institution Act Books: Diocesan Registration in the Sixteenth Century', *Archives* 13 (1978) 171-9. The change towards neatness and order is not found in *every* instance; it occurred a little later within records of the diocese of Carlisle than most; Carlisle Act book DRC 3/2 (1573-8) compares quite unfavourably with DRC 3/3 (1632-8).

⁴⁶ In the diocese of Rochester, for instance, compare Act book DRb Pa 20 (1590-3) with DRb Pa 2 (1444-56).

⁴⁷ This is by no means universal, but they are not uncommon. An example is Bristol Act book EP/J/1/12 (1603-6).

Middle Ages.⁴⁸ New classes of records were created in many diocesan courts – separate files or books for sentences of excommunication and for testamentary caveats for example. Past records were also more scrupulously preserved.⁴⁹ It is remarkable for how many dioceses it turns out to be true that the preservation of an uninterrupted series of act books and cause papers dates from the middle years of Elizabeth's reign.⁵⁰

Not only was litigation better recorded, there was more of it to record. This was the second positive development of the years after 1570. Though the nature of the Church's subject matter jurisdiction largely remained what it had been, the volume of causes heard by the ecclesiastical courts everywhere expanded at least modestly over the course of Elizabeth's reign. For instance, in the consistory court for the diocese of Lichfield, 81 instance causes were introduced in 1529. In 1590 the total was 204, an increase of over 150 per cent.⁵¹ Even taking the shorter time-frame of Elizabeth's reign, there was growth in most courts. For the consistory court of Salisbury, for example, 92 causes were introduced in 1566; in 1597 the comparable figure was 25 more, or 117 causes.⁵² In the new diocese of Gloucester, 112 causes

⁴⁸ In the Province of York, this change seems to have occurred towards the end of the century; see for instance those found in York BI Trans.CP.1590–1603. All appeals from the last three years of this period, and a few from the earlier years, were in codex form. At Exeter, the first examples found come from the first decade of the seventeenth century; see Exeter Cause papers CC 3/28 and CC 3/61. At Hereford, the earliest appealed cause in the codex form I could find is from 1605: Hereford MS. Misc. 2. At Winchester, the first examples so far discovered come from the 1610s: *Hunt c. Freind* (1618), or *Reed c. Bragg* (1615), Winchester CC B 84 and 90. It is difficult of course to estimate the extent of loss among this class of records.

⁴⁹ Files of churchwardens' presentments begin in the 1570s at Lincoln and become plentiful in the 1590s; see Kathleen Major, *Handlist of the Records of the Bishop of Lincoln* (Oxford 1953) 72–3. Tuition bonds are preserved at Lincoln from 1596. In the diocese of Chester, caveat files, containing orders to prevent the too hasty probate of estates, begin in 1614; see Chester County Council, *County Record Office and Chester Diocesan Record Office Guide* (n.d.) 3B–4. In the archdeaconry of Essex, excommunication books survive beginning in 1590; see Essex Record Office, Chelmsford, D/AEM 3.

⁵⁰ See, e.g., the records of the diocese of Chichester, catalogued in Francis W. Steer & Isabel M. Kirby, *Diocese of Chichester. A Catalogue of the Records of the Bishop, Archdeacons and Former Exempt Jurisdictions* (Chichester 1966) 16–17 (Instance act books), 19 (Deposition books) and 24 ('Detection' books). For all these categories there are scattered books from before the central years of Elizabeth's reign, but continuous records survive only from the late 1560s and 1570s.

⁵¹ Compiled from Lichfield Act books B/C/2/3, and B/C/2/26 and 27.

⁵² Compiled from Salisbury Act books D 1/39/1/3 and D 1/39/1/26.

were introduced in 1560; by 1600 the number had risen to 163.⁵³ These figures seem to be fairly representative. Virtually every survey so far made of litigation levels during the last third of the sixteenth century has shown growth in numbers.⁵⁴ And almost any random examination of a Jacobean act book suggests by the volume's bulk that the increase continued into the next century.

The meaning of these rising numbers is not free from doubt. Certainly they do not themselves prove that the Church itself was getting stronger. Much of the growth of litigation came in the numbers of tithe causes, and it can plausibly be maintained that growth of this sort shows a weakening of the Church's power to compel the laity to pay this most important of the financial obligations owed to the Church.⁵⁵ This objection is all the more telling on the *ex officio* side. No one would pretend that a rise in prosecutions for, say, fornication indicates that the Church and its legal system were rising in public esteem. At most, one might say that it offered court officials greater opportunities for personal profit.

On the other hand, the health and fortunes of the spiritual courts were not identical with those of the Church as a whole, and the evidence is far from demonstrating a sudden collapse in overall respect for spiritual sanctions after the Reformation. For many matters – tithe disputes for example – litigants had the choice of where to sue.⁵⁶ That they chose the ecclesiastical forum in such large numbers means that they must have thought the jurisdiction worth invoking. That churchwardens made increasing numbers of presentments against those who had violated the ecclesiastical laws must show that many men in fact considered the ecclesiastical system a legitimate and not ineffective one.⁵⁷ Any attempt to assess the 'popularity' of a functioning court system will always be something of a will-o'-the-wisp, but at least the evidence demonstrates beyond doubt

⁵³ Compiled from Gloucester Act books GDR 15 and GDR 84.

⁵⁴ Peter Clark, *English Provincial Society from the Reformation to the Revolution* (1977) 280; Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (1987) 69; Ronald A. Marchant, *The Church under the Law* (1969) 16–18, 62; Keith Wrightson & David Levine, *Poverty and Piety in an English Village: Terling 1525–1700* (1979) 113–14; Ralph Houlbrooke, 'The Decline of Ecclesiastical Jurisdiction', *The English Reformation Revised*, ed. C. Haigh (1987) 244–8; Christopher Haigh, 'Anticlericalism and the English Reformation' *ibid.* 67.

⁵⁵ E.g., Christopher Hill, *Economic Problems of the Church* (1956) 119–21; Peter Clark, *English Provincial Society*, 182.

⁵⁶ See pp. 92–3. ⁵⁷ See pp. 105–7.

that the jurisdiction and use made of the courts was not withering. Regarded from the point of view of the men who served in them, the courts under Elizabeth and James I would have seemed to be prospering concerns.

The third positive development of these years was the establishment of new ecclesiastical courts. A full account of ecclesiastical jurisdiction would have to deal with this development at length. It might, for example, profitably look at the courts in the new dioceses created under Henry VIII.⁵⁸ It would certainly have to examine in some detail the work of the Office of Faculties, which largely exercised the dispensing powers that had once been the prerogative of the papacy.⁵⁹ The Office operated in conjunction with the Court of Chancery, and dealt mostly with non-contentious matters: the creation of notaries public and the issuance of dispensations to allow clerics to hold two benefices or to permit laymen to marry without the publication of banns.

However, for understanding the overall fate of the Roman canon law in England, such an excursion is probably unnecessary. It is enough that particular attention be paid to the most important of these new tribunals: the Court of Delegates and the Court of High Commission. These two were easily the most important in their legal and social consequence. Neither could be called a complete innovation, since both had early Tudor precedents. However, their effective organization belongs to the second half of the sixteenth century.

The Court of Delegates was the final court of appeal for all English spiritual tribunals.⁶⁰ Created to implement the statutes that forbade appeals to the Roman court, this Elizabethan tribunal 'built upon' precedents from the Henrician period. Royal commissioners had been commonly appointed to hear ecclesiastical appeals under Henry VIII,

⁵⁸ They were the dioceses of Bristol, Chester, Gloucester, Oxford, Peterborough, and (briefly) Westminster. The extent of change which these consistory courts meant would be a valid subject of research, since some of them simply replaced arch-deaconry courts.

⁵⁹ See Wilfrid Hooper, 'The Court of Faculties', *E.H.R.* 25 (1910) 670-86; E. F. Churchill, 'Dispensations under the Tudors and Stuarts', *E.H.R.* 39 (1919) 409-15; Dorothy M. Owen, *Records*, see note 44, at 51. For an earlier period, and containing a valuable introduction, see D. S. Chambers, *Faculty Office Registers 1534-1549* (1966).

⁶⁰ See G. I. O. Duncan, *The High Court of Delegates* (1971).

and they continued to do so. However, it is to Elizabeth's reign that the creation of a true court of Delegates belongs. Though a separate commission of judges was appointed for each cause appealed, a real court existed. It met in regular sittings, appointed permanent officers, adopted settled procedures, and dealt with substantial levels of litigation.⁶¹ Act books and cause papers survive from the last years of the century. Having a final court of appeal in which they themselves held the upper hand must have seemed an encouraging development to the English civilians.

Elizabeth's reign also saw the inception of the Court of High Commission, known officially as the Commissioners for Causes Ecclesiastical.⁶² Created specifically to enforce the religious settlement and to supplement and support the work of the ordinary ecclesiastical tribunals, the High Commission was armed with the power to imprison and to fine, powers ordinary ecclesiastical courts lacked. The Commissioners did not allow these powers to lie idle. They used them throughout the realm to suppress dissent of varying sorts, although it inevitably turned out that in some dioceses the branches of the High Commission also became the forum for instance litigation falling within their charter. People with private grievances to settle could not be kept from resorting to these new, more resourceful, courts.

It was once thought that a single court of High Commission existed. We now know, however, that the Court was divided into branches, usually one for each diocese. A fuller search through local archives has since shown that there were separate groups of Commissioners active in most English dioceses. Act books have survived from the sees of Canterbury,⁶³ York,⁶⁴ Chester,⁶⁵ Durham,⁶⁶ Exeter,⁶⁷ Gloucester,⁶⁸

⁶¹ *Ibid.* 17, 19.

⁶² See generally Roland Usher, *The Rise and Fall of the High Commission*, rev. edn with new introduction by Philip Tyler (1968).

⁶³ Kent Archives Office, Maidstone, PRC 44/3 (1584–1603); see also Peter Clark, 'The Ecclesiastical Commission at Canterbury: 1572–1603', *Archaeologia Cantiana* 89 (1974) 183–97.

⁶⁴ See Tyler's Additional Bibliography in Usher, *Rise and Fall* (1968) pp. xxxiv ff.

⁶⁵ Cheshire Record Office, EDA 12/2 (1562–72).

⁶⁶ Covering 1628–39 and printed in *The Acts of the High Commission Court within the Diocese of Durham*, ed. W. Longstaff (Surtees Soc. Vol. 34, 1858).

⁶⁷ Devon Record Office, Exeter, Chanter MS. 761 (1602–7, with gaps).

⁶⁸ Gloucestershire Record Office, Gloucester, GDR 101 (1606–7). See also F. D. Price, 'The Commission for Ecclesiastical Causes for the Dioceses of Bristol and Gloucester, 1574', *Transactions of the Bristol and Gloucester Archaeological Society* 59 (1937) 61–184.

Norwich,⁶⁹ Peterborough,⁷⁰ Salisbury,⁷¹ and Winchester.⁷² Cause papers from still other dioceses remain to give evidence of the court's activity elsewhere.⁷³ So do a few official letters of commission to branches in still other locations.⁷⁴ There is even a manuscript treatise, now to be found among the Ely diocesan muniments, devoted specifically to the procedure used in the courts of the Commissioners.⁷⁵ The level of litigation shown by these surviving records varies enough to suggest varying levels of zeal on the part of the diocesan Commissioners, but everywhere these branches met regularly and took action in accordance with the wide royal commission they enjoyed. In other words, the first-hand evidence accords with the contemporary complaints made against the intrusiveness and the power of the High Commission. It was an actively exercised jurisdiction.

Whether the creation and operation of these new courts demonstrates rising or falling fortunes in the existing ecclesiastical tribunals has been a subject of scholarly discussion.⁷⁶ In part because the High Commission was thought necessary at all, in part because it was given the power to impose temporal sanctions, some historians have concluded that the ordinary courts must have been declining in effectiveness. Without the new courts, the argument runs, the traditional diocesan tribunals would have been rendered powerless. A remark by Archbishop Whitgift that ecclesiastical law would have been a 'carcasse without a soul', had it not been for the High Commission, has buttressed this conclusion.⁷⁷

In some respects, the conclusion is obviously correct. Recusants, for example, had little reason to respect the spiritual sanctions of a Church they regarded as heretical. The same can largely be said of

⁶⁹ 'Mortimer's Book' (1595-98), Norfolk Record Office, Norwich, ACT/31, and noted in Tyler's Additional Bibliography to Usher, *Rise and Fall* (1968) p. xxxvi.

⁷⁰ Peterborough Act book 9 (X 607/9) (1574-9).

⁷¹ Wiltshire Record Office, Trowbridge, Office Act book 1 (1584-6).

⁷² Hampshire Record Office, Winchester, Act book CC B 73 (1606-8).

⁷³ Lincolnshire Archives Office, Diocesan Court Papers Box 69/2/7 (c. 1582); York HC.Prec.Papers (Southern Province) (1613-36); Ely Precedent book EDR F/5/41, f. 25 (1577); Folger MS. L.b.253 (temp. Eliz.) (London); Beinecke, Osborn shelves MS. fb 24, Nos. 19, 24, 90-5.

⁷⁴ See those listed in Usher, *Rise and Fall* (1968) 361-7; and also Folger MS. X.d.317 (1594), an order for penance to be conducted in the diocese of Chichester.

⁷⁵ Ely Precedent book F/5/45.

⁷⁶ Compare Usher, *Rise and Fall* (1968) 99-100, with Houlbrooke, 'Decline of Ecclesiastical Jurisdiction', see note 54, 250-1. See also Penry Williams, *The Tudor Regime* (1979) 262-4.

⁷⁷ John Strype, *Life of Whitgift* (ed. 1922) I:267.

'left wing' Protestants. Both opposed the jurisdiction of the English Church on principled grounds, and it was these principled dissenters that justifiably worried Whitgift.⁷⁸ As to them, he was right to conclude that fines and imprisonment were the only sanctions worth imposing, and that the High Commission exercised the sole appropriate means of imposing them. Dissenters would have set little store in sentences of excommunication, and even less in their threat. The ordinary consistory courts could do little more.

A different understanding of this evidence, however, also makes sense. The great majority of persons who appeared before the courts conformed to the tenets and ordinances of the Church of England. As to this larger group, the threat of prosecution by the High Commission would have served primarily to stiffen the effect of the sanctions at the disposal of ordinary diocesan courts. Now added to the spiritual and temporal disabilities a sentence of excommunication entailed were new and more immediate penalties. The threat of the latter could only have provided better reason for attending to the former. Therefore, as to this class of litigants, the new courts would have strengthened the system overall. For most men, the sanctions of fine and imprisonment available in the High Commission were to be avoided if at all possible. Avoiding them now required initial conformity to the dictates of the ordinary consistory courts.

For the internal workings of the ecclesiastical court system itself the new courts turned out to be mostly gain. They did not leave the existing courts without business; in fact litigation levels rose in both sets of courts under Elizabeth. The new courts also provided additional work for the civilians, the lawyers who staffed both sets of courts. And most important from a lawyer's point of view, the Court of Delegates and the High Commission opened up possibilities for development and refinement of the Roman canon law. These courts had the ability materially to affect the substantive law of England. In the law of marriage and divorce, their work had a lasting and largely beneficent effect.⁷⁹ Whatever their place in the long-term history of English law, the creation of these new courts must be counted as an immediately positive development for the courts that enforced the ecclesiastical law of England and the men who served in them.

In this respect, the Courts of High Commission and the Delegates

⁷⁸ See BL Add. MS. 28571, f. 172, a letter of 1592-3 quoted in Usher, *Rise and Fall* (1968) 99.

⁷⁹ See pp. 77-9.

also formed part of a fourth positive development of the Elizabethan and Jacobean periods. That is a growth in legal learning and organizational sophistication. It may be that the Protestant emphasis on a learned clergy and the English common law's increase in scope and legal rigour both had an effect on practice in the ecclesiastical courts. Whatever the cause, advances occurred on several fronts, sometimes in response to problems and threats from without, sometimes as the result of a desire for better legal rules generated from within. If any period in English history, with the exception of the twelfth century, should be remembered as an age of flourishing canonical and civilian scholarship, it is the last quarter of the sixteenth century and the first third of the seventeenth.⁸⁰

Demonstration of this unexpected and surprising finding occupies much of the rest of this book, and it would be wasteful to anticipate the detail required to prove that it is true. The outlines, however, can easily be sketched. For the first time, references to canon and Roman law texts and commentaries began to appear in diocesan court records.⁸¹ The reigns of Elizabeth and James also witnessed the creation of an indigenous and extensive literature on the procedure and substance of the ecclesiastical law.⁸² Ecclesiastical legislation continued to be enacted. It had a force in consistory court practice, leading to tighter regulation of jurisdictional rules and culminating in adoption and implementation of the 1604 canons.⁸³ Some of these diocesan statutes were actually glossed with references to texts and commentaries of the Roman canon law, evidence of legal sophistication the civilians found compatible with the outcome of the Reformation.⁸⁴

⁸⁰ The parallel with the twelfth century is not frivolous. Both were periods of rapid development in the law of the Church; in both English jurists played their part. See Mary G. Cheney, *Roger, Bishop of Worcester 1164–1179* (1980) 166–212.

⁸¹ E.g., *Ex officio c. Vaux & Ellys* (c. 1600), Lincoln Diocesan Court papers Box 59/1/19, a marriage cause including citation of a papal decretal from the *Liber Extra* and the *Speculum iudiciale* of Gulielmus Durantis.

⁸² See pp. 131–41.

⁸³ E.g., Cheshire Record Office, Chester, Cause papers EDC 5 (1621) No. 67, a set of episcopal decrees regulating the jurisdiction of the rural deans. See also: diocesan statutes regulating the ecclesiastical courts collected in Bodl. Tanner MS. 315, fols. 41–52 (1587); Canterbury, MS. Z.3.23, Pt. I, fols. 183 ff. called 'Orders of the Court', regulating fees and procedure; and Bishop Cox's 'Interpretations and Further Considerations', in Strype's *Annals* *213–16. See also the canons of 1571, 1575, 1585, and 1597, in Edward Cardwell, *Synodalia* (Oxford 1842) I:111–63. For enforcement and problems raised by the 1604 canons, see pp. 169–71.

⁸⁴ Durham, Library of the Dean and Chapter, Raine MS. 124, fols. 76–82v, glossing the 1573 statutes of Bishop James Pilkington.

Finally, several improvements in procedure and an enlargement of the scope of the Church's *ex officio* jurisdiction, some of it drawing on the riches of Continental sources, also occurred during these years.⁸⁵ Whatever may have been the attitudes of contemporary laymen towards the courts of the Church, the lawyer's eye would have seen in them a real and impressive growth in knowledge and legal sophistication.

Fifth, the ecclesiastical courts profited from the increasing stability of the Elizabethan regime. As the prospects of abolition or wholesale reform of the canon law began to fade, and as Elizabethan religious policies began to look more like a Settlement than another change of mind, the courts of the Church were the incidental beneficiaries. Though they faced challenges from without, in particular from aggressive common lawyers, their continued existence was no longer in doubt. Parliamentary legislation continued to be outwardly respectful of their jurisdictional rights, and even conferred new duties upon them. The question more often discussed was how they might be made more effective, not whether they should be stripped of their jurisdiction. The civilians took heart.

They also took pen in hand to affirm the legitimacy and utility of ecclesiastical jurisdiction. In answer to the expanding use of writs of prohibition, the civilians mounted a counterattack. They explored the history of their own jurisdiction and they searched common law precedents to buttress their arguments. Richard Cosin, the dean of the Court of Arches between 1583 and 1597, is the best known and also the best of these ecclesiastical apologists.⁸⁶ But there were several others.⁸⁷ The spirited defence of the Church's jurisdiction their works contain signals a rise in assertiveness and self-confidence among the civilians during these years. Though they were losers after 1640,

⁸⁵ See pp. 105–9.

⁸⁶ Author of *Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (London 1591).

⁸⁷ The best known is Thomas Ridley, *View of the Civile and Ecclesiasticall Law* (Oxford 1607). Other slighter printed examples are William Clerk, *An Epitome of Certain Late Aspersions Cast at Civilians* (Dublin 1631) and Calibute Downing, *A Discourse of the State Ecclesiasticall of this Kingdom* (Oxford 1632). Unprinted examples: 'Distinction between the Ecclesiasticall Law and the Common Law' (c. 1616), BL Lansd. MS. 253, fols. 138–78v; Berkshire Record Office, Reading, MS. D/ED O 45/1, fols. 1–185 (c. 1610). Some of it now seems quite ephemeral: e.g., Trinity Hall, Cambridge, MS. 43/2, fols. 2–4: 'Reasons of Precedency of Doctors before Serjeants'. On this controversy, see J. H. Baker, *The Order of Serjeants at Law* (1985) 54–5.

that outcome was long in doubt. The Elizabethan and Jacobean civilians did not know the verdict of history. They believed they had a strong position in English law, and they asserted it. They also put what they wrote into practice in the spiritual courts under their control. It is wrong to portray them as helpless hand-wringers in the face of an unceasing onslaught of prohibitions. That was essentially the picture drawn by the great student of this subject, Roland Usher.⁸⁸ His views have been influential, but they correspond imperfectly with the evidence drawn from the ecclesiastical court records. The evidence, showing a new assertiveness on the part of the English civilians, is examined in some detail in the chapter that follows.

Negative developments

Against the five generally positive developments in the history of the ecclesiastical courts and the Roman canon law in England should be set three clear negatives. Although the surviving evidence shows more vigour than Usher assumed, to paint a picture of the Elizabethan and Jacobean Church's courts in roseate hues would be to ignore some very real problems they faced. The conjunction of the three negative factors, coupled with the hiatus in the operation of the courts during the Interregnum, eventually put an end to the independence of the spiritual tribunals from common law control. This had not happened by 1625, or indeed by 1640, but forces pointing in the direction were in place, and Usher was right to make something of them.

The first factor is the development of a significant body of common law purporting to restrict the freedom of the spiritual courts to enforce the Roman canon law. Growing mostly out of cases involving writs of prohibition, this body of law was meant to define the limits of what the ecclesiastical officials could and could not do. For instance, the common law judges issued prohibitions requiring the civilians to defer to common law jurisdiction in all tithe causes involving rights based upon immemorial custom.⁸⁹ The temporal judges similarly tried to keep the ecclesiastical courts from hearing slander cases where the allegedly defamatory words amounted to 'mere abuse'.⁹⁰ The efforts of the common lawyers went far beyond their medieval func-

⁸⁸ *The Reconstruction of the English Church* (1910) II. 206–10.

⁸⁹ E.g., *Couper v. Andrews* (K.B. 1612), Hobart 39, holding 'that a custom is determinable at the Common Law and not before a Spiritual Judge'.

⁹⁰ E.g., *Anon.* (K.B. 1615), 1 Rolle 217, holding that a prohibition lies in an action brought for having called a woman 'queen' or a man 'knave'.

tion of patrolling the boundaries between temporal and spiritual jurisdiction. Prohibitions had the effect, in the end, of defining a great many aspects of the law that could be applied in the spiritual courts.

The ecclesiastical officials before the Civil War did not accept that the common law judges had this broader right to define substantive ecclesiastical law for them. They resisted the development, refusing to admit that the law made by writs of prohibition could determine the rules they enforced within their own sphere of jurisdiction.⁹¹ None the less, the civilians obeyed specific writs of prohibition when they received them, and routine use of prohibitions therefore materially interfered with their ability to apply their own law in individual cases. With the growth in volume, specificity and sophistication of 'prohibition law' of the common law courts, and with the threat of a prohibition hanging over much ecclesiastical litigation, the civilians' independence became harder to maintain. Eventually, the corpus of 'prohibition law' grew to the point where a treatise on some aspects of ecclesiastical law could be written exclusively from common law sources. That development would raise the possibility of wholesale displacement of the Roman canon law. Such displacement had not occurred prior to the English Civil War. But it was to happen, and it had begun under Elizabeth.

Second, within the English Church itself there remained an attitude of suspicion towards the Roman canon law. This was not an attitude limited to 'advanced' Protestants. Many men, even churchmen in high places, looked upon the canon law as a dangerous popish relic, even if it might be 'cleansed' of its specifically popish provisions. Archbishop Abbot's attitude of conscientious disgust towards the fine distinctions involved in the divorce between the Earl and Countess of Essex for the Earl's sexual impotence, an importance professedly limited to the Countess alone,⁹² or Lord Burghley's feelings of impatience with the sophistical arguments needed to deprive the Puritan clergyman Robert Cawdrey of the benefice to which he had been lawfully instituted,⁹³ are two examples of this habit of mind. It is the

⁹¹ See pp. 173–80.

⁹² Archbishop Abbot's anguish about the case is expressed at length in All Souls' College, Oxford, MS. 343, fols. 5–28, and to a lesser extent in Huntington Library (San Marino, California) MS. HM 1553, fols. 1–17v. There is a modern account in Paul A. Welsby, *George Abbot, the Unwanted Archbishop 1562–1633* (1962) 57–73.

⁹³ Printed in J. R. Tanner, *Tudor Constitutional Documents A.D. 1485–1603* (2nd edn 1930) 373–4. The case itself is reported at 5 Co. Rep. 32b, and discussed in Usher, *Rise and Fall* (1968) 136–46.

plain man's attitude towards the *oceanus iuris* of the Roman canon law.⁹⁴ Even an enthusiastic student of that law must admit that there is something to be said for it.

This attitude, widely shared, put the civilians on the defensive. They had to make a credible showing that their courts were not popish and that they were not relics. They never succeeded in making that showing, and the failure damaged their ability to maintain the Roman canon law. Widespread distrust of the canon law had several concrete results. It led, for example, to the appointment of fewer men trained in the civil law to the episcopal bench than had once been true, and it led to the occasional appointment of mere M.A.s rather than LL.D.s to some of the judgeships of England's consistory courts.⁹⁵ It caused a consequent weakening of the study of the civil law at Oxford and Cambridge. Contemporary civilians were alarmed at these developments, and (from their point of view) they had every reason to be.

Third, under both Elizabeth and James I, English statute law conferred on the common law courts some rights to jurisdiction that had once belonged exclusively to the Church. This happened, for instance, in the law of usury,⁹⁶ the law of filiation,⁹⁷ the law of perjury,⁹⁸ and the law of charity.⁹⁹ It is right to point out that virtually every statute that enlarged the scope of the common law jurisdiction contained a 'savings clause' for spiritual jurisdiction. The Church was expressly permitted to retain its prior rights. Consequently, these acts posed no direct threat to the Church's courts. But not every real threat is a direct threat, and over the long run these statutes inevitably worked to shrink the effective jurisdiction of the ecclesiastical tribunals. Shared jurisdiction may soon turn into occasional or even purely theoretical jurisdiction. This largely happened, for example, in the law relating to usury. Usury causes virtually disappear from the act books after 1571, the date of the Elizabethan statute on the subject. At the time, the serious consequences of this kind of indirect loss were plastered over by the overall growth in litigation within the

⁹⁴ See also William Stoughton, *An Assertion for True and Christian Church Politie* (1604) 39, arguing that, 'the Papall and foreign canon law is already taken away, and ought not to be used in England'.

⁹⁵ G. D. Squibb, *Doctors' Commons* (1977) 44. For an instructive example, see Robert Peters, *Oculus Episcopi: Administration in the Archdeaconry of St Albans 1580-1625* (1963) 11-15.

⁹⁶ 13 Eliz. c. 8 § 8 (1571).

⁹⁷ 18 Eliz. c. 3 § 1 (1576).

⁹⁸ 5 Eliz. c. 9 § 5 (1563).

⁹⁹ 39 Eliz. c. 6 (1597).

ecclesiastical courts. Usury cases never had taken a large share of the business of any ecclesiastical court, and their absence would scarcely have been missed. But this must not disguise what was happening. A plaster is not always a cure.

The modern historian of the Roman canon law must see these statutory changes as a happy event. They provide one of the best reasons for asking English legal historians to look seriously at the substance of the law enforced in the ecclesiastical tribunals. They mean that the histories of English laws relating to usury, perjury, filiation, charity, and many other aspects of modern English law do not begin with the Tudor legislation, and they mean that the substantive law in these and other areas of the common law will be better understood by looking in a more than perfunctory way at the history of the Roman canon law. The common law courts took over substantial parts – though not all – of existing canon law in implementing the new statutes. We shall more fully understand the legal history of that period if we know that this is what was occurring.

However, it is idle to suppose that Elizabethan and Jacobean civilians might have shared this perspective. They were not legal historians. They hoped and endeavoured to keep strong the courts upon which their livelihood depended. They hoped and endeavoured to maintain the law they knew, that is the Roman canon law. The more detailed account of the ways they sought to do this, together with some estimate of their successes and their failures, occupies the remaining chapters of this book.

DEVELOPMENTS IN LAW AND LEGAL PRACTICE

Three principal features emerged from surveying the outer framework of ecclesiastical jurisdiction during the years of the Reformation. First, serious attempts to work root and branch reform of the court system came to nothing. Not all men had given up hopes for substantial reform as Elizabeth's reign went on, but more and more it looked as though the courts would follow the pattern set during the reign of her father. That meant continued enforcement of the Roman canon law, in so far as it was compatible with the settled customs of the country and the interests of the English Crown. Second, the principle that Parliament could legislate directly for the ecclesiastical courts was accepted in principle and implemented in fact. Statute law became a regular feature of practice within the spiritual forum. Third, the volume of litigation in the courts grew during the course of Elizabeth's reign. Both on the instance and the *ex officio* sides, more causes were being heard in 1600 than had been true fifty or even one hundred years before. This third development signalled, if it did not wholly cause, some restoration of confidence among the civilians who staffed the ecclesiastical tribunals.

This chapter looks inside the outer framework. It describes the legal developments that occurred in five specific areas of post-Reformation court practice, attempting to show what continuities and changes they entailed. Its purpose is thus to add legal flesh and bones to my account of the jurisdictional developments, and to show in detail how the spiritual courts coped with the changed circumstances brought about by the Reformation. I have not tried to describe every aspect of the ecclesiastical law, but rather to illustrate the important ways in which the Roman canon law both changed and remained the same in the English tribunals.

DEFAMATION

The history of the law of defamation is one of continuity in substance, coupled none the less with significant developments in court practice. The continuity is the easier to appreciate. The jurisdictional settlement with the common law courts arrived at by the 1520s persisted, respected on all sides. The courts of the Church heard causes involving the imputation of 'spiritual' crimes like simony, sorcery or adultery, but not causes involving imputations of temporal crimes, which they had heard in medieval practice. The common law courts dealt with these, under the rubric of the action on the case for words. The sensible principle underlying this sharing was that only where the ecclesiastical courts had jurisdiction over the principal matter should they also hear cases involving the accessory matter, that is the slanderous imputation. Where one man had called another a thief or a murderer, in other words, only the temporal courts could entertain a suit for slander, because only temporal courts had jurisdiction over the crimes of theft and murder.¹

Jurisdictional definitions and conflicts

Acceptance of this jurisdictional principle by both common lawyers and civilians brought relative harmony throughout the period. Defamation was not one of the areas of sharp conflict between the two court systems. In only two instances do the records show regular signs of jurisdictional stress. The first occurred when the slanderous words included both a temporal and a spiritual crime – as in 'Thou are a thief and a whore.' The second consisted of imputations of the French pox, that is syphilis. The more aggressive among the common law judges held that the ecclesiastical courts should be prohibited from hearing both sorts of cases. The more aggressive among the civilians insisted they could not. The outcome of the disagreement can only be called a stand-off. Certainly the ecclesiastical courts continued to hear such cases right through the period,² but how many more were discouraged

¹ Acknowledged by a civilian in York BI Precedent book 11, f. 6v: 'To call one theefe etc. will beare no action in the spirituall court, because it is no crime punishable by the ordinary or spirituall judge.'

² E.g., *Clarke c. Knap* (1580), Salisbury Act book D 1/39/1/13, f. 24 (brought both for imputing theft of a hen to the plaintiff and also saying that she was a whore); *Clarke c. Brunt* (1604). Chester Cause papers EDC 5 (1604) No. 58: 'Thou or she art or is a whore and a cutt purse theife'; *Welch c. Heelie* (1637), Nottingham Act book A 43, last folio: 'Thou art both a theefe and a whore.'

at initial stages by the availability of writs of prohibition we cannot be sure.

Behind these seemingly trivial cases stood a principle of some importance to the civilians. If the aggressive common law position were fully put into practice, the courts of the Church would be unable to provide a remedy for defamation even in cases that traditionally belonged to them. Not only would the aggressive position mean that the inclusion of *any* sort of temporal matter in a slanderous imputation would exclude ecclesiastical cognizance, even where the main imputation was unquestionably spiritual in nature. It would also mean that the common law judges could oust ecclesiastical jurisdiction whenever they desired, simply by offering a common law remedy. Quarrelling men and women are rarely careful in their choice of words, and if 'perjured whore' fell on the temporal side of the fence because perjury might be a common law crime, the spiritual courts would be substantial losers. Conceivably, if fornication became a common law offence, even calling a woman a whore would give rise to no right to sue in the spiritual forum. That seemed a dangerous precedent to the civilians, because it upset the traditional jurisdictional boundaries between spiritual and temporal.

The French pox cases illustrate the problem as the civilians saw it. The French pox was contracted by sexual intercourse, and therefore seemed to fall easily on the ecclesiastical side of the jurisdictional boundary line. However, for reasons that are not very clear, the common law courts offered a remedy for imputations of the disease.³ Hence the dilemma: If the civilians ceased hearing cases where the French pox had been imputed, they would be acknowledging that, at least in the law of defamation, their jurisdiction depended wholly upon the sufferance of the common law judges. This they would not admit, and French pox causes continued to appear in the Church court records.⁴ The litigation was surely of negligible importance in

³ See S.S. Vol. 101, pp. xcvi-xcvii.

⁴ French Pox cases in ecclesiastical courts: *French c. Basuet* (1555), Chester Cause papers EDC 5 (1555) No. 3: 'He had receyvyd the french pokes and that he was burnyt by one Elizabet French'; *Tither c. Windover* (1582), Salisbury Deposition book D 1/49/9, f. 37v: 'I will prove that thowe wert layd of the frenche pokes'; *Sharplus c. Dawson* (1598), Lincoln Diocesan Court papers, Box 59/1/15: 'John Sharplus hast or hath a burnt pricke'; *Upsall c. Pursglove* (1609), Nottingham Court papers LB 221: 'layd in a bathe for the pokes'; *Hoptwood c. Smyth* (1631), Chester Cause papers EDC 5 (1631), No. 77: 'that he [the defendant] had gotten the pox from the said Helen and that she had sett the pox upon him'.

itself, even to the civilians. But it did raise a point of principle, one they thought important to defend.

For the most part, however, divisive problems like this one remained theoretical. Not many litigated causes raised the problem, and where it did arise, the cause itself was often trivial enough to encourage compromise of issues of principle. Moreover, neither the common lawyers nor the civilians had cause for immediate alarm, since no diminution of slander litigation in either sets of courts occurred over the course of the century. The fact was the reverse. The volume of defamation causes was increasing in most dioceses,⁵ just as it was in the Courts of Common Pleas and King's Bench. The jurisdictional restrictions of the 1520s and the sparring that followed them left the ecclesiastical courts with a volume of defamation litigation few observers would have called too low.

Expansion in the scope of defamation

It is difficult to assign an altogether satisfactory reason for the overall growth in numbers of defamation causes within the post-Reformation courts, though several plausible candidates have been advanced.⁶ All of them ought to take account of one purely legal development. The sixteenth and seventeenth-century ecclesiastical courts carried further a change that had begun at the same time their jurisdiction over imputations of secular crimes were beginning to be attacked in the last quarter of the fifteenth century. That was to permit actions to be brought for *convicium*. *Convicium* meant abusive and hurtful language which did not, however, necessarily impute the commission of a crime. Post-Reformation practice built upon and expanded this change. Thus one finds imputations that were in truth no more than insults – words like ‘whore of thy tongue’ – appearing in the act book

⁵ Peter Rushton, ‘Women, Witchcraft and Slander in Early Modern England: Cases from the Church Courts of Durham’, *Northern History* 18 (1982) 125–7; J. A. Sharpe, *Defamation and Sexual Slander in Early Modern England: the Church Courts at York* (1980) 8; Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (1987) 299; C. A. Haigh, ‘Slander and the Church Courts in the Sixteenth Century’, *Transactions of the Lancashire and Cheshire Antiquarian Soc.* 78 (1975) 2; S.S. Vol. 101, xlv.

⁶ J. A. Sharpe concluded that the increase reflected society's growing concern for sexual morality (See *Defamation and Sexual Slander* 24). C. A. Haigh suggested that it grew from a growing desire among plaintiffs to avoid being presented for the offence (See ‘Slander and the Church Courts’, 8). Both admit the difficulty of drawing any sure conclusions about causation, as I do.

records.⁷ It became possible to invoke ecclesiastical jurisdiction when one had been called merely 'a hypocrite',⁸ 'a false knave',⁹ 'a cozenor',¹⁰ or 'a scurvy drunken baggage'.¹¹ To say that a man had 'no more conscience than a dog',¹² or even that he 'went to church to pray for his dog',¹³ could amount to actionable *convicium*. None of these abusive but unincriminating phrases would have been actionable under the Provincial Constitution of 1222 that had dominated medieval practice.¹⁴ That Constitution required the imputation of a crime, and the requirement had had the effect of limiting the number of defamation causes the Church courts heard. This development removed that limit.

Behind the new remedy lay the theory that any words uttered out of malice and against 'fraternal charity' should subject the speaker to ecclesiastical jurisdiction and discipline just as surely as those which expressly imputed a crime. In the act books, these causes were sometimes expressly styled as being undertaken 'for the reformation of manners'.¹⁵ Focusing on the speaker's wickedness as well as on the harm caused, the broader remedy amounted to a sweeping assertion of jurisdiction over the laity, at least in its potential. *Auctoritate dei patris*, the medieval Constitution, was easy to confine, and it was easy to know when one's words offended against it. Not so when merely reproachful words were swept into the ecclesiastical net. Defining what words might be said to offend 'fraternal charity' is not an easy thing to do, and contemporary civilians did not offer precise definition.

Whether the English civilians had embraced this broader conception of slander specifically in order to compensate for attacks by the common lawyers on their medieval jurisdiction is a possible, though not a provable, assumption. The coincidence in time between the two events is the only direct piece of evidence for the connection. Cer-

⁷ *Kinder c. Barton* (1597), Nottingham Act book A 11, pp. 22-3.

⁸ *Cabell c. Eger* (1599), Bath and Wells Papers and Causes s.d. 1599.

⁹ *Webbe c. Bowreman* (1527), Winchester Act book CB 6, f. 40.

¹⁰ *Ex officio c. Tye* (1600), Ely Act book EDR B/2/21, f. 4v.

¹¹ *Dickes c. Coles* (1605), London Guildhall MS. 11448, f. 4v.

¹² See marginalia to MS. of Francis Clerke, 'Praxis in curiis ecclesiasticis', Catholic Univ. of America, Washington D.C., Spec. Coll. MS. 180, f. 127.

¹³ *Hale c. Annion* (1613), Chester EDC 5 (1613) No. 2.

¹⁴ See *Councils & Synods* 1:107.

¹⁵ E.g., *Shawe c. Barton* (1596), Durham Act book III/5, f. 61v, called a 'causa diffamationis sive morum reformationis'.

tainly, the change was deliberate. The civilians were well aware of the difference between the two sorts of defamation. The two called for variation in pleading forms (though both forms could be included in the same libel), and such variation in pleading is found regularly in the surviving records.¹⁶ Moreover, slightly different procedural rules applied to each. Civilian writers frequently noted, for instance, that there was a one-year limitations period for merely abusive language, but not for actions founded upon the Provincial Constitution.¹⁷

In assessing the reasons for the change, it is well worth pointing out that the change brought the English spiritual courts into greater conformity with the Roman law of *iniuria* and indeed with the formal canon law.¹⁸ The medieval English Constitution had provided a narrower scope for the law of defamation than either, requiring that a crime have been imputed to make the language actionable. This was not necessarily contrary to canonical principles. But the broader civil law remedy was expressly sanctioned by the papal decretals,¹⁹ and it may be that this congruence encouraged acceptance of the newer remedy during the late fifteenth century. Consultation of any Continental treatise on the subject would also have pushed the sixteenth-century civilians in the same direction. Whatever the cause, it remains a nice irony that the English Church courts came closer to enforcing the law found in the papal decretals during the late sixteenth century than they had in the fourteenth.

Jactitation

Defamation practice during the Reformation era also expanded in a related but slightly different direction: to encompass false boasting,

¹⁶ Compare, for example *Cabell c. Eger* (1599), Bath and Wells Papers and causes s.d. 1599, brought by a plaintiff who had been called a hypocrite and in which the positions do not mention the 1222 Constitution, with *Rodwaye c. Newton* (1596), found in the same file of Bath and Wells Cause papers, brought for imputation of sexual offences, in which the Constitution was expressly pleaded. The 'combined' form of pleading is illustrated by *Kingwell c. Taylor* (1559), in S.S. Vol. 101, 16–17. A listing of the main differences is found in York BI Precedent book 11, f. 32. It can also be found, being explained to the common law judges by Dr Duck in *Ralph Bradwell's Case* (C.P. 1626), Lit. 9, 12.

¹⁷ There is full discussion of the point in *Butcher c. Hodges* (1619), Bath and Wells D/D/O, Box 5 of 5, fols. 32–8.

¹⁸ There is a good summary of this aspect of the civil law in W. W. Buckland, *A Text-book of Roman Law from Augustus to Justinian*, 3rd edn rev. by Peter Stein (1963) 589–92.

¹⁹ X 5.36.9; see generally Hostiensis, *Summa aurea* (Turin 1574) Lib. V, tit. *de iniuriis et damno dato*.

called 'jactitation' in canonical parlance. A form of this remedy survived into modern times in the quaint common law action known as jactitation of marriage.²⁰ Brought for wrongfully and publicly pretending that a valid marriage exists between the speaker and the plaintiff, the action is meant to establish that no such marriage in fact exists. The theory behind it is that the cause of action is needed to protect the plaintiff's reputation (and chances of marriage) from the manifold inconveniences that follow from such false, but not legally defamatory, statements.

The origins of this action are certainly ecclesiastical and in fact seem to belong to the sixteenth century. The earliest clear example I have found comes from the diocese of London in 1502,²¹ although some of the medieval suits brought for impeding the solemnization of a contract of marriage by 'reclaiming' at the reading of the banns approximated the substance of the jactitation suit.²² However, it is only in the latter half of the sixteenth century that the cause expressly called jactitation of marriage becomes at all frequent in the act books. One ecclesiastical lawyer even experimented with its mirror image: 'jactitation of nullity of marriage'.²³ That meant boasting falsely that one had procured a divorce.

In the later years of the century and the first part of the seventeenth, the scope of actionable jactitation expanded beyond marriage. A parallel with the growth of the similar action of slander of title in English common law can in fact be drawn. Both grew out of and expanded upon existing remedies, and both happened at roughly the same period of time. For their part, the civilians built upon the theory which lay behind the remedy in marriage cases – that it was an injury both to the party spoken about and more broadly to the public interest falsely to claim a right to the detriment of others. They used this theory to encompass several other sorts of boasting within the scope of ecclesiastical jurisdiction. Making a false boast that one enjoyed a

²⁰ Henry Conset, *Practice of the Spiritual or Ecclesiastical Courts* (1685) VI:6; Joseph Jackson, *The Formation and Annulment of Marriage*, 2nd edn (1969) 87–8.

²¹ *Risley c. Heyner* (1502), London Guildhall Act book MS. 9064/9, f. 5: 'Margareta Heyner jactitat se matrimonium contraxisse cum Thoma Risley cum sic non contraxerit in preiudicium alterius contractus inter se et aliam.'

²² E.g., *Ex officio c. Sandecoke* (1456), Canterbury Act book Y.1.5, f. 132v: 'Item dicta Agnes Sandecoke scandalizavit seipsam et dictum Stephanum dicendo ipsam Agnetem Sandecoke contraxisse matrimonium cum dicto Stephano ea intencione et causa quod matrimonium contrahendum inter dictum Stephanum et predictam Agnetem Wylloke impediret.'

²³ 'Civilian's Notebook', Berkshire Record Office, Reading, MS. D/ED O 45/1, p. 230.

special seat in his parish church was held to give rise to a remedy in the ecclesiastical courts.²⁴ To claim falsely that one was entitled to a benefice, or that one had the right to collect parish tithes now gave rise to an ecclesiastical cause of action.²⁵ Even to boast of having committed adultery subjected the speaker to potential prosecution by the courts of the Church, and several examples of *ex officio* causes that can only be styled 'jactitation of adultery' appear in the surviving records.²⁶

The implications of these two developments were not inconsiderable. The one made much personal abuse actionable; the other did the same for harmful boasting. If allowed to flourish, the new remedies would have subjected a very wide range of human speech to supervision and punishment by the spiritual tribunals. It is not surprising, therefore, that there was resistance to the new remedies almost from the start. Prohibitions from the royal courts were successfully sought in defamation cases where the words spoken were thought too trivial even for an ecclesiastical court to entertain. To call a man 'a knave' or a woman 'a queen' are two examples in which common law judges held that the words were too uncertain in their effect to justify the exercise of spiritual jurisdiction.²⁷ There was some common law opinion in favour of restricting the spiritual courts strictly to imputations of ecclesiastical offences.²⁸ That would have reversed the expansive tendency of fifteenth and sixteenth-century ecclesiastical jurisdiction

²⁴ *Eaton et al. c. Lloid* (1580), St Asaph Act book SA/CB/1, f. 32, called 'causa jactitationis iuris usus et occupationis sedilis et familiaris sepulchri'. Canterbury Precedent book X.5.16, fols. 118v–119, called 'causa beneficiaria sive jactitationis decimarum'.

²⁵ *Howlett c. Smith* (1587) Winchester Act book CC B 58, s.d. 15 July; Buckingham Precedent Book (c. 1615) D/A/X/4, fols. 302–4v, a 'libellus in causa jactitationis beneficii'. See generally Francis Clerke, *Praxis* tit. 131, no. 10. Much the same development seems to have occurred on the Continent; see, e.g., Mattheus de Afflictis, *Decisiones S. Regii Neapolitani consilia* (Frankfurt 1616) Dec. 268; Andreas Gail, *Observationes practicae imperialis Camerae* (1595) Lib. I, Obs. 9–12 (making use of Cod. 7.14.5).

²⁶ *Ex officio c. Turner* (1587), Peterborough Correction book 21 (X 609/21), f. 5: 'he hath slandered hymselfe with Sibell Thorpe'; *Ex officio c. Hawkes* (1589), Winchester Act book CC B 60, f. 54: 'valde imprudenter gloriando se illam septies per noctem contaminasse'; *Ex officio c. Conyworth* (1611), Lincoln Visitation book Vj/21, f. 100: 'for defaming himselfe with Alice Kingston'; *Ex officio c. Viccars* (1616), Bedford Act book A.B.C. 5, f. 4: 'for reporting he had to doe with the said Jane Jeroms'.

²⁷ *Anon.* (K.B. 1615), 1 Rolle 217; *Lewes v. Whitton* (K.B. 1625), Noy 85; *Anon.* (K.B. 1627) Latch 205.

²⁸ E.g., *Crompton v. Dudley* (C.P. 1641), March, N.R. 153.

over defamation. It would have forced the courts back to the law found in the Provincial Constitution of 1222.

The civilians resisted such restrictions. They insisted on their right to hear disputes where people had by their words violated the norms of fraternal charity and the bounds of acceptable behaviour. But even they must have felt some unease at the implications of the development. It could have opened their courts to the most trivial sorts of quarrels, and not all ecclesiastical lawyers welcomed that development.²⁹ One Jacobean civilian suggested that the word 'queen' was 'not so grievous' as the word 'whore', and therefore might not sustain an ecclesiastical prosecution.³⁰ He wondered similarly about the word 'bastard'. The term imputed no crime to the party slandered, and only if used in conjunction with real property litigation would it cause him any measurable harm. On the other hand, there was little doubt that the word was abusive and 'contrary to the norms of charity'. It was a hard case for him. He thought that the term might, or that it might not, be actionable.³¹ Certainly it should call for a lesser penance than more clearly defamatory utterances. His hesitation is instructive.

The canon law did not view this sort of litigation as a public good. It enjoined the virtues of concord on its practitioners. Nowhere did this injunction make greater sense to contemporaries than in the law of defamation. The results are visible in the act books. The combination of the civilians' reluctance to make lawsuits of every exchange of insults, a natural unwillingness on the part of litigants to sue except where a real point of honour was at stake, and the availability of writs of prohibition where the slander was trivial seem together to have limited the extent of the expansion of ecclesiastical jurisdiction. Though the surviving records all contain some causes based on the wider conception of defamation, they do not contain a great many. In some of those that *are* found, the abusive words seem to have been part of a more serious public quarrel, one that had truly disturbed the harmony of a neighbourhood.

The majority of ordinary defamation causes found in sixteenth and seventeenth-century act books continued to be brought for imputations of ecclesiastical offences, continuing the medieval state of

²⁹ E.g., London Guildhall MS. 11448, f. 156: 'Yf a mynister be called knave. Dr Martin saieth it is actionable in the spirituall lawe by the cannons. But dubito.'

³⁰ *Ibid.* f. 52.

³¹ *Ibid.* f. 103v: 'An action if diffamacion doth lie against one that calleth another Bastarde. But quaere. Solutio noe.'

things. The expanded definitions of defamation, therefore, did not wholly replace the traditional English rule that slanderous words normally included the imputation of a crime. The cases brought for abuse or jactitation remained occasional entries, and in this sense the continuity with medieval practice was in fact stronger than the growth of new conceptions of actionable slander might imply.

Other areas of substantive law

The substance of other areas of the law of defamation enforced in the ecclesiastical courts also remained of a piece with medieval practice, though here too developments occurred. The first of these came in some slight progress that was made in dealing with the troubling and traditional question of whether or not truth could serve as a valid defence in defamation causes. There was also the emergence of something like a law of qualified official privilege, a surprisingly late development in the law. More minor at the time, but more pregnant for future change, were occasional borrowings of substance and form from the growing common law of libel and slander.

Whether or not the truth of an imputation served as a valid justification, and therefore furnished the speaker with an answer to a suit brought on the words, was a subject of traditional doubt in the Roman canon law. On the one hand, to make known the truth about the perpetration of a crime often served a public good. It might be made out of duty and with the highest motives. On the other hand, even a truthful imputation might be uttered out of pure malice and deserve censure on that account. The disclosure might serve no purpose other than spite or revenge. In the canonical system, meant to correct as much as to punish, it was likely that this might have been an uncertain question. Medieval practice in the English courts mirrored the substantive uncertainty; the surviving evidence seems insufficient to me to say whether or not truth was regularly accepted as a defence in English canonical practice. There is some evidence both ways.³² It

³² The evidence is reviewed in S.S. Vol. 101, pp. xxx-xxxii, a treatment which now seems to me to exaggerate the strength of the evidence that truth served as legal justification. In *Petwen c. Smyth* (1535), Berkshire Act book D/A 2/c 3, f. 13, the defendant admitted calling the plaintiff 'a strong whore' but said that he had had sexual relations with her. Sentence was nevertheless given for the plaintiff without further proof. It is possible that the reason the defence of truth was proffered in many of the causes heard was that the defendant merely wished to secure mitigation of the penance.

may be that the point of law was simply unsettled, left to judicial discretion in individual cases.

Uncertainty about the point continued into the sixteenth century. Specific ecclesiastical causes raised the point, and civilians who appeared in them put arguments on both sides.³³ However, in the Court of Arches what might be called a compromise was accepted late in Elizabeth's reign, and at least according to one reporter, this became the practice generally observed. Under it, except where the imputation could be justified as a duty imposed on a speaker by his office or some other legitimate obligation, truth would not constitute a valid justification to a plea of defamation. However, in dealing with truth-speaking slanderers, the judges 'commonly mitigated the penance and the expenses'.³⁴ This solution was inconsistent with the common law rule that truth was a good justification in slander cases, and there were occasional prohibition cases attempting to enforce the temporal law's position on the ecclesiastical courts.³⁵ At least prior to 1625, however, there were not enough of them materially to affect canonical practice.

A second development in the defendant's side of defamation cases was the emergence of a qualified privilege attached to the office of churchwarden. This was more important, and newer, than might be thought. Among the doubts in the Roman canon law tradition was the whole question of whether there should ever be immunity from prosecution for slander, and the more common opinion was that there should not. Even magistrates should not enjoy a blanket privilege to defame in the exercise of their office. Thus the question was left to a case by case determination of whether or not the imputation had in fact been made maliciously. A person's office and the duties connected with it counted in the balance against the existence of malice, but they

³³ In *Webb c. Rowbottom* (1613), Bristol Act book EP/J/1/15 s.d. 24 July, the allegation was that the defendant had called the plaintiff 'bird of a whore'. The defendant pleaded that the plaintiff was *minime diffamata* by these words, because she had been born towards the end of the two year absence of her mother's husband. In *Crooke c. Bennet* (1601), Bodl. Tanner MS. 427, f. 182, where truth was offered in justification, it failed, apparently for want of proof. In *Toothbye's Case* (1609), York BI Precedent Book 11, f. 15v, the objection was made in a cause dealing with a public libel. It was rejected, 'for in a libell, there is no doubt that *veritas criminis* doth not excuse'.

³⁴ See York BI Precedent book 11, f. 5, adding 'Sic Turner in nostris foris observari ait.'

³⁵ See S.S. Vol. 101, pp. cvii-cviii.

were not dispositive.³⁶ Thus a lawyer arguing for his client could rarely be considered to be speaking out of malice. However, it was not impossible. The point could be argued. And it was.

This situation was intellectually defensible, but it invited doubt and contention. In one respect, post-Reformation practice in England made a real improvement on it. Canon 115 of the canons of 1604 'admonished and exhorted all Judges, both Ecclesiastical and Temporal' not to admit complaints against churchwardens, clergy or other officers who made presentments of crimes to the courts.³⁷ The judges enforced this canon. As one civilian reporter put it, 'No judge will admit an action against the churchwarden, because it is to be presumed he doth it not upon malice.'³⁸ In other words, the churchwarden's office and oath, tending to show lack of malice on his part, now gave rise to a presumption of law that was irrebuttable.³⁹ The presumption freed churchwardens from the fear of a suit for defamation as a consequence of having presented their fellow parishioners, and it freed the spiritual courts from one of the most uncertain of factual inquiries in defamation litigation. This must be counted an advance.

Whether or not a third sort of change in ecclesiastical practice represented any kind of advance seems less certain. It was the adoption of some common law habits and rules of pleading. The civilians knew a good deal about practice in the common law courts, and they sometimes made use of what they knew. For instance, they copied the *innuendo* form used in the royal courts. This was a way of pleading that the persons referred to in slanderous words were in fact the same persons who were parties to the litigation.⁴⁰ It was carried to extreme

³⁶ E.g., *Medcalf c. Bishop* (1601), Bodl. Tanner MS. 427, fols. 62–62v, in which plaintiff's counsel argued, 'Nec excusabitur officialis ex eo quod est officialis, 1. ea quidem, de accusationibus et inscriptionibus C. (Cod. 9.2.7) nisi in iis solum quae de suo facto in executione officii Abb. cap. finali, de iniuriis (Panormitanus, *Commentaria* ad X 5.36.9).' For a common law example of the same sort of balance being struck, see *Cox v. Worrall* (K.B. 1607) Yelv. 105.

³⁷ See 'Constitutions and Canons Ecclesiastical', in Edward Cardwell, *Synodalia* (1842) I:229, 311.

³⁸ York BI Precedent Book 11, f. 10v.

³⁹ The privilege did not extend, however, to those who informed the churchwardens; see, e.g., *Dix's Case* (c. 1620), Bodl. MS. Eng. Misc. f. 473, p. 11: 'A parishioner may informe a churchwarden of a misdemeanor soe it be true and soe he doe it not animo malicioso.' So pleaded in *Osborne c. Moorgen* (1613), Bristol Act book EP/J/1/15 s.d. 30 June.

⁴⁰ See, for example, the learning in William Sheppard, *Action upon the Case for Slander*, Cap. 23 (1662) 106–14.

lengths in practice – as in ‘Alice Smith (innuendo dictam Aliciam Smith) did say that Anne Jones (innuendo dictam Annam Jones) was a whore (innuendo dictam Annam Jones fuisse meretricem).’ This sort of extravagant carefulness happened on both sides of the jurisdictional line.⁴¹

More substantive was the civilians’ flirtation with the common law’s use of the *mitior sensus* rule. The common lawyers held that if words could be construed in a non-defamatory sense, they would be so construed. The principle of construction gave rise to contention and argument at the time, because milder interpretations could be invented for a great deal of obviously slanderous language. ‘J. S. knows as much law as a jackanapes’, for example, might not be actionable even if J. S. were a lawyer, because (it was contended) the speaker might have meant that J. S. knew as much law as a jackanapes *and more*.⁴² Some quite absurd arguments along these lines can be found in the common law reports, and the *mitior sensus* doctrine has provided an easy target for critics of the law of libel and slander.

In its origins and as a means of construing truly doubtful utterances, the rule was actually quite a sensible one. Indeed it may have been part of the ecclesiastical inheritance of the common law of defamation. The rule provided a way of ensuring that real harm have been done before recovery was allowed, and it fulfilled the Provincial Constitution of 1222’s requirement that a real crime have been imputed before the words would be actionable. The distinction continued to be important even when merely abusive language became actionable, because different rules of evidence and procedural requirements prevailed for each, and also because simple abuse was thought deserving of lesser punishment than imputations of a crime. Its civilian pedigree was therefore both impeccable and important. The rule appeared in the Roman law Digest.⁴³ Commentaries on the

⁴¹ E.g., *Upsall c. Pursglove* (1609), Nottingham Cause papers LB 221: ‘hec verba anglicana videlicet Elizabeth Upsall (innuendo et significando dictam Elizabetham Upsall) was layd in a bathe for the pockes’. The most extreme example so far discovered is *Dillingham c. Smith* (1597), Huntingdon Act book 5/3, fols. 69–70, in which the proctor contrived to use the *innuendo* form twelve separate times in a single set of articles.

⁴² *Palmer v. Boyer* (C.P. 1593), CUL Ee.3.45, f. 69. There are printed reports of this case found in Cro. Eliz. 342; Goulds 126; Owen 17.

⁴³ The rule was set out in Dig. 50.17.56.

canon and civil law also endorsed the preference for milder construction in cases of doubt about what the words had meant.⁴⁴ In the sense that true uncertainty should be resolved against actionability, it has long been part of the Roman canon law tradition. What was new were the heights of subtlety and perversity to which the doctrine was pushed in the hands of the common lawyers.

Perhaps, then, the civil law origin of the rule and its great frequency in the early common law reports made it inevitable that the *mitior sensus* doctrine should begin to make a regular appearance, at least by way of respectable argument, in post-Reformation ecclesiastical practice. Certainly it did. For example, in a 1619 cause found in a civilian's notebook from Bath and Wells, one question raised was whether or not saying that a man 'did keepe' a woman during the lifetime of his deceased wife necessarily meant that he had committed adultery with her. Counsel for the defendant argued that it did not, for 'where a deed or word can be interpreted either for good or evil, . . . it should be interpreted *in meliorem partem*'.⁴⁵ He buttressed the argument with citations to treatises by William Lyndwood and Joannes Campegius (d. 1512).⁴⁶ In a slightly earlier cause from the diocese of Ely, similar doubts were raised about the phrase 'evil as a witch'. Did these words amount to an imputation of actual witchcraft? Or did they stop short enough of it to constitute mere abuse?⁴⁷ Such arguments, minus the civilian citation but otherwise identical, might have come from almost any common law report of the time.⁴⁸ The civilians never pushed the

⁴⁴ E.g., *gl. ord.* ad X 5.41.2 (*Estote*) s.v. *in meliorem partem*: 'Et benigniorem interpretationem sequi debemus in re dubia.'

⁴⁵ *Butcher c. Hodges* (1619), Bath and Wells, D/D/O Box 5 of 5, fols. 32–8, at 34v: 'ubi factum vel dictum se habere potest indifferenter ad bonum vel ad malum, tunc quia dubium est quo animo id factum est vel dictum, debet interpretari in meliorem partem' (entitled 'Lura ex parte Hodges' in the MS).

⁴⁶ The first reference is to *Provinciale* 263 s.v. *injuriose*; the second to *Tractatus de testibus* (T.U.I. Vol. 4) Reg. 299.

⁴⁷ Ely Precedent book EDR F/5/41, f. 355v.

⁴⁸ See *Lady Morrison v. Cade* (K.B. 1607), CUL Gg.2.23, fols. 54v–55, in which it was argued that these words 'serra intend come un taylor in measuringe ou phisicion in donant phisicke et similiter'. See also the printed report of the case in Cro. Jac. 162.

mitior sensus rule as far as the common lawyers, but they found it equally impossible to leave alone.⁴⁹

MARRIAGE AND DIVORCE

Like the law of defamation, the history of the law of marriage and divorce during the Reformation era combines essential continuity with real change. In this instance, the continuity is the more remarkable. The law of marriage presents the paradoxical case in which the English Church clung to a part of the medieval Roman canon law which the Roman Catholic Church itself discarded. That is essentially what happened on the question of the validity of clandestine marriages. After debate and hesitation, the Council of Trent cut this gordian knot of medieval marriage law; its decree *Tametsi* declared the presence of the parish priest a requirement for contracting a valid and enforceable marriage.⁵⁰ Medieval canon law had allowed a man and woman to enter into a binding and indissoluble marriage merely by exchanging words of present consent. No public ceremony, no publication of banns, no approval of the couple's family, no sexual consummation were required. Only a contract, made by *verba de praesenti*, between two consenting parties was necessary. *Tametsi* ended that regime.

Continued enforcement of clandestine marriages

England was obviously not among the countries that received *Tametsi*. The English Church held to the medieval position that words of present consent, without more and even if privately uttered, made a fully binding marriage. The result of that decision was that marriage litigation in sixteenth and seventeenth-century England continued to

⁴⁹ For instance, in *Lambert v. Franklin* (1600), Bodl. Tanner MS. 427, f. 74v, in which the words were that the plaintiff should 'stand again at the market cross in a white sheet', the objection taken was that this 'non est obiectum crimen ecclesiasticum sed poena criminis'. However, in Anon. (1605), London Guildhall MS. 11448, f. 66v, the answer given to what was an apparent attempt to apply the *mitior sensus* rule was that 'dicta sunt intelligenda secundum communem usum loquendi non secundum subtilitatem jurisconsultorum'. In other words, as at common law, the point was arguable.

⁵⁰ See *Enchiridion symbolorum*, eds. H. Denzinger and A. Schönmetzer (1965) 417.

look much as it had during the Middle Ages.⁵¹ That is, it dealt with questions involving the formation of marriage more often than with those involving its annulment. The suit brought for specific performance of the obligations arising from a clandestine marriage was a continuing and normal feature of litigation in the English courts. So was the *ex officio* proceeding to require public solemnization of a private contract of marriage.

This is exactly what one would expect. Treating clandestine marriages as valid marriages led inevitably to litigation. In the first place, they raised problems of proof that did not exist with marriages duly and publicly celebrated. Witnesses to the clandestine contract there must have been, and in reliability and character those witnesses must have met the not insignificant requirements of the Roman canon law of proof. Thus, one continues to find causes in the English ecclesiastical court records in which the principal question was the sufficiency of the proof proffered. Were the depositions in sufficient agreement about the details of the contract? Were the witnesses *omni exceptione maiores*?⁵² Such questions simply did not come up so often in the new regime on the Continent which made questions of validity turn upon the presence of one's parish priest.

Cases involving clandestine marriages also raised hard problems of interpreting the words used to contract marriages. The purely oral nature of the contracts, the variety of words possible, and the slippery distinction between words of present and future consent combined to create uncertainty and litigation. 'I take thee as my handfast wife', for example, were the words found in a 1573 cause from the diocese of Carlisle.⁵³ The term 'handfast' was an ambiguous one, and it was a fair question under the Roman canon law whether these were words of present or of future consent. It might even have been argued that they amounted to no more than an agreement to marry at some future time, since the term 'handfast' had something of the connotation of an act seriously meant but not intended to bind if subsequent events turned

⁵¹ For description, see *Marriage Litigation in Medieval England* (1974), 25–73 and Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (1987) 125–218.

⁵² E.g., *Fletcher c. Cosin* (1599), Bodl. Tanner MS. 427, fols. 113v–14v, 155, in which this was the principal defence to a suit brought to enforce a marriage contract. The authors cited by the defendant's advocate included Panormitanus, Covarruvias, Bartolus, Bossius and Gabrielus Romanus.

⁵³ *Browne c. Alleson* (1573), Carlisle Act book DRC 3/2, second folio. Sentence was given for the defendant, but the exact grounds of the sentence do not appear in the record.

out badly. Or what of the marriage contract entered into allegedly in jest? Such a cause came before the Court of Arches in 1602.⁵⁴ Would such a jesting contract be enforced where the other party had been in earnest? And what sort of proof of intention would be dispositive? We do not know the outcome of this dispute, or indeed that from the diocese of Carlisle, but it is clear that causes raising similar points continued to arise in English practice. Learning about them was a staple of all academic treatments of the Roman canon law of marriage, even after the Council of Trent. That learning continued to be of immediate relevance in the courts of the English Church.

Discouragement of clandestine marriages

This example of conservatism in English law is perhaps too well known to require much elaboration. However, there were also developments, not so well known, that moved the practice of English matrimonial law closer to the result reached by *Tametsi*. The first was the inception of *ex officio* prosecutions against laymen who had been present at clandestine marriages. Medieval practice in the courts produces examples of disciplinary action being taken against the parties and the clerics who had celebrated clandestine marriages at their instance. Friar Laurence in Shakespeare's *Romeo and Juliet*, for example, might well have been summoned before an English ecclesiastical tribunal, along with the lovers themselves.⁵⁵ However, the surviving medieval records do not show laymen being regularly prosecuted simply for attending the contracting of such a clandestine union.

During Elizabeth's reign this relaxed regime came to an end. Disciplinary action began regularly to be taken against laymen who had merely been present at and witnessed such marriages. For example, a man at Ely in 1604 told of being in the fields one day and hearing the parish church bells ringing. He went to church out of curiosity (he said) only to find himself in the presence of a marriage ceremony, one unprecedented by licence or banns. He also later found himself as a defendant in an *ex officio* prosecution for illicit attendance at a clandestine marriage.⁵⁶ Happily, this man was excused. *Scienter* was required, and the judge at Ely must have believed his story.

⁵⁴ *Smart c. Reve* (1601), Bodl. Tanner MS. 427, f. 212; sentence was given for the defendant.

⁵⁵ Act III, sc. 6, ll. 35-7.

⁵⁶ *Ex officio c. Chapman*, Ely Act book D/2/23, f. 47v.

Others were not so fortunate. A man who came before the court of the archdeacons of Buckingham in 1606 claimed that he had been told that the couple had obtained a licence before he agreed to attend their marriage. In fact they had none, and the man was obliged to submit to ecclesiastical discipline.⁵⁷ A similar fate before the consistory court of Chester awaited the man who in 1616 had 'suffered a marriage to be made in his house'.⁵⁸ The same thing happened at Salisbury in 1616 where the defendant claimed that he had merely been keeping the company of his own brother.⁵⁹ During the reign of Elizabeth, these *ex officio* proceedings became normal features of English life.

Initiation of such prosecutions must have worked to discourage clandestine marriage contracts. Not only might the contracting parties be punished for their action, the threat of prosecution now also hung over anyone who had abetted or knowingly been present for the occasion.⁶⁰ Even if this threat did not prevent all men and women from witnessing private marriage contracts, it certainly would have discouraged them from later giving evidence about them. To appear as a witness invited one's own prosecution. Thus, by an indirect route, the Church of England approached the result of the Council of Trent's decree. Clandestine marriage became harder to prove.

Making marriages harder to prove also resulted from a stricter treatment of the evidence given by those witnesses who were willing to testify. A bishop of London in the first decade of the seventeenth century went so far as to forbid admission of any such evidence, his theory being that excommunicates were forbidden to testify under the Roman canon law and that anyone who had been present at such a union was *ipso facto* excommunicate.⁶¹ This extreme position was not widely accepted, but there was definite sentiment among some of the

⁵⁷ *Ex officio* c. *Britnell* (1606), Buckingham Act book D/A/C/3, f. 110.

⁵⁸ *Ex officio* c. *Chritchlowe* (1616), Chester Visitation book EDV 1/19, f. 159.

⁵⁹ *Ex officio* c. *Collier* (1616), Salisbury Act book D 1/39/2/8, f. 30.

⁶⁰ E.g., *Ex officio* c. *Roebech* (1600), Essex Act book D/AEA 20, f. 233: 'that he was present at the marriage of the aforesaid Jane Chapman privately in the chamber'. Large numbers were occasionally involved; e.g., *Ex officio* c. *Hobler, Wilson, Wale, Waise, Whitson, Smith & Major* (1621), Lichfield Act book B/C/3/11 s.d. 1 August. Offenders seem not normally to have been required to perform public penance, however. In *Ex officio* c. *Revell* (1587), Peterborough Correction Book 21 (X 609/21) f. 91v, for example, the defendant was dismissed 'cum pia monitione' after appearing and acknowledging his fault. Contra: *Ex officio* c. *Swett* (1623), Winchester Act book CC B 96, f. 60, where public penance was awarded.

⁶¹ See Anon. (c. 1605), London Guildhall MS. 11448, f. 56.

bishops for tightening up the rules.⁶² The strict treatment of evidence found in cases involving clandestine unions in contemporary reports of causes in the ecclesiastical courts suggests that the bishop of London was simply carrying to an extreme a policy of which other ecclesiastical officials approved. Some courts held that a clandestine marriage would never be enforced if it derogated from a subsequent, but publicly celebrated and consummated union.⁶³ It was also argued that where the woman seeking to enforce a marriage contract was 'defamed of fornication', her relatives should be disqualified from testifying in her favour.⁶⁴ The post-Reformation English courts, therefore, continued to enforce private contracts of marriage, but they regarded them with much suspicion.

Divorce

On the divorce side, the courts of the Church of England also witnessed both continuity and change. The Church refused to permit remarriage of either party after a judicial separation for adultery, cruelty or abandonment, rejecting the reform adopted by some of the Reformed Churches on the Continent. This refusal was contrary to what some Englishmen thought fair, at least as regards the innocent party. The *Reformatio legum* had endorsed a change, and even among the civilians there was doubt about the question early in Elizabeth's reign.⁶⁵ A worried Elizabethan bishop wrote that in consequence of the uncertainty these unions had 'outgrown the whole land',⁶⁶ and one entry in a London act book shows that within the Church's courts themselves, the traditional rule could occasionally be allowed to pass unobserved.⁶⁷

However, the legal controversy was soon settled against the 'laxist'

⁶² Strype's *Annals* *324.

⁶³ *Keblewhite c. Wade & Philips* (1597), Bodl. Tanner MS. 427, f. 95: 'Matrimonium manifestum preiudicat clandestino si manifestum uberiores habeat probationem.'

⁶⁴ *Hill c. Kidd* (c. 1600), Durham, Library of the Dean & Chapter, Hunter MS. 70, fols. 5-6v, 14, 16: 'Consanguinei non sunt recipiendi in testes quando mulier pro qua deponunt est diffamata de fornicatione [citing works by Mascardus and Gabrielus Romanus].'

⁶⁵ See T. A. Lacey, *Marriage in Church and State*, rev. edn by R. C. Mortimer (1947) 161-3.

⁶⁶ Quoted in Robert Peters, *Oculus Episcopi: Administration in the Archdeaconry of St Albans 1580-1625* (1963) 31.

⁶⁷ *Ex officio c. Jones* (1589), London Guildhall Act book MS. 9064/13, fols. 27, 28v, in which the defendant confessed to having married again and was dismissed by the commissary general, 'ex certis causis eum moventibus'.

view, and the courts began to take positive steps designed to prevent such second marriages. These steps included express prohibitions of second marriages in formal sentences of separation and the conscious exclusion of the word 'divorce' from those sentences. The object was to leave no doubt about what was meant,⁶⁸ and both amounted to innovations from medieval habits. Moreover, English judges sometimes took the additional step of requiring parties to post bonds not to remarry as a condition to receiving a sentence of judicial separation.⁶⁹ This provoked resentment and occasional outright opposition from those involved, but the civilians thought it a necessary safeguard for the traditional and moral rule in their own, as they thought, more licentious age.

Change in the law of divorce *a vinculo matrimonii* – what we call annulment – was greater. A Henrician statute, repealed by Queen Mary's parliament but renewed in the first year of Elizabeth's reign, declared that all marriages that were neither contrary to the law of God nor within the degrees prohibited in the eighteenth and twentieth chapters of *Book of Leviticus* should stand as lawful marriages.⁷⁰ The statute's stated purpose was to rid England of marriage disqualifications that were purely the invention of men and which, the statute asserted, had led to shameful and expensive trafficking in papal dispensations. That is, the statute broadened the number of lawful marriages by cutting down the reach of the canonical impediments of consanguinity and affinity. Prior law had forbidden all marriages contracted within the fourth degree of kinship, but had allowed papal dispensations to relieve hardships caused thereby.

The ecclesiastical courts attempted to put the Henrician statute into practice. At Winchester, for example, the marriage between Robert Tote and Elizabeth Carter was allowed to stand when it was shown that they were related only in the third degree of consanguinity, not the second degree as had been alleged.⁷¹ The result was that few such divorce cases appear in the surviving act books. The statute led to real change in the substantive law applied, although it is perhaps

⁶⁸ London Guildhall MS. 11448, f. 156: 'The woorde divorce is not thought fitte to bee putte in a sentence of separacion quoad thorum because the common lawiers doe say it dothe inferre separacion quoad vinculum.'

⁶⁹ Authorized by Canon 107 (1604); put into practice, e.g., in *Hill c. Tailour* (1634), Carlisle Act book DRC 3/3, p. 157. The plaintiff was required to provide 'cautionem iuxta canones (sic) et sanctiones in hac parte editas'.

⁷⁰ 32 Hen. VIII c. 38 (1540); 1 Eliz. I c. 1 § 3 (1559).

⁷¹ *Ex officio c. Tote & Tote* (1551), Winchester Act book CC B 9 s.d. 7 December.

also right to note that such causes actually figured less prominently in medieval practice than was once thought.

The difficulties the courts had in this area of matrimonial law occurred mostly in cases involving the closer kinship relationships. And there were difficulties. The degrees mentioned specifically in the *Book of Leviticus* were not thought exhaustive. They were rather illustrative, and might be extended *de paritate rationis* to other similar degrees. Nor was it altogether certain whether the statutory prohibition of marriages contracted 'against God's law' was disjunctive or not. The question was whether it created additional categories of unlawful unions, or merely restated what was already implicit in the Levitical degrees.⁷²

The Church sought to deal with the consequent ambiguities. In 1563 Archbishop Parker published a table illustrating sixty specific sorts of kinship that made marriage unlawful.⁷³ Other clarifications followed.⁷⁴ However, it cannot be pretended that these were uniformly put into practice, or even that they would have answered every question that arose had they been fully implemented. Parker himself called the subject 'a sea of perplexities'.⁷⁵ For instance, whether or not the 'impediment of crime' survived the Reformation statute was not an easy question.⁷⁶ The impediment was contracted by conspiring to cause the death of the spouse of a person whom one subsequently married. It rendered a marriage with that person permanently invalid. The moral revulsion this act of conspiring creates made it a good candidate for retention; but on the other hand, *stricto sensu* it was not within the English statutory language. In 1600, it was hard to know where the impediment stood.

This impediment was by no means unique. For example, what about the widow of the brother of one's mother? Could a man marry her? The relationship did not figure in *Leviticus* and it was not one of

⁷² See C. L. Powell, *English Domestic Relations 1487-1653* (1917) 62.

⁷³ Edward Cardwell, *Documentary Annals of the Reformed Church of England* (1844) I:316-20.

⁷⁴ See the canons of 1571, in Cardwell, *Synodalia*, I:130; Canon 99 (1604), *ibid.* 304.

⁷⁵ Letter to William Cecil (1569), in *Correspondence of Matthew Parker*, eds. John Bruce & Thomas Perowne (Parker Society, Vol. 33, 1853) 352.

⁷⁶ London Guildhall MS. 11448, f. 41: 'Quaere whether the statute which prohibiteth the impeachment of mariadge not contrarie to the word of god bee understood onlie touching the degree of mariadge.' The question of 'spiritual' impediments contracted through baptism or confirmation was also difficult; it was raised in conjunction with a dispensation from Archbishop Cranmer in *Standley c. Gascoigne* (1557), York BI CP.G.687.

those degrees that could be described as clearly condemned by God's law. On the other hand, the situation did not seem vastly different from that raised by marriage to the daughter of the brother of one's mother (which was clearly illegal). *Ex comparatione*, therefore, this marriage was open to attack. When the problem arose at Chichester in 1588, it was thought prudent to procure a dispensation to still any public doubts about the marriage's validity.⁷⁷ Indeed contemporary ecclesiastical court records actually produce one case raising the same legal issue that was differently decided by different tribunals. At Gloucester in 1600, a marriage between a man and the daughter of his wife's sister was dissolved,⁷⁸ whereas the opinion given in a contemporary civilian notebook now found at Reading was that such a union was valid because it was not forbidden by the express words of the Henrician statute.⁷⁹

The whole question was further complicated by the possibility of intrusion by the common law courts. Making use of the theory that they alone had the power to interpret Acts of Parliament, and citing also a Jacobean statute against bigamy,⁸⁰ the common law judges came to issue writs of prohibition to the ecclesiastical courts in divorce cases involving the prohibited degrees.⁸¹ They intervened, they said, in order to make the civilians adhere to the terms of the statute. The suggestion was strong that the civilians were resorting to the older, stricter law whenever they could. The civilians therefore had to approach problems of divorce *a vinculo* with the common lawyers looking over their shoulders.

Such offensive intervention by the common law courts seems, however, to have been more threat than reality during these years. It did not happen with any frequency during the reigns of Elizabeth and James I. Even Coke did not describe it as common practice.⁸² Very

⁷⁷ Marriage of Threle & Fynes (1588), Chichester Precedent book Ep I/51/3, f. 80. The marriage had lasted sixteen years and produced eight children, but the dispensation states that some unknown persons had been 'boasting' that the marriage was invalid, 'eo quod dicta Anna Fynes fuit relicta fratris matris tuae defunctae'.

⁷⁸ *Ex officio c. Baston* (1600), Gloucester Act book GDR 86, p. 158.

⁷⁹ Civilian's Notebook, Berkshire Record Office, Reading, D/ED 0/48, p. 155 *per* Dr Hammonde.

⁸⁰ 1 Jac. I c. 11 (1603).

⁸¹ *Harrison v. Burwell* (C.P. 1668), Vent. 9. An early example is found in Beinecke, Osborn shelves MS. fb 149, p. 17: a woman's husband had formerly been married to the sister of her mother; a sentence of divorce given by the Bishop of Peterborough was prohibited in 1604.

⁸² 2 Co. Inst. 683; see also *Man's Case* (K.B. 1591), 4 Leo. 16, where the prohibition was denied on technical grounds.

likely this was one area the common lawyers were loath to enter. With good reason. In English tradition, the law of marriage and divorce was firmly settled on the ecclesiastical side of jurisdictional lines. That tradition, coupled with the many technicalities and traps contained in the Roman canon law on the subject, fully justified hesitation on the part of the common lawyers.

Alimony awards

The common law judges were more willing to intervene in another area of divorce practice, probably because it represented an innovation from traditional rules. This was the provision of alimony for wives who had secured a divorce *a mensa et thoro*. Prior canonical practice had known alimony only as an interim provision for a wife's support during the pendency of divorce litigation. Once secured, the divorce had ended the husband's support obligation. The procedure gave, as a contemporary observer put it, 'slender relief for distressed wives', and it must have deterred many a woman from pursuing her legal rights against an abusive or adulterous husband.⁸³ Complaints about the situation, brought before the Elizabethan Privy Council, led to licensing the Court of High Commission to make orders for 'reasonable alimony and maintenance' for wives who had secured judicial separations from their husbands on grounds of cruelty or adultery.⁸⁴

This licence was used in practice. Virtually everywhere they survive, contemporary act books of the diocesan branches of the High Commission include causes where alimony was assigned, as well as the inevitable instances where it was alleged that the husband had been delinquent in making the payments assigned.⁸⁵ The new remedy and its sanction were effective enough to call forth a complaint in the

⁸³ York BI HC.Misc.9, titled 'The Cheife Branches of the Commission', and discussing the jurisdiction of the Court of High Commission under seventeen headings; the eighth deals with alimony.

⁸⁴ *Ibid.*

⁸⁵ *Greenfeild c. Greenfeild* (1632), in *Reports of Cases in the Courts of Star Chamber and High Commission*, ed. S. R. Gardiner (Camden Soc. N.S. Vol. 39, 1886) 265-8; *Savile c. Savile* (1597), York BI HC.CP.1597/5; *Hart c. Lower* (1605), Exeter Act book Chanter MS. 761, s.d. 4 July; *Ex officio c. Bradstonde* (1606), Gloucester Act book GDR 101 s.d. 14 August; *Ex officio c. Golding* (1607), Winchester Act book CC B 73, fols. 26v-27; *Horsey c. Horsey* (1631), CUL Dd.2.21, f. 23v.

1610 Parliament that the Court of High Commission was encouraging wives to be 'disobedient and contemptuous against their husbands'.⁸⁶ To the credit of that much discredited institution, therefore, belongs the early development of the English law of alimony.

In fixing the size of permanent alimony awards the High Commission regarded several factors: the needs of the divorced wife, the means of the husband, the length of the marriage, and the severity of fault.⁸⁷ It also considered the size of the estate the woman had brought to the marriage,⁸⁸ and thereby slightly mitigated the harsh English rule that treated the wife's chattels as the absolute property of the husband. The paucity of survival of records for the branches of the Court make it difficult to say a great deal about early alimony awards other than that they existed and that some of its outlines can be discerned. However, it does also seem that under the Stuart monarchs the ordinary ecclesiastical courts began to follow the lead of the High Commission. They copied that court by themselves making alimony awards.⁸⁹ It would have been inconvenient to split the ordinary suit for a divorce *a mensa et thoro* into two halves, and this must have militated in favour of general adoption of this change from medieval practice.

The Jacobean and Caroline ecclesiastical courts were troubled by writs of prohibition in alimony cases more often than in causes brought for divorce *a vinculo matrimonii*. The argument made in favour of granting the writ was that the causes were about money, not marriage. Hence they could seem temporal in character. This argument, added to their lack of medieval pedigree, made alimony awards good candidates for prohibition. But they filled a real social need, and in fact the common law cases on the subject were inconsistent. Some-

⁸⁶ Elizabeth R. Foster, *Proceedings in Parliament 1610* (1966) II:265.

⁸⁷ E.g., London Guildhall MS. 11448, f. 147: 'In these articles it is good to laie howe longe the wife hath beene married to the husband, what portion shee brought, what parrentage shee is of, how longe she hath been wrongd etc.' In Nottingham Act book (c. 1637) A 43, 5th fol. from end, the practice was said to be to allocate a sum worth a third or a fourth of the real property.

⁸⁸ A post-Restoration civilian's notebook, Cheshire Record Office, Chester, EDR 6/12, f. 37 put this point pithily: 'Husband cruel, interest of her fortune decreed her to live on.' See also the exact pleading of the estates the wives had brought to the marriage in a precedent book form, in Beinecke, Osborn shelves MS. fb 24, Nos. 89 (1632).

⁸⁹ Post-Restoration reports of ecclesiastical causes contain some quite extensive literature on the subject; e.g., FLP MS. LC 14/98, pp. 314-15, 406.

times the judges allowed the writ.⁹⁰ Sometimes they did not.⁹¹ Quite unrealistic arguments were occasionally advanced in common law prohibition cases, such as the suggestion that the ecclesiastical courts could *make* alimony awards, but not entertain suits for their enforcement. The reasoning was that the latter directly involved a judgment about lay debts, whereas the former did not.⁹² Such arguments can only be a sign of unease on the part of the common lawyers, and the rise of alimony awards went ahead despite them. The power to make permanent alimony awards became an accepted part of English ecclesiastical law, and it passed into the common law with the Matrimonial Causes Act in 1857.⁹³

TESTAMENTS AND PROBATE

The history of probate jurisdiction in England has been too little studied for a complete picture of its operation to have emerged.⁹⁴ We do understand some things. For example, the institutional history of the most important probate court in England, the Prerogative Court of Canterbury has been examined in some detail. Christopher Kitching, who undertook the examination, described the period between 1500 and 1600 as one of 'continuity rather than change', adding that the Court staved off major disruption by its willingness 'to implement modest reforms and minor procedural adjustments'.⁹⁵ A preliminary look at the records of the diocesan courts suggests that Dr Kitching's judgment will likely turn out to be an equally apt description of legal developments in the area of wills and testaments, and that it applies equally well to all, or at least most, of England's probate tribunals.

In some respects, the lack of change he described is an unexpected

⁹⁰ *Anon.* (C.P. 1629), Lit. 314; *Sir Edward Powell's Case* (C.P. 1641), March 80 (pl. 119).

⁹¹ *Thomas Hyat's Case* (K.B. 1615), Cro. Jac. 364; see also the inconclusive discussion and compromise in *Stanelie's Case* (C.P. 1628), Lit. 189 and *Sir William Chancey's Case* (C.P. 1611), 2 Br. & G. 18.

⁹² So contended in *Langdel's Case* (C.P. 1614), LI Maynard MS. 22, fols. 67-8.

⁹³ See J. L. Barton, 'The Enforcement of Financial Provisions', in *A Century of Family Law 1857-1957*, R. H. Graveson & F. R. Crane eds. (1957) 352-5.

⁹⁴ For what is known, see R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere* (1901); M. M. Sheehan, *The Will in Medieval England* (1963), and 'English Wills and the Records of Ecclesiastical and Civil Jurisdictions', *Journal of Medieval History* 14 (1988) 3-12, containing references to secondary works appearing after 1963.

⁹⁵ 'The Prerogative Court of Canterbury from Warham to Whitgift', in *Continuity and Change*, Rosemary O'Day & Felicity Heal eds. (1976) 213.

finding, and I cannot pretend to have a full explanation for the evidence supporting it found in the court records. The period witnessed persistent complaints about probate fees and procedures; Parliament passed several statutes regulating testamentary practice; Chancery and other equity courts provided competition in a way they did not in the law of marriage or defamation; and testamentary causes were more frequently prohibited by the common law courts than any kind except tithes. One expects dramatic change and precipitous decline. Instead, one finds specific problems, but stability and slight improvement overall.

Each of the external forces for change does appear at places in the surviving records. The ecclesiastical courts enforced several statutes that affected testamentary jurisdiction. They did so even for those regulating the fees that could be charged, though it is true that they took a 'minimalist' view of the changes these statutes required.⁹⁶ The existence of Chancery's jurisdiction over aspects of probate practice was referred to in several recorded cases; its legitimacy was not disputed.⁹⁷ Writs of prohibition from the royal courts were received, though perhaps not quite in the numbers one might expect from reading contemporary common law reports. When received, they were obeyed as a matter of course.

None of these sources of disruption materially changed the pattern of testamentary litigation in the ecclesiastical courts. Indeed there is a kind of timelessness about many of the causes found in the records. Hard cases involving faulty integration of testamentary instruments,⁹⁸ incomplete provision for distribution of assets upon a legatee's reaching a certain age,⁹⁹ and the effect on an executed will of the

⁹⁶ See pp. 165–9.

⁹⁷ Noted as pending in *Tipping c. Tipping* (1601), a suit for a legacy against the executor of an insolvent estate, in Bodl. Tanner MS. 427, fols. 225–25v. Action in Chancery was also described as the sole remedy available to the legatee under a will in which the executor died intestate before suit, in Anon. (c. 1605), London Guildhall MS. 11448, f. 35v. See also Bodl. MS. Eng. misc. f. 473, f. 7: 'If a man dispose of his lands by will and dispose not of his goods, an administration shall be granted of his goods in the ecclesiasticall court, and his will concerning the land shall be proved per testes in Chancery.'

⁹⁸ *Yelverton c. Yelverton* (1587–8), BL Lansd. MS. 135, fols. 139–45v. (It was alleged by Dr Styward, at f. 141, that the testator's 'will was made in 15 sheetes of paper which afterwards hee confirmed, and willed it to be sealed'.)

⁹⁹ *Estate of James Swifte*, Canterbury MS. Z.3.25, fols. 270–1. (Opinion of Dr Hone about the legal effect of a legacy to be paid at age 21 years where the legatee had died before reaching that age.)

testator's subsequent marriage,¹⁰⁰ all these staples of the modern law of succession appear in the ecclesiastical records. And the same records show the ordinary probate of testaments continuing along well worn grooves.

Areas of dispute with the common law

Some part of the explanation for the relative stability of ecclesiastical probate must lie in the unwillingness on the part of the actors to push theoretical claims to their logical limits. 'Mixed will' cases show this habit particularly well. A 'mixed will' was one which contained disposition of both real and personal property. In it, two different kinds of disposition were mixed together as part of the same testamentary instrument. Since the ecclesiastical courts had jurisdiction over the personalty, the common law courts over the realty, these wills posed a jurisdictional problem. Common lawyers argued that if ecclesiastical probate of these wills were permitted, the result might prejudice the outcome of any subsequent litigation over land in the royal courts. Once probated in the spiritual forum, they feared that the testament would be strong evidence to 'induce the jury, upon a trial, to pass for the will'.¹⁰¹ Hence they concluded that any ecclesiastical probate of a 'mixed will' must be prevented.

The civilians could not have accepted this principle without a struggle. It cut too deeply into their jurisdiction. They took the position, therefore, that all petitions and decrees in their courts would keep the two parts of a 'mixed will' as separate as possible. In substance, however, they would retain jurisdiction to determine the validity of a testament bequeathing personal property even where real property was devised in the same instrument. As one civilian put it, 'The Prerogative court is proving a will wherein lands are devised taketh no notice of the lands but only that such a will was made.'¹⁰² Similarly, where a will contained a demonstrative legacy, that is a bequest of money to be paid out of the profits of specific land, the ecclesiastical courts did not allow the cause to be framed directly in

¹⁰⁰ Estate of Collier (1605), London Guildhall MS. 11448, f. 9v.

¹⁰¹ *Mary Semaine's Case* (K.B. 1612), 1 Bulst. 199; *Egerton v. Egerton* (K.B. 1614), 2 Bulst. 218.

¹⁰² London Guildhall MS. 11448, f. 50. In York BI Precedent book 11, fols. 9v-10, a civilian suggested that an exception to the rule against allowing the original will to be taken out of the registry should be made where there was subsequent litigation over land. This effort at compromise may have been aimed at deflecting direct attacks on the Church's jurisdiction over 'mixed wills'.

terms of a legacy issuing from land, but only generally for the amount bequeathed.¹⁰³ This formal separation respected the division between land and chattels, even while it maintained the substance of the Church's jurisdiction. Perhaps it could be called a subterfuge. But it was meant to declare for all to hear that the civilians were claiming no direct authority over devises of land. And to the extent that it was a subterfuge, the civilians thought themselves driven to it.

Not all common lawyers, for their part, believed that the ecclesiastical courts had to be kept within the straitest of bounds where 'mixed wills' were concerned. Some were hesitant. There were differences of opinion. Few were willing entirely to oust the Church's probate jurisdiction over the chattels bequeathed, and full enforcement of the strict view threatened to do just that. One consequent opinion, perhaps the dominant one, was that a 'mixed will' case should be prohibited only if there were 'special factors' present.¹⁰⁴ There must be something beyond the bare possibility of prejudice to an action for land devised before the common law judges would exercise their discretion in favour of granting the writ. They left what would count as a 'special factor' unclear, though they gave examples. If ecclesiastical probate held that the testator was *non compos mentis*, for instance, this might be enough.¹⁰⁵ But there was no definitive list. The result was that the ecclesiastical courts were not faced with anything like a determined campaign to end their jurisdiction over 'mixed wills'. They sought to avoid making a public display of that jurisdiction, but they continued to exercise it. This cautious attitude was characteristic of the civilians in most areas of testamentary jurisdiction.

Probate administration

The ecclesiastical courts had greater difficulty in maintaining continuity of practice in the area of probate administration. By the 1520s, the spiritual courts had lost irretrievably the *de facto* power they had once enjoyed to adjudicate cases of testamentary debt and to enforce sworn promises. The successful attacks by actions of *Praemunire* had left them without direct jurisdiction over both.¹⁰⁶ This loss

¹⁰³ London Guildhall MS. 11448, fols. 128, 194v.

¹⁰⁴ See the discussion in *Egerton v. Egerton* (K.B. 1614), 2 Bulst. 218.

¹⁰⁵ See also the report of *Egerton v Egerton* in Cro. Jac. 364.

¹⁰⁶ See pp. 30–2.

complicated administration of estates. It meant that the courts could not directly enforce the oaths that fiduciaries took as a preliminary part of probate procedure. And on the mundane matter of collection of assets, the foundation of successful probate administration, it meant that proceedings might easily be held up to await the outcome of pleas of debt in the royal courts. The diminished capacity of the spiritual courts particularly complicated the administration of insolvent estates. It upset the normal order of payment of claims because, although the ecclesiastical courts had settled rules preferring claims based on judgments or written obligations to oral contracts, the courts could not prevent the creditor from suing on an oral contract in the royal courts and reducing his claim to a judgment. The result was awkwardness and sometimes evasion of the law.

In this dilemma, the civilians hit upon several expedients. One of the most successful was the greater use of bonds. Instead of simply requiring executors, administrators, guardians, and other fiduciaries to swear to perform their offices – the former practice – the courts now more commonly required them to enter into a formal bond, including the giving of sureties, before being appointed to these offices.¹⁰⁷ The ecclesiastical document known as a ‘tuition bond’ was the fruit of this change.¹⁰⁸ The result was that, even though the bond could not be directly enforced in an ecclesiastical court, if the fiduciary later refused to follow the direction of the judge, he would be entangled in a separate suit on the bond as a consequence. As one civilian put it, ‘If an administrator will not perform the judge’s order touching the goods, let the judge assign over the bond by a letter of attorney to the parties which are wronged.’¹⁰⁹ Because the bond would be absolute on its face, the administrator or other fiduciary would normally have to attempt to secure a writ of prohibition that would go behind the terms

¹⁰⁷ Its legality is discussed in Anon., Library of Congress, Washington, D.C., Law Division MS. 27, pp. 174–7, and (in a common law setting) in *Anon.* (C.P. 1610) 2 Br. & G. 11. In *Estate of the Bishop of Durham* (c. 1590), Durham DDR XVIII/3, f. 138v, the practice was justified *inter alia* by ‘the equity of the statute’ (21 Hen. VIII c. 5).

¹⁰⁸ In places these were collected in separate files or books; e.g. the diocese of Chester: EDC 4/1 (from 1614).

¹⁰⁹ London Guildhall MS. 11448, f. 54. An example of this being done is found in Rochester Act book DRb Pa 18, f. 20 (1608); the administrator’s bond was handed over to Robert Oliveri, one of the creditors, ‘pro recuperatione debiti dicti Oliveri et aliorum dicti defuncti creditorum ad eorum usum in quacumque curia regia de recordo’.

of the instrument and defeat the suit brought on the bond. That would be costly, and its result uncertain. This canonical strategy – though that is perhaps too grand a term – was enough to secure obedience to most, though by no means all, such judicial orders requiring faithful administration of estates.

Securing the payment of debts that had been owed by decedents caused greater difficulties for the ecclesiastical courts, but here too they were not without resources. For one thing, the common law had long admitted that if a testament contained an express direction that the testator's legitimate debts be paid, the ecclesiastical courts had jurisdiction to enforce their payment.¹¹⁰ Creditors could in that circumstance invoke spiritual jurisdiction if they chose, the theory being that the testator's direction to pay the debts converted the debts into quasi-legacies. Since the Church had undoubted jurisdiction over legacies, it was no great stretch to permit ecclesiastical jurisdiction here as well. Where testaments contained such a direction, as many did, the spiritual courts continued their traditional practices without serious hindrance.

The courts also continued the medieval practice of making a public proclamation at the decedent's domicile, requiring all persons with claims against the estate to appear and to register their claims with the ecclesiastical court. They declared that failure to do so would bar the claim. On the grounds that this 'was the ancient custom', the common lawyers did not object to the proclamation's being made.¹¹¹ In a sense, this was an unwise concession, and the ecclesiastical claim was pure bluff. The Church courts could not prevent a creditor from suing the executor in the royal courts. Nor was the common law judges' concession meant to imply that they could. But both suggested that the ecclesiastical forum might be a fit place to settle probate claims, and there were certainly sound practical reasons for permitting the proclamation to be made. It notified creditors that an estate was being administered and it simplified the tasks of the executor or administrator. Moreover, there would have been little practical reason for a creditor *not* to make his claim in response. If he were unsatisfied with the outcome of ecclesiastical proceedings, he could always try again in

¹¹⁰ A. Fitzherbert, *Novel natura brevium* *44b.

¹¹¹ London Guildhall MS. 11448, f. 219: 'Dr Martin saith, . . . , that The Lord Cheife Baron Periam said it was justifiable because it was the auncient custome.'

the royal courts.¹¹² That creditors in fact continued to take the initial step of using spiritual jurisdiction is shown by the list of decedents' debts that continued to appear in the post-Reformation accounts of executors and administrators,¹¹³ and by entries in the act books that deal unmistakably with claims made against the estate.¹¹⁴

There was an additional reason for creditors to make their claims in response to the proclamation. The post-Reformation ecclesiastical courts put another remedy into their hands: the action for an accounting against the executor or administrator. Although personal representatives could no longer be sued directly on debts owed by the decedent, they could still be required to account for their administration of the decedent's estate. Citation of executors and administrators *ad reddendum computum* is a frequent entry found in the surviving act books, and creditors were allowed to initiate it.¹¹⁵ In the consequent accounting, personal representatives had to satisfy the judge that they had paid the legitimate debts owed by the decedent, and this requirement allowed creditors to litigate their original right to be paid. In other words, testamentary debts continued to be litigated under what amounted to a new 'form of action' akin to an equitable accounting.¹¹⁶ By indirection, therefore, the ecclesiastical courts coped with the threat to probate administration caused by the loss of direct jurisdiction over testamentary debt.

Claims *against* a dead man's debtors, that is claims brought by the executor or administrator against those who owed money to the decedent, were handled neither so easily nor so well by the post-Reformation ecclesiastical courts. The officials did not have the same

¹¹² A plea to delay proceedings in a spiritual court pending action in the royal courts is sometimes found: e.g., *Ex officio c. Axtell* (1597) Huntingdon Act book AHH 5/3, f. 38. The defendant executor pleaded that 'he hathe ben and is at this present tyme sued . . . at the common law, and saide actions at this presente do depende undesyded by reason whereof he cannot make his saide accompte accordinge as he is bounde'.

¹¹³ See, e.g., 'Account book', Worcester MS. 794.093 (BA 2876) (1611–15), a collection of the accounts of executors and administrators.

¹¹⁴ E.g., Estate of Richards (1605), Rochester Act book DRb Pa 22, fols. 216–17; *Holman c. Holman* (1606), Cornwall Act book ARD/3, f. 11v; Estate of Dudley (1615), Bath and Wells Act book D/D/Ca 187 s.d. 23 November.

¹¹⁵ E.g., Canterbury Act book Z.1.15, f. 141v (1631): 'Negotium exhibitionis compoti calcule sive ratiocinii veri et iusti unacum inventario pleno plano et perfecto omnium et singulorum bonorum iurium creditorum Nicholai Consant . . . promotum per Vincentem Twyman [et] Nicholaum Attwade principales creditores dicti defuncti.'

¹¹⁶ Express recognition of this point is found in Durham DDR XVIII/3, f. 128.

immediate hold on debtors that they did on executors, and they had therefore to exert whatever informal pressure they could to secure payment of debts owed to decedents. The only formal weapon at their disposal was the ecclesiastical cause which could be brought for wrongful administration of a decedent's goods, the *causa temerariae administrationis bonorum*. The theory behind this canonical remedy was that anyone holding the assets of a decedent who refused to carry out the decedent's last wishes was 'administering' the goods unlawfully.¹¹⁷ To retain goods was in effect to administer them. A little stretching of that theory would allow executors and administrators to bring action against all persons withholding the decedent's goods from the executor. It might even be claimed that those who had owed the decedent money on the day he died were wrongfully administering that sum if they refused to hand it over to the executor. What seemed to be (and in fact was) a simple debt might thus be considered a physical part of the decedent's estate.

This argument was made. It was sometimes allowed where chattels were involved,¹¹⁸ even though there was good opinion among the advocates that use of the remedy was *stricto iure* improper where the chattels had come into the defendant's hands prior to the decedent's death.¹¹⁹ However, where a simple contract to pay money was involved, it seems to have been too much of a stretch even to the practising lawyers to treat the debtor as an 'administrator' of the amount he owed. Not that this tactic was not tried. A 1597 case from the archdeaconry of Huntingdon contains an attempt to treat a debt of £38 owed to the testator as a 'fund' so that it could be sued for as a chattel.¹²⁰ In a Canterbury cause of 1596, an administrator used the theory successfully to recover both a cow and a debt of 20s from a man who had owed them to the decedent.¹²¹ Despite these counter-

¹¹⁷ See Lyndwood, *Provinciale* 175 s.v. *effectum*, for medieval thought on the question.

¹¹⁸ *Ex officio promoto* c. *Swaine* (1595), Canterbury Cause papers J/J 1/6 (with libel used in such causes). The chattels were listed 'in schedula presentibus annexa', which schedule has also survived. It lists six items, including tools, apparel, two chests, and 'an obligation' evidencing a debt owed to the decedent.

¹¹⁹ *Banting* c. *Edwards* (1600), Bodl. Tanner MS. 427, f. 74; it may be that practice ran ahead of theory on this point. See also London Guildhall MS. 11448, fols. 104, 107v.

¹²⁰ *Ex officio* c. *Goddin* (1596), Huntingdon Act book AHH 5/3, f. 12v. Such efforts must lie behind cases like *Goram v. Fowks* (K.B. 1590), 4 Leo. 150.

¹²¹ *Ex officio* c. *Pye*, Canterbury Act book X.8.15, f. 190v. It may be significant that these two causes were brought *ex officio*, as a way of avoiding a writ of prohibition.

examples, the *communis opinio* among the English civilians was clearly against permitting use of the remedy for simple debt.¹²² In most cases, therefore, the ecclesiastical courts simply had to rely on whatever force informal pressure and the natural desire most people feel to close out decedents' estates could exert in their attempt to secure full collection of decedents' assets. Where that failed, the executor had to have recourse to the common law.

Procedural improvements

Like the other expedients mentioned, this use of the *causa temerariae administrationis bonorum* was essentially defensive, a means of preserving as much as possible of the courts' medieval jurisdiction. However, as Dr Kitching has shown for the Prerogative Court of Canterbury, the Elizabethan bishops also went beyond protective measures. They introduced what he called a 'tightening up of court procedures' in order to improve the testamentary jurisdiction of their courts.¹²³ For instance, a regular table of permissible probate and administrative fees was published and made available.¹²⁴ This movement, part of a general feeling that probate procedure must be made to work more effectively if ecclesiastical jurisdiction were to be preserved, made itself felt in many diocesan courts. At Norwich, for example, Bishop John Parkhurst promulgated a series of statutes in the 1570s aimed at improving testamentary procedure. Among them were rules requiring administrations to be granted with greater deliberation, and one forbidding registrars to put their seal to wills without the consent of and in the presence of the judge.¹²⁵

One such improvement found generally in the diocesan court records was the more common use of *cautiones*, or caveats, in order to avoid improvident granting of probate administration. The problem was old and difficult. Probate courts normally made grants of probate administration on the basis of *ex parte* applications by the person claiming the right to administer the estate. Such a person would be the

¹²² See CUL, EDR F/5/41, f. 303 (1604): 'And then let him sue debtors in the common lawe, and temere administrantes in the spirituall court.'

¹²³ 'The Prerogative Court of Canterbury', see note 95, p. 212.

¹²⁴ There is a copy printed in J. Ayliffe, *Parergon juris canonici Anglicani* (1726) 551-2.

¹²⁵ *The Letter Book of John Parkhurst*, ed. Ralph Houlbrooke (Norfolk Record Soc. Vol. 43, 1974-5) 261-4.

executor where the decedent died testate, the next of kin where he died without having made a will. Only when there was a contest, or reason to expect one, did the courts hold up proceedings for a full hearing on the question of entitlement. Although erroneous grants could be revoked subsequently if there had been an initial mistake about who was lawfully entitled to administer,¹²⁶ revocation might easily come too late. The goods of the decedent would already have been committed to the first applicant, and he might already have distributed or dissipated them, leaving legatees and executors with only theoretical rights.

In this situation, allowing any person with a potential interest in the estate to interpose a caveat preventing the grant of probate until he or she had been personally summoned, was a way of preventing some abuses. Caveats could be filed with any court where probate was likely to be granted, warning the court not to proceed on an *ex parte* application.¹²⁷ The device itself was not new, having been regularly used to prevent admission of clerics to vacant benefices where there was a dispute over patronage. However, caveats seem to have come into regular use within the probate sphere only during Elizabeth's reign.¹²⁸ Though far from a cure for the problem of improvident grants of administration, the caveat was helpful medicine.

In sum, looking at probate administration indicates something quite important about the response from within the ecclesiastical courts to several of the problems, old and new, which they faced. The civilians did the best they could. They used indirect methods, adopted new or modified old legal theories, and employed informal pressure to secure continuation of the orderly administration of estates. They attempted to correct abuses and imperfections within the system by introducing modest reforms. The self-interest of the civilians was of course much involved in all this. A fair part of their livelihood depended on probate jurisdiction, and they were very much 'on the defensive' about it. They knew, as the common lawyers reminded them, that there was nothing inherently spiritual about

¹²⁶ E.g., Estate of Whalley (1596), Lichfield Act book B/C/2/31 s.d. 2 March, a suit to revoke the grant of letters of administration allegedly 'tacita veritate surreptas'.

¹²⁷ London Guildhall MS. 11448, f. 99v: 'That a caveat maie bee available in law it must be decreed by the judge and entred in actis by the register ne quid fiat nisi prius vocato tali.'

¹²⁸ See, e.g., York BI Cav. Bk. 1 (1534-1644).

their testamentary jurisdiction.¹²⁹ It was allowed to them only by the concession of English custom, a concession their Continental brethren did not enjoy, and one which some men thought might usefully be taken from them. In these circumstances, a thoughtful Jacobean civilian might well have considered the relative stability of his probate practice a not inconsiderable accomplishment.

TITHES

'Discord's torches' – so Lord Byron was to describe tithe causes.¹³⁰ I cannot fault his description. Litigation over tithes was the area of greatest contention for the Elizabethan and Jacobean civilians, both within their own courts and in their dealings with the common lawyers. The subject also presents the greatest puzzle for the legal historian. Indeed it sets him a difficult theme. Tithes have all but disappeared today, and it is tempting to set the subject aside, saying that the tithe obligation was often based on local custom and that people disliked having to pay it. Both statements may be true enough, but they cannot end the matter. Anyone who pretends to trace the history of the Roman canon law in Reformation England must look further into a subject that was the object of such fierce contemporary controversy. What he sees is not always easy to interpret; in fact it seems paradoxical. On the one hand, post-Reformation tithe litigation looks very different from that found in the medieval act books. Change, not continuity, must be the dominating theme. On the other hand, the litigation scarcely makes sense unless one begins with the Roman canon law of tithes inherited from the Middle Ages. Continuity in the law applied helps to sort out some of the puzzle.

The law of tithes in England

An outline of the English Church's tithe jurisdiction can be given shortly, although at the cost of omitting much intricate and some

¹²⁹ E.g., *Armiger Brown v. Wentworth* (K.B. 1606), Yelv 92; 2 Co. Inst. 488 (Coke on *Circumspecte agatis*). There is a full exposition on this point in Berkshire Record Office, Reading, MS. Trumbull Add. 19 (23), being called 'Of the originall of ecclesiasticall jurisdiction of Testaments'.

¹³⁰ *Don Juan*, Canto XIII, 60, l. 4. See also J. A. Venn, *The Foundations of Agricultural Economics* (2nd edn 1933) 154.

interesting law.¹³¹ As it had evolved by the sixteenth century, the canon law held that every person owed to his parish church a full tenth of the yearly increase of his crops and his flocks. This was the *praedial* tithe. He also owed a tenth of the income of his industry, as for instance that earned from weaving, calculated after deducting legitimate expenses. This was the *personal* tithe. There was also a 'mixed' tithe, covering income that partook of both kinds, such as that derived from making cheese from the milk of cows. A distinction was also drawn between the lesser and the greater tithes, a distinction that normally determined which tithes would go to the rector, which to the vicar, of each parish. In practice, there was room for disagreement about the class into which particular tithes should be put, and there was considerable local variation in their incidence and destination, so that academic definitions sometimes served merely as starting points.

Probably most significant in terms of actual practice, very often the 'in kind' obligation had been commuted in favour of a fixed customary payment. Such commutation could occur either by agreement, called a *composition*, with the holder of the tithe, or by virtue of prescriptive usage. There were also places, particularly for personal tithes, where no tithe was paid at all. In this, the English regime was in no way special. Something like it prevailed in most parts of Europe, and the canon law itself allowed the lawfulness of commutations if they were reasonable. However, except in special circumstances, the canon law held that a total exemption from the payment of tithes, especially *praedial* tithes, was not lawful.

Litigation over tithes became something of a growth enterprise in the post-Reformation ecclesiastical courts. Where, for example, the commissary court at Canterbury had heard only thirteen tithe causes in 1532, in 1575 it was hearing forty-nine of them.¹³² Increases approximating this three-fold growth were quite normal, and in some dioceses the rate of growth was even greater. Moreover, the rise continued in many diocesan courts well into the reign of James I.

¹³¹ The most accessible account of the English ecclesiastical law of tithes in English is William Crashaw, *Decimarum et oblationum tabula* (1st edn 1591). There is an unprinted and fuller treatment called 'Decimarum materia' in BL Lansd. MS. 132, fols. 164–190v. The Continental treatise most commonly used in contemporary English practice was probably Petrus Rebuffus (d. 1557), *Tractatus de decimis*. For the English common law of tithes, the standard work is W. Bohum, *Law of Tithes* (1st edn 1730). Also helpful is Robert E. Rodes, *Lay Authority and Reformation in the English Church* (1982) 81–2; 218–19.

¹³² Figures taken from Canterbury Act books Y.2.13 and Y.3.1.

Virtually throughout England, tithe causes claimed the largest single segment of the legal business conducted within the spiritual tribunals during the second half of the sixteenth and the early seventeenth centuries.¹³³

This tithe litigation was initiated by plaintiffs who were about equally split between clerics and laymen. That is, something like half the tithes being sued for were in lay hands. These plaintiffs were invariably described as 'farmers' of the tithes in the court records,¹³⁴ although most of them held the greater tithes as successors to the monasteries dissolved under Henry VIII and considered themselves the impropiators or owners of the tithes. The reason for this divergence between terminology and fact was that the canon law did not admit that laymen might lawfully hold tithes in perpetuity. They might farm them, that is hold them under a lease, where it suited the needs of the cleric entitled to them. This of course often happened even during the Middle Ages, since it would often have been useful for clerics to find someone else to undertake actual collection of the tithes.¹³⁵ But 'farming' was not equivalent to ownership of the tithes. The term 'farmer' found in the sixteenth-century act books, therefore, represented an attempt to remain faithful to the letter of the canon law, even in circumstances that were very different from those that had prevailed a century before.

The law of tithes applied by the post-Reformation English ecclesiastical courts can be described without serious distortion as the canon law, amended and augmented by three statutes passed in the reigns of Henry VIII and Edward VI.¹³⁶ Six features of this legislation had an immediate impact on practice in the spiritual courts:

- (1) Laymen were permitted to sue for tithes in their own right and names.
- (2) Defendants impleaded for failure to pay tithes could not be examined by their 'own corporal oath'.

¹³³ *Select XVI Century Causes in Tithe*, ed. J.S. Purvis (Yorkshire Archaeological Soc., R.S. Vol. 114, 1949), vii-viii; Ralph Houlbrooke, *Church Courts* 276-7; W. J. Sheils, 'The Right of the Church; the Clergy, Tithe, and the Courts at York, 1540-1640', in *The Church and Wealth*, ed. W. J. Sheils & Diana Wood (1987) 235.

¹³⁴ Occasional exceptions exist: e.g., York BI Trans. CP.1595/1, in which the plaintiff is styled 'proprietary occupator sive possessor legitimus rectorie ecclesie ...'.

¹³⁵ E.g., *Rector of Chartham v. Brygham* (1419), Canterbury Act book Y.1.3, f. 92v, in which issue was joined on whether or not the plaintiff had farmed the tithes.

¹³⁶ 27 Hen. VIII c. 20 (1535); 32 Hen. VIII c. 7 (1540); 2 & 3 Edw. VI c. 13 (1549).

- (3) Uninterrupted payment of tithes in one manner and form for forty years established a prescriptive right to tithe in that same manner and form.
- (4) Double, and in some circumstances, treble the value of the tithes owed could be recovered against those who wrongfully withheld them.
- (5) Lands that had been previously discharged from the payment of tithe, whether by 'prescription, privilege, or composition real', were to remain exempt.
- (6) Barren lands improved and made productive were exempted from tithes for seven years; afterwards they were subjected to the obligation in the same fashion as ordinary lands.

Other provisions of these statutes either dealt with more minor points of law, left things as they stood, or made little real difference in actual litigation.

Jurisdictional rules and statutory remedies

The puzzle of tithe litigation is to account for its increasing volume and to attempt to understand what that increase means. A small part of the increase, it should be said, turns out to be illusory. The numbers used to show the increase have almost always been taken from the instance side of ecclesiastical jurisdiction. There was an inevitable rise there, because the statutory provision forbidding the putting of defendants to their corporal oath (No. 2 above) had the effect of moving tithe litigation exclusively to the instance side of the courts' ledger. Prior to the Reformation one could be prosecuted *ex officio* for failure to pay tithes, and some men were.¹³⁷ Afterwards, there had to be a plaintiff. This change did not materially disturb the Church's jurisdiction over tithes, because in the nature of things there were always plaintiffs where tithes had gone unpaid. What it did change was the form in which the jurisdiction was exercised, and this now makes the increase in tithe litigation look larger than it actually was.

Even taking this procedural variation into account, however, the puzzle remains. The *ex officio* act books from the period before the Edwardian statute do not contain large numbers of tithe prosecutions. There were never enough to come close to matching the huge increases that occurred. The puzzle is compounded by the very large

¹³⁷ E.g., London Act book Guildhall MS. 9064/11 (1511–16) contains quite a few such prosecutions. Perhaps this reflects special circumstances in London, however.

numbers of royal prohibitions that were issued in tithe causes, and by the availability, after 1588, of a parallel remedy in the royal courts. A decision of that year allowed plaintiffs to recover tithes by writ of debt, so that suits could be brought in either forum.¹³⁸ With stronger immediate sanctions at their disposal, and untroubled by the possibility of a writ of prohibition, the royal courts would seem to have been easily the preferred forum for anyone who had a choice. It seems astonishing that common law jurisdiction did not sweep tithe disputes out of the spiritual forum. But it clearly did not. Why did this change not occur?

In approaching any question about tithes during this period, Christopher Hill's pioneering work, *Economic Problems of the Church*, remains the starting point.¹³⁹ Professor Hill showed the difficulties under which the clergy laboured in endeavouring to collect this traditional source of income. He showed some of the twists and turns of the law of tithes and the conflicting contemporary views about the authority of the tithe obligation. He showed the extent of the inroads the common law judges sought to make on the traditional jurisdiction of the ecclesiastical courts. However, Professor Hill did not examine the records of the ecclesiastical courts themselves, and it must be said that his account is incomplete on that account. For instance, he scarcely considered the implications of the statutory provision allowing double or treble damages in tithe causes. The court records show that this provision, far from making the statute the 'disaster for the Church', which Hill thought it was,¹⁴⁰ in fact worked to the Church's advantage. The view Professor Hill took was therefore too simple, too dark. The records themselves provide a more balanced assessment, though the picture that emerges is by no means all harmony and light.

The first reason for the increase in tithe litigation suggested by the records is that suing became more profitable than it had once been. The statutory provision for greater than compensatory damages provided an obvious incentive for tithe holders to bring suit in the courts

¹³⁸ Brought by an action of debt, sanctioned by the case of *Regina v. Wood* (Exch. 1587) according to H. Bohun, *Law of Tithes* (1730) 347. See also *Beadle v. Sherman* (K. B. 1597) Cro. Eliz. 608, 613; Moore (K. B.) 1288.

¹³⁹ *Economic Problems of the Church from Archbishop Whitgift to the Long Parliament* (1956) 77–131. See also Rosemary O'Day, *The English Clergy: the Emergence and Consolidation of a Profession* (1979) 191–8; Eric J. Evans, *The Contentious Tithe; the Tithe Problem and English Agriculture, 1750–1850* (1976).

¹⁴⁰ *Economic Problems* 91; see the criticism of his treatment of the statute made in review by Norman Sykes, in *E.H.R.* 73 (1958) 298, gracefully acknowledged by Professor Hill in the 1963 reprint of his book.

of the Church. Prior to the Reformation, lay 'farmers' could not sue at all, and clerics from whom tithes had not been paid could recover only the amount actually withheld. Afterwards, all persons entitled to the tithe could invoke ecclesiastical jurisdiction, and (depending on the circumstances) they could recover twice or three times the value of the tithes, plus the expenses of litigation. Plaintiffs thus had more to win, defendants more to lose, than they had had before passage of the Edwardian statute.

A number of prohibition cases in the royal courts held that the statute's provision for treble damages could not be used by the ecclesiastical courts.¹⁴¹ Only double the amount of tithes owed could be recovered. The threat, and sometimes the reality, of a writ of prohibition in tithe causes led many of them to be compromised. As W. J. Sheils has shown, compromise of claims for tithes owed played a pivotal role in actual practice.¹⁴² This common use of prohibitions did not, however, change the convictions of the civilians about the availability of treble damages. They held fast to the more natural interpretation of the statute, in spite of the prohibition cases. The civilians found exceptions to and ways around many of the sixteenth-century statutes regulating their courts, but this one they thought should be enforced according to its letter, and in the absence of an actual prohibition, the ecclesiastical courts continued to make treble damages available in tithe causes.¹⁴³ To state it simply, this meant that suing paid.

Custom and the Roman canon law of tithes

The Roman canon law itself provided the second reason for choosing to sue in the courts of the Church. To put the matter bluntly, the law favoured plaintiffs. Appreciating this advantage requires another

¹⁴¹ E.g., *Baldwyn v. Girrie* (C.P. 1613), Godb. 245.

¹⁴² See Sheils, 'The Right of the Church', note 133.

¹⁴³ Executors of *Seaberne c. Marten* (1588), Worcester Act book 794.011 (BA 2513/4) p. 165: 'Dominus ad petitionem Archpole [the proctor] petentis sententiam in presencia Bull dissentientis ob metum premunire tulit et legit sententiam diffinitivam in scriptis conceptam per quam inter cetera condemnavit dictum Marten in triplici valore decimarum silvae ceduae.' Other examples: *Monford c. Pigott* (1598), Huntingdon Act book AHH 5/3, f. 236v; *Case & Primate c. Croughton* (1615), Chester Cause papers EDC 5 (1615) No. 29; *Thorolde c. Thorolde* (1616), Lincoln Cause papers R.P. 9/4. See also York BI Precedent book 2, p. 453; Beinecke, Osborn shelves MS fb 149, pp. 26–38.

slight excursion into the Roman canon law of tithes, but it is a doubly worthwhile diversion because it also demonstrates the reason for the prominence of tithe disputes in the prohibition cases decided in the common law courts. There is little doubt that this was the greatest area of dispute between the two court systems. Most of the common law of tithes was taken over from the canon law, but in this vital respect the two took quite divergent views of what would justify an exemption from full payment of tithes.

The canon law held that the tithe obligation was owed by divine law, and ordinarily a full tenth in kind was to be paid. Anything less had to be justified by the affirmative showing of a grant, a prescriptive right, or an express composition to the contrary. That showing was not easy to make under the Roman canon law. Its rules of evidence and its stiff requirements for establishing the validity of a custom or composition worked to make payment in kind the norm. The presumption in favour of tithing in kind also encouraged tithe holders to sue when they could find reason to dispute the existence of a custom and they were dissatisfied with what had traditionally been paid.

It was of course in the interest of all concerned to admit some commutation of tithes. Payment of tithes in kind would have been inconvenient or impossible in many circumstances. Suppose, for example, that a farmer's sows gave birth to sixteen piglets. It would be hard for him to hand 1.6 piglets over to the parson, and it is likely that the parson would prefer not to have to deal with any piglets at all. He would be happier with a cash payment, and at least in times when prices were stable, he might be better off with a payment that did not vary from year to year.¹⁴⁴ The farmer would probably find the arrangement equally convenient. Whether this was done by explicit agreement or long established practice would not matter much as long as things remained the same, though of course in some years the parson would fare better than in others, depending on the number of piglets born.

The difficulty comes when things do not remain the same, as they did not in the sixteenth century. It is then that the canonical presumption in favour of full payment of tithes in kind comes powerfully into play, because it is then that the self interest of the tithe holder moves him to attempt the upset of custom or composition, if he can manage it, and return to payment of the tenth in kind. Here natural and divine

¹⁴⁴ The example is slightly simplified, but taken from a cause in a civilian's notebook: Anon. (c. 1600), York BI Precedent book 11, f. 25.

law justifications of the tithe obligation played a vital role in litigation. They were used to support the strong presumption that tithes should be paid in kind and in full.¹⁴⁵ This is one reason John Selden's argument that tithes were not owed *iure divino* was such a red flag to clerics, and it is also the reason that the law of tithes cannot be described solely in terms of local custom, important as local custom was.¹⁴⁶ Positive or customary rules contrary to the canonical rule of full payment in kind were to be read strictly. They were to be given a narrow scope. This is what was supposed to happen under the Roman canon law of tithes. It is also what did happen in the English ecclesiastical courts.

The 'bite' of the presumption that tithes should be paid in kind can be illustrated by cases taken from contemporary ecclesiastical records and reports. In tithe litigation perhaps the most common entry found in the act books was an initial proffer by the defendant of a lesser sum than that demanded. Such proffers were not simple efforts at compromise. They were almost always alleged to be the amount owed 'according to the ancient and laudable custom of the said parish'.¹⁴⁷ However, most plaintiffs rejected these proffered sums. They were bringing suit precisely to escape the 'ancient and laudable' custom. At the very least they meant to insist on some upward revision in it. The law encouraged them to do so.

An early Jacobean case from the diocese of Ely shows one reason they could hope for success. In it, the parson was suing for tithes due from the produce of a garden. The defendant answered that by immemorial custom he had paid a penny for the garden tithes. The parson admitted the custom, but alleged that, 'He [the gardener] hath enlarged his garden lately.' The result was a sentence for the parson.¹⁴⁸ Tithes in kind had to be paid for the whole garden. As the report says, 'Because the defendant hath not kept his custom precisely, it is lost.' One of the stock arguments against tithes was that they discouraged

¹⁴⁵ 'Decimarum materia', BL Lansd. MS. 132, f. 170v: 'Prescriptio de non solvendis decimis est contraria iuri naturali, quia naturalis ratio dictat, ut quicumque salutem populi ministrat et procurat, debet ad vitam necessaria habere.'

¹⁴⁶ This point is well made by J. L. Barton's Introduction to Christopher St German, *Doctor and Student* (S.S. Vol. 91, 1974) pp. lxi-lxiii.

¹⁴⁷ *Hitche c. Len* (1608), Cornwall Act book ARD/3, f. 102: 'iuxta et secundum antiquam et laudabilem consuetudinem dicte parochie'. Other examples: *Ward c. Spire* (1592), Worcester Act book 794.011 (BA 2513/4) p. 914; *Hamond c. Jackson* (1614), York BI Act book Cons.AB.58 s.d. 24 November; *Cole c. Tucker* (1617), Exeter Act book Chanter MS. 792 s.d. 24 September.

¹⁴⁸ Anon., York BI Precedent book 11, f. 17.

improvements in agriculture. This cause demonstrates the truth of that argument.

In a 1604 cause from the county of Westmorland, the vicar of Barton sued one of his parishioners for tithe of lambs' wool. The defendant pleaded a custom time out of mind of paying 2d per lamb. The vicar did not apparently dispute that this is what the defendant had been paying, but he argued that the matter must be considered on a parish-wide basis, and the evidence showed that within the parish some parishioners had actually paid 10d or 11d for each lamb during some of the years involved. Therefore, he argued, 'the prescription [was] interrupted and varying in and from itself'. Again the result was a sentence in favour of the plaintiff.¹⁴⁹ As in the modern law of prescriptive easements, any substantial change in the nature of usage before full establishment of the right destroyed the force of what had gone before.¹⁵⁰ In tithe practice, this meant restoration of the *ius commune*, full payment of tithes in kind. The parishioner thus ended by having to pay full value for each lamb instead of the customary 2d.

The same result largely obtained in causes involving compositions between the tithe holder and the parishioner. Not only did the law require the consent of the bishop before tithes could be commuted for more than the lifetime of the holder of a benefice, it also adopted a rule that rendered all such agreements precarious. As stated in a Durham report of about 1600, 'Even if the composition is made by authority of the superior, the person alleging it must prove that he himself has followed it. Otherwise it will not aid him.'¹⁵¹ In other words, any failure to pay tithes according to the agreement, and to pay them 'exactly',¹⁵² raised the real possibility of a return to full payment of tithes in kind. Where the tithe holder could allege that there had been deviation from a composition, he had every reason to sue.

¹⁴⁹ *Hudson & Yates c. Bewshar*, Durham DDR XVIIII/3, f. 237. There was a separate question argued in the case, that the custom was unreasonable: 'so unreasonable and contrarye to lawe that [even if proved] it would proove no custome but an auncient wronge'.

¹⁵⁰ See *Upton c. Bishop of Bath and Wells* (1601), Bodl. Tanner MS. 427, fols 27–30: 'Si praescriptio completa non sit, unicus actus contra interruptit praescriptionem.'

¹⁵¹ Anon., Durham, Library of the Dean and Chapter, Hunter MS. 70, f. 7: 'Si compositio facta sit etiam de auctoritate superioris, si is qui allegat compositionem vult ea se iuvare oportet quod probat se compositionem servasse alias . . . non poterit illa se iuvare', citing Petrus Rebuffus, *Tractatus de decimis*, Quaest. 13, no. 32.

¹⁵² So stated in *Stapleton c. Clerke* (1599), Bodl. Tanner MS. 427, f. 146v. See also London Guildhall MS. 11448, f. 101: 'Note in a composition personall or in a composition reall viz. made with the consent of the bishopp that yf one partie breake the other maie, and it is noe longer good than it is performed.'

The canonical rules of evidence worked in tandem with such rules favouring the payment of tithes in kind. In a case from 1582, for instance, the parishioner's defence to the parson's demand for full tithes was an agreement by the parson made ten years before to take 8s yearly in lieu of tithes.¹⁵³ There was no doubt that this sum is what he had been paying, but the agreement had not been reduced to writing, and the defendant's proof was not free from ambiguity. The witnesses were vague about some of the details, as well they might have been after ten years. Moreover, some believed the agreement made at the time had been meant to cover only past tithes; others believed that it had been meant for the future as well. Because of the unsatisfactory nature of the evidence, the judge held that the whole defence failed. The canon law required not only two witnesses, but two witnesses who agreed on all matters of substance. Thus the judge was able to find that this agreement had not been fully proved, and he condemned the defendant to pay tithes in kind, trebled according to the Edwardian statute, plus litigation expenses.

Some of the sentences handed down by the ecclesiastical tribunals triggered the legitimate indignation of the common lawyers, and no doubt of the tithe payers involved. The civilians held, for example, that the statute of Edward III that excepted timber of over twenty years growth from tithe applied only to wood destined for the construction of ships, despite the absence of textual authority in the statute for such a reading.¹⁵⁴ They held also the improver of barren land, exempt from tithes for the first seven years by the Edwardian statute, had to demonstrate that the land had *not* been subjected to tithe for the previous forty years in order to take advantage of the statutory exemption.¹⁵⁵ Proving a negative has never been easy, and it was required to take advantage of the statutory exemption from the

¹⁵³ *Ayres c. Croe* (1582), BL Lansd. MS. 135, f. 6v.

¹⁵⁴ *Bury c. Nossell* (c. 1605), York BI Precedent book 11, f. 9; it was also argued that the statute did not affirmatively bind the ecclesiastical courts to apply its rule because it merely stated that a prohibition would lie. The statute involved was 45 Edw. III, c. 3. There is an instructive contemporary discussion of the question in Christopher St German, *Doctor and Student* (S.S. Vol. 91, 1974) 300.

¹⁵⁵ *Mr Dent's Case* (c. 1600), Durham DDR XVIII/3, f. 153. An interesting example of the difficulties of proof is found in *Graunt c. Bot* (1561), Worcester Deposition book 794.052 (BA 2102) f. 16, in which one witness testified, 'that he can not tell how long the saide parcell of grownde called the olde had layen waste'. See also *Singer c. Gill* (1572), St Albans Act books ASA 8/3, fols. 20v-21 and ASA 7/9, fols. 32, 43v, 45v.

full tithing obligation. Again, the interests of the tithe holders prevailed.

These obstacles to the maintenance of the rights of the tithe paying laity came together with the rule that in order to be found valid, prescriptive rights of laymen had to pass a test of 'reasonability'. Since the sufficiency of the tithe for the adequate maintenance of the clergy was one ingredient in that test, this was far from a toothless requirement. It meant that long standing compromises were subject to upset. And there was more of the same.¹⁵⁶ Woe to the man who paid his full tithe one year in order to buy peace, or in the mistaken belief that he owed it. Unless his prescriptive rights were undoubted, he opened himself to their loss.¹⁵⁷ It must have seemed to many that there was no end to the ways in which the ecclesiastical courts would favour the interests of the clergymen and gentlemen who held the tithes. The short of it was that Roman canon law principles encouraged the upset of customary rights, and that the English ecclesiastical courts enforced those principles.

The fragility of customary rights in the canon law of tithes helps explain the contemporary development of the common law rule that only the common law courts could try a *modus decimandi*, that is a prescriptive right to pay tithes other than in kind. If a *modus* were pleaded, the common lawyers argued, the plea ousted ecclesiastical jurisdiction unless fully accepted by the civilian judges. The civilians countered that they, judges in the ecclesiastical tribunals, would fairly hear the matter and allow proof of a valid *modus*.¹⁵⁸ They argued that exclusive common law jurisdiction was innovative and unnecessary, because the same plea was admissible in the spiritual forum. So it was. They argued that it seemed most 'inconvenient' for the rights of the clergy to be subject to the whims and self-interest of lay juries.¹⁵⁹ So it did. But the common lawyer who characterized the civilians' attitude as refusing to admit any *modus decimandi* except a *modus plene*

¹⁵⁶ For example, the preference for classifying tithes as praedial rather than personal (e.g. a windmill or lead mines) the result being that expenses could not be deducted. So held in *Somes c. Morris* (1601), Bodl. Tanner MS 427, f. 190v. Contrast *Jake's Case* (K.B. 1616), 1 Rolle 405.

¹⁵⁷ Mr Sanford's case (1600), Durham DDR XVIII/3, f. 235: holding that the payment of tithes in kind or in a greater sum while the period of prescription was running required the start of a new period of prescription.

¹⁵⁸ Thomas Ridley, *View of the Civil and Ecclesiastical Law* (1607) 149.

¹⁵⁹ So contended in the polemical literature surrounding the scope of writs of prohibition; e.g., Folger MS. V.b.17, f. 83: 'How inconvenient it is for the Ministerie to leave the right of their tithes (by meanes of prohibitions) to bee tried by juries.'

decimandi came close to the mark.¹⁶⁰ The ecclesiastical courts gave such a narrow reading to customary rights that it was not simple anti-clerical prejudice that led common lawyers to prefer statements of custom to come from the collective voice of twelve men of the neighbourhood.

This preference for the verdicts of juries is of course the exact opposite of what plaintiffs seeking to collect tithes wanted. They wanted strict application of the Roman canon law. This, then, is a second reason that tithe litigation grew in volume and continued to do so even after the 1587 decision permitting actions for recovery of tithes to be brought in the common law courts. The law put into practice in the spiritual tribunals favoured plaintiffs. Plaintiffs quite understandably 'shopped' for the forum where they stood the better chance of coming out ahead.

The effects of inflation

The third reason for the growth in tithe litigation must be the existence of unprecedented inflation. According to best estimates, agricultural prices rose something over 500 per cent during the course of the sixteenth century.¹⁶¹ The effect of this inflation upon the holders of tithes was considerable, because then it meant that customary rates of payment, whether the result of prescription or composition, came to represent a smaller fraction of the true worth of the tithes than they once had. That disparity was a powerful inducement for trying to upset a composition or *modus decimandi*, and the canon law rule that a tithing custom's reasonability could be tested in part by whether or not it was adequate for the maintenance of the clergy would have provided an added incentive to make the attempt, if any incentive were needed. The start, sometimes even the threat, of a suit for tithes might well induce tithe payers to be more generous. Litigation was clearly used this way.¹⁶² Some defendants, for example, pleaded that they had once agreed to pay more than the customary rate for the sake of harmony with their parson, only to have their benevolence turned

¹⁶⁰ *Smith v. Sharffe* (K.B. 1609) FLP MS. LC 14/76, fols 177-77v: '... ils ne voient allow custom en non decimandi ou non plene decimandi'. See also *Robinson's Case* (C.P. 1602), Beinecke MSS. G R 29, No. 16, f. 181: '... ne voient allowe aucun plea en discharge de dismes pur ceo que tiegnent que sont due de iure divino entier'.

¹⁶¹ R. B. Outhwaite, *Inflation in Tudor and Early Stuart England* (2nd edn 1982), 12-14.

¹⁶² See, e.g., the deposition of William Hodgeson in *Mody c. Cowper* (1569), in *Select XVI Century Causes in Tithe*, note 133, at 110.

against them, when they were later met with the argument that they had lost the benefit of the *modus* because they had not kept to it precisely.¹⁶³

Professor Hill's book deals in detail and convincingly with the effects of price inflation on the income of tithe holders.¹⁶⁴ He shows that although on average the value of tithes kept pace with inflation, the spread was quite uneven. The detrimental effect on clerical incomes was greater in the cities than in the countryside. It also had a greater impact on the lesser tithes normally held by vicars than on the greater tithes in the hands of rectors or lay impropriators. In short, the rich got richer; the poor got poorer. The evidence drawn from the court records supports his analysis. What one sees in them are the efforts by tithe holders squeezed by inflation to keep up with the fortunes of those who were entitled to payment of tithes in kind. The canon law provided them with the means of making the effort successful. Inflation provided the motivation.

Inflation also may have led to increasing levels of tithe causes on the 'demand side'. Indeed it must have encouraged the proliferation of ecclesiastical litigation of all kinds. Christopher Brooks has shown that in real terms common law litigation became considerably cheaper over the course of the sixteenth century, because fees failed to keep pace with the price rise.¹⁶⁵ He has made a persuasive case for thinking that this relative cheapness must have been an important part of the explanation for the growth in numbers of actions brought before the common law courts. It is certainly sensible to suppose that the same thing happened in the spiritual courts. Proctors' fees and most other expenses associated with canonical litigation did not rise at anything like the rate of inflation.¹⁶⁶ This made it relatively cheaper to sue. The rewards of suing were greater, and the costs were less. Tithe causes proliferated as a result.

Other factors and explanations

The conjunction of these three factors, I believe, provides the best explanation for the great increase in tithe litigation that occurred

¹⁶³ *Ackworth c. Wyn* (1578–79), Canterbury Act book Y.3.16, fols. 133–326 *passim*; and Deposition book X.10.18, fols. 127v–29, 147v. The legal arguments were made in *Hotchkin c. Pakenham* (1605), York BI precedent book 11, f. 36v.

¹⁶⁴ *Economic Problems* 93–5, 108–21.

¹⁶⁵ C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth* (1986) 101.

¹⁶⁶ See Ronald A. Marchant, *The Church under the Law* (1969) 51–4.

during the sixteenth century. I do not mean to suggest that no other factors came into play. Indeed the records themselves suggest three, though each involves a small leap of conjecture. There is some evidence, first, that the middle third of the century had witnessed some increase in non-payment of tithes.¹⁶⁷ Under attack on a wider front, the clergy had not felt bold enough to sue for some of the tithes owed to them. With the return of greater confidence, the press of rising prices, and even (as contemporary gossip had it) the nagging of clerical wives, the English clergy showed a greater willingness to assert those rights. The limit of prescription was forty years, and if the parson could produce evidence that the tithe had been paid during some year within that limit, he might succeed in bringing to life an obligation his parishioners had thought extinguished.

Second, the ecclesiastical records also show that the dispersal of the monastic lands led to uncertainty, contention, and litigation. Title to land can easily become confused when the land is conveyed with frequency, and that is exactly what happened to the property that had once been held in monastic mortmain.¹⁶⁸ In some cases the tithe question was further complicated because in the wake of the Dissolution the tithe had not been fully paid, or had been paid to the vicar instead of to the absent successor in title to the monastic lands.¹⁶⁹ When an energetic landowner later assumed that title, he naturally would have asserted his rights to tithes, upsetting what many doubtless considered a fairer arrangement. Yet another cause of uncertainty was that much of the monastic land was exempt from tithes by papal privilege. The courts accepted these exemptions, but they required that they be proved and they gave the exemptions a narrow reading. Again the result was litigation.

Finally, there is the question of lay resistance to tithes. Many

¹⁶⁷ An admittedly speculative conclusion, drawn on the basis of the frequency with which non-payment of tithes in the middle years of the century is mentioned in later litigation; e.g., *Stapleton v. Clerke* (1599), Bodl. Tanner MS. 427, fols. 131, 132v, 133v. See also John Guy, *Tudor England* (1988) 294.

¹⁶⁸ Tracing of title from monastic ownership was a necessary and a frequent feature of tithe litigation: e.g., *Cleiton v. George et al.* (1602), Bodl. Tanner MS. 427, f. 157v. For a common law example of the point, see *Nash v. Molins* (K.B. 1590). Cro. Eliz. 206. For a civilian's opinion about the validity of a title derived from a dissolved monastery see Bodl. Tanner MS. 427, f. 173 (1605). Some of the difficult questions of statutory interpretation raised by monastic lands are well illustrated by *Whitton v. Weston* (K.B. 1629), Jones, W. 182.

¹⁶⁹ *Fynnet v. Curtys* (1576), Canterbury Act book Y.3.1, f. 173v/ff. and Deposition book X.10.16, fols. 181, 206v-7; *Newell v. Sadler & Hiches* (1599), Bodl. Tanner MS. 427, fols. 11-11v.

Tudor and Stuart tithe payers did not love or fear their parson. They probably loved a lay impropriator even less. A few men may even have thought tithe an immoral exaction. Dislike, disdain, or conscientious scruple, coupled with a self-interest attachment to old tithing customs on the part of those who owed tithes, would have compelled many tithe holders to sue for a payment that had once been more gladly surrendered. So, at least, thought one Jacobean ecclesiastical lawyer, who wrote on the flyleaf of his copy of Lanfrancus de Oriano's *Praxis* to complain about the grudging and occasionally fraudulent tithing practices of the English laity.¹⁷⁰ It seems likely that some truth lay behind his complaint.

Any serious estimation of the weight of such resistance in causing litigation presents well nigh insurmountable problems. There is no strong evidence for it in the records, but of course it is not the sort of thing any sensible defendant pleads in a lawsuit. There were complaints among many of the English clergy about the difficulty of collecting tithes, but there is also evidence on the other side, and it is difficult to be sure how strongly to weigh self-interested and anecdotal evidence. Lay resistance to tithes must therefore be counted as a possible explanation, even a likely explanation, for the growth of tithe litigation in the ecclesiastical courts. But it is a hard one to demonstrate conclusively. In its favour one can say that the growth is a fact, and that it fits well with the supposition that tithes were becoming harder to collect. Beyond that weak generalization it is hard to advance.

Whatever the effects on the Church generally, for the civilians and the other officers of the ecclesiastical courts, the growing amount of tithe litigation brought change that may not inappropriately be called dramatic. This sort of contested litigation took up a much greater share of their practice than it had before the Reformation. And it involved them in problems of statutory construction and in conflicts with the common law courts they had not had to face before. In this area of the law, therefore, the Reformation vastly changed the nature of ecclesiastical court practice.

At the same time, in the changed circumstances the Reformation had brought, the civilians sought to enforce the Roman canon law of

¹⁷⁰ Noted in flyleaf of Huntington Library, San Marino, California, Rare Book 89067, f. 120v, complaining that the English laity 'would gladly have pastors and preachers among them, and yett do thei defraud their ministers unjustly of their tithes and other duties which they ought of duty to pay'.

tithes they had inherited from the Middle Ages. Continuity was what they desired, at least as much continuity as they could find compatible with the wording of Reformation statutes. And of that sort of compatibility they were able to find quite a bit. The court records and reports demonstrate that they continued to apply the traditional principles of the Roman canon law of tithes in contested litigation. The result was continuing friction and dispute. The ultimate outcome remained in doubt. Only individual tithe causes came to an end.

EX OFFICIO PROCEEDINGS

The civilians treated the enforcement of the Church's rules relating to morality and personal conduct as the 'criminal' or *ex officio* side of their practice. It was subject to special procedural rules, just as were pleas of the Crown in the common law courts. The dominance of this side in the many local tribunals of the Church led some contemporaries and has also led some modern historians to speak of the 'bawdy courts', since the bulk of the *ex officio* proceedings in the spiritual tribunals concerned the sins of the flesh: fornication, adultery, pimping, incest, occasionally sodomy.¹⁷¹ In this aspect of ecclesiastical jurisdiction there was depressing continuity across the Reformation divide. Sexual offences dominated before. Sexual offences dominated after. They make for tedious reading. Sophisticated social historians have been able to uncover some significant differences within the records, as for example in the incidence of prenuptial pregnancy. But the mere legal historian will quickly be out of his depth if he attempts generalizations about such questions. I shall not risk any.

However, the records do show three legal developments on the *ex officio* side that help fill in the history of the Roman canon law in Reformation England. First, efforts were made, with some success, to make the system of presentment work more effectively than it had. Second, several new offences were brought within the criminal jurisdiction of the ecclesiastical courts, at the same time others fell out.

¹⁷¹ E.g., E. R. C. Brinkworth, *Shakespeare and the Bawdy Court of Stratford* (1972), a collection of the offences prosecuted in a local ecclesiastical court. Similar and also valuable are William Hale, *A Series of Precedents and Proceedings in Criminal Causes 1475-1640* (1847); Paul Hair, *Before the Bawdy Court* (1972); and F. G. Emmison, *Elizabethan Life: Morals and the Church Courts* (1973).

Third, lawyers played a greater part in the *ex officio* side of the courts' practice than they had before the Reformation. None of these came anywhere near to transforming Church court practice, but they all made a difference to it. As such, they are of a piece with some of the changes that were occurring on the instance side.

Visitation procedure

Nothing found within the first development, improvement in correction procedure, was wholly new. The visitation system was venerable, and it had long made use of inquests of sworn men drawn from the community to discover defects in the fabric of the parish church and deficiencies in the public conduct of the parishioners. Churchwardens had long been expected to act as representatives of their parish church.¹⁷² What happened in the sixteenth century was simply that practical measures were undertaken to make this system work better. Visitations were conducted more regularly.¹⁷³ Attendance at them by clergy and laity was more rigorously enforced.¹⁷⁴ Diocesan statutes improving visitation court procedure were enacted.¹⁷⁵ Official schedules containing proper forms for carrying out public penances were printed, distributed, and put to use.¹⁷⁶ Certification back to the court

¹⁷² Charles Drew, *Early Parochial Organization in England: The Origins of the Office of Churchwarden* (1954).

¹⁷³ This occasionally went farther than many thought profitable; in some places officials held sessions three or four times a year in imitation of the practice of English justices of the peace, as in the archdeaconry of Hereford in 1593, where churchwardens were required to present a 'billam trimestrem'. See St Alban's Act book ASA 7/15, f. 39v (1593). See also the 1601 complaint against 'the vexing and charging the country with quarter bills' in Wilkins, *Concilia* IV:366–7.

¹⁷⁴ See the evidence presented in H. Gareth Owen, 'The Episcopal Visitation: its Limits and Limitations in Elizabethan London', *Journal of Ecclesiastical History* 11 (1960) 179–85; E. R. Brinkworth, 'The Study and Use of Archdeacons' Court Records: Illustrated from the Oxford Records (1566–1759)', *Transactions of the Royal Historical Society* 25 (4th ser. 1943) 93–119; J. A. Vage, 'Ecclesiastical discipline in the early seventeenth century', in *Journal of the Society of Archivists* 7 (1982) 86–7; Kenneth L. Parker, *The English Sabbath* (1988) 133–8; Robert Peters, *Oculus Episcopi: Administration in the Archdeaconry of St Albans 1580–1625* (1963) 37–45; and John F. Williams, *The Early Churchwardens' Accounts of Hampshire* (1913), pp. xlvii–xlvi.

¹⁷⁵ See, e.g., Archbishop Whitgift's statutes of 1587, in Wilkins, *Concilia* IV:328–35, or Archbishop Bancroft's orders of 1596, *ibid.* 348–50.

¹⁷⁶ The fundamental work is *Visitation Articles and Injunctions of the Period of the Reformation*, eds. W. H. Frere & W. P. M. Kennedy, 3 vols. (1910). Brief but valuable is Dorothy M. Owen, *The Records of the Established Church in England* (1970) 30–5. It contains an example of the procedures used for public penance, at pp. 39–40.

that penances had indeed been performed was regularly insisted upon.¹⁷⁷ Procedures for making the system of 'signification' of obdurate excommunicates to the royal courts for their capture and imprisonment were enacted.¹⁷⁸

The most conspicuous signs of this vigour now surviving are the large numbers of printed articles of inquiry. Tudor bishops regularly prepared printed articles of inquiry to be put to the churchwardens during episcopal visitations. Most of these were pamphlets of twenty pages or so, containing long lists of detailed questions about the state of the parish and the morals of its inhabitants. At the very least, the churchwardens were to be actively reminded of the offences they were meant to discover and present. Marginal literature to be sure, and most of it doubtless now lost, the modern *Short Title Catalogue* yet lists more than 400 separate surviving editions of these testaments to episcopal zeal for the reformation of morals.¹⁷⁹

More important from a strictly legal point of view, for the first time the duty to present spiritual offences to the courts became a legally enforceable obligation fastened upon the representatives of the parish. Churchwardens and sidesmen were required to present a written 'bill of detections' to the visitors. During the reign of Elizabeth, it was established that if they failed to do so, they were themselves subject to discipline until they made good on their responsibility.¹⁸⁰ Moreover, if they did submit a bill, but the presentments in it did not contain crimes that ought to have been there, the same result obtained. Indeed it was possible for a churchwarden actually to be excommunicated for failing to present himself.¹⁸¹

Consequent prosecutions against churchwardens are very frequent in Tudor and Stuart act books. To take only one illustration from the

¹⁷⁷ E.g., *Ex officio c. Edwards* (1596), Cornwall Act book ARD/1, s.d. 29 January: 'Et dominus monuit eum ad certificandum de peractione penitentiae in xix diem februarii proximi.' Certification of this sort, under the hand of the curate, is sometimes recorded as required in early sixteenth-century act books, sometimes not.

¹⁷⁸ See Strype's *Annals* *307-13.

¹⁷⁹ A. W. Pollard & G. R. Redgrave, *A Short-Title Catalogue of Books Printed in England, Scotland & Ireland . . . 1475-1640* (2nd edn 1986) I:457-63.

¹⁸⁰ E.g., *Ex officio c. Cripps & Austen* (1585), Canterbury Act book Y.3.9, f. 28: they were cited to declare 'an habeant aliquam causam quare excommunicari non debeant in non exhibendo billam detectionum iuxta etc.' The defence offered in this instance was illness, and they were ordered to present a proper bill in the next session.

¹⁸¹ *Ex officio c. Warde* (1598), York BI Visitation book Y.V/CB.1, f. 52: 'a recusant and being a churchwarden omitted to present himself'.

many to be found: during an Ely episcopal visitation, Nicholas Bushe, churchwarden of the parish of Caldecote in Cambridgeshire, had failed to present that Harry Baxter and Alice Reynolde were living together incontinently. He was later summoned before the bishop's court to explain his earlier omission.¹⁸² At the earlier visitation he would have taken a formal oath faithfully to present the offences it was his duty to discover during the first visitation, and when it turned out that he had failed, the theory was that he himself had committed an offence. That is exactly what happened to Bushe. He could not excuse himself and was subjected to ecclesiastical discipline.

How Bushe's failing came to light is not apparent in this act book, and that is largely true throughout the surviving records. Only occasionally one can discover the source. Where one can, it sometimes turns out that it was the parson who revealed the omission. Sometimes it was another court officer or a party aggrieved by the conduct in question.¹⁸³ Whatever the most common source, the Elizabethan records show concrete results. Virtually all late sixteenth-century *ex officio* act books contain prosecutions of churchwardens for failure to present, and this was something new. Such entries are not found in medieval act books. Puritan critics of the Church regarded the practice as an innovation and an abuse.¹⁸⁴ There was something to be said for their opinion. Thus, although the mechanism of inquiry was not new, the rigour of its enforcement was. What had been a means of acquiring information had become a legally supervised and enforceable obligation to investigate and present.

Tightening up visitation machinery in this way encouraged churchwardens to present objectionable conduct they might otherwise have overlooked. At least so it appears from the *ex officio* act books. Dressing oneself in clothes of the opposite sex,¹⁸⁵ encouraging young people to dance and drink throughout the night,¹⁸⁶ looking at a Latin

¹⁸² *Ex officio* c. Bushe (1599), Ely Precedent book EDR F/5/43, fols. 78–9.

¹⁸³ I have been able to find no legal requirement of interest, and some entries suggest that there was none: e.g., *Ex officio* c. Hodge & Everill (1588), Peterborough Correction book 21 (X 609/21), f. 143: 'Informatur per Mason . . . that they looke lowlye to their office in pretermittinge thes thinges.'

¹⁸⁴ See 'The Kent Petition against Episcopacy', No. 27 (1640), in *Proceedings Principally in the County of Kent*, ed. L. Larking (Camden Soc. 1st ser. Vol. 80, 1862) 37.

¹⁸⁵ *Ex officio* c. Reynoldes (1613), Worcester Visitation book 802 (BA 2884), f. 93: 'for dressinge her selfe in man's apparrell and imodestly behavinge herselfe therein'.

¹⁸⁶ *Ex officio* c. Westlake et al. (1621), Exeter Act book Chanter MS. 763 s.d. 6 July; encouraging the carousing was here also alleged to have been the cause of the birth of four bastard children in the parish.

primer during prayers without understanding it,¹⁸⁷ allowing one's dog to enter a church,¹⁸⁸ being overly 'idle',¹⁸⁹ talking irreverently too late in the evening,¹⁹⁰ saying 'Amen' after prayers scoffingly and too loudly;¹⁹¹ people who had committed each of these indiscretions found themselves the subject of a formal presentment. The variety and incidence of presentments found in the Elizabethan and Jacobean act books suggests vigorous, and occasionally excessive, activity on the part of many churchwardens.

Many of the offences presented were distinctly minor breaches of the moral law. They must have seemed like very small beer to many sensible men, and in fact many of them came to little in the end. Those presented were sometimes simply dismissed with 'a pious monition' and made to pay a small fee. But the expense of the court appearance and the lesson for the future would have been real enough. The existence of such causes is surely tribute to the zeal, and perhaps also to the self-interest, of particular churchwardens in reporting all that they could. Social historians normally think of the presentment system as 'filtering out' charges against people with whom churchwardens had afterwards to live. It must have done that. Many visitation inquiries still produced the routine *omnia bene*. However, making representatives of the parish responsible for discovering all presentable offences also worked the other way. It encouraged churchwardens to present behaviour they or their neighbours thought anti-social. Where they were themselves serious about the reformation of morals, as many were,¹⁹² the result was increased and sometimes quite idiosyncratic *ex officio* litigation.

Court officials exercised some control over the things churchwardens could effectively present. The representatives of the parish

¹⁸⁷ *Ex officio* c. *Heywood* (1587), Peterborough Correction book 21 (X 609/21), f. 130v.

¹⁸⁸ *Ex officio* c. *Collins* (1621), Bath and Wells Act book D/D/Ca 224, f. 17, the presentment adding that 'all the people then present weare much offended att itt'.

¹⁸⁹ *Ex officio* c. *Sheppard* (1600), Gloucester Act book GDR 86, p. 141. Perhaps sexual licence was also meant.

¹⁹⁰ *Ex officio* c. *Barret* (1604), Ely Act book EDR B/2/21, f. 15v.

¹⁹¹ *Ex officio* c. *Maie* (1621), Bath and Wells Act book D/D/Ca 224, f. 34. The defendant's answer was 'that in cathedral churches they use soe to doe'.

¹⁹² See, e.g., Keith Wrightson and David Levine, *Poverty and Piety in an English Village: Terling 1525-1700* (1979) 156-8; Joan Kent, 'Attitudes of Members of the House of Commons to the Regulation of "Personal Conduct" in Late Elizabethan and Early Stuart England', *Bulletin of the Institute of Historical Research* 46 (1973) 41-71. And see generally Patrick Collinson, *From Iconoclasm to Iconophobia: the Cultural Impact of the Second English Reformation* (1986); Kenneth L. Parker, *The English Sabbath* (1988) 136.

were not given free rein. Supervision from above must have intervened, for instance, when a small strip of paper containing a presentment survives, but the contemporary act book does not include it.¹⁹³ Signs of active official control also appear at places in the records themselves. For example, a Hereford man was cited in 1609 because, as the presentment put it, he had 'abused our vicar in words'. However, he was dismissed by the judge until the churchwardens made the presentment more specific about what his words had actually been.¹⁹⁴ Entries in which churchwardens were required to explain or to justify their presentments are found regularly in the act books.¹⁹⁵ These were the other side of a general tightening up of *ex officio* court procedure. If the system was to work more effectively to bring all those who had offended against the Church's laws before the courts, it must not be without safeguards for those being presented. Operation of the *ex officio* jurisdiction was being taken more seriously.

Expansion and changes in substantive law

The second aspect of the Church's *ex officio* jurisdiction that attracts the attention of anyone who examines the records is an expansion in the kinds and the numbers of prosecutions undertaken. A wider range of human behaviour was subjected to regulation by the ecclesiastical courts after the Reformation than had been true before. Some of this expansion was imposed from without. Royal injunctions or parliamentary statutes required the spiritual courts to act. Prosecuting schoolmasters for teaching without proper licence,¹⁹⁶ churchwardens for failing to secure copies of the Bible and Bishop Jewel's *Apologia*,¹⁹⁷

¹⁹³ The presentment of Thomas Bleuerhasset (1593), for instance, is found inserted between folios 19 and 20 in Norwich (Archdeaconry) Office Act book ANW/2/31, but not found recorded in the act book itself.

¹⁹⁴ *Ex officio* c. *Turbill* (1609), Hereford (Archdeaconry) Act book O/83, p. 87: 'Et quia huiusmodi detectio est generalis dominus ipsum dimisit donec huiusmodi verba specificentur.'

¹⁹⁵ *Ex officio* c. *Birtbye* (1597), Huntingdon Act book AHH 5/3, f. 49, where the defendant alleged that 'by lawe he was not bounde to aunswer' and the churchwardens were ordered 'ad explanandum dictam billam detectionis'; *Ex officio* c. *Crabbe & Brigges*, Churchwardens of St Mary (1604), Ely Act book EDR B/2/21, f. 28v, where they were ordered 'ad justificandum billam presentationis exhibitam contra Johannem Clarke'. In this context 'justifying' required showing that there had been common fame of the offence, i.e., that the churchwardens had not acted out of personal malice.

¹⁹⁶ *Ex officio* c. *James* (1604), Ely Act book EDR D/2/23, f. 58: 'instruit pueros non licenciatos'.

¹⁹⁷ *Ex officio* c. *Atkinson et al.* (1613), York BI Visitation book Y.V/CB.2, f. 13v.

and parishioners for not having made their contributions to relief of the poor,¹⁹⁸ are three familiar examples of officially inspired changes that expanded the scope of ecclesiastical jurisdiction.

However, most of the changes that occurred were internally generated. At least they were in the sense that no specific royal order or statute required extension of ecclesiastical jurisdiction. The list of new offences is not terribly long. It is none the less revealing, and it generated considerable activity within the ecclesiastical courts. Habitual drunkenness, what two Wiltshire churchwardens described as 'extraordinary drinking',¹⁹⁹ for the first time became a spiritual crime.²⁰⁰ Many such entries are found in Elizabethan act books. This development, a change from medieval practice, occurred in advance of the Jacobean statutes punishing drunkenness, and it continued afterwards.²⁰¹ Drunkenness must therefore be considered a 'mixed' offence in early seventeenth-century England, reflecting a widespread desire for stricter supervision of personal conduct. The same impulse probably explains the growth in *ex officio* prosecutions for blasphemy and swearing.²⁰² The act books also contain quite a few of them. They, however, represented change from earlier practice only in the sense that there was an increase in numbers.

Pre-marital unchastity became a punishable offence during the second half of the sixteenth century. Theoretically a spiritual offence throughout the Middle Ages, in practice subsequent marriage had normally been allowed to 'clear' the antecedent fornication.²⁰³ Not so

¹⁹⁸ *Ex officio* c. *Pearson* (1588), Ely Presentment book EDR D/2/18, f. 8v: 'Presentatur for that he refuseth to paye his collection to the pore mans boxe.'

¹⁹⁹ *Ex officio* c. *Cooke* (1616), Salisbury Act book D 1/39/2/8, f. 16v.

²⁰⁰ E.g., *Ex officio* c. *Barrie* (1588), Winchester Act book CC B 60, f. 42v: 'a common dronkerd'; *Ex officio* c. *Jesmond* (1605), Rochester Act book DRb Pa 22, f. 148: 'detectus for that he is a common drunkard'; *Ex officio* c. *Gunson* (1611), Lincoln Visitation book Vj/21, f. 27v: 'for a common drunkard and railing on his neighbours when he is drunke'.

²⁰¹ 4 Jac. I c. 5; 7 Jac. I c. 10; 21 Jac. I c. 7.

²⁰² E.g., *Ex officio* c. *Colier* (1598), York Visitation book Y.V/CB.1, f. 63: 'for cursinge the wife of Richard Thwaites and her children'; *Ex officio* c. *Welles* (1599), London Guildhall MS. 9064/15, f. 8: 'he is a blasphemmer of the name of God a comen brawler and a sower of discord amonge his neighbors'.

²⁰³ See generally Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640* (1987) 219-37. That claiming a clandestine contract was a common way of escaping punishment was asserted in Bartholomeus Caepolla (d. 1477), *Tractatus cautelarum* (1582), Caut. 42.

in 1600. Any man and woman who 'experimented' before getting married and were found out were required to do public penance in their parish church.²⁰⁴ It was no defence for those convented to allege a pre-existing contract of marriage by *verba de praesenti*.²⁰⁵ The act books of the archdeaconry of Buckingham even contain one case where eighteen years had elapsed between marriage and prosecution.²⁰⁶ That interval was rare, but the prosecutions were not. Many a Jacobean marriage got off to what must have been a humiliating start, the couple's public penance sometimes having to be performed on the very day their marriage was solemnized.²⁰⁷

Birth of the tort of 'attempting the chastity' of a woman also belongs to this period. The terseness of most act book entries makes it difficult to generalize about the offence, but it is clear that it required no use or even threat of force. Little more than a serious and perhaps persistent proposition of sexual relations seems to have been all that lay behind most such prosecutions.²⁰⁸ A man from the diocese of Bath and Wells, for example, was prosecuted in 1621 for having so 'very earnestly' solicited the chastity of a woman that she could allege an inability to 'go quiet' on his account.²⁰⁹ A few of the *ex officio* causes

²⁰⁴ E.g., *Ex officio* c. *Browne* (1601), Lichfield Act book B/C/3/9, s.d. 17 April: 'illicitam copulam seu fornicationem etc. cum quadam Elizabetha eius nunc uxore ante matrimonium inter eos solemnizatum'. On this subject, see G. R. Quaife, *Wanton Wenches and Wayward Wives* (1979) 38–88; P. E. H. Hair, 'Bridal Pregnancy in England in Earlier Centuries', *Population Studies* 20 (1966) 233–43.

²⁰⁵ *Ex officio* c. *Gortlie* (1599), Berkshire Act book D/A 2/C 42, f. 56v: 'beinge man & wiffe betweene themselves he had carnal knowledge of her body aboute half a year before he was openly married unto her in the church'. The defendant was assigned public penance upon this confession.

²⁰⁶ *Ex officio* c. *Pingre* (1608), Buckingham Act book D/A/C/3, f. 133; the defendant objected that he 'thinketh it verie hard' that he should be punished after so long, and the court dismissed him with a public admonition, 'propter facti seu criminis vetustatem'.

²⁰⁷ E.g., *Ex officio* c. *Williamson & Hall* (1605), Durham Act book IV/6, f. 88v: 'ad confitendum crimen in ecclesia sua in diem solemnizationis matrimonii predicti tempore divinorum'.

²⁰⁸ E.g., *Ex officio* c. *Edmondes* (1621), Bath and Wells Act book D/D/Ca 224, f. 35: 'did verie earnestlie attempte her chastitie'. In *Ex officio* c. *Hill* (1605), Rochester Act book DRb Pa 22, f. 109, the Act book entry alleged only 'solicitinge'. In *Ex officio* c. *Horsfull* (1599), Nottingham Office Act book A 11, p. 252, the charge was only that the defendant, 'was verie earnest with her to have had carnall knowledge of her bodie'. See also *The Archdeacon's Court; Liber actorum, 1584*, ed. E. R. Brinkworth (Oxfordshire Record Soc., Vols. 23–4, 1942) 99, 103.

²⁰⁹ *Ex officio* c. *Edmondes* (1621), Bath and Wells Act book D/D/Ca 224, f. 35.

tempt one to see in them antecedents of the modern notion of 'sexual harassment'.

Conduct in and around one's parish church was more closely regulated by the ecclesiastical courts than had once been true. Interrupting the parson's sermon,²¹⁰ throwing a snowball in the churchyard,²¹¹ sitting obstinately in the wrong seat,²¹² wearing one's hat during the reading of the Gospel,²¹³ even being a 'common sleeper' during church services;²¹⁴ all could subject the offender to a required appearance before a spiritual tribunal. A mother's failure to appear for 'churching' after the birth of a child was cause for citing her.²¹⁵ So was marrying in a church during a prohibited time of the year.²¹⁶ Equally punishable was speaking abusively against the churchwardens.²¹⁷ The best that any of these offenders could hope for from the courts was dismissal with a warning not to repeat the conduct.²¹⁸ They almost always had to pay court fees, and very often to contribute something towards relief of the poor.²¹⁹ Elizabethan and Jacobean act books, though dominated

²¹⁰ Ely Precedent book, EDR F/5/43, f. 95v–96: 'articles for interrupting a Minister tempore divinorum'. Examples of such prosecutions: *Ex officio* c. *Parker* (1602), York Act book Chanc.AB.14, f. 176v; *Ex officio* c. *Blatcher* (1609), Rochester Act book DRb PA 22, f. 133; *Ex officio* c. *Willson* (1611), Lincoln Visitation book Vj/21, f. 51v.

²¹¹ *Ex officio* c. *Smyth* (1609), Nottingham Presentment bills PD 294 s.d. 14 April; the snowball was alleged to have contained a rock and to have hit Edward Farles in the head.

²¹² *Ex officio* c. *Turner* (1600), Winchester Act book CC B 69, f. 7v.

²¹³ *Ex officio* c. *Reade* (1616), Bedford Act book A.B.C. 5, f. 61v. He denied the truth of the presentment and was dismissed 'cum monitione'.

²¹⁴ *Ex officio* c. *James* (1590), Ely Presentment book EDR D/2/18, f. 108v: 'a common sleeper in the churche'. Other examples: *Ex officio* c. *Garrard* (1594), Norwich Act book ANW/2/31, f. 23v; *Ex officio* c. *Wattum* (1611), Lincoln Visitation book Vj/21, f. 98; *Ex officio* c. *Collyer* (1621), Exeter Act book Chanter MS. 763 s.d. 16 February.

²¹⁵ E.g., *Ex officio* c. *Ireland* (1589), Winchester Act book CC B 60, f. 17: 'She refuseth to be purified.'

²¹⁶ E.g. *Ex officio* c. *Tepler et ux.* (1597), Huntingdon Act book AHH 5/3, f. 91v: 'propter solemnizacionem matrimonii inter se et Margaretam Lincoln tempore prohibito videlicet tempore Adventus'.

²¹⁷ E.g., *Ex officio* c. *Carter* (1611), Bedford Act book A.B.C. 4, p. 43: 'for giveinge evill words to the churchwardens in the church'.

²¹⁸ E.g., *Ex officio* c. *Starke* (1620), London Act book Guildhall MS. 9064/18, f. 28; cited for drunkenness, Starke alleged that he was innocent, that he had been presented at the instigation of his enemies, and that a writing signed by his vicar and others to that effect proved his good character. He was dismissed 'cum monitione'.

²¹⁹ See the examples and the apparently justified complaints cited in G. R. Quaife, *Wanton Wenches and Wayward Wives* (1979) 196–7.

by the prosaic sexual offences that were their medieval inheritance, yet made room for new wrongs.

Greater vigilance to discipline men and women who had 'breached' the Sabbath was another, and entirely expectable, consequence of the English Reformation. Such prosecutions of course appear in medieval act books,²²⁰ but they were almost always for openly pursuing one's trade on a Sunday or saint's day. This more relaxed attitude did not survive the Reformation. Bowling on Sunday,²²¹ hunting on that day,²²² or even playing at football or quoits,²²³ all appeared as the subject of *ex officio* prosecutions. So too did some very minor actions in the pursuit of one's livelihood: picking apples,²²⁴ binding up oats,²²⁵ or drying wool,²²⁶ for example. The beginnings of the 'English Sunday' are readily apparent in the post-Reformation ecclesiastical records.

In assessing the meaning and importance of this expansion of human conduct being punished by the spiritual courts, it is well to call to mind more than the arrival of 'Puritan' attitudes. One should also consider the effects of closing the penitential forum. The medieval Church dealt with some of the minor offences just mentioned inside the confessional. The canon law assumed the existence of the internal forum, and depended on it for regulating much of men's lives. With the ending of the requirement of annual confession after the Reformation, that avenue was shut off. Conduct that had once been sorted out privately now gave rise to public controversy. For instance, the start of regular prosecutions for consorting with excommunicate

²²⁰ See Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952) 80–1.

²²¹ *Ex officio* c. *Parrye* (1592), Bristol Act book EP/J/1/9, p. 181; the defendant's justification, that he had not done so during time of divine service, was rejected. In the examples given, except where specially noted, I have excluded violations occurring during church services.

²²² *Ex officio* c. *Machyn* (1620), Exeter Act book Chanter MS. 763 s.d. 26 July: 'for hunting upon the saboth day'.

²²³ *Ex officio* c. *Barneboe* (1608), St Albans Act book ASA 7/21, f. 25; *Ex officio* c. *Redall* (1610), *ibid.* f. 90.

²²⁴ *Ex officio* c. *Buntinge* (1594), Norwich Act book ACT/25, s.d. 6 February; this seems to have occurred during evening prayer.

²²⁵ *Ex officio* c. *Radford* (1620), Exeter Act book Chanter MS. 763 s.d. 4 July.

²²⁶ *Ex officio* c. *Lamhorne* (1624), Cornwall Act book ARD/7 s.d. 7 September: 'for drying wooll on the sabaoth day'.

persons,²²⁷ or for having long 'stood excommunicate',²²⁸ can probably best be explained along these lines. Both were traditional offences under the Roman canon law, but neither is found with any frequency, if at all, in medieval act books. They must have been dealt with within the internal forum. Such resolution was no longer possible.

I do mean to ascribe all, or even most, of the change to this factor, and of course it would be equally wrong to think that penitential relations between clergy and laity ceased in 1558. It is fair to say that there is a greater moral seriousness apparent in the *ex officio* records after the Reformation than existed before. The rise of Sabbatarianism is only its most obvious manifestation. However, it would be equally misleading to ignore the effect of this external change. By closing the confessional, Protestantism opened wider the doors of the spiritual courts to new sorts of public regulation. Until the notion spread abroad that anti-social and immoral conduct was a truly private matter, the English Church would have to deal with some of it in the public forum of its courts.

Closure of the internal forum may equally explain some of the hundreds of *ex officio* prosecutions found in the Act books for failure to receive Holy Communion on one of the Church's festivals. They positively blossomed in the late sixteenth century. In them, the most common excuse proffered by defendants was a variation on the theme of standing out of 'love and charity' with their neighbours, exactly the sort of thing that would once have been heard in the confessional. Reasons of conscience, defendants said, kept them from receiving the sacrament.²²⁹ When pressed for details most said, not that they did not accept the teachings of the Church of England, but rather that some individual fault of their own (or of someone else) stood in the way. One man being convented for this offence said that he felt himself

²²⁷ *Ex officio* c. *Butler* (1592), Bristol Act book EP/J/1/9, p. 44 (in which the defendant was dismissed after taking an oath that she did not know them to be excommunicate); *Ex officio* c. *Hunter* (1598), York BI Visitation book Y.V.CB.1, f. 7v; *Ex officio* c. *Cowde* (1620), Exeter Act book Chanter MS. 763 s.d. 13 October: 'for harboring an excommunicate person in his howse'.

²²⁸ *Ex officio* c. *Katherine ux. John* (1595), Cornwall Act book ARD/1, f. 7: 'for that she hath stode excommunicate a great while'; *Ex officio* c. *Phillips* (1599), Winchester Act book CC B 60, f. 53v: 'for standing excommunicate and seeking no reformation'; *Ex officio* c. *Picke* (1621), Bath and Wells Act book D/D/Ca 224, f. 164v, said to have been 'to the great dislike of the parishioners'.

²²⁹ *Ex officio* c. *Kent* (1589), Winchester Act book CC B 60, f. 62: 'for certaine causes moving his conscience'.

unworthy because he had taken another man's goods.²³⁰ Another offered in excuse that he had been unable to make up a public and long-standing quarrel.²³¹ A third said that he had not received the sacrament because he had believed himself at fault for having fought with a woman.²³² These were typical.

It seems likely that some of these responses in fact concealed more serious dissent from the Church, perhaps most often Catholic recusancy. It is impossible to estimate the share, however, because the English spiritual courts did not become the forum for attempts to convince the wavering or the recalcitrant. The judges' normal response to these excuses was, at least outwardly, to brush them aside. Although there are a few instances in which the court ordered the defendant to consult with a clergyman about his or her difficulties of conscience, most act book entries record that defendants were simply ordered to receive the sacrament, no apparent attention being paid to their pleas of conscience, whether feigned or genuine. This does not seem a subtle or a satisfactory response on any level, though it is equally hard to see what else the judges could have done. A public courtroom makes an awkward forum for dealing with scruples of conscience. That awkwardness was one of the costs of the English Reformation. It led inevitably to greater numbers of *ex officio* causes.

The Reformation also led to growth in another sort of *ex officio* cause involving religious opinion, because one result of the Reformation was the rise of a wider range of religious beliefs among the laity. Combined with the conviction that dissent was inherently dangerous to public order, this greater range of belief all but required some sort of activity on the part of the spiritual tribunals. The question was how much. Laypeople like the Hertfordshire man who announced in 1592 that baptism had no validity unless it was preceded by a sermon,²³³ or the Lincolnshire man who urged fellow diners to render thanks to the yeoman who had grown their food instead of to

²³⁰ *Ex officio* c. *Knight* (1589), *ibid.* f. 19v: 'abstinuisse ratione culpe sue videlicet eo quod furtum commisit'.

²³¹ *Ex officio* c. *Clarke* (1593), St Albans Act book ASA 7/15, f. 42v.

²³² *Ex officio* c. *Reade* (1584), London Act book Guildhall MS. 9064/12, f. 25, in which the defendant was ordered to beg the pardon of the woman involved as well as to receive the sacrament. In *Ex officio* c. *Rayment* (1604), Lincoln Act book Cj/14, f. 70, the defendant in a similar situation was ordered 'ad reconciliandum se citra proximam communionem et tunc recipiendum et certificandum'.

²³³ *Ex officio* c. *Hawgood* (1592), St Albans Act book ASA 7/15, f. 11v; he was assigned public penance after submitting to the court's jurisdiction.

God,²³⁴ or the Yorkshire literary critic who expressed his opinion that, 'the *Magnificat* in the Book of Common Prayer was not worthy to be read in church',²³⁵ represented a continuing problem for the spiritual courts. How tight should the lid on the kettle of religious opinions be kept? How tight *could* it be kept? No satisfactory answer to the problem was found. But the bubbling inside the kettle kept the courts busy.²³⁶ It is true that they had long attempted to enforce uniformity of belief. It was just that now the problem was greater.

On most sides of the courts' *ex officio* jurisdiction, therefore, the picture that emerges from the records is one of expanding numbers and expanding competence. To balance this, there were also three specific losses. First, the medieval Church's exclusive jurisdiction over usury disappeared with the enactment of Tudor statutes on the subject, one in 1545, the other and more important in 1571.²³⁷ Though neither statute abolished ecclesiastical jurisdiction over usury, and though there were occasional usury causes heard during the reigns of Elizabeth and James I, in practice ecclesiastical causes grew rarer because of this newly shared jurisdiction. In fact, they all but ceased.

Second, the power exercised by the medieval Church to order the fathers of illegitimate children to pay for child support passed to the English justices of the peace.²³⁸ The spiritual tribunals were left simply with the ability to discipline the fathers, that is to require them to do public penance for the offence. The courts exercised this now

²³⁴ *Ex officio* c. *Rokesbie* (1611), Lincoln Visitation book Vj/21, f. 34v, cited 'for saying let us not give god thanks for our meat but let us thanke ourselves'. He explained what he had said and was dismissed 'cum monitione'.

²³⁵ *Ex officio* c. *Brooke* (1613), York BI Visitation book Y.V/CB.2, f. 48v. No appearance by the defendant is recorded.

²³⁶ Often the words were noted only in general terms, as *Ex officio* c. *Johnson et ux.* (1592), Norwich Act book ACT/25, f. 10: 'verba opprobriosa contra librum communium precum'; *Ex officio* c. *Lacocke* (1598), York Visitation book Y.V/CB.1, f. 12v: 'bestly and shameles speeches in matters of religion'; *Ex officio* c. *Slinet* (1609), Nottingham Presentment bills P 294/2 s.d. 4 April: 'unreverent words'. On the general connection between religious diversity and such court proceedings, see John F. Davis, *Heresy and Reformation in the South-East of England, 1520-1559* (1983); the reaction of an important civilian who was sympathetic with Puritan ideals is interestingly discussed in L. M. Hill, *Bench and Bureaucracy: the Public Career of Sir Julius Caesar, 1580-1636* (1988) 14-16.

²³⁷ 37 Hen. VIII c. 9 (1545) and 13 Eliz. c. 8 (1571) made perpetual by 39 Eliz. c. 18 (1597), amended by 21 Jac. I c. 17 (1624).

²³⁸ Discussed in 'Support Orders, Church Courts, and the Rule of *filius nullius*: A Reassessment of the Common Law', *Virginia L. Rev.* 63 (1977) 431-48; the statute enforcing support payments as a temporal obligation is 18 Eliz. c. 3 (1576).

purely disciplinary jurisdiction quite often and without apparent scruple caused by the suggestion that this amounted to double jeopardy. In numbers, there were probably as many such causes heard in the ecclesiastical courts as there had been a century before. The difference was that their content had shrunk.

Third, jurisdiction over assaults on clerics, traditionally called *injectio manuum violentarum*, was removed from the consistory courts.²³⁹ Though still in theory part of the Church's ordinary jurisdiction, because authorized by clear medieval precedent,²⁴⁰ in actual practice by the late sixteenth century only the courts of High Commission seem to have punished the offence. There are a few exceptions to this pattern to be found among surviving records,²⁴¹ as indeed there are for any generalization about the ecclesiastical courts. However, in terms of normal practice the branches of the High Commission had taken over this jurisdiction. They seem also to have allowed a remedy only where the offender had meant to show disrespect for the clerical order. None of these three offences, in other words, passed completely out of the domain of public crimes into that of private morality. All were simply punished in a new forum and in a slightly altered fashion. But this development happened at the expense of the ordinary jurisdiction of the spiritual courts.

Proctors in ex officio causes

The third notable development of these years on the *ex officio* side of the Church's jurisdiction was a growing use of lawyers. Medieval practice had made regular use of proctors in the ecclesiastical tribunals, but almost exclusively on the instance side. As was true in the English common law, the criminal side of the Church's jurisdiction went on mostly without lawyers to represent the persons accused. Medieval canonists had long debated the question of whether or not proctors could represent those being prosecuted. The *communis opinio* held that they could not.²⁴² The most affirmative opinion I have

²³⁹ See 'Si quis suadente in Theory and Practice', *Proceedings of the Seventh International Congress of Medieval Canon Law*, ed. Peter Linehan (1988) 425–38.

²⁴⁰ See 'Circumspecte agatis' (1286), in *Councils and Synods* II:974–5.

²⁴¹ E.g., *Holland c. Gretten* (1596), Lichfield Act book B/C/2/31 s.d. 16 March; the plaintiff was admitted *in forma pauperis*.

²⁴² The *locus classicus* for canonistic discussion of the subject was X 5.1.15 (*Veniens*). There were exceptions to the rule from the start; see *gl. ord.* ad id. s.v. *criminali*.

found is that allowing representation by proctor rested in the judge's discretion. It was not a defendant's right. English practice was consistent with accepted opinion. Proctors were seldom if ever allowed to appear in criminal causes.²⁴³

For reasons that are not wholly clear, this state of affairs changed in the sixteenth century. Continental writers opened the gates a little wider to the admission of lawyers in criminal causes,²⁴⁴ and English lawyers followed their lead. As one civilian reported, though there was still dispute about both its advisability and its compatibility with the canonical texts, in actual criminal practice proctors were customarily permitted to intervene.²⁴⁵ The presumption had swung over in favour of their admission. The English act books reflect this change of academic opinion. Though certainly not present to represent the majority of defendants in *ex officio* matters, proctors did appear with increasing frequency, and *ex officio* causes figured largely in contemporary notebooks of both proctors and advocates.

The results of this change on the shape of English practice can only be called predictable. There were more exceptions taken to the jurisdiction of the courts.²⁴⁶ There were more objections to the form of the defendant's citation,²⁴⁷ more to the legal sufficiency of bills of presentment,²⁴⁸ and more to the competence of the witnesses against the

²⁴³ This statement is largely based on negative evidence; the presence of proctors is not found recorded in medieval *ex officio* causes, whereas it is in instance causes. There is, however, at least one recorded attempt by a proctor to intervene; the judge rejected it: *Ex officio* c. *Mustell* (1377), Ely Act book EDR D/2/1, fols. 82v–83.

²⁴⁴ E.g., J. Damhouder, *Praxis rerum criminalium* (1562) c. 24, no. 2: 'Verumtamen multifarium comperimus hanc regulam fallere.' See generally John Tedeschi, 'Preliminary Observations on Writing a History of the Roman Inquisition', in *Continuity and Discontinuity in Church History*, F. Church and T. George eds. (1979) 242–3.

²⁴⁵ An English civilian commented c. 1605: 'In criminalibus hodie semper admittitur procurator et tenet processus factus per procuratorem, . . . et hoc tenetur etiam per omnes canonistas', London Guildhall MS. 11448, f. 46.

²⁴⁶ *Ex officio* c. *Smith* (1595), Canterbury Act book X.8.15, f. 74; there was also express use of the *declinatio fori*, not (so far) found in English medieval practice, in *Lindley* c. *Henson* (1597), Nottingham Act book A 11, pp. 26–7.

²⁴⁷ See *Berisford* c. *Babington* (1599–1601), Bodl. Tanner MS. 427, f. 20: 'Citatio debet continere causam specificam'; *Philips* c. *Piper et al.* (1599), *ibid.* f. 35v (objection to citation *viis et modis* without prior public citation).

²⁴⁸ *Ex officio* c. *Plumtree* (1597), Nottingham Act book A 11, p. 22: 'insufficiencia presentamenti'; *Ex officio* c. *Leaper* (1600), Essex Act book D/AEA 20, f. 75: 'allegavit dictam detectionem fuisse insufficientem de iure'; *Ex officio* c. *Beeche* (1612), St Albans Cause papers ASA 9/1/23, objecting that the presentment had been made by the defendant's 'capital enemies'.

person accused.²⁴⁹ Arguments about the proper use of compurgation – mostly dealing with the choice and qualifications of the compurgators – also appeared in the act books with far greater frequency than they did in the Middle Ages.²⁵⁰

Probably most numerous of these lawyerly objections were challenges to prosecutions based on an alleged lack of public fame. The Roman canon law had long held that defendants could not be put to their oaths in *ex officio* prosecutions unless there were respectable public fame that they had committed the offence.²⁵¹ It was one way of protecting defendants and the courts themselves from baseless or malicious prosecutions. In law, therefore, any defendant could object to being required to answer a charge by alleging that no public fame circulated against him. Such objections were not entirely unknown during the Middle Ages, but they became much more frequent with the advent of proctors in local *ex officio* practice.²⁵² Proctors required that civilian due process be followed. Whether that was regarded as an ominous or as a healthy development, I cannot now be sure. Which-ever it was, it followed inevitably from the growing use of proctors in these prosaic causes.

CONCLUSIONS

From the accumulation of detail about these five most important areas of ecclesiastical jurisdiction, at least three general conclusions emerge. All of them bear materially on the fate of the Roman canon law in Reformation England. The first is that the spiritual courts remained more vigorous than has sometimes been thought. Within the reduced framework of spiritual jurisdiction settled upon by the 1520s, the men in control of the spiritual courts worked actively to protect the continuity and effectiveness of their system. The civilians

²⁴⁹ *Ex officio* c. *Hoskins* (1598), Lincoln Diocesan Court papers Box 62/1/15.

²⁵⁰ *Ex officio* c. *Wysecombe* (temp. Jac. I), London Guildhall Library MS. 11448, fols 253v–54; *Ex officio* c. *Carpenter* (1611), Huntingdon Act book AHH 5/7, f. 7v.

²⁵¹ A fully argued cause dealing with the question is *Snow* c. *Dr Morris* (1602), Bodl. Tanner MS. 427, fols. 167, 168v, 177.

²⁵² E.g., *Ex officio* c. *Harbert & Edes* (1620), London Act book Guildhall MS. 9064/18, f. 16v; the proctor, 'licentiatus per dominum iudicem', argued against a charge of pre-marital fornication that the marriage had later been duly celebrated, and that 'nullamque famam laborasse aut laborare infra parochiam predictam dictos Johannem et Christianam ante solemnizationem matrimonii predicti incontinenter vixisse'. The churchwardens were then to be cited and required to prove the existence of pre-existing public fame.

were not simple nay-sayers. Using indirect or informal means where available, taking advantage of favourable statutes where feasible, and applying traditional principles of the Roman canon law where not statutorily forbidden, the civilians sought to maintain their position in the legal life of England. They held a more restricted competence than they had during the fifteenth century, but what they had they meant to keep. The fact that the volume of litigation in the ecclesiastical courts rose, in spite of the persistent difficulties the courts faced, demonstrates that the civilians enjoyed a measure of success. They were confronted by many and serious problems, but they were not in disorderly retreat.

A second conclusion is that, along with the continuity in subject matter jurisdiction which characterized the Reformation years, there also occurred change and expansion in the substantive law applied within the spiritual courts. The broadened definition of defamation, the new *ex officio* offences, the changes in the rules about divorce, and the statutory modifications of the law of tithes all represented breaks with medieval habit. Some of these changes can be tied directly to the introduction of Protestantism; some had already begun and would almost certainly have occurred in any event. Together, they mean that it can be misleading to speak of the ecclesiastical courts as simply 'carrying on' in their traditional fashion. New things were happening.

A third conclusion rising from the mass of detail found in the court books is that there was more law – more Roman canon law and more English common law – involved in civilian practice under Elizabeth and James I than there had been a hundred years before. In formulating their response to the legal challenges of the era, the civilians had frequent recourse to texts of the law and to academic treatments on them. Many of the changes and improvements in ecclesiastical court practice were in fact drawn from the rich storehouses of the *ius commune*. This third conclusion has probably been less apparent here than the other two. It becomes clearer if one looks at the working literature of the English ecclesiastical law. Creation of such a body of literature was the achievement of the late sixteenth and early seventeenth centuries. It is the subject of the chapter which follows.

THE LITERATURE OF CIVILIAN PRACTICE

No better window on the internal history of the Roman canon law after the Reformation exists than that afforded by the 'working literature' which English civilians produced for their own law practice. This literature reveals to the interested observer what points were debatable and what thoughts were thinkable among the men who made their careers in the ecclesiastical courts. It shows what authorities counted with them, and it demonstrates how they fashioned legal and factual arguments from those authorities. At their best, the works written by English ecclesiastical lawyers show which points of law were decisive in the litigation the observer finds so blankly recorded in the act books. Even at their worst, they reveal something about the intellectual resources the civilians had at their disposal.

'Working literature' excludes by definition all writing intended for polemical purposes or designed to reach a wider audience than that of practising lawyers. The English civilians were quite capable of writing for those to whom Panormitanus or Mynsinger were only names. John Cowell's *Interpreter* (1607) or William Fulbecke's *Paralleles* (1618) are familiar works to students of Stuart England. General treatments like Robert Wiseman's *Law of Laws* (1657) or Arthur Duck's *De usu et autoritate iuris civilis* (1653) are known to some. These works, meant to publicize the virtues of the civil law to an English audience largely ignorant of and indifferent to those virtues, are not the subject of this chapter. The works described here have little to say about matters of principle, and less about great issues of political thought.¹ They are inward looking works, written for no

¹ For surveys of the civilian literature, see Brian Levack, *The Civil Lawyers in England 1603-1641: A Political Study* (1973); Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons, London* (1988); Helmut Coing, 'Das Schrifttum der englischen Zivilisten und die kontinentale Rechtsliteratur in der Zeit zwischen 1550 und 1800', *Ius Commune* 5 (1975) 1-55; Peter Stein, 'Continental Influences on English Legal Thought, 1600-1900', in *La formazione storica del diritto moderno in Europa* 3 (1977) 1105-25.

other purpose than to help a practising advocate or proctor deal with a severely practical problem – a problem relating to the legal sufficiency of evidence, the time available for entering an interlocutory appeal, or the most careful way to frame a pleading.

Little is known about the literature of civilian practice. Holdsworth was entirely unfamiliar with it, and could assert with confidence that there have been 'no great English writers' on ecclesiastical law.² In the more than sixty years since Holdsworth wrote, not a great deal has been discovered. Several excellent studies on the courts of the Church during the early modern era have appeared,³ but none of them has examined seriously the legal literature produced for civilian practice. This neglect is surely understandable. Not only is the importance of this body of literature not immediately apparent, but many parts of it seen in isolation do not amount to much. Only when it can be taken together and used in conjunction with court records does its significance become apparent.

In addition, virtually all of this kind of civilian writing has remained in manuscript. It would have been obsolete when the ecclesiastical courts were abolished after 1640. Indeed a large part of it would have remained obsolete even when they were restored in 1660, because by then the common law played a larger role in civilian practice than it had before the Civil War. Not being printed before then, few of the works to be discussed here would have justified any printer's undertaking. Thus it is comprehensible that only those of Henry Swinburne, the York civilian and author of a treatise on the law of wills and an incomplete work on matrimonial contracts, along with one or two other writers, has been served at all well by the printing press.⁴

I will not pretend that this survey of this literature will convince the sceptic that Holdsworth was mistaken or move every observer to

² W. S. Holdsworth, *Sources and Literature of English Law* (1925) 229–31. See also the survey in Roland Usher, *The Reconstruction of the English Church* (1910) II:383–90. A typical dismissive comment is that of Charles H. and Katherine George, *The Protestant Mind of the English Reformation* (1961) 225: 'Generally, the clergy were at their theoretical worst in dealing with law.' There is, however, notice taken of one such Durham manuscript in *The Canon Law of the Church of England* (Report of the Archbishop's Commission on Canon Law) (1947) 56.

³ E.g., Ronald A. Marchant, *The Church under the Law: Justice, Administration and Discipline in the Diocese of York 1560–1640* (1969); Ralph Houlbrooke, *Church Courts and the People during the English Reformation 1520–1570* (1979); Richard M. Wunderli, *London Church Courts and Society on the Eve of the Reformation* (1981); Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (1987).

⁴ See J. Duncan M. Derrett, *Henry Swinburne (?1551–1624) Civil Lawyer of York* (1973).

conclude that England has in fact known great writers on ecclesiastical law. However, the survey does contradict the argument of the greatest of English legal historians, F. W. Maitland. It was Maitland's view that the Reformation brought with it a 'sudden catastrophe' in the dominant role the canon law had played in England's legal life. Looking at the civilians, upon whose work any judgment on this subject must be based, he wrote, 'Year by year they were becoming more English and less cosmopolitan.' They were, he contended, 'fast acquiring what may be called the common law mind'.⁵ By this he meant that their frame of reference was shrinking. The sources from which they drew authority and argument were becoming insular, drawn from the English common law rather than from the *oceanus iuris* of Continental and canonist writing. To him it appeared that the 'cosmopolitanism' that once had characterized English ecclesiastical lawyers had seen its day.

It is easy to see how Maitland reached this conclusion on the evidence before him. By 1600, the canon law faculties at Oxford and Cambridge had long since been closed. The anti-papal tenor of English life cast a dark shade over what he called 'the papal law books and their ultra-papal glosses'. In unprecedented ways and numbers, the common law courts were granting writs of prohibition to check the pretensions of the ecclesiastical tribunals. Moreover, Maitland noted, the majority of the printed works dealing with the King's ecclesiastical law, though later in date than 1640, regularly cited English common law cases as persuasive authority. They were the best evidence he had of what had happened before the Civil War. His conclusion about the minds of the English civilians in the hundred years after the Reformation followed logically.

However, Maitland's conclusion is mistaken. At best it could be called premature. The evidence of the practical writings of civilians from before 1640, now lying unprinted and unnoticed in libraries and archives around England, demonstrates beyond doubt that the Roman canon law continued to exercise the predominant influence in shaping the King's ecclesiastical law after the Reformation. Far from acquiring a 'common law mind', the civilians continued to look for guidance and authority to the mass of legal literature pouring off Continental printing presses during the sixteenth and seventeenth centuries. From it they pruned 'ultra-papal glosses'. But that ac-

⁵ 'Church, State, and Decretals', in *Roman Canon Law* 96.

complished, the *ius commune* remained their touchstone. This is the conclusion that follows from examination of their working literature.

For purposes of presenting a preliminary survey of this literature, I have divided it into four categories: proctors' books, advocates' treatises relating to specific substantive areas of law, reports of ecclesiastical causes, and opinions of counsel. The categories are not water-tight, but they provide a workable starting place for description and analysis. And although I have little doubt that much remains that is still to be uncovered, at least what follows makes a start.

PROCTORS' BOOKS

Books of forms for use in litigation – roughly analogous to common law books of entries – are the most frequently found of the literature that can be identified with proctors. Virtually every diocesan record office contains several, and they are an exception to the rule that this working literature has been neglected by historians. Usually taken directly from contemporary records,⁶ the forms found in precedent books seem for the most part to have been made up by proctors for the personal use of proctors, or for the use of their successors. The utility of such forms would not have been limited to one generation, any more than would have been the case with books of entries. Some precedent books in fact show signs of successive ownership, and a few contain new forms and new comments that were added over the course of many years.⁷

The forms found in these workaday collections were drawn both from act books and cause papers, the latter predominating in numbers. That is, some proctors found it worthwhile to collect examples of the act book entries which recorded each stage of court procedure, and a few have left quite full records of individual causes in which they were involved in consequence.⁸ More often, however, proctors found it useful to copy and accumulate models of cause papers, the forms they were required to submit in litigation: libels, articles, interrogatories, sentences, and so forth.

⁶ E.g., in a Precedent book found in Essex Record Office, Chelmsford, D/AED 9, f. 113v (1616), on the dorso of testamentary positions is found the proctor's notation 'Recepi 6 s.', evidently from the original cause.

⁷ An extreme example is a Precedent book found in the records of the diocesan court of Chester, EDR 6/14; it contains forms dated from between 1598 and 1824.

⁸ The fullest I have discovered is John Lane's manuscript called 'Processus habitus in diversis causis', Trinity Hall Library, Cambridge, MS. 42/1, fols. 104–66.

There was nothing innovative about these severely practical works. English ecclesiastical lawyers had collected precedents long before the Reformation, and the number of medieval compilations that survives is far from negligible.⁹ On the other hand, many more precedent books survive from the reigns of Elizabeth and James than from earlier periods, and it is unlikely that this is pure accident.¹⁰ New forms were needed after the Reformation – for instance a form demanding double or treble damages in a tithe cause, or one seeking permanent alimony for the woman in a divorce *a mensa et thoro*. Neither of these would have been found in a medieval precedent book. There were enough such instances and enough variations in pleading practices used in the courts to encourage proctors in most dioceses to start the work of collecting precedents afresh. Again there is a parallel here with the history of common law books of entries. They proliferated during this period, and for much the same reasons. Legal change required new forms.

The amount of information about contemporary law to be gleaned from these precedent books varies considerably. All contain forms that were used in actual practice. Many in fact are simply stitched-together forms taken from actual litigation in which the compiler had been involved. In this they do little more than duplicate information found in the cause papers used in litigation, by this date a relatively common survival in diocesan archives. As such, it may seem tempting to dismiss them as adding little to what can be discovered directly from the records of actual litigation.

In fact, dismissal would not be wise or fair. It is a rare precedent book that tells the searcher nothing at all beyond what he will also find in cause papers. Even where there are only forms, it is useful to see their spread from one diocese to another, as for example, when a formulary from the Welsh diocese of St David's contains recent forms from the courts in London.¹¹ And many precedent books contain more than forms copied from cause papers. They frequently contain comments by the proctors who compiled them, ranging from simple

⁹ The subject has been discussed in the third of Dr Dorothy Owen's 1988 Sandars Lectures, 'The Medieval Canon Law: Teaching, Literature, and Transmission'. Publication of these Lectures is forthcoming.

¹⁰ See the remarks of C. E. Welch, 'An Ecclesiastical Precedent Book from St Asaph', *Journal of the Historical Society of the Church in Wales*, 11 (1961) 9–24. For a diocesan example, see J. A. Vage, *The Records of the Bishop of Exeter's Consistory Court to 1660* (1981) 9, 16–17.

¹¹ National Library of Wales, Aberystwyth, MS. Dept. SD/Misc. B/4.

marginal notations like 'bona forma'¹² or 'quaere de hoc precedente',¹³ to fuller statements about questions of law raised by particular forms. For example, a formulary from the diocese of Chichester adds a marginal reference to the *Praxis beneficiorum* by Petrus Rebuffus (d. 1557), showing the appropriateness of several clauses found in that treatise for inclusion in the form found in the proctor's text.¹⁴

Some of the marginalia relates directly to applicable law. For instance, one Carlisle proctor's notebook contains a table of prohibited degrees of consanguinity and affinity together with its precedents.¹⁵ The compiler of a Norwich formulary added some elementary legal principles to his compilation, noting for instance that children over fourteen could choose a *curator* rather than be assigned a *tutor* by the court.¹⁶ A Durham precedent book adds several citations to the learned laws, placing for example a reference to a *consilium* by Oldradus da Ponte (d. 1335) beside a form used to dispute the validity of a testament.¹⁷ In other words, busy proctors found it useful to add observations about the law in this most rudimentary kind of practitioners' literature. Some of them show that proctors could take an interest in the Roman and canon laws.

Besides precedent books, there also existed a body of elementary treatises on procedure meant for use by working proctors. 'Summa proctoris' or 'De processu in foro ecclesiastico' are representative contemporary titles.¹⁸ These works cannot be called sophisticated in any sense, and some of them were quite short, no more than five or six folios. Most commonly, the texts found in them simply moved through the ordinary steps of litigation: citation, certification of that citation, constitution of proctors, on through to the final sentence. Their point was to describe briefly the essential parts of each step, and perhaps to give guidance to the tyro. Like precedent books, some of these treatises added brief points of law to the discussion and oc-

¹² Buckinghamshire Record Office, Aylesbury, D/A/X/4, f. 134v.

¹³ Joint Record Office, Lichfield, B/A/20, Liber tertius, f. 163.

¹⁴ West Sussex Record Office, Chichester, Ep I/51/4, p. 3.

¹⁵ Cumbria Record Office, Carlisle, DRC 3/63, f. 1.

¹⁶ BL Harl. MS. 1253, f. 1v.

¹⁷ Durham, Library of the Dean and Chapter, Hunter MS. 18, f. 4 (c. 1570).

¹⁸ Bodl. Rawl. MSS. C.503, C.555, D.1461, E.73; CUL, Ely diocesan records, F/5/46; Durham, Library of the Dean and Chapter, Hunter MS. 18; Berkshire Record Office, Reading, D/ED O 42; Cheshire Record Office, Chester, EDR 6/17, pp. 212-21; National Library of Wales, Aberystwyth, MS. SD/Misc. B/6, fols. 150-57v. These contain material that seems to be for the most part identical.

casionally also the citation of a more learned work on procedure for support.

One fuller example of this elementary procedural literature may help to indicate something of the varied character of the books put together and used by English proctors. The manuscript is now in the Library of Trinity Hall, Cambridge. Compiled in 1613 by a proctor named John Lane, it contains a miscellaneous collection of material, among which is found one section he entitled 'Notulae ad practi-cam'.¹⁹ This brief effort begins with a list of exceptions that could be taken against the person of proctors, reasons any proctor might use to disqualify his opponent in litigation. One could object, for instance, that a proctor was excommunicated, that he was not yet twenty-five years old, that he was not of good fame, and several other matters. Each of these possibilities was followed by a citation from Gratian's *Decretum*, the Gregorian Decretals, or the Roman law Digest. Lane then moved on to other aspects of practice that interested him: for instance, the question of whether or not truth was a defence in defamation causes. He ended with a discussion of the ways of classifying different sorts of crimes. Lane's work makes no pretence of covering all aspects of canonical procedure, and it has only a little to say overall about substantive law. It appears to have been rather a collection of practice points one proctor had found useful or interesting.

In terms of legal sophistication and usage of learned authorities, Lane's effort stands about in the middle of the works discovered. Some are quite superficial, containing no reference whatsoever to learned authorities.²⁰ Others are more impressive. One found among the muniments of the archdeaconry of Nottingham and apparently compiled by a proctor named William Garland, for instance, tells us that in September of 1595 he received five Continental works devoted to *praxis*: those by Petrus de Ferrariis (fl. 1389), Lanfrancus de Orianio (d. 1488), Joachim Mysinger (d. 1588), Henningus Goeden

¹⁹ MS. 42/1, fols. 166v–71v; from f. 169v, Lane has called the material 'praeparatoria ad practi-cam'.

²⁰ This is true of TCD MS. O.5.21, pp. 55–63: called 'The manner and forms of proceeding before his Majesties Commissioners Ecclesiastical' (temp. Jac. I); Cum-bria Record Office, Carlisle, MS. DRC 3/62, fols. 82–86v, called 'Processus seu modus procedendi in causis correctionum' (temp. Jac. I); and Joint Record Office, Lichfield, B/A/20/5 (seemingly an epitome of Clerke's *Praxis*).

(d. 1521), and Fredericus Schenck (d. 1580).²¹ He used all of them in putting together what the modern cataloguer accurately described as a 'precedent and general memorandum book'. It contains forms and miscellaneous points of ecclesiastical law. The result comprises 169 folios, and covers a broad spectrum of practical learning. Garland's is an impressive effort, a tribute to the range of interest and erudition possible for a lawyer even on a quite lowly rung on the ladder of ecclesiastical courts.

The most ambitious work on English ecclesiastical procedure remains that compiled by Francis Clerke, *Praxis in curiis ecclesiasticis*. Clerke had been a London proctor for thirty-six years when, in 1596, he finished this account of the procedure and jurisdiction of the spiritual tribunals in London. He drew upon a depth of personal experience, and the treatise filled a clear need. It was circulated in manuscript from the date of its initial composition right up to 1640. Cambridge University Library, for instance, contains seven pre-1640 copies. Oxford's libraries have eight. Indeed the manuscript was considered useful enough to be worth publishing after the Restoration. A first edition was published in Dublin in 1666.

Clerke's work has been the subject of an excellent study by J. D. M. Derrett,²² and it is my intention only to add to his conclusions on the basis of work in local and diocesan archives. Derrett quite understandably looked only at manuscript copies in the libraries of London and the ancient Universities. In fact, however, there is a great deal more. For one thing, the manuscript was circulated widely. New copies were being made as late as 1636, and in ecclesiastical courts far from the capital.²³ Early handwritten texts of Clerke's *Praxis* survive in the record repositories for the dioceses of Bath and Wells, Chester, Chichester, Durham, Gloucester, Salisbury, York, and St David's. The muniments of the archdeacons of Berkshire, Sudbury and Nottingham also contain manuscript copies. Outside of England they now exist (at least) in the libraries of Trinity College, Dublin, Harvard Law School (three copies), the Catholic University of America, and

²¹ Nottingham University Library, MSS. Dept. Coll., P 283, f. 164v. The book was also owned, and at least partially compiled by, the registrar John Tibberd. It was owned in 1636 by Matthew Tibberd; see *ibid.* f. lv.

²² 'The Works of Francis Clerke, Proctor', *Studia et documenta historiae et iuris* 40 (1974) 53-66.

²³ Gloucester GDR 390, at end: 'scriptum erat per Thomam Brethers ad septimum decembris diem 1637'.

the Huntington Library in California.²⁴ Compilations containing substantial extracts from Clerke's *Praxis* exist in the diocesan archives for Ely and Lichfield.²⁵ It would be wrong to pretend to have made an exhaustive search. I have not. But at the least the search undertaken proves beyond doubt that the learning found in Clerke's proctorial work was widely copied and dispersed in quite ordinary ecclesiastical courts in the years after its composition.

Moreover, many of these manuscript copies of Clerke's text were glossed by the proctors who used them, in much the same way they added comments or authorities to precedent books. For instance, beside Clerke's treatment of the production of witnesses, the annotator of the manuscript copy now in Washington D.C., wrote: 'vide Marant. parte 6 fol. 389 nu. 4'.²⁶ This was a reference to a work called *Speculum aureum* or *Praxis civilis*, written by Robertus Maranta (d. 1540), an Italian proceduralist and teacher of law in Sicily and Salerno. The reference was meant to lead the annotator to Maranta's treatment of the same subject. In the margin of a copy now at Lambeth Palace Library, at the point where Clerke discussed the right of judges delegate to 'invoke the secular arm' by calling for the imprisonment of obdurate excommunicates, one finds: 'Covar. pract. qu. ca. 10 nu. 1'.²⁷ This would have led an experienced proctor to the work of a sixteenth-century Spanish jurist, Didacus de Covarruvias y Leyva (d. 1577), *Quaestionum practicarum*, specifically to the beginning of the work's tenth chapter. Neither of these treatises will be familiar to most English legal historians, but both went through many sixteenth-century printings, and they (and many others like them) circulated widely in post-Reformation England. Their frequent inclusion in the margins of manuscript copies of Clerke's work demonstrates that its learning was used and understood in light of contemporary Continental legal thought.

²⁴ For list of the surviving MSS. of Clerke's *Praxis*, see Appendix I. Huntington Library, San Marino, California, MS. 35072 may come from the diocese of Peterborough; according to the notation at f. 1, it belonged to Ambrose Rawlyns, registrar of the consistory court there in the 1620s.

²⁵ Ely EDR F/5/46; Lichfield B/A/20/5. The National Library of Scotland, Edinburgh, contains a very full index to the *Praxis* that is bound with Clerke's similar work on the Admiralty (MS. Adv.28.6.6). However, I was unable to discover any copy of the text itself.

²⁶ See Catholic University of America, Special Collections MS. 180, f. 33v.

²⁷ LPL MS. 2451, f. 30.

Short of a long and tedious list,²⁸ it is impossible adequately to convey the range of marginalia found in pre-1640 copies of Clerke's treatise. I will venture a few generalizations. The great majority of the citations came from contemporary Continental works of *praxis*. Longer works on substantive areas of the law are found less frequently than in the treatises that belonged to advocates to be examined below. The works of canonists and civilians from the medieval period also appear less frequently than do works written during the sixteenth century. Proctors seem to have wanted compact and recent authority.

Their habit was to cite fewer works than the advocates customarily did. One or two citations to treatises from the *ius commune* for any one point usually sufficed. Proctors were also much less likely to raise what might be called 'open questions', matters of academic doubt, than were the more learned advocates. Proctors' marginal notations are thus apt to look comparatively simple. They were designed to lead a busy man to additional information if he needed it, and perhaps also to provide more learned support for some of the points found in Clerke's treatise, at least in the years before Clerke's work had established itself as an authority worthy of citation.

In all, the marginalia contains much that is suggestive about the fate of the Roman canon law in England. By far the greatest numbers of citations found in this manuscript literature were to the works of Continental writers. One does find some marginal notations to English statutes,²⁹ and equally there are marginal references to changes in the ecclesiastical law made by the 1604 canons, changes that rendered a part of Clerke's treatment out of date.³⁰ From time to time, one comes upon an annotator who disagreed with a point made by Clerke or at least pointed out a contrary precedent.³¹ What one does *not* find in the manuscripts is any considerable citation of authorities drawn from English common law reports. There are exceptions, but

²⁸ Tedious, that is, to compile. A similar list for another system of courts has been compiled and is full of interest: Alain Wijffels, *Qui millies allegatur: les allégations du droit savant dans les dossiers du Grand Conseil de Malines (causes septentrionales, ca. 1460-1580)* (1975) II:467-934.

²⁹ E.g., St David's MS. SD/Misc. B/6, f. 56v, where next to Clerke's treatment of personal tithes is written: '2 Ed. 6 cap. 13'.

³⁰ E.g., Catholic University of America Special Collections MS. 180, f. 238: 'Canon vide 115 qui repugnat et tollit huiusmodi actionem quoad guardianos.'

³¹ E.g., BL Harl. 878, f. 69, a marginal note of a contrary precedent dealing with commissions to witnesses 'in meis libris'.

they are very few.³² To judge by pre-1640 annotations to Clerke's *Praxis*, one would suppose that the working world of English proctors had been left virtually untouched by common law influence. That impression would be an exaggeration of the reality, but it is fair to say that the frame of reference found in the books used and composed by English proctors remained the *ius commune*.

ADVOCATES' TREATISES

Procedural questions were not a concern exclusive to the proctors. Advocates, more learned in the law, also dealt with them, and it is therefore a matter of interest to find that a few of the manuscript copies of Clerke's *Praxis* were glossed much more extensively than the proctors' copies just discussed. I have noted these specially in an appendix, and have treated them as treatises used and annotated by advocates. This is not pure guesswork, since Professor Derrett established that advocates as well as proctors owned copies of the *Praxis*.³³ The primary difference between the two, at least as I see it, lies in the more complete and sophisticated citation of legal commentaries in the margins of the manuscript treatises which were used by English advocates.

One example may show this. Clerke's text states that a defendant was not ordinarily required to answer an incriminating *positio* (i.e. the seriatim statement of the plaintiff's claim which defendants answered as a preliminary part of canonical procedure). In a copy now at the Bodleian Library, a marginal gloss to this text reads: 'For when incriminating positions *are* to be answered, [see] Lanfran. de respon. nu. 13; Vestr. lib. 5 c. 14; Pan. c. dudum de elect; D. Cosin part 3 c. 9.'³⁴ The marginal gloss does also refer to authorities in support of the rule in Clerke's text, but the interesting point is that this advocate did not stop there. He did not simply provide one further reference to a canonical text or to a contemporary procedural manual. Unlike most proctors, he went into considerable detail and he tested the limits of the rule.

The question this advocate dealt with was of some moment. The then current controversy over the legality of the *ex officio* oath was the

³² Bodl. Tanner MS. 176, f. 2v: 'Cooke Vol. 9 Peacockes case f. 72b'. (The reference is to Peacock's Case (Star Chamber 1611), 9 Co. Rep. 70b.)

³³ See 'The Works of Francis Clerke, Proctor', see note 22, at 65-6.

³⁴ Tanner MS. 112, f. 16v.

underlying issue. By this oath persons convented before the ecclesiastical courts in criminal causes were required to undertake, in advance, to answer truthfully all questions to be put to them. The oath forced men, as it seemed to some, to agree to incriminate themselves or else commit perjury. This dilemma would face them before they knew what the questions would be. The advocate who glossed this copy took the occasion to buttress the argument in favour of the oath's legality (and against the statement in Clerke's text) with four learned treatments of the subject.

The first of these, 'Lanfran', referred to the thirteenth section of the title dealing with defendants' answers in the *Praxis aurea* of Lanfrancus de Oriano (d. 1488). He had been a doctor of both laws and professor of civil law at Padua. 'Vestr' was Octavianus Vestrius (d. 1573), a Roman advocate and writer on civilian procedure. The citation was to the fifth book of his Introduction to practice in the papal courts, a work that enjoyed nine separate printings in the sixteenth century. The third author, here called 'Pan', was Nicholaus de Tudeschis, or Panormitanus (d. 1445) the greatest of the fifteenth-century canonists and author of a multi-volume commentary on the Gregorian Decretals. The reference was to his *Commentaria*, at Book I, title 6, chapter 54. Finally, D. Cosin was Dr Richard Cosin, the Dean of Arches whose contemporary *Apologie* for ecclesiastical jurisdiction (1st edn 1591) made the strongest case for the legality of the *ex officio* oath. Again, the essential point is that all four were references to works from within the tradition of the *ius commune*. The man who added the gloss expected that he, or whoever used his manuscript, would be able to find them for himself. They demonstrate, or at least they tend to demonstrate, the continued vitality of canonical and civilian learning in post-Reformation England.

Fully glossed copies of Clerke's *Praxis* do not exhaust the English procedural literature that bears the practised hand of an advocate. A manual prepared for use in the court of the chancellor of Oxford, surviving now in Lambeth Palace Library, deserves mention as one of these relatively sophisticated works, and perhaps also merits a fuller investigation.³⁵ Equally interesting is a work dealing with the procedure used in the branches of the Court of High Commission, which

³⁵ LPL MS. 2085, titled 'Praxis iudiciaria in curia cancellarii Oxoniensis'. It has 30 folios and is incomplete, breaking off in dealing with 'De probationibus'.

is now found in Cambridge University Library.³⁶ It treats quite a number of disputed points of practice in that controversial tribunal, points that might usefully be incorporated into historical treatments of it.

Probably the most impressive example so far discovered is an eighty-seven folio treatise on civilian procedure, written during Elizabeth's reign, and now found in the library of Canterbury Cathedral.³⁷ Among many things, it contains a full discussion of the cases in which proctors were permitted to represent defendants in *ex officio* causes.³⁸ It also has a valuable, and considerable, discussion of the rules for payment of court fees in cases of contumacy.³⁹ The author of this treatise had a real familiarity with Continental works, which he was not reluctant to apply to English practice. For example, he made constant use of the *Consilia* literature; in discussing the question of proctors' fees, he cited those of Bartholomeus Caepolla (d. 1477) and Philippus Corneus (d. 1492).

Moving to treatises that deal with substantive areas of the law, one finds the same constant use of the Continental literature. Some of these works were put into print during the period and need only to be mentioned. Henry Swinburne's treatise on the law of wills and testaments and his incomplete work devoted to matrimonial contracts are both relatively well known.⁴⁰ Sir Thomas Wilson's treatise on the law of usury falls into the same category.⁴¹ Less well known, but also printed, are William Clerke's short *Triall of Bastardie*, published in 1594, and William Crashaw's work on tithes, the *Tabula Decimarum*, which first appeared in 1591 and which was repeatedly printed up until 1683.

All of these works belong within the Roman canon law tradition. For example, when Crashaw wanted authority for the proposition

³⁶ CUL Ely MS. F/5/45; see also the slighter treatment in Trinity College, Cambridge, MS. O.5.21, pp. 55–63, entitled 'The Manner & Forme of Proceeding before his Majesties Commissioners Ecclesiastical', and TCD MS. 735, fols. 7–14 (same title).

³⁷ Canterbury MS. Z.3.25, titled 'Practica iudicialis et petitiones forenses'. At fols. 327–30 is found a catalogue of law books belonging to the author in 1608.

³⁸ *Ibid.* fols. 10v–11; he gives the rule that they may not, then adds five exceptions to it.

³⁹ *Ibid.* fols. 13v–14; the general rule was that the contumacious party had to pay all court fees which his delay occasioned, but again there were exceptions. Here twelve are noted.

⁴⁰ The first edition of *Briefve Treatise of Testaments and Last Willes* was published in 1591; the *Treatise of Spousals* was published only after the Restoration, in 1686.

⁴¹ *A Discourse upon Usury* (1572); modern edn with historical introduction by R. H. Tawney (1925).

that pimps and thieves were obliged to pay tithes on their ill gotten gains, but that the parochial clergy was equally bound not to accept them, it was to the contemporary work of Petrus Rebuffus (d. 1557) that he looked for the best authority.⁴² Rebuffus was the vigorous defender of the Church's rights against the traditional and entrenched claims of the French laity, and it is only just slightly anachronistic to speak of his treatise as 'the latest word' on the canonical position. Crashaw used his *Tractatus* constantly, though not exclusively. The author of the first real common law treatise on the law of tithes, William Bohun, later criticized Crashaw for falling 'vastly short of the mark' by relying 'chiefly on opinions and decisions of the canon and civil law'.⁴³ Bohun had a point, but of course he and Crashaw were aiming at different marks.

Besides these printed works, there remains a larger body of treatises remaining in manuscript. I have found more than a few such treatises, and doubtless there are others that have escaped me. The quality of this unprinted literature is admittedly uneven. Some of it is excellent. Two such treatises are now found in the British Library: one on the law of tithes,⁴⁴ the other on the law relating to testamentary executors.⁴⁵ They furnish the best English guides to the law on these subjects that I have seen. Both of them are based primarily on the Roman canon law, but blend Continental learning with English local custom, statutory law, and (for executors) common law precedent.⁴⁶

On the other hand, even an enthusiast must confess that some of this unprinted literature fully deserves its neglect. For instance, there is a grandly titled '*Corpus iuris canonici Anglicani*' now also in the British Library.⁴⁷ This 258 folio compendium was modelled so consciously on Roman canon law sources that it opens with the title, '*De summa trinitate et fide catholica*'. However, its subsequent attempt to restate the entire body of the traditional canon law as it was then in force in England manages to be at once ponderous, pretentious and

⁴² *Tractatus de decimis* (Lyons 1564).

⁴³ *Tithing Table* (1732) in Preface. Bohun himself occasionally found Rebuffus useful, citing him at p. 60.

⁴⁴ BL Lansd. MS. 132, fols. 164–90v. There is a briefer treatment on the law of tithes in York BI Precedent book 2, pp. 451–64.

⁴⁵ Cotton MS. Cleo. F. I, fols. 338–434.

⁴⁶ Ibid. f. 341 (listing authorities) and fols. 394–403; this is true particularly on the subject of collection of the assets and paying the obligations of the decedent.

⁴⁷ BL Harl. MS. 882. It is continued in MS. 883–4.

uninformative. It has very little connection with the realities of ecclesiastical jurisdiction in most consistory courts.

Equally grandiose in design and only slightly less deficient in execution is a manuscript treatise, now the property of the Lincoln Cathedral Library, called '*Methodus iuris canonici seu ecclesiastici Anglicani*'.⁴⁸ Its author made use of the texts of Roman and canon law to attempt a summary of the principles used in civilian jurisprudence. His attempt is not without interest. It might even sometimes have been helpful to some practising advocates. He deals with points like the desuetude of laws, the nature of equity, and the purposes of ecclesiastical sanctions. However, he proceeds on the highest level of abstraction, ignoring many of the special circumstances of English practice. He says nothing, for instance, about English statutes, and he speaks about the penal sanction of condemnation to the mines as if it were a real possibility in the English ecclesiastical courts. Only its title and its 'non-papal' tone set it out as English. The '*Methodus*' was, and remains, too grand in conception to have been of immediate use in most litigation.

Some of the surviving civilian efforts were quite the opposite: modest treatments of individual areas of law and tied directly to English conditions. One example of these is an eighteen-page treatise called '*De injuriis*' now in the Bodleian Library.⁴⁹ Its anonymous compiler relied exclusively on Roman law texts for authority, though he also briefly discussed current defamation practice in the English ecclesiastical courts. Occasionally, such a civilian manuscript may at first sight seem surprising, but peculiarly apposite for English conditions. For instance, there is a short tract at Trinity College, Dublin, called '*De matrimonio clericorum*'. The tract was composed largely from traditional canonical sources and written in defence of clerical marriage.⁵⁰ Overall, one cannot conclude that the existing literature covered the entire field of contemporary court practice, but it is true that a very large part of it attracted an English civilian author. And

⁴⁸ Lincoln Cathedral Library MS. 269. It is described as only the first of three volumes. The date 1636 appears at the end, but this may refer only to the date the manuscript was copied.

⁴⁹ Bodl. Rawl. C.53 (using mostly Roman law sources); pp. 14–18 deal in part with English law.

⁵⁰ TCD Library, MS. 248. See also Durham DDR XVIII/3, f. 287: '*Coniugia clericorum licita, de clericis coniug. c. cum olim Panormitanus*' (Panormitanus ad X 3.3.6).

again, virtually all of it was written from the sources of the Roman canon law.

Finally, among the advocates' treatises should be mentioned commonplace books of civilian learning. General collections of points about the canon and civil laws, they usually added learned authorities in support of each point. Some were arranged alphabetically, and in fact look something like a common law abridgement. For instance, one now at the Bodleian Library contains an alphabetical collection of material that ranges from practical rules about devising land, derived partly from English statute law, to abstract points about ecclesiastical liberty based on the *Apparatus* on the Decretals by Pope Innocent IV.⁵¹ Its failure to mention any of the 1604 canons probably puts its compilation before that date. Altogether it has some 270 folios of text. It is fair to say that its collector's use of canon and civil law sources, while regular and extensive, did not rise to the highest levels of learning found in other examples of English civilian literature.

The most superficially impressive example of this last sort of treatise is Sir Thomas Eden's Commentary on the Digest's title *De regulis iuris*. Professor of Civil Law at Gresham College, London, and from 1626 Master of Trinity Hall, Cambridge, Eden completed the work in 1633, and it survives in at least three manuscripts, one in Oxford,⁵² one in Cambridge,⁵³ and one in Philadelphia.⁵⁴ It is undeniable that this compilation did not amount to an original idea on Eden's part. There is in fact another quite different contemporary effort now among the Harleian manuscripts at the British Library,⁵⁵ and commentaries on this title of the Digest were a well known genre on the Continent, the best known (much used by Eden) being that from the

⁵¹ Rawl. D.1478. Other collections: BL Add. MS. 24104, fols. 55–63v (called 'Praxis in curiis ecclesiasticis' but not apparently connected with Francis Clerke); York BI Precedent book 2; TCD Library MS. 598 (called 'Collectanea de jure civili et canonico'); Durham DDR XVIII/3, fols. 262v–386v; CUL EDR F 5/49 (described by P. G. Stein, 'Thomas Legge, a Sixteenth Century English Civilian and his Books', in *Satura Roberto Feenstra*, eds. J. A. Ankum, J. E. Spruit, & F. B. J. Wubbe (1985) 545–56); Worcester 'Collectanea A', MS. 794.093 (BA 2470).

⁵² Bodl. Tanner MS. 422.

⁵³ Trinity Hall, Cambridge, MS. 27; the modern binding incorrectly attributes authorship of the treatise to Robert Blemell (LL.B. 1675) on the basis of this notation on the flyleaf: 'Robertus Blemell aul. Trin. scripsit anno domini 1675'. The notation must be taken literally.

⁵⁴ FLP MS. LC 14/99. ⁵⁵ BL Harl. MS. 5197.

pen of Philippus Decius (d. 1535).⁵⁶ However, Eden's effort nevertheless deserves both mention and appreciation. Its quality is fully on a par with some of the Continental examples.

Probably because there was less need for it than in a treatise on substantive law, Eden did not make serious attempts to integrate any English law into his commentary. He did invoke one case involving an English dispute over a bequest to Cambridge colleges to illustrate one of the Digest's maxims,⁵⁷ but he scarcely went beyond that. He preferred the authority of Matthaeus Wesenbecius (d. 1586) and Petrus Peckius (d. 1589) to that of Sir Edward Coke.⁵⁸ In a work devoted to juridical interpretation, Eden apparently did not think it useful even to include any English statute. As is true with so much of the literature meant for the practising English civilians, Eden's effort stands firmly within learned and Continental traditions.

ECCLESIASTICAL REPORTS

Unlike treatises, no contemporary reports of causes heard in the ecclesiastical courts have found their way into print. The first printed collection of ecclesiastical causes, that compiled by Sir George Lee, comes from the middle of the eighteenth century. Nor have the earlier manuscript reports been much noticed by legal historians, although a few years ago Dr Baker called attention to a valuable collection of causes from the Court of Arches.⁵⁹ His note was the start of my search for other contemporary reports. So far about a dozen reports have turned up, and they are listed in an Appendix. Here I attempt only an overview of their salient features.

It should be noted at the outset, however, that not all the reports listed were independent collections. There is enough duplication within the manuscripts to show that contemporaries considered the reports worth copying and circulating. In addition, there exist some quite modest collections, containing only three or four cases. Usually these lesser efforts are to be found within books of precedents, and it is

⁵⁶ For a full list, see *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, ed. Helmut Coing II:1 (1977) 211–12.

⁵⁷ At Dig. 50.17.98 (*Quotiens utriusque*). See Bodl. Tanner MS. 422, f. 66v.

⁵⁸ I have not picked these names at random; Eden cites both Wesenbecius and Peckius frequently, and Coke was much given to the use of civilian maxims, though he did not cite their ultimate source. For Coke's likely knowledge of civil and canon law, see *A Catalogue of the Library of Sir Edward Coke*, ed. W. O. Hassall (1950) 38–41.

⁵⁹ J. H. Baker, *English Legal Manuscripts* (1978) II:150.

not at all apparent for what exact purpose they were added. They have not been counted as true reports, although I have tried to pay attention to what they say in describing English litigation.

Whatever their limitations, for understanding the history of the Roman canon law in England these reports have the greatest value. Without them, it is as if one had the plea rolls and Bracton, but not the Yearbooks or the reports, with which to write the early history of the English common law. With them, the searcher can penetrate behind the procedural entries and uninformative sentences characteristic of the records of the spiritual tribunals. He can see in detail what arguments were being advanced and what law was being applied. He can appreciate something of both the continuity and the edges of uncertainty characteristic of post-Reformation ecclesiastical practice. Taken together, these reports show beyond doubt that more than the shell of the Roman canon law had survived the Reformation. Had Maitland been able to look at them, he would not have concluded that the English civilians had taken on 'a common law mind'.

The collection that Dr Baker described is the fullest, and probably the most professional, among the surviving reports. It is a manuscript of 227 folios, now a Tanner manuscript at the Bodleian Library.⁶⁰ Its reports extend from 1597 to 1604. Although there is variety in the completeness of the reports in it, the best give the names of the parties, a brief statement of facts, the legal point at issue, the arguments advanced, the authorities cited, and the sentence. A great many of the causes reported involved procedural questions: matters like when an appeal could be considered *deserta*: that is how long one had to wait before an appellant's failure to prosecute an appeal made the sentence against him *res judicata*.⁶¹ Another much reported kind of cause found revolved around the taxation of the expenses of litigation, what a common lawyer would call the law of costs.⁶² It is lawyers' literature through and through.

One example may suffice to illustrate the character of these reports: *Haiward c. Graple* (1598), a defamation cause brought against Graple for allegedly having said that Haiward had 'occupied' the wife of another man. The question in the cause was not whether these

⁶⁰ Tanner MS. 427.

⁶¹ E.g., *Wyer c. Atchley et al.* (1600–01), *ibid.* f. 148; the authorities cited were the Digest, the Codex, Innocent IV's *Apparatus* to the Decretals, Bartolus' Commentaries on the Digest, and the *Speculum iudiciale* of Gullielmus Durantis.

⁶² E.g., *Eden & Curd c. Strutte* (1598), *ibid.* fols. 53–54v.

words amounted to an imputation of adultery.⁶³ That was admitted.⁶⁴ The question was rather whether a discrepancy in the depositions of the witnesses about exactly when and where the defamatory words had been uttered meant that there had been a dispositive failure of proof. The authorities cited on the question were (in rough chronological order): the Roman law Institutes, the Gregorian Decretals, and treatises by Baldus de Ubaldis (d. 1400), Panormitanus (d. 1445), Lanfrancus de Orianio (d. 1488), Franciscus Curtius (d. 1495); Felinus Sandeus (d. 1503), Joannes Antonius de Sancto Gregorio called Praepositus (d. 1509), Joannes Campegius (d. 1512), Aymo Cravetta (d. 1569), Ludovicus Gomesius (d. 1577), Julius Clarus (d. 1575), Didacus Covarruvias (d. 1577), and Prosper Farinacius (d. 1618). The commentators whose works were considered relevant thus extended from the thirteenth century to the sixteenth, with a slight preponderance in favour of the latter, but including only one commentator alive at the time of the litigation. All were French, Spanish or Italian. In this report the links between the English civilians and Continental treatises were evidently being kept intact.

So regular was the advocates' reliance on Continental literature that in many ways the most interesting reports involve questions in which the traditional Roman canon law did *not* serve. Such questions drove the civilians back to their own resources, and sometimes even to those of the English common law. For instance, could a son succeed to his father's benefice without a dispensation? The canonical answer was clearly that he could not. But this rule had been adopted at least partly to enforce a regime of clerical celibacy that no longer obtained in England. Was the rule itself therefore obsolete? The cause, reported in a manuscript now in the Guildhall Library in London, held that it was not, that the old rule still held, though the dispensation would now come from the Archbishop of Canterbury rather than the Pope.⁶⁵ There were also other new and perplexing problems raised by the existence of clerical wives. When the husband died, how long did the

⁶³ *Ibid.* f. 15.

⁶⁴ The expression was the subject of a current joke at the expense of Lord Burghley. He was said to have asked the Queen's maids of honour whether or not the Queen was then 'occupied', only to realize his mistake when the women began laughing. See John Oglander, *A Royalist's Notebook*, ed. Francis Bamford (1936) 79.

⁶⁵ London, Guildhall Library MS. 11448, f. 121. On this apparently debatable point, see also *Stoke v. Sykes* (K.B. temp. Car. I) Latch 191. Maitland preferred Judge Doddridge's statement of what a civilian had told him to the case's statement of contemporary ecclesiastical practice. See 'Church, State, and Decretals', in *Roman Canon Law* 96.

widow have to vacate the vicarage in which they had lived together? As the reporter noted in a cause found in a York manuscript, it would be 'but vain labour' to look into the Roman canon law for consideration of the specific point. The popish clergy had no wives. So he looked instead to the English common law of quarantine, allowing the widow a month's grace period by analogy.⁶⁶

Sometimes the English civilians found the Continental literature insufficient on a particular point of practice, or at least not in sufficient conformity with English customs to make it sensible to follow. An interesting if unlikely example concerned the marriages of the mentally incompetent. The canon law treated the ability to enter into a marriage pretty much as it did the making of an ordinary contract. The insane could validly marry only if they enjoyed a 'lucid interval' and contracted while it lasted. But, lamented Dr Cowell in discussion of a cause from the diocese of Ely, most incompetents did not have lucid intervals, and 'What help is there for them if they be given to the lust of the flesh (as most fools are)?' He had looked. He might have followed Continental guidance if he found any. But, as Dr Cowell complained, he could 'never find this point considered by any canonist or casuist'. The report then concludes by noting that it had been customary practice in England to maintain the marriages of incompetents 'as if they had some *intervallum rationis*'.⁶⁷ For want of better authority, he followed common English usage.

The extent of the use of sources from outside the Roman canon law to be found in the ecclesiastical reports varies considerably. The compiler of causes from the diocese of Ely and the court of the Vice-Chancellor of Cambridge University, whose collection is now found at the Borthwick Institute in York, and from which the example just noted comes, was much more concerned with English common law and customs than the advocate who put together the collection from the Court of Arches now in the Bodleian. The second advocate virtually never referred to English sources. In virtually every case, however, the habit of all these men was to look first to the Roman canon law. In the Borthwick Institute report dealing with the incompetent's marriage, for example, one finds references on other aspects of the cause to five canonical works, ranging in date from the com-

⁶⁶ York BI Precedent book 11, fols. 21v-22; that the situation caused difficulties is evidenced by the attempt to oust a widow recorded in a letter found in Lincoln, Diocesan Court papers Box 62/1/42 (1603).

⁶⁷ *Ibid.* f. 15.

mentary on Gratian's *Decretum* by Joannes Monachus (d. 1313), to the most recent treatise on the law of marriage, that of Thomas Sanchez (d. 1610). And even in the other case, in which English common law did come into play, it was because the Continental law failed him that the reporter looked closer to home.

Of the origins of the reports, it is impossible to speak with assurance. They begin in the 1580s and continue up until the time of the civil war. There is also a not inconsiderable body of unprinted reports from after the Restoration that awaits an investigator.⁶⁸ It is tempting to link the appearance of the earliest ecclesiastical reports with the great surge in English common law reporting that was occurring at the same time. It would not be wildly implausible to suppose that the civilians were consciously following the lead of the temporal lawyers. Many of the ecclesiastical reports resemble what one finds by turning the pages of Dyer, Croke, Plowden, or even Coke. A small collection of defamation causes now part of the archives of the Archdeaconry of Nottingham, for instance, resembles nothing so much as many contemporary English common law reports on the same subject.⁶⁹ Its single-minded concentration on the actionability *vel non* of long strings of abusive words would have been at home in either forum.

On the other hand, the tradition of reporting *decisiones* was well established in the Roman canon law.⁷⁰ Medieval collections from the Roman Rota and the see of Toulouse circulated widely in England. They were themselves cited in the English reports.⁷¹ It may be, as Dr Baker has suggested, that a dual tradition of reporting cases can actually be pushed back into the fourteenth century.⁷² Whatever their ultimate source, however, the contents of these reports show beyond doubt that the English civilians had not lost touch with Continental learning. They were in fact regularly applying that learning in ordinary litigation. 'Cosmopolitanism' was holding its own.

⁶⁸ I have located three coincidentally: Berkshire Record Office, Reading, MS. D/ED O 47; Oxford, All Souls' College, Codrington Library, MS. 230 (with a few pre-1640 causes); and FLP MS. LC 14/54.

⁶⁹ Nottingham University Library, Manuscripts Dept., A 43 (1634-37); it contains about forty causes and occupies only the first and last three folios of this act book. It has no citation to Continental literature.

⁷⁰ See generally, H. Coing, *Handbuch* I:849-56.

⁷¹ Decisions of the Roman Rota are cited, e.g., in *Brasgridel* c. *Aldworth* (1601), Bodl. Tanner MS. 427, fols. 83v.-87; those from Toulouse in *Keblewhite* c. *Wade & Philips* (1597), *ibid.* f. 95.

⁷² J. H. Baker, 'Dr Thomas Fastolf and the History of Law Reporting', *Cambridge Law J.* 45 (1986) 84-96.

OPINIONS OF COUNSEL

The same generalization holds true for a fourth kind of working literature the civilians produced: opinions of counsel. These opinions were formal answers drafted by advocates, normally resident at Doctors' Commons in London, to questions of law that had been put to them. They were akin to the *Consilia* literature familiar to students of Continental legal history, but not identical to it. The English opinions were normally less elaborate, the writer undertook no personal part in the cause from which the question sprung, and (so far as I know) no advocate ever collected his opinions into one book.⁷³ Yet the essential feature of the Continental *consilium* – resort to the sophisticated legal knowledge of an outside expert in an actual case – was also the essence of these opinions of counsel.

Advocates' opinions are to be found scattered in a wide variety of locations. They were attached to and now are discoverable within precedent books,⁷⁴ treatises,⁷⁵ private correspondence,⁷⁶ proctors' notebooks,⁷⁷ letter collections,⁷⁸ and files of cause papers.⁷⁹ Some great names are represented. Contemporary opinions given by the judicious Swinburne are still to be uncovered in the episcopal archives at Durham.⁸⁰ The dispute over depriving the Puritan clergyman, Robert Cawdrey, of his benefice for nonconformity gave rise to opposing opinions of counsel which can be found today in the British Library. They are testimony to the differences of opinion found even among the civilians about that Elizabethan *cause célèbre*.⁸¹ Together with the ecclesiastical reports, these opinions open up the 'insides' of legal argument in the spiritual courts.

Perhaps one example that illustrates the occasion and the nature of

⁷³ The earliest I have so far discovered is in Cheshire Record Office, Chester, EDR 6/8 (1693–1752), a very interesting volume, containing one opinion of Dr Duck from 1638. Another is Worcester (St Helen's) Record Office, Worcester, MS. 794.093 (BA 2761) titled 'Doctors opinions' on the cover (1695–1756).

⁷⁴ E.g., BL Harl. MS. 5105, fols. 316–23.

⁷⁵ Canterbury MS. Z.3.25, fols. 270–70v, 313v–14 (temp. Eliz.).

⁷⁶ BL Lansd. MS. 68, no. 56 (1591).

⁷⁷ Essex Record Office, Chelmsford, D/AED 9, f. 12v.

⁷⁸ CUL Ee.2.34, fols. 80–82, printed in *The Letter Book of John Parkhurst*, ed. R. A. Houlbrooke (Norfolk Record Society, Vol. 43, 1974–5) 122–6.

⁷⁹ *Mullinex c. Rymer et al.* (1574–5) (appeal in a tithe cause from the diocese of Chester) York BI Trans.CP.1579/1.

⁸⁰ Library of the Dean and Chapter, Raine MS. 124, fols. 230–30v, 234v–36 (c. 1607) (dealing with tithe causes); York BI Precedent book 2, p. 451 (defining the term *alteragium*).

⁸¹ BL Lansd. MS. 68, no. 56.

one of these opinions will be useful. This particular dispute arose during the early years of James I's reign in the consistory court of the bishop of Bath and Wells. The question of law was whether or not an extra-judicial, but fully proved, confession of having contracted marriage by Toby Andrews and Ann Bailey was sufficient to have that marriage declared valid as against Ann's subsequent marriage to another man. That is, Andrews and Bailey had made a public statement to the effect that they were man and wife, but there were no witnesses who had actually heard them utter the words that constituted present consent ('I take thee etc.'). The complication was that Ann had subsequently married a man named William Prynne in a private marriage ceremony, one that had been attended by several witnesses and could thus be fully proved. She was adhering to Prynne. Consent made a marriage, that was clear. But consent must be proved. Which side had proved it? On such hard questions large amounts of property and even human happiness could depend.

It is impossible now to be sure how this particular cause was resolved. Dr Francis James, the bishop's chancellor and judge of the merits, was perplexed by the problem raised, and two opposing counsel's opinions were submitted to him.⁸² One said that Andrews' marriage must prevail; the other Prynne's. The first contended that consent could be presumed when it was shown by a public admission of the parties. The second argued that this presumption did not apply when it worked to the detriment of another, established union. Both opinions were based entirely on commentaries on the Roman canon law. The first counsel (whom I think one must conclude Andrews had retained),⁸³ cited treatises by Panormitanus, Alciatus, Lyndwood, Felinus Sandeus, and Didacus Covarruvias in support. Prynne's counsel cited Hostiensis, Innocent IV, Lyndwood, and Mynsinger, distinguishing the other advocate's use of Panormitanus as not on point. It is hard now to form any sure opinion about the right result, although on other evidence of English practice, Prynne's case would probably have been the stronger had his marriage been entirely free from clandestinity.

⁸² The opinions are found in Canterbury Cathedral Library MS. Z.3.27, a precedent book, at fols. 70–70v. The manuscript gives no date, but the archivist dates it at 1620, and Dr James died in 1616. Unfortunately, I have not been able to find the cause in the Somerset County Record Office in Taunton.

⁸³ That the opinion of counsel had been obtained by payment of money was specifically urged in argument against its authority in *Mullinex v. Rymer et al.* (1574–5), York BI Trans. CP.1579/1. The argument seems not to have been accepted, however.

These two opinions of counsel are typical in their reliance on the Roman canon law and in their connection to a concrete piece of litigation. They are, however, slightly more elaborate than many. Some of the slighter examples to be found in the archives simply recited the question that had been asked and gave the counsel's opinion, his signature being added at the bottom. It was the great cause that attracted counsel willing to work over a problem at length, probably also a cause in which the parties were willing to pay for the elaborate effort found in the matrimonial litigation from Bath and Wells. Thus, when a proctor in the diocesan court at Canterbury consulted London counsel on a point of probate law in 1618, he got back this reply: 'I am of the opinion that where there is a will, no cause for unlawful administration of goods may be brought, for the law is that *omnis causa etiam iniusta excusat a dolo*.'⁸⁴ Dr Thomas Gwynn, the advocate, wrote no more on a point of law that might well have been controversial.

Even where they are as brief as Dr Gwynn's effort, the opinions of English advocates provide a real window on the law the ecclesiastical courts used. They show one way the learned laws penetrated into the local diocesan tribunals. Many of England's consistory courts were not served by advocates; only proctors practised in them. It was the opinion of counsel that served to make up something of the proctors' deficiencies in legal knowledge. As shown by the glossed copies of Francis Clerke's treatise, many proctors were in fact acquainted with the basic commentaries on the procedure of Roman canon law. But there was always a gap between what they knew and the level of legal sophistication attained by the advocates at Doctors' Commons. Opinions of counsel helped bridge the gap. And, as with the other categories of practitioners' literature being discussed, these opinions clearly demonstrate the continued connections between the English civilians and Continental legal literature.

GENERAL CHARACTERISTICS OF CIVILIAN LITERATURE

The very existence of this English literature of practice and its continued dependence upon the literature of the Continental *ius commune* are easily the most significant findings to emerge from the research undertaken for this survey. The evidence requires some

⁸⁴ Canterbury Cathedral Library MS Z.3.25, f. 317.

rethinking about the intellectual world of the English civilians after the Reformation and a revision in Maitland's conclusion that their links with the *ius commune* had been cut. We can, however, go a little further. Three more detailed generalizations about the literature seem warranted, even though there is enough variety within it to require a recognition that the generalizations will not fit every single exemplar.

First, the English civilians used Continental treatises from both before and after the Reformation, but they showed a slight preference for works written during the sixteenth and seventeenth centuries. Of medieval civilians and canonists, one finds all the great names: Baldus, Hostiensis, Bartolus, Innocent IV, and a host of others. Panormitanus, whom Swinburne called the 'captain of the canonists', was probably the most frequently cited among the medieval writers, at least if one excludes William Lyndwood. That is as it should be. The Commentaries on the Decretals written by Panormitanus were comprehensive and clear. His treatment commanded and deserved respect. His prominence in the English literature followed directly from his excellence as a writer on the canon law.

Lyndwood's prominence depended, I think, both on his ability and on the close fit between his work and practice in the English ecclesiastical courts. Lyndwood commented on the canon law found in the ecclesiastical constitutions of the Province of Canterbury, and that gave his work a special relevance to English civilians. Whatever his 'papalist' presuppositions, most of what he wrote about legal problems remained as relevant after the Reformation as it had been before. Lyndwood was also the only canonist the English common lawyers cited as authoritative with any frequency,⁸⁵ and it may be that their acceptance of his authority encouraged the civilians to buttress their arguments with references to the *Provinciale*.

Characterizing the choices made among the post-Reformation writers is more difficult, but it is evident that the English civilians cast their nets widely. Sixteenth-century writers on procedure like Robertus Maranta (d. 1540), Octavianus Vestrius (d. 1573), or Julius Clarus (d. 1575) were probably the most frequently used, at least among the proctors. This is what one should expect. Proctors were most closely concerned with procedural questions, and the procedure used in the English courts was the aspect of law least touched by the Reformation statutes. The Continental proceduralists therefore

⁸⁵ See, e.g., *Case of Modo Decimandi* (1609), 13 Co. Rep. 37; *Hutchins v. Glover* (K.B. 1618), Cro. Jac. 463.

remained the most relevant to questions arising in their everyday practice.

However, one also finds at least occasional reference to most of the famous Continental writers on all aspects of the Roman and canon laws. Works by Joachim Mynsinger (d. 1588), Ulrich Zasius (d. 1536), and Andreas Alciatus (d. 1550) all found their way into the English literature. Some very obscure names can equally be found, however, and I confess that some citations found in these works of practice have defeated my efforts to track down their source. It is also worth noting specially that the English civilians kept abreast of the latest literature. Works of contemporary civilians and canonists such as Jacobus Menochius (d. 1607),⁸⁶ Thomas Sanchez (d. 1610),⁸⁷ and Prosper Farinacius (d. 1618)⁸⁸ all appeared in English practitioners' books within a very few years of their publication on the Continent.

The civilians quite obviously had no policy of excluding contemporary Catholic writers. Quite the reverse in fact, and it is no wonder that Puritans regarded Doctors' Commons as a seedbed of popery. To find the basic procedural manual of the Inquisition being cited as living law,⁸⁹ the decrees of the Council of Trent being referred to with approbation,⁹⁰ and papal powers of dispensation being used as the legitimate rule of decision,⁹¹ must have been alarming to unsubtle Protestants. To see works written by the author of *Defense of the Catholic Faith against the Errors of the English Sect* being treated with respect by an English and professedly Protestant judge must have raised more than the eyebrows of many who regarded the bishop of Rome as the enemy of true religion.⁹² However, that is exactly what an observer would have seen had he looked seriously into the working literature used in the courts of the English Church.

Contemporary depiction was not kind to the civilians. Perusal of

⁸⁶ Author of *De praesumptionibus* (Venice 1587–90), cited in Bodl. Tanner MS. 427, f. 41.

⁸⁷ Author of *Disputationum de sancti matrimonii sacramento libri sex* (1602), cited in York BI Precedent book 11, f. 15.

⁸⁸ Author of various works on criminal law, cited e.g., in BL Lansd. MS. 132, f. 191v.

⁸⁹ Nicholaus Eymericus, *Directorium Inquisitorum* (Venice 1595), frequently found cited, for example, in the annotation of Clerke's *Praxis*, LPL MS. Arches N/3.

⁹⁰ BL Lansd. MS. 131, f. 205: 'Vide examen decret. consil. Tridentino fol. 267'.

⁹¹ Wiltshire Record Office, Trowbridge, MS. D 5/24/5, f. 54; the same standards were used in determining the powers at the disposal of the King and of the Archbishop of Canterbury.

⁹² Franciscus Suarez (d. 1617), cited by Arthur Duck, *De usu et autoritate iuris civilis* (1653) 302.

the Marprelate Tracts,⁹³ or the pamphlet entitled *The Pimpe's Prerogative*,⁹⁴ shows abundantly that many Englishmen saw the Pope and his minions lurking behind the robes of the civilians. The civilians themselves regarded this as calumny pure and simple. They looked to the Continental literature, they maintained, because of the excellence of the law found therein, and they used it only in so far as it was consistent with English statute and custom. For them, it was entirely possible to separate the Roman canon law from its 'ultra papal glosses'. None the less the suspicion of popery clung to them, and the literature described here shows one reason why.

A second general characteristic of this literature is its clear preference for work of the Bartolist tradition to that of the legal Humanists. Modern historians sometimes lavish praise on the latter, dismissing the traditional reliance on glosses and commentaries of the former as sterile imitations of the past. They may be right to do so, but theirs was not an attitude the English civilians shared. The civilians were not interested in pure Roman law, stripped of its medieval accretions. They were interested in law that had direct relevance to their practice. To deal with a question about tithes or marriage with the resources of Roman law as it existed before Tribonian would have seemed, indeed it would have been, an act of folly. As a consequence, although citations to humanist writers are to be found in the English practitioners' literature, overall a traditional approach to the legal texts prevailed. The names one meets most frequently are Petrus Rebuffus, not Hugues Doneau; Julius Clarus, not Guillaume Budé.

In evaluating the use the civilians made of current Continental literature, one ought to call to mind that the sixteenth century was not just the age of legal Humanism. The century also witnessed an amazing outpouring of monographic literature on a vast array of technical legal subjects, and also a somewhat greater emphasis on *praxis* than had been true in medieval juristic literature. English readers may find it difficult to appreciate just how large that outpouring was, but Maitland was entirely accurate in describing it as an

⁹³ See *The Marprelate Tracts 1588, 1589*, ed. William Pierce (1911) 51, 248–51.

⁹⁴ Printed in 1641. It is described in W. Senior, 'The Advocates of the Court of Arches', *L.Q.R.* 46 (1923) 493, at 505. There is an early seventeenth-century poem voicing similar sentiments found in Folger MS. X.d.232, called 'The Dismall Summons to Doctors' Commons'. See also Anon., *The Proctor and the Parator* (1641), Strype's *Annals* *490; Peter Clark, *English Provincial Society from the Reformation to the Revolution* (1977) 364; and the pamphlet literature listed in Brian P. Levack, *The Civil Lawyers in England* (1973) 289.

oceanus iuris. The number of works devoted to procedural subjects alone is truly staggering. It dwarfs the entire output of contemporary English common lawyers. And treatises in the hundreds, many on seemingly obscure subjects, found their way into print. Works with names like *De iure sistendi*,⁹⁵ *De nullitatibus processuum*,⁹⁶ or *De nothis spuriisque filiis*,⁹⁷ made many a sixteenth-century academic career. They also found a receptive audience among the English civilians.

That this workaday literature should have appealed to the English civilians should not actually be surprising. The English civilians considered their work as belonging within the tradition of the European *ius commune*, and that tradition was being added to all the time. The followers of Bartolus and the *mos italicus* were energetic writers. The monographs pouring off sixteenth-century printing presses made available a mass of legal learning on the *ius commune* that is harder to extract from the medieval commentaries, which were normally more closely tied to the texts of the civil and canon laws. For the practical questions with which the civilians were mainly concerned, it made good sense for them to turn to works that continued within the Bartolist tradition. The recent writers were specialized, likely to digest and sum up prior literature, and more concerned with immediate questions of practice than were their medieval predecessors. None of these prosaic features was found in the contemporary works of the more famous and talented legal Humanists.

Third, although extensive use of and familiarity with the Continental literature was characteristic of the civilians, they did not stop there. The 'working literature' incorporated English statute law wherever it applied. Occasionally the civilians could even refer to common law cases where they were relevant. Where the question of usury arose, for instance, it would have made little sense to deal with it solely in terms of the *ius commune*. The Elizabethan statute regulating the rate of permissible usury had to come into play, and the statute is in fact noted in the reports.⁹⁸ Where a temporal guardian of a minor who held land by socage tenure appeared in a spiritual court to represent the child, at least one ecclesiastical judge permitted him to introduce

⁹⁵ Written by Petrus Peckius, cited in BL Lansd. MS. 130, f. 170.

⁹⁶ Published by Sebastianus Vantius in 1550, cited as authority in London Guildhall MS. 11448, f. 46.

⁹⁷ Written by Gabrielus Palaeotus in 1572, cited in Bodl. Tanner MS. 427, fols. 95–95v.

⁹⁸ London Guildhall MS. 11448, f. 64.

English common law to justify the appointment.⁹⁹ To him, the rules of guardianship of the Roman canon law did not seem so unyielding that the English guardian might not be counted a *tutor* or *curator*. Where a case in Plowden's Reports helped answer the question of whether or not one clergyman's acceptance of a benefice incompatible with the one he already held rendered the old benefice *ipso facto* vacant, one English civilian thought some attention might legitimately be paid to it, and Plowden's case is found cited alongside authorities drawn from the Continental literature.¹⁰⁰

These examples point to a vital characteristic of the civilian literature. It was meant to take account of changed circumstances. The creation of a body of works designed for the needs of practising English civilians during the reigns of Elizabeth and James was itself a response to those circumstances. It was written because it filled a need. In it, the Reformation statutes, internal developments in English ecclesiastical law, a more aggressive common law, and the perceived need to articulate the basis of their jurisdiction led the English civilians to explore sources from outside the Continental writings with which they were most familiar. It is certainly fair to say that the civilians felt more at home with the traditional learning of the Roman canon law than they did with authorities drawn from the common law. And of course many of the practical questions the civilians dealt with simply had no common law analogue. But they were concerned with living law. Living law required them to deal with English statutes, local customs, and even sometimes with English common lawyers.

SOURCES OF KNOWLEDGE OF ROMAN CANON LAW

The continued dependence on the Roman canon law found in the literature of the English civilians must raise questions, perhaps even scepticism, in the mind of fair minded readers. How can it have been so? England had renounced the jurisdiction of the papacy, and if any body of law was inextricably tied up with papal jurisdiction, it was the Roman canon law. Every page of the Decretals and many pages from the pens of the commentators proclaimed the rights and prerogatives of the bishop of Rome. Moreover, the canon law faculties at Oxford and Cambridge had been shut. The foundation of the knowledge of

⁹⁹ *Ibid.* f. 47v.

¹⁰⁰ *Ibid.* f. 12v.

the canon law must be the study of the canon law, and that study had been proscribed. It is difficult therefore to see just how it could have been that the influence of the Roman canon law made itself felt as strongly as this evidence from this literature of practice shows it did.

The civilians answered the ideological aspect of this question by saying that they regarded the substance of the law found in the books of the *ius commune*, not its connection with the papacy. As Jeremy Taylor later put it, they resorted to the 'Roman storehouses, . . ., because there the staple is, and very many excellent things exposed to view'.¹⁰¹ In this they had little choice. The civilians could not *invent* a jurisprudence. They were accustomed to looking to texts and commentary for guidance and inspiration. It was the simple truth that the 'Roman storehouses' did contain excellent things. Most of what sophisticated discussion of legal problems there was, was to be found there.

For the civilians the great force of the Roman canon law consisted in the juristic excellence of the law found in it, not in the particular person who happened to enunciate it. It should be remembered that with them, as with all commentators inside the traditions of the *ius commune*, law was not thought of primarily as the command of a sovereign. Because the English civilians felt themselves free to disregard those aspects of the Roman canon law which were inconsistent with English customs, and because they were accustomed to traditional ways of handling the rules and the commentaries of the Roman canon law, they simply did not see any necessary inconsistency in their position. It seems more obvious to us than it was to them.

This attitude of the English civilians was not an uncommon one. Contemporary Continental writers made use of, even extolled the virtues of, pure Roman law without in the least endorsing the claims of the Roman emperors to be found in its texts. They saw no internal contradiction in this. Lawyers took good ideas where they found them. In addition, the attitude was one shared by Protestant canonists on the Continent. Of these (to us) incongruous figures, there were then more than a few. They found themselves in essentially the same position as the English civilians. Matthaeus Wesenbecius (d. 1586) or Joannes Schneidewein (d. 1568), for instance, were Protestant writers who continued directly along the paths of the European

¹⁰¹ *Ductor dubitantium* (1676) pp. i-ii.

ius commune. Theirs are not familiar names today, but they were widely known at the time, and substantial works of both men were cited with some frequency by the English civilians. Only a very careful reading of their works reveals the religious allegiance of these Protestant canonists. The connection between law and religion in their eyes was really no different from that made by the English civilians.

The aspect of the question dealing with the lack of available training in the canon law is more difficult to answer; I confess to finding my attempt not wholly satisfactory. The difficulty is to explain how men untrained in canon law came to use it with such facility and consistency. It does not seem likely that the closure of the canon law faculties at Oxford and Cambridge can have had so little impact on the practice of the practising civilians. But it seems to be the fact.

A part of the explanation for this fact must lie in the interconnection that existed between the two laws. Knowledge of Roman law in the sixteenth century led naturally, almost inevitably, to knowledge of the canon law. Maitland wrote on the assumption that there was a fundamental antipathy between them. Alberico Gentili, Regius Professor of Civil Law at Oxford from 1587, Maitland said, 'hated the canon law as the thoroughbred civilian should hate it'.¹⁰² Such an attitude was surely open to a sixteenth-century civil lawyer, at least if he were a thoroughgoing academic. But it was by no means an inevitable attitude. And if the civilian descended from theory to practice, it would have been an impossible attitude. The two laws were so interdependent by 1600 that they could scarcely be pulled apart.¹⁰³ This never meant that commentators did not recognize differences between them. They did. But if an aspiring civilian picked up any of the Continental treatises discussed above, whether written by a professor of canon or of civil law, he would have found his text filled with references to both of the learned laws. The *ius commune* included both.

The interdependence of the two laws certainly obtained in any serious study of English ecclesiastical law. It would have been impossible to examine the law of succession or marriage without some reference to both. A notebook of a seventeenth-century English student of Roman law described the ecclesiastical law of his country as

¹⁰² 'Church, State, and Decretals', *Roman Canon Law* 95.

¹⁰³ Petrus Rebuffus, 'Tractatus de nominationibus', Quaest. 5, no. 15, in *T.U.I.* XV:2, fols. 301-39: 'Ius canonicum et civile sunt adeo connexa, ut unum sine altero vix intelligi possit.'

permixtum; composed of elements from both the Roman and canon laws, with local and national customs being added.¹⁰⁴ Almost every work by an English civilian contains references to both laws. Moreover, where the two laws differed, the ordinary rule was that in practice the canon law prevailed. This principle was widely accepted by the civilians themselves; it was known and put into use in England.¹⁰⁵ Thus, any study of the civil law inevitably carried with it the need for some familiarity with the canon law. Maitland's term 'Roman canon law' is not a bad description for the *ius commune*.

Second, it is by no means certain that the closure of the canon law faculties at Oxford and Cambridge ended all study of the canon law there. Thomas Fuller, the early historian of Cambridge University, described the civilians as keeping the canon law 'in commendam' with their study of the Roman law.¹⁰⁶ Such early manuscripts as reflect on the substance of what was taught in the ancient English universities suggest that Fuller described the reality. 'Notes taken at the lecture of some Civilian temp. Charles I', now in the Cambridge University Library, may or may not adequately and accurately describe a contemporary lecture, but its contents certainly include frequent reference to the canon law.¹⁰⁷ The lecturer's definition of *alimenta*, or his argument in favour of the father's obligation to support his illegitimate children, for instance, both came directly out of the literature of the canon law. Among the commentaries he cited were those of Hostiensis (d. 1271), Petrus Rebuffus (d. 1557), Benedictus de Capra (d. 1470), and Franciscus de Ripa (d. 1534). If put to choose, one would have to say that all these writers were more canonists than Romanists.

This is not an isolated example. Several manuscripts purporting to describe something of what English students of the civil law learned

¹⁰⁴ BL Sloane MS. 1526, fols. 61–74v (titled 'Manuductio in juris civilis studia'). At f. 64, the anonymous compiler noted the relevance of canon law, 'cum ii qui commentariis jus civile illustrarunt, ad jus canonicum lectorem saepissime remittant'.

¹⁰⁵ E.g., *Simpson v. Turner* (temp. Jac. I), BL Lansd. MS. 135, f. 131: 'ubi non concordant, ius canonicum sequendum est' (citing works by Panormitanus, Covarruvias, Felinus Sandeus and Joannes Crotus).

¹⁰⁶ *The History of the University of Cambridge*, eds. M. Prickett and T. Wright (1840) 225.

¹⁰⁷ CUL Dd.5.78.2, fols. 2–14v. Accord: Durham, Library of the Dean and Chapter, MS. 68, called 'Disputationes juridicae', at Disp. 3, no. 5, 'Caeterum jure canonico quod mores hodierni sequuntur.'

show the same habitual reference to the canon law.¹⁰⁸ A seventeenth-century compilation of 'Quaestiones disputatae' from the Oxford civil law faculty, for example, contains many notations to the canon law and commentaries upon it.¹⁰⁹ Equal ease in dealing with the canon law is found in a late sixteenth-century 'Student's Notebook' now found in the Somerset Record Office.¹¹⁰ The primary reference point in these notebooks was always to the texts of the Roman law, but this led in both cases to discussion of the canon law on the same subjects.

Two somewhat later manuscripts now found at Trinity Hall, Cambridge, provide a revealing glimpse of the method of an early lecturer in civil law. They contain the lecture notes of Francis Dickins, Regius Professor of Civil Law from 1714.¹¹¹ Dickins' habit was to begin with the Roman law texts and then move to those of the canon law (though it must be said that he allowed himself to range a little more widely still). A *nunc videndum est de iure canonico* regularly followed his exposition of the civilian texts. Dickins thus made frequent reference to the texts of the *Decretum* and the Gregorian Decretals, even mentioning the decrees of what he called *Synodus Tridentina* in discussing the law of marriage.¹¹²

It is true that none of these examples allows us to describe a sixteenth or seventeenth-century legal education with any great confidence. The testimony they provide is too thin. However, taken together with the evidence of English practitioners' literature discussed above, these notebooks do suggest that some academic study of canon law may well have survived the formal closure of the separate canon law faculties at Oxford and Cambridge.

Finally, it would be wrong to neglect what could be learned in 'on the job' training, particularly if one began with a grounding in the civil law. This sort of training was a normal avenue by which English common lawyers learned their profession, and the civilians clustered together in Doctors' Commons may also have taught each other a good

¹⁰⁸ See BL Harl. MS. 3190, classified as 'Adversaria studentis in iure civili sec. XVII'; BL Harl. MS. 5758, purporting to be an introduction, useful for a student of theology, 'for attaining some convenient knowledge of the civil law' and probably written post 1640; BL Harl. MS. 6043, said to be 'desumpta ex ore studentis in hoc facultate' [Civil Law] from 1587-9; Berkshire Record Office, Reading, MS. D/ED O57, called 'Exercitia in iure' (c. 1658).

¹⁰⁹ Bodl. Tanner MS. 423; see, e.g., fols. 234-6: 'Quid sit symonia?'

¹¹⁰ Somerset Record Office, Taunton, MS. DD/WO 52/1, described as 'Student's Notebook (law)', and dating from the late sixteenth century.

¹¹¹ Trinity Hall Library, Cambridge, MSS. 31, 44(1).

¹¹² MS. 31, f. 42.

deal of canon law. Each new entrant was required to spend at least an initial year devoted exclusively to study, and there are signs that a kind of informal tutelage extended beyond that.¹¹³ The same thing may have occurred on a smaller scale in the careers of the proctors who served in the local consistory courts. No civilian has left us a description of the early stages of his career, so that this explanation for widespread knowledge of canon law may be no more than guesswork. At least it makes sense of the evidence found in the working literature of the civilians.

It is undeniable that once a student has a grasp on how to use Roman law texts, together with their attendant glosses and commentaries, mastery of the same literature on the canon law side comes relatively easily. To the extent that there was a separate body of canon law in 1600, a trained civilian could make the leap without an effort that anyone would call heroic. The Continental works of the *ius commune* were accessible in Oxford, Cambridge, and London.¹¹⁴ Many were equally to be found in some quite ordinary diocesan courts around England.¹¹⁵ With these books, any civilian could immerse himself in the canon law if he needed to. And of course, he did need to. The subject matter of much of his practice made frequent recourse to the canon law obligatory. Confronted by a hard question about the law of marriage or tithes, no text from the Digest would have carried him very far.

CONCLUSION

In 1569 Archbishop Parker wrote to Sir William Cecil about the civilians: 'Sir, I think these lawyers keep but their old trade.'¹¹⁶ The Archbishop was telling the unvarnished truth. Far from acquiring a 'common law mind', the Elizabethan and Jacobean civilians remained tied to the traditions of the Roman canon law. They used the

¹¹³ Called the 'year of silence'. See generally G. D. Squibb, *Doctors' Commons* (1977) 32; *The Canon Law of the Church of England* (Report of the Archbishops' Commission on Canon Law) (1947) 52–3.

¹¹⁴ For Cambridge: see E. S. Leedham-Green, *Books in Cambridge Inventories: Book-lists from Vice-Chancellor's Court Probate Inventories in the Tudor & Stuart Periods* (1987); Sargent Bush, Jr and Carl J. Rasmussen, *The Library of Emmanuel College, Cambridge, 1584–1637* (1986); CUL MS. Dd.5.45 (Catalogue of the Library of St John's College, c. 1623).

¹¹⁵ See notes 26–34.

¹¹⁶ Letter of July 1569, in *Correspondence of Matthew Parker*, eds. John Bruce and Thomas Perowne (Parker Society 1853) 351–2.

traditional literature constantly, and they 'kept up' with the masses of it being produced across the Channel. They preferred it in virtually every instance to authorities drawn from the English common law, applying the principles of the Roman canon law regularly in the causes that came before the ecclesiastical tribunals. Statutes were the one exception to this rule, and they were an important exception. But as will become obvious in the following chapter, the civilians interpreted even English statutes with a mind steeped in the European *ius commune*.

Apart from this conclusion that the Reformation did not sever the links between the English civilians and Continental legal scholarship, and apart from the fact that the creation of a body of working legal literature based on Roman canon law was an achievement worthy of note, there is another and perhaps more significant lesson to be drawn from this survey. It is this: Many of the disputed legal and constitutional issues that disturbed Tudor and Stuart England appear in a slightly different light if one looks at them knowing that the traditions of the Roman canon law were being kept alive in the ecclesiastical tribunals. The history of what was happening in those courts puts into clearer perspective several developments of English legal history. Let me give three brief examples.

First, the common law judges issued repeated writs of prohibition to stop the spiritual courts from hearing defamation causes where only 'general' and abusive language had been used. The 'advanced' common law view was that words like 'queen' and 'knave' were too insubstantial to found even ecclesiastical jurisdiction.¹¹⁷ Viewed in the light of the civilian literature, these prohibitions were not the simply hostile acts they otherwise appear. The ecclesiastical courts were attempting seriously to apply the Roman law of *iniuria* and also to develop an expansive jurisdiction over all manner of 'jactitation'. That development, if successful, would have left them with a much greater jurisdiction over verbal wrongs than they had enjoyed. It would have changed the balance of legal practice in their favour. The common law judges had reasons other than anti-clerical prejudice for desiring to prevent it.

Second, there were repeated clashes between the common law and the ecclesiastical courts over the scope and nature of tithe litigation. Laymen took advantage of the full resources of temporal jurisdiction

¹¹⁷ See pp. 62-4.

to escape their obligation to pay this exaction, and it has sometimes been concluded that this fact demonstrates the English Church's weakened position in the hearts of those who were subject to its jurisdiction. The works of contemporary civilians cast doubt on that conclusion, though they do not *prove* that it is false. What was happening in the ecclesiastical courts was that Roman canon law's preference for full payment of tithes in kind was being applied to upset many traditional tithing customs and compositions.¹¹⁸ And it was being applied together with an English statute that awarded double or even treble damages. This situation was bound to create clashes, whatever most laymen's attitude towards the Church and its clergy may have been.

Third, one of the most famous disputes of the period revolved around the 'ex officio' oath. That oath required defendants to swear in advance to answer truthfully any questions to be put to them. The common law's attempt to restrict use of the oath, particularly by the branches of the Court of High Commission, is said to have given rise to the modern privilege against self-incrimination.¹¹⁹ The civilian literature makes this story appear in a somewhat different light. It shows that the privilege was asserted in the spiritual courts themselves. The privilege was asserted by advocates who argued that it was warranted under the *ius commune* of the Roman canon law.¹²⁰ In fact, it was. The very words Sir Edward Coke used to announce it as the undoubted heritage of free Englishmen were the common coin of civilian criminal procedure.¹²¹ What the common law judges were doing in substance, therefore, was to try to make the judges of the prerogative courts adhere to their own rule.

The legal issue involved in the controversy over the *ex officio* oath was, it must be said, slightly more complicated than this summary implies. The Roman canon law contained exceptions, ampliations, and fallations in the rule against compelled self-incrimination, and the civilians defending the practices of the Court of High Commission

¹¹⁸ See pp. 94–100.

¹¹⁹ The basic statement of this understanding of the evidence is found in Leonard Levy, *Origins of the Fifth Amendment* (2nd ed. 1986).

¹²⁰ See, e.g., BL Add. MS. 11406, fols. 256–7: 'Positioni criminose non cogitur quis respondere.'

¹²¹ BL Stowe MS.424, f. 160v: 'Quod per legem terre nemo tenetur in causis criminalibus prodere seipsum' *per* Coke J. The identical phrase is found in the *glossa ordinaria* to the Gregorian Decretals, ad X 2.20.37 s.v. *de causis*. See also Julius Clarus, *Practica criminalis* (Lyons 1661), Lib. 5, Quaest. 45, Addit. no. 3.

maintained that English ecclesiastical practice came within one or another of the exceptions. But it was far from clear which side had the stronger argument, and a common law judge might well have thought that he was simply endeavouring to make sure that judges of the ecclesiastical courts kept within the bounds of the Roman canon law itself. Viewed from this perspective, the English common law reports on the 'ex officio' oath take on a different look. The common lawyers seem less like inventors of an imaginary common law past and more like strict overseers of ecclesiastical jurisdiction. That is of course exactly what they consider themselves. This opinion, together with an examination of the results that followed from it, are the subject of the final chapter.

THE CIVILIANS AND ENGLISH COMMON LAW

When he composed a litany, the Caroline civilian Robert Aylett included a plea: 'That we may be preserved from the jurisdiction of temporal lawyers.'¹ His fellow civilians would have added a heartfelt 'Amen'. They desired to continue in the traditions of the European *ius commune* and were endeavouring to do so. Their adherence to those traditions, however, was being made ever more difficult by aggressive common lawyers. Numerous statutes and scores of prohibition cases in the royal courts were purporting to change, define, and limit ecclesiastical jurisdiction. Some of this interference the civilians could brush aside. But by no means all. The common law judges had mighty resources to hand. In most instances the civilians had no choice but to respond to the temporal law where it touched their own. They had to take active steps to combat what they correctly considered a vital threat to their independence. They could not rest their fate waiting for an answer to Dr Aylett's prayer.

Regular patterns of response to the English temporal law are to be found among the surviving court records and other literature of the practising civilians. The ecclesiastical lawyers developed several ways of avoiding writs of prohibition, and they hit upon expedients for dealing with some of the common law encroachments on their jurisdiction. However, at least on the surface, the clearest pattern found in the surviving records is the distinction the civilians drew between English statutes and the case law emanating from the Courts of Common Pleas and King's Bench. The civilians did not regard them as possessing equal authority, and it was principally the latter Dr Aylett had in mind when he asked God to preserve them from the incursions of temporal lawyers. An analysis should follow this distinction, beginning with the statutes.

¹ Quoted in J. H. Round, 'Dr Robert Aylett', *Transactions of the Essex Archaeological Soc.* N.S. 10 (1909) 26-34.

CIVILIANS AND ENGLISH STATUTES

The Tudor and early Stuart legislation

It would require a long detour to explore all the sixteenth and seventeenth-century legislation that affected the courts of the Church in one fashion or another. The statutes of the 1530s reached into many corners of English ecclesiastical life, and the precedent they set was not forgotten. Similar legislation followed. Fortunately for the task of understanding the history of the Roman canon law in post-Reformation England, the excursion through this legislation can be shortened, because virtually all the Tudor and Stuart statutes that touched the courts of the Church fell under one of four headings.

First, some statutes directly restricted the exercise of ecclesiastical jurisdiction. Most of these statutes were specifically anti-papal measures, prohibitions of appeals to the Roman court being the most obvious and the most important.² As such, these particular statutes had only a small effect on everyday practice within the English tribunals themselves, because they did not touch the substance of the law enforced in the courts. Besides statutes extinguishing papal rights, restrictions on the rights of sanctuary and on benefit of clergy were the two major items that fell within this heading.³ Neither had more than marginal relevance to actual practice *within* the spiritual courts. The former had never required a trial by the consistory courts; the latter had by this time become a matter exclusively for the Crown side of royal court jurisdiction.

The long-term, constitutional significance of these statutory changes should not be ignored, or even played down. If Parliamentary legislation could abolish appeals to Rome, it might equally abolish ecclesiastical jurisdiction over marriage, tithes, or testaments. However, this did not happen at once. Indeed it was not to happen until many years had passed. This means that except for appeals, the Reformation statutes left the Church's subject matter jurisdiction pretty much where it stood in 1530.

² 24 Hen. VIII c. 12 (1533); 25 Hen. VIII c. 19 § 4 (1534).

³ See generally William Holdsworth, *History of English Law* (5th edn 1942) III:299–307; see also E. W. Ives, 'Crime, Sanctuary, and Royal Authority under Henry VIII', in *On the Laws and Customs of England*, eds. Morris S. Arnold *et al.* (1981) 296–320.

Second, many statutes were enacted to enforce particular aspects of the Elizabethan religious settlement. The Act of Uniformity (1559) is the best known of these.⁴ It authorized new forms of worship and provided penalties for their non-observance. Other examples were statutes permitting the creation of new dioceses,⁵ requiring attendance at one's parish church,⁶ and setting standards for clerics to hold benefices with cure of souls.⁷ A part of this legislation was made necessary by the anti-papal legislation – for instance the act allowing the Archbishop of Canterbury to issue dispensations that had once been issued by the Papacy.⁸ Most of it, however, simply required implementation of Protestant standards of discipline, worship and doctrine. Its principal effect on the courts was slightly to enlarge the *ex officio* side of ecclesiastical jurisdiction. The spiritual courts shared the task of enforcement of this new legislation with English temporal magistrates, and that task kept both occupied.

Third, some sixteenth-century statutes changed the substance of the Roman canon law applied within the ecclesiastical courts. The Edwardian statute defining the reach of the tithe obligation and permitting laymen to sue for tithes in their own name is one example.⁹ The Elizabethan usury statute that in effect made illegal only the taking of more than 10 per cent interest is another.¹⁰ A Jacobean statute prohibiting any widow who was also a 'popish recusant' from acting as executrix of her husband's testament is a third.¹¹ These statutes had the most immediate effect on practice in the spiritual courts, and the reports contain much discussion of them. They must necessarily occupy the largest share in any coverage of the reaction of the civilians to the new legislation.

Among the statutes of this third sort were a few that worked significant changes in the ecclesiastical law. A surprising amount of this legislation, however, basically confirmed existing law. The 1529 statute regulating the ordinary's choice of administrators for intestate estates, for example, was essentially declaratory of existing practice.¹² Some of the legislation fell in between, ending uncertainties in the law or correcting what had come to seem evident abuses. For instance, an

⁴ 1 Eliz. I c. 2 (1559). On the Elizabethan statutes directly affecting religion, see Norman L. Jones, *Faith by Statute* (1982).

⁵ 31 Hen. VIII c. 9 (1539).

⁷ 13 Eliz. I c. 12 (1571).

⁹ 2 & 3 Edw. VI c. 13 (1549).

¹¹ 3 Jac. I c. 5 §§ 8, 14 (1605).

⁶ 5 & 6 Edw. VI c. 1 (1552).

⁸ 25 Hen. VIII c. 21 (1533).

¹⁰ 13 Eliz. I c. 8 (1571).

¹² 21 Hen. VIII c. 5 (1529).

Elizabethan statute required that when the incumbent of a parish church recovered money from a prior incumbent on account of dilapidations to the church fabric, he must actually spend that money on repairs within two years.¹³ This statute resolved a matter left in doubt under the Roman canon law, and it must have seemed a useful change to everyone but the incumbents actually affected. A good deal of the Reformation legislation was like this. The real problem with it, from the point of view of the civilians, was not that it hurt the interests of the Church or changed the Roman canon law, but rather that some of the statutes were so poorly drafted that it was difficult to know exactly what the new statutes meant. A small part of the English legislation was internally contradictory,¹⁴ and even the important Edwardian tithe statute was no model of clarity.¹⁵

Fourth, some of the Tudor and Jacobean legislation made temporal offences of illegal conduct that had once fallen within the Church's exclusive jurisdictional competence. This list includes bankruptcy, bastardy, and blasphemy and moves through to witchcraft.¹⁶ Virtually all of this legislation did contain 'savings clauses' to preserve the existing rights of the ecclesiastical courts. This meant that shared jurisdiction became the rule much more often than it had been. The practical result, therefore, was to lower the numbers of the causes that would once have come before the spiritual courts, rather than to change the nature of causes that did. The records show greater effects in some areas than in others. Usury causes, for instance, became quite rare in practice, whereas bastardy prosecutions did not.

This fourth type of legislation was probably the most hurtful to the interests of the civilians, narrowly conceived. In the long run, the expectations of the laity and a natural preference for courts that could enforce money judgments would make ecclesiastical jurisdiction obsolete, a theoretical possibility to which few paid attention in fact. For the pre-1640 period, however, these long-term consequences were

¹³ 14 Eliz. I c. 14 § 6 (1572).

¹⁴ Noted by a civilian about the statutes regulating the grant of probate administration, in London Guildhall MS. 11448, f. 55v.

¹⁵ For example, the rules in the Edwardian tithe statute for distinguishing cases where double damages would be awarded from those where treble damages were appropriate were so confused that it was common practice for libels to pray that the defendant be condemned 'in triplici seu saltem duplici valore decimarum'. See, e.g., *Thorolde* c. *Thorolde* (1616), Lincoln Diocesan Court Papers R.P. 9/4, f. 139. See also the disparaging comments in Folger MS. V.b.17, fols. 117–20.

¹⁶ 13 Eliz. I c. 5, 7 (1571); 18 Eliz. I c. 3 (1576); 1 Jac. I c. 11 (1603); 3 Jac. I c. 21 (1605); 5 Eliz. I c. 17 (1563); 5 Eliz. I c. 16 (1563).

masked by the overall rise in volume of litigation being heard in virtually all of England's ecclesiastical tribunals.

The statutes in ecclesiastical court practice

There may have been High Church firebrands who believed that Parliament could not touch the ark of the Church, but the civilians were not among them. They accepted the authority of Parliamentary legislation and put it into effect. References to specific statutes appear frequently in ecclesiastical reports, precedent books, and treatises written by the civilians. Archival evidence shows that abridgements of English statutes were regularly kept in the libraries used by ecclesiastical officials,¹⁷ and some ecclesiastical lawyers made their own collections of material from the statutes relevant to their practice.¹⁸ It is undeniable that some of the new Parliamentary legislation did go unenforced,¹⁹ but this happened not because of any fundamental or spiritual principle. It happened for technical reasons, or because in any age not every act that passes through a legislature is capable of being put into effect.

The most frequent assertions of the supremacy of statute law found in the act books, and in some ways the most dramatic, were the statutes of general pardon. Most Elizabethan and Jacobean Parliaments passed acts of amnesty, pardoning all crimes except those specifically excepted.²⁰ These legislative pardons were regularly applied in the spiritual courts, although the ecclesiastical officials were usually careful to describe them as resting on royal authority, not on mere passage through the Houses of Parliament. For example, when Robert Harrolde was convented on suspicion of keeping a bawdy house before the bishop's court at Norwich in 1594, he denied the

¹⁷ Cited, for instance, in *Jarvis v. Hallowell* (1590), BL Lansd. MS. 130, f. 75.

¹⁸ E.g., Wiltshire Record Office, Trowbridge, MS. D 5/24/5, fols. 52-59v: 'An abstract of divers things out of the Statutes of this land touching ecclesiasticall courts and the suites and jurisdiction thereof'; see also 'Decimarum materia', BL Lansd. 132, f. 164, in which one finds 'Statuta Angliae' listed together with several canon law treatises as basic sources for the treatment that follows.

¹⁹ E.g., York BI, Precedent book 11, f. 2: 'It is seldome used that incumbents of benefices doe read their articles in their parish church twice; yett the Statute anno 13 Eliz. cap. 12 doth require it.'

²⁰ E.g., 5 Eliz. I c. 30 (1563), 3 Jac. I c. 27 (1605); some of these expressly excepted specific ecclesiastical offences from their coverage, as 23 Eliz. I c. 16 (1581), exempting adultery, incest, fornication.

charge and also, as the act book entry put it, 'prayed the benefit of the royal indulgence'. As a consequence, the record continues, 'the said Harrolde and his wife were dismissed from further proceedings'.²¹ Similar entries appear in most post-Reformation act books. Neither they nor the statutes are to be found in the records of the medieval courts.

There were limits to the effect of these pardons in ecclesiastical court practice. For example, they would not pardon adultery continued after the date of the pardon's enactment, even if the adulterous couple were pretending to be married.²² Neither would they automatically remove an offender's excommunicated status. The offender would be entitled to receive absolution because of the pardon, but he would have first to submit himself to the jurisdiction of the spiritual court that had excommunicated him and affirmatively seek removal of the sentence.²³ Most importantly, the civilians held that the pardons did not apply when a private interest came into play. A statutory pardon would therefore not be reason for remitting an award of litigation expenses. Nor would it provide justification for forgiving a compensatory award in a cause involving tithes or church rates.²⁴

This last rule was particularly important in the law of defamation, where the nature of the underlying offence could be treated either as a civil or an *ex officio* matter. Wherever an individual was injured by public slander, the slanderer could not plead a statutory pardon. As one civilian reporter put this, 'the King doth not pardon or remit that which [is] due to a private man; he giveth no man's right away'.²⁵ To negate the possibility that a pardon might be invoked, and to lessen the chance that a writ of prohibition might be awarded if one were

²¹ Norwich Act book ACT/25, s.d. 26 February 1593/94. The entry adds that the truth of the accusation was also not proved.

²² Anon. (1605), London Guildhall MS. 11448, f. 24. The man and woman had lived together as man and wife for three years. The report confines the effect of the pardon to freeing them from prosecution for marrying without banns.

²³ *Ibid.* f. 56: 'The pardon doth discharge the fault whereupon a man is excommunicated, but the excommunication is not pardoned but an absolution must be obtained.' Another such statement is found in *Dister c. James* (1599–1600), Bodl. Tanner MS. 427, f. 101.

²⁴ *Vincent c. Roper* (Arches 1605), Worcester (St Helen's) Record Office MS. 794.093 (BA 2470), f. 21v: 'Dr Dun sayde if it had bin poena pro delicto it had bin pardoned but beinge inter partes pardon cannott cutt it of.' Also illustrated by *Dene c. Dals & Charlton* (1602), Peterborough Act book 20 s.d. 18 February. Contrast *Enby v. Walcot* (C.P. 1611), 2 Br. & G. 28.

²⁵ York BI Precedent book 11, f. 8.

invoked, the ecclesiastical lawyers inserted articles into the libels used in defamation causes specially to emphasize the private nature of the complaint.²⁶

There were also instances where the ecclesiastical officials skated close to the limits of obedience in dealing with these statutory pardons. For example, in 1571 Robert Kytchynman was convented for fornication before the court of the dean and chapter of York. Although he admitted the offence, he had to be dismissed 'without any penalty because the crime had been pardoned by the Queen's majesty'.²⁷ That was not the end of it, however. The York court went on to order that a copy of its decree of absolution should be published in Kytchynman's parish church. His neighbours would know the whole story thereby. Since normal penance would have consisted of his public confession of guilt, he might well have concluded that the only thing the pardon saved him was the pain of having to wear a white sheet and making the humbling admission himself. That was clearly an advantage worth having. But it was something less than suffering no consequence at all.

It is easy to sympathize with slender enforcement of the pardon statutes, and easier still to understand it. Statutes that emerged from Parliament could, and here did, interfere with what the ecclesiastical lawyers regarded as their duty to enforce basic rules of moral and ethical conduct. Pardons from without hindered the legitimate work of their courts. They searched for, and found, a partial way around the statutes. The English civilians never asserted that they were free to ignore the statutory pardons; they simply found a means of minimizing the harm the pardons caused.

Something like this attitude also characterized the civilians' response to the 1531 statute prohibiting spiritual courts from citing any person outside his diocese.²⁸ This statute caused great difficulty to the ecclesiastical courts. In one sense it merely reiterated a canonical rule, but its absoluteness could also subvert spiritual jurisdiction, because

²⁶ Buckingham Precedent book D/A/X/4, f. 25v: 'Hi articuli sequentes bene inserentur in libello diffamationis quando timor est ut quam citissime subsequatur generalis ex parlamento pardonatio.' However, the substance of the civilians' position was accepted by the common law judges in Anon. (C.P. 1602), Beinecke MSS. G R 29, f. 147v.

²⁷ York BI Act book D/C.AB 6, f. 30: 'Et tunc dominus quia crimen condonatur per regiam maiestatem dimisit eum sine pena, decernendo tamen tenorem decreti huiusmodi edi in ecclesia de Husthwait per curatum ibidem.'

²⁸ 23 Hen. VIII c. 9 (1531); for an illustrative case see *Lynche v. Porter* (C.P. 1610) 2 Br. & G. 1.

the statute did not contain the exceptions that had been traditional parts of the canonical rule. Most objectionably, men might even move from one diocese to another and invoke the statute in order to escape ecclesiastical proceedings that had already begun. Where there was a real danger of this, the court officials therefore required the parties to appoint an agent within the diocese for the receipt of process. So, for example, in 1617 the official of the archdeacon of Bedford required the executor of Richard Hunt to 'elect for himself the house of the said Richard Hunt, deceased, situate within the parish of Cardington where he wished to be cited whenever the need arose'.²⁹ It was a way of avoiding some of the unfortunate consequences that could have followed from the new statute.

Normally the civilians did not have to resort to this sort of defensive tactic. They treated statutes by reading them in light of the existing Roman canon law, and this was enough. If the statute could be read as reiterating the *ius commune*, it was so read. If the statute evidently derogated from the *ius commune*, it was read strictly to make no more changes than absolutely necessary. Omissions and doubtful points were always resolved in favour of the continued enforcement of traditional rules. Thus, the Elizabethan statute against simony³⁰ was understood as importing a distinction between simony *in se* and simony *quia prohibitum* found in the *Commentaria* of Panormitanus.³¹ The statute regulating tithe payments in the City of London³² was 'but an exposition of the gloss in Lyndwood', according to Sir Thomas Crompton, chancellor of the diocese of London between 1605 and 1609.³³ On the crucial question of whether the Elizabethan Statute of Supremacy left the courts free to employ inquisitorial procedure, the answer from Doctors' Commons was clear: 'Though visitations be annexed to the imperial crown of this land, yet the manner and order of visiting is to be done *secundum ius commune*'.³⁴

²⁹ Archdeaconry of Bedford Act book A.B.C. 5, f. llv: 'eo quod habitavit extra jurisdictionem huius curie, cuius pretextu dominus iudex non habet potestatem citandi eum etc. elegit sibi domum dicti Johannis Hunt defuncti situatam infra parochiam de Cardington ubi citari voluerit quotienscumque opus fuerit'.

³⁰ 31 Eliz. I c. 6 (1589).

³¹ See 'Case of A.B.' (1596), Durham DDR XVIII/3, f. 227v.

³² 27 Hen. VIII c. 21 (1535).

³³ London Guildhall MS. 11448, f. 45v.

³⁴ In 'Mark Tabor's Book' (1626), Somerset Record Office, Taunton, MS. D/D/O Box 5 of 5, f. 28.

This sort of reading of statutes is found throughout the ecclesiastical reports, sometimes in cases where the outcome now seems strained. A Jacobean statute made it bigamy and a felony, for any deserted spouse to marry within seven years of the desertion.³⁵ Remarriage after seven years, however, was expressly excluded from the definition of bigamy where the deserted spouse had no knowledge of the whereabouts of the other. The statute raised the possibility of improvement in the long-standing problem caused by the canon law's refusal to admit remarriage without definite proof of the death of a long absent spouse.³⁶ It was a heartbreaking dilemma, particularly acute in cases of actual desertion. How could a woman prove the death of a man who had deserted her and whom she has not seen for more than seven years? Most women in that situation could not. The statute offered hope. But when such a cause came up before the consistory court at Ely early in the reign of James I, the judge nevertheless refused to read the statute to permit the deserted woman to remarry. The statute, he held, applied 'only as to the penalties of a felony; in other respects the *ius commune* is still in force'.³⁷ In support he cited passages from *De delictis carnis* by Prosper Farinacius (d. 1618) and *De sponsalibus* by Didacus Covarruvias (d. 1577).

Some of the ecclesiastical causes found in the surviving records and reports go far to explain the genesis of the extreme, and seemingly silly, opinion that the common law courts should grant a prohibition any time a cause being heard in a spiritual court raised a question of statutory interpretation. The civilian judges held, for instance, that the statute regulating the fees paid by testamentary executors did not cover administrators of large estates, even administrators *cum testamento annexo*. Administrators were a *casus omissus* in the statute and could thus be required to pay any fee the court deemed reasonable.³⁸ Statutes purporting to regulate ecclesiastical jurisdiction by making available a writ of prohibition in specific cases were similarly held to have no effect on ecclesiastical law. They were said merely to autho-

³⁵ 1 Jac. I c. 11 (1603).

³⁶ See generally Patrick Rice, *Proof of Death in Pre-Nuptial Investigation* (1940) 1-28.

³⁷ 'Causa absentis coniugis' (c. 1610), York BI Precedent book 11, f. 2v: 'Statutum autem 1^o Jacobi cap. 11 requirit tamen septennium, sed id quoad poenam feloniam tantum for bigamy. Aliis respectibus ius commune adhuc viget.' Accord: *Ex officio* c. *Sonley* (1596), Durham, Library of the Dean and Chapter, Act book SJC/2, f. 12; *Ex officio* c. *Pare alias Poore* (1592), Bristol Act book EP/J/1/9, p. 63.

³⁸ Note in York BI Precedent book 11, f. 33: 'the Judge and his registers may have what they will of an administrator, haveinge goods above forty pounds'. The statute was 21 Hen. VIII c. 5 (1529).

rize the granting of the writ.³⁹ A Henrician statute restricting the right to appeal from royal delegates was held not to cover petitions for redress against an unjust decision or a claim for *restitutio in integrum*. The statute was applied only to appeals in the narrowest canonical sense of the word.⁴⁰

No one would pretend that these were examples of neutral principles of statutory interpretation. They carried to the outer limits the canonical principle that the words of a statute ought always to 'receive their interpretation from the *ius commune*',⁴¹ and they gave cause for grievance or alarm to those who thought that the English Church should have put its 'popish' past behind it. If there is any one theme that runs throughout the ecclesiastical reports it is this: *Statutum contra ius commune stricte interpretandum est*.⁴² This is, of course, a familiar maxim of the English common law. But in the hands of the civilians, the maxim became the engine by which the Roman canon law was defended against the English common law itself.

Though it may seem slightly conspiratorial, this attitude of the civilians towards English statute law was actually not. The Roman canon law held that even canonical statutes contrary to the *ius commune* were to be strictly construed. That principle applied even to papal decrees. The law held equally that ambiguous statutes should be read in favour of the Church's interests.⁴³ In this sense, therefore, the civilians were doing no more than to apply familiar rules of construction to the English statutes. For instance, an Henrician statute provided that mortuary payments should be made 'only in such place where heretofore [they] have been used to be paid and given'.⁴⁴

³⁹ *Bury c. Nossell* (c. 1605), *ibid.* f. 9v: 'Besides, the statute aforesaid, although it be pleadable before an ecclesiastiall judge, yett it saith onely thus, a prohibition shall lye.'

⁴⁰ *Hewet c. Shelbery* (1590), BL Lansd. MS. 130, fols. 123v–24: 'Nevertheless according to the learning we now professe, under the prohibition of all further appeale by a statute the recourse to a soveraine prince by way of supplication or complaint is not forbidden, for such Prince may againe heare any such cause himself in person or by his delegates in way of revision or by way of restitution in integrum.'

⁴¹ See, e.g., Dec. 157 (1604), in Johannes Baptista Coccinus, *Decisiones S. R. Rotae* (Lyons 1623), applying the stated principle to a papal privilege.

⁴² *Per Dr Martyn*, in Anon. (1605), London Guildhall MS. 11448, f. 67. See also *Civilian's Notebook*, Berkshire Record Office, Reading, D/ED O 48, p. 155: 'Casus omissi in statuto relinquuntur decisioni et dispositioni iuris communis.'

⁴³ E.g., Jacobus Menochius, *De praesumptionibus* (Frankfurt 1590), Lib. IV, Praesump. 88, no. 60: 'et praesertim ut faveat ecclesiae piisque locis, pro quibus in dubio pronunciandum est'.

⁴⁴ 21 Hen. VIII c. 6 (1529).

In a 1596 cause from the diocese of Carlisle, the question was whether the word 'place' in the statute meant the entire parish or a particular household within a parish. If it meant the former, then proof that *someone* within the parish had paid the mortuary might be enough to show that *every* household within the parish must pay it. It would not be necessary to show that any particular household had 'been used to' paying this customary oblation. In fact, that was the decision reached.⁴⁵ The unashamed reason given for the decision was that the Henrician statute had been made 'for the benefit of the Church', and therefore its construction must equally be favourable to the Church's interests.

An impartial observer might not think this Carlisle decision fair. Perhaps he would be right. Certainly the parishioner involved might legitimately have felt aggrieved to find himself obliged to pay an unaccustomed mortuary fee simply because some other parishioner had once paid it, and to have an English statute cited as the rationale for the decision. However, the Roman canon law itself called for judges to decide doubtful cases with a presumption in favour of the Church and against change in the *ius commune*. A civilian would have answered any critic of the decision by saying that they were merely following settled principles of law. And (from his point of view) he would have been entirely correct.

This is one situation, I think, where an historical parallel clarifies, and in some measure excuses, the attitude of the English civilians. I have in mind the legal world of judges in the former British colonies in North America after the War of Independence, which we Americans call the Revolutionary War. When the War was over, American judges knew that the King's writ had ceased to run. They knew that the legislatures of the new states could enact statutes that bound them. But the judges (and most American lawyers) were conservative men. They liked the law that they had learned, and the law they had learned was the English common law. If a statute expressly changed the common law, they would enforce it. But they were inclined to minimize potential conflicts between any new statute and existing common law. They read it with minds steeped in the pages of Coke and Hale. Above all, most of them did not care to strike out on their own to create a new and Republican jurisprudence.

⁴⁵ Fox's Case (1596), in Durham DDR XVIII/3, f. 210v. The cause had been referred to counsel by agreement of parties in the diocese of Carlisle.

This is of course a traditional theme of many courses in American legal history: the 'Reception' of the English common law. Very likely it can be duplicated in the legal history of many countries that have experienced the end of colonial rule. We now know that it is not a full description of what happened in the new United States, but it is an important part of the story. *Mutatis mutandis* it is also a fair description of the world of the English civilians during the reigns of Elizabeth and James I. They looked at English statutes with a traditional cast of mind, affirming established rules of the Roman canon law where a particular act of Parliament left them any choice, and applying canonical principles of construction to the act where it did not. In this, they were neither the first nor the last lawyers to cling to familiar ways in the face of an invitation to enter a new era.

The 1604 canons and statute law

Special problems of statutory construction were raised by the enactment of new ecclesiastical statutes, and some attention must be paid to them. The English Church continued to enact legislation after the Reformation, and it considered that the new statutes bound both clergy and laity. The canons of 1604 were the most important example. The problem they raised for the civilians had two parts. First, what effect did the canons have on the traditional rules of the Roman canon law? Second, what was the relationship between the canons and the legislation enacted in Parliament? The civilian's normal response to the first was that English canons, like English statutes, could change traditional rules, although they too would be interpreted in light of the *ius commune*. Their answer to the second was that Parliamentary legislation was supreme. Where a canon came into conflict with a statute, the canon took a back seat.

The great majority of causes heard in the ecclesiastical courts raised no real conflict with acts of Parliament. In them, the judges put the canons into effect without hesitation. For example, one finds in a typical Ely record of 1609 that a man was convented before the diocesan court specifically for his failure to comply with Canons 15, 58, 59, and 75.⁴⁶ Such entries appear throughout the Jacobean act books. The judge of the consistory court at Lincoln caused the new canons to be read in open court on 12 December 1604, warning those

⁴⁶ *Ex officio* c. Gyles (1609), Ely Precedent book F/5/39, f. 11v.

present 'to take notice thereof at their peril'.⁴⁷ A marginal note to a Peterborough proctor's copy of Francis Clerke's *Praxis* records that the law found in Clerke's text had been 'taken away by the canon'.⁴⁸ One contemporary civilian put the question of whether or not English canons could change the received canon law.⁴⁹ His affirmative answer is fully borne out by the surviving evidence in everyday litigation where no English statute came into play. For instance, the new immunity churchwardens enjoyed from being sued for defamation by those they had presented at visitations rested on a presumption created by Canon 115 that the churchwardens were acting 'to the restraint of shameless impiety'.

When a Parliamentary statute did come into play, however, the statute prevailed against the 1604 canons. One civilian, writing only a few years after enactment of the canons, laid it down as a general rule that their provisions 'do take no place', except where there was no statute law to the contrary.⁵⁰ Canon 122, for example, required that all sentences depriving clergy of benefices be made by the bishop with the assistance of at least two of his parochial clergy.⁵¹ However, even on such a matter of 'internal' Church discipline, the civilians held the canon to be of no effect because it was said to be contradicted by the Henrician statute allowing Doctors of Law to exercise ecclesiastical jurisdiction. Chancellors who held the LL.D. degree, as most did, used the statute to overthrow the inconvenient (to them) canon, so that they could promulgate sentences of deprivation on their own authority. As one reporter noted about Canon 122, it 'is to little purpose against a statute of this realm'.⁵²

The most troublesome and persistent doubts involving ecclesiastical legislation arose in conflicts between the canons and long-standing local customs. This was a very old dilemma in the Roman canon law itself, variously resolved by the jurists and variously dealt with by

⁴⁷ Recorded in Lincoln Act book Cj/14, f. 73v: 'Duodecima decembris 1604 dominus tradidit mihi librum canonum editorum in ultima convocatione et perlectis 54 capitulis dominus monuit ministros sequentes tunc presentes to take notice thereof at their perills.'

⁴⁸ Huntington Library, San Marino, California, MS. 35072, f. 126v: 'tollitur per canonem' (dealing with dispensation practice for solemnizing marriages without banns).

⁴⁹ London Guildhall Library MS. 11448, f. 100: To the question of whether Convocation might repeal any of the canon law in force in England he wrote, 'I think yea.'

⁵⁰ York BI Precedent book 11, f. 22.

⁵¹ Cardwell, *Synodalia* I:233-4.

⁵² York BI Precedent book 11, f. 40v.

judges.⁵³ Post-Reformation English practice faced the problem in a new form with the promulgation of new canons. For instance, Canon 91 reserved choice of the parish clerk to the parson of each parish. But when Thomas Hobson, incumbent of the parish of Warter in Yorkshire tried to take advantage of the rule in 1624, his parishioners refused to accept his choice. Instead they alleged a contrary custom of more than fifty years standing by which they enjoyed an equal voice in the clerk's election.⁵⁴ Which prevailed: custom or canon? In the ensuing litigation before the High Commission at York, Hobson apparently did. However, some other causes heard in the spiritual courts suggest that custom could overcome canon,⁵⁵ and it is possible that the court of High Commission at York simply found this particular custom to be unreasonable or insufficiently proved. One cannot now be sure. Certainly *some* customary practices could be abridged by legislation. The question of how far in that direction ecclesiastical enactments could go may have been one of those matters left open to debate and doubt. If so, that uncertain status would not have been greatly different than that of customary rights under the Roman canon law. Even some of the traditional dilemmas of the *ius commune* remained in place in the minds of the English civilians.

CIVILIANS AND THE COMMON LAW COURTS

The attitude of the English civilians towards the authority of the common law judges was quite different from their attitude towards statutes. There existed then, and there remain now, uncertainties and inconsistencies in the opinions of different civilians. But this much can be said with confidence. They drew a definite distinction between the statute law enacted by King and Parliament and the decisions of the Courts of Common Pleas and King's Bench. The constitution of the Church of England bound them to apply the former. No settled

⁵³ E.g., Dec. 376 (1607), no. 5, in J. B. Coccinus, *Decisiones S. R. Rotae* (Lyons 1623): 'Neque obstat quod in ecclesia Barch' videatur statutum in contrarium quia dato quod istud statutum esset contrarium tamen in concursu praevallet consuetudo quia est maioris auctoritatis.'

⁵⁴ *Hobson c. Sanderson* (1624), York BI HC.CP.1624/10. An illustrative common law case, with very different assumptions, is *Condict v. Plomer* (C.P. 1611) Godb. 163.

⁵⁵ *Case of Waterbeach* (1609), York BI Precedent book 11, f. 22, involving a custom of paying for communion wine. The argument that apparently prevailed was that 25 Hen. VIII c. 19 specifically disallowed canons contrary to the customs of the realm, and that this local custom came within that language.

principle they accepted required them to treat the latter as authoritative.

This was emphatically not the view held by the common law judges themselves. Their attitude, identical in principle if not in degree with that of their medieval predecessors, was that they, the common law judges, were the legitimate arbiters of the boundaries of ecclesiastical jurisdiction. To them, the operative principle had always been that the spiritual tribunals must enforce no law contrary to the laws and customs of the Realm and that, subject to correction by the High Court of Parliament, the determination of what those laws and customs were fell within the exclusive competence of the common law courts. Judges of the spiritual courts must therefore follow common law decisions. This did not mean that the common law judges ever thought that the King's ecclesiastical law had in all things to be identical with that of the common law courts. The civilians had a law of their own. They stood somewhere outside the common law. How far outside was the question.

Prohibition law and civilian attitudes towards it

During the reigns of Elizabeth and James I, there occurred a vast outpouring of prohibition cases giving answers to that question. The common law decisions reported are not free from ambiguity and internal contradiction. Although there were some principles no common lawyer denied, not all of them agreed about how far they could, or should, go in restraining and directing the ecclesiastical courts. None the less, five generalizations about the common law position seem warranted.⁵⁶ They represent a kind of *communis opinio* among the temporal lawyers:

- (1) Writs of prohibition were the appropriate means for policing the boundaries between the jurisdictions of Church and common law. Where a prohibition lay, the spiritual courts were bound to treat the case as outside their jurisdiction and to regard the prohibition as authoritative.

⁵⁶ Drawing upon cases and accounts found in BL Cotton MS. Cleo. F. I, fols. 135–61; Beinecke, Osborn Shelves MS. fb 149; Folger MS. V.b.17, and LI MS. Misc. 581. These are collections consisting largely of common law cases and comments on the subject, but also including some ecclesiastical material and stating the civilians' point of view.

- (2) Interpretation of all Acts of Parliament belonged exclusively to the common law courts. Whenever a statute came into play, the civilians were bound to follow the construction put upon it by the temporal courts. Where there was doubt, they had to consult the common law judges.
- (3) All matters involving the validity of customary rights of the laity were to be tried solely in the common law courts. Where an ecclesiastical cause required determination of the existence or the lawfulness of a tithing custom, for example, spiritual jurisdiction had to yield to determination in the temporal forum.
- (4) Where the common law courts provided a remedy, the ecclesiastical courts could not. Except for the special situation where a statute contained an express savings clause, creation of a common law right impliedly ousted spiritual jurisdiction.
- (5) The judges could legitimately supervise the exercise of ecclesiastical jurisdiction. If the Church's courts deviated too far from their own law or trespassed on fundamental customs of the realm, the common law should intervene even where it provided no remedy itself.

As a matter of principle, the English civilians gave a limited kind of assent to the second and fourth of these positions. With the others they flatly disagreed. As a matter of practice, the civilians followed their principles. Writs of prohibition did cast a long shadow over full implementation of the principles, and when ecclesiastical officials received a prohibition they obeyed its letter. However, prohibitions were a problem, not a guide, for the sixteenth and early seventeenth-century civilians. Their rule was: 'The precedent of a prohibition maketh no law.'⁵⁷

The jurisdiction of England's post-Reformation spiritual courts as put into practice cannot, therefore, be accurately described by reading prohibition cases from the common law reports. One cannot assume that the civilians followed the law as laid down by the English judges. Indeed one comes rather closer to the mark by assuming that the civilians habitually followed the practice being prohibited. This conclusion is admittedly at odds with some accounts of the history of the period, but the testimony of records and the working literature of the Church courts from before the Civil War requires it. It is con-

⁵⁷ The opinion is stated and supported with argument and authority in Folger MS. V.b.17, f. 25.

firmed in looking at each one of the five jurisdictional principles of the common law.

The civilians' disagreement with the first – the definitive character of writs of prohibition – has already been illustrated in the several areas of the law where the spiritual tribunals continued to exercise jurisdiction in areas forbidden to them by the common law judges. Probably the outstanding example remains their regular use of the *ex officio* oath, despite all common law attempts to declare it illegal.⁵⁸ Continued ecclesiastical probate of mixed wills, this is wills in which bequests and devises of both land and personalty were contained, provides a more prosaic example.⁵⁹ Entertaining defamation causes where mere abusive language, or where language including both spiritual and temporal crimes had been used, is a third.⁶⁰ One reason that there were so many prohibition cases heard in the royal courts was that there continued to be so many violations of the common law rules.

In some ways more dramatic, and certainly more immediate evidence of this attitude comes from situations where an ecclesiastical report describes a civilian judge's action after receiving a writ of prohibition. Though the judges did not disobey the writ, they did not treat it as settling the applicable law. Thus, where a writ prohibited a judge from continuing a cause at Durham, he did cease hearing it. He nevertheless allowed an appeal of the same cause to the court of the Archbishop of York. By so doing, he reasoned, 'I am so far off from proceeding in the cause, that I utterly rid my hands of it.'⁶¹ A judge in a London diocesan court similarly desisted from hearing a cause after receiving a writ of prohibition. However, he refused to lift the sentence of excommunication from the party introducing the writ, justifying his refusal with the argument that 'if the ecclesiastical judge be not commanded in the writ, he needeth not absolve the party'.⁶² In other words, although these ecclesiastical officials would not disregard the actual writ, neither would they render definitive sentence according to it or regard it as a statement of the ecclesiastical law.

The second point of fundamental disagreement arose from the common law judge's claim to the exclusive right of interpreting

⁵⁸ See pp. 156–7.

⁵⁹ See pp. 81–2.

⁶⁰ See pp. 58–62.

⁶¹ *Swift v. Johnson* (1585), Durham DDR XVIII/3, f. 125. Compare *Bowry v. Wallington* (K.B. 1626), Latch 6.

⁶² London Guildhall MS. 11448, f. 115v.

English statutes. In its more extreme form, this claim became a justification for granting a writ of prohibition virtually any time a statute became relevant in an ecclesiastical cause. Statutes were in fact relevant quite often in the spiritual forum, and when this happened either party could secure a writ of prohibition simply by claiming that the statute in question required construction. The writ would thus effectively transfer decision of the cause to the temporal forum. The rule thus served severely to restrict ecclesiastical jurisdiction.

The civilians were quick to point out the absurdity of this rule.⁶³ It meant that a statute purporting to strengthen ecclesiastical jurisdiction would actually become the engine of its overthrow. If legislation conferred jurisdiction over a specific subject matter on the spiritual courts, or even affirmed its legitimacy, every time an ecclesiastical court sought to enforce the statute, a writ of prohibition would lie to prevent them from doing so. That result cannot have been the intention of Parliament, but it was the conclusion to which this common law view led. It exalted logic over good sense. The civilians did concede to the common lawyers the right to interpret statutes affecting the common law and the royal courts. But they asserted that the right to construe all Parliamentary legislation affecting the spiritual courts belonged to those who were expert in the spiritual law, that is, to themselves.⁶⁴ This right was equal, in their opinion, to that enjoyed by the common lawyers within their own sphere.

Views as diametrically opposed as these naturally led to marked contradictions in the way the common lawyers and the civilians treated specific statutes. Perhaps the most telling instance involved a venerable statute from the reign of Edward III. This act of 1371 authorized a prohibition to prevent collection of tithe from the sale of all 'great wood' of over twenty years growth.⁶⁵ The common law courts interpreted the statute expansively. They used it, for instance, to cover all tops and underwood.⁶⁶ The civilians, on the other hand, gave it a restricted reading. They held that it exempted only timber

⁶³ E.g., Thomas Ridley, *View of the Civile and Ecclesiastical Law* (1607) 130–31, complaining that the statutes regulating tithes 'which then were intended for the good of the Ecclesiasticall Courts are now become the utter ruine and overthrow of the same'. See also Beinecke, Osborn shelves MS. fb 149, pp. 15–23.

⁶⁴ This is spelled out most defiantly in 'Sir John Bennet's Treatise of interpretation of statutes concerning ecclesiasticall cognizance', Trinity Hall, Cambridge, MS. 43/2, fols. 8v–10.

⁶⁵ 45 Edw. III c. 3.

⁶⁶ E.g., *Ram v. Patenson* (K.B. 1596), Cro. Eliz. 477.

meant for ship construction.⁶⁷ The wording of the statute itself provided them the thinnest of justification for this reading, but they concluded none the less that all other wood, even old timber, was fully titheable. The English civilians thus glossed this particular statute with a freedom very like that with which medieval commentators had glossed papal decretals. Their attitude towards this legislation was also wholly inconsistent with any common law monopoly over statutory interpretation.

The third principal area of contention between the two groups of lawyers had to do with rights based upon custom. The common law judges held that, at least where lay rights were involved, their courts held exclusive jurisdiction. 'A custom is determinable at the Common Law and not before a spiritual judge.'⁶⁸ This meant that writs of prohibition were to be granted wherever the claim of either party in an ecclesiastical cause depended upon the existence or the validity of a customary right. The civilians took the opposite position. According to them, a customary right's validity should be examined in an ecclesiastical court whenever it arose in ecclesiastical litigation. No prohibition should issue, because the spiritual courts would themselves determine and allow all pleas of valid customary rights.

This jurisdictional disagreement was a matter of the greatest moment in tithe disputes. Customary rights favoured the interests of tithe payers over those who held the right to collect the tithes. Common law judges and juries provided a measure of protection for the former. The canon law's allowance of purely customary rights was so niggardly that it was not pure 'aggression' or a reflexive desire to expand their jurisdiction that lay behind the common lawyers' position. The substantive point – determining who would have to pay tithes in kind – is what made the jurisdictional question so crucial and the argument surrounding it so bitter. The ecclesiastical courts records show that, despite clear common law precedents and despite repeated prohibitions, the civilians held to their claim to equality of jurisdiction. Much of the litigation heard in the spiritual courts continued to be about customary tithing rights. The judges would obey an actual writ of prohibition presented to them in such a cause, but they would not defer to the rules of the temporal forum without one.

The law of church seats or pews provides a different but equally

⁶⁷ Noted in York BI Precedent book 11, f. 3v: 'Which statute was meant especially to free ship timber, but the common lawyers doe extend it.'

⁶⁸ *Napper's Case* (K.B. 1618), Hobart 286; *Anon.* (K.B. 1626), Latch 48.

clear example of this attitude held by the civilians. Large numbers of causes dealing with this strange and trivial subject are to be found within contemporary act books. Evidence about men sitting obstinately in each others' laps, or putting tacks on the seats to keep their enemies from sitting there, figured in contemporary litigation. In these causes, the normal issue of law (slightly simplifying) was whether or not one could acquire a right to a particular seat by sitting there long enough. That is, the outcome of the litigation turned on the law of prescription. Men fought intemperately over who would sit where on a particular Sunday, precisely because they wanted to guard against any interruption of their prescriptive and customary rights.

Regrettably, no simple and definitive answer to the underlying legal question about pews was ever given. At least none emerges from the records. One opinion held that nothing within a church could be prescribed because it was *res sacra*.⁶⁹ Another was that possession time out of mind could raise a presumption that the right had been legitimately granted.⁷⁰ I have not been able to tell which eventually prevailed, if indeed either did, though the persistence of the question suggests that the first view did not carry the day. For present purposes, however, the important fact is that discussion and resolution of the issue went on in the spiritual courts without the slightest reference to the English common law. The judges of the ecclesiastical courts treated questions about the existence and validity of this particular sort of custom as belonging fully within their own sphere of determination.

Fourth, there was the problem of overlapping subject matter jurisdiction. A measure of agreement existed here. Both the common lawyers and the civilians endorsed the principle that neither camp should put its scythe into the other's harvest. The difficulties came in that principle's implementation. In general, the common lawyers held that they had the exclusive right to define the boundaries, and that expansion of remedies available in the royal courts ousted the jurisdiction of the ecclesiastical courts, unless spiritual jurisdiction was specifically preserved by statute.⁷¹ The civilians admitted that the common law courts had the right to police the jurisdictional boundaries, but argued that the royal justices were themselves bound by the rules found in medieval precedents. Under this view the common law

⁶⁹ Case of the Parish of Over (c. 1600), York BI Precedent book 11, f. 8v.

⁷⁰ *Win c. Win* (1601), Bodl. Tanner MS. 427, fols. 194-95v.

⁷¹ E.g., *Higgon v. Coppinger* (K.B. 1633), Jones W. 320.

judges could not alter the boundaries without the consent of Parliament. The civilians also argued, perhaps with a degree of inconsistency, that they were themselves free to expand spiritual jurisdiction in areas where the common law provided no remedy.

The 'Statutes' of *Circumspecte agatis* (1286) and *Articuli cleri* (1316) were the principal texts relied upon by the English civilians.⁷² Both enumerated the jurisdictional rights of the English ecclesiastical courts, and both were still in force. The ecclesiastical courts' right to try all matter of 'tithes, oblations, obventions, and mortuaries' was, for instance, distinctly recognized in *Articuli cleri*. To the civilians, this meant that the common law judges were acting lawlessly by attempting to prohibit them from exercising these jurisdictional rights. The common law judges argued that they were only hearing matters involving the customary rights of the laity, not preventing the spiritual courts from exercising legitimate jurisdiction over tithes or oblations. The civilians regarded this as a shameless pretext for evading the clear words of a statute.⁷³ And so in a sense it was. The outcome of this disagreement was not to be settled by legal argument, or even in courts of law.

The Elizabethan ecclesiastical lawyers did not believe, however, that they were themselves *limited* by the jurisdiction enumerated in the medieval statutes. To them, the statutes merely established a base, leaving them free to exercise spiritual jurisdiction in areas not already covered by the common law. Expansion of spiritual jurisdiction to encompass wrongful boasting or the 'crime' of drunkenness thus seemed entirely legitimate to the civilians. New times and new evils required new remedies. Where the common law had no established claim, they might enter. In their view, only if Parliament created a common law remedy was ecclesiastical jurisdiction excluded.

Finally, there was a fifth area of disagreement: that concerning the exercise of 'supervisory' jurisdiction over the spiritual tribunals. About none of the five areas being discussed did the civilians feel more

⁷² See *Councils & Synods* II:2, 974–5; *Statutes of the Realm* I:171–74. For illustrative civilian comment about the continuing force of these 'statutes', see Richard Zouche, *Elementa jurisprudentiae* (1636) Part III § 1.

⁷³ *Wilson c. Stile* (1582), Durham DDR XVIII/3, f. 255. The argument was made under the same reasoning that the ecclesiastical courts should allow suits to enforce promises in consideration of marriage, because 'non competit sibi actio in foro seculari' (*marginalia* to Clerke's *Praxis*, in CUL Collect. Admin. MS. 32, f. 49).

strongly. The common law judges held that they were entitled, and indeed constitutionally obligated, to supervise the internal workings of the spiritual courts. They did so to make certain that the 'laws and customs' of England were preserved. The common law judges were charged with ensuring that the ecclesiastical officials acted in accordance with the law that bound them, that is the King's ecclesiastical law. Though they would do so with circumspection and due respect for spiritual authority, the common law judges claimed the right to issue writs of prohibition that defined both what the 'laws and customs' of the realm were and what the applicable ecclesiastical laws required.

The operative principle endorsed by the English civilians was wholly different. They argued that the common law judges should ordinarily not issue a prohibition unless they, the common law judges, would themselves provide a remedy for the wrong. Thus, a prohibition might lawfully prevent a defamation cause for imputation of theft, because a common law action on the case lay for it. However, granting the writ where no such action lay at common law was another matter. The civilians thought it an illegal act on the part of the common law judges. Prohibitions for cases involving words like 'queen' or 'knave' or 'cuckold' therefore seemed entirely wrong to the civilians, since no action on the case lay for that sort of language.⁷⁴ Similarly, the civilians admitted that a prohibition lay to prevent an ecclesiastical court from trying a question of patronage in which an action of *quare impedit* lay. It was an entirely different matter for them, however, if the common law judges used the writ to define the extent of learning which a bishop could require of a cleric presented by the patron. Such common law cases deprived the civilians of the right they thought undeniably theirs, that is the right to say what the Roman canon law was.

Probably the most objectionable example of this sort of common law intervention involved the two-witness rule. The law of proof of the *ius commune* required the testimony of two trustworthy witnesses to establish a point of fact. This was a vital principle to the civilians, not simply as a way of dealing with causes in which a plaintiff turned up with only one witness. That happened rarely. It was vital because it allowed them to discriminate between fully and imperfectly proved causes. Under the rule, the testimony of the two witnesses had to

⁷⁴ See Francis Clerke, *Praxis*, tit. 132.

agree to all matters of substance. If it did not, the witnesses were accounted *testes singulares*, and their testimony was to be rejected. Without this rule, the judges in the ecclesiastical courts (who often would not themselves have seen the witnesses) had no reliable means of testing whether or not a fact had been proved.

During the reign of Elizabeth, the English common law courts began to issue prohibitions to prevent the civilians from enforcing this two-witness rule. When that happened, the civilians saw paralysis staring them in the face. They complained bitterly. Most such causes raised no issue having to do with jurisdictional boundaries, and most were admittedly of ecclesiastical cognizance. The prohibitions simply told the civilian judges how to enforce their own law, and they came from courts in which the judges had only the most tenuous grasp of the applicable law of proof. They seemed to represent the most threatening assault on the spiritual jurisdiction and an entire perversion of the settled principle that the courts of the Church were governed by a different set of legal rules than those which prevailed in the common law courts.

This argument went further in the hands of some of the civilians. It became an argument for the elimination of every aspect of the common law's claim to 'supervisory' jurisdiction. It meant, for instance, that no prohibition should lie in favour of a person who was sued in an ecclesiastical court outside his diocese, even though the suit was contrary to a statute of 1531 forbidding it.⁷⁵ The proper remedy for such a grievance was an appeal within the ecclesiastical court system, not a writ of prohibition, and the reason was that the common law courts themselves provided no remedy in the underlying case.⁷⁶ In other words, in the civilians' opinion writs of prohibition should be used only to preserve the traditional boundaries between common law and spiritual jurisdiction, not to police the ways in which the civilians interpreted their own law. That the common law judges were the authoritative interpreters of the King's ecclesiastical law the civilians altogether denied.

⁷⁵ 23 Hen. VIII c. 9 (1531).

⁷⁶ Noted in London Guildhall MS. 11448, f. 120: 'The courtes of comon lawe shoulde not sende prohibicions in causes of ecclesiasticall cognizance uppon pointe of citinge out of the dioces, because they cannot give any remedie therein or trie the same.' Contrast *Cartwright's Case* (K.B. 1615) Godb. 246; *Lynche v. Porter* (C.P. 1610) 2 Br. & G. 1.

The receipt and impact of prohibitions

It is important to emphasize that the positions of the civilians outlined above were not just statements of what they wished the English ecclesiastical law to be. They were statements of what it was. The examples given above come from records and reports of causes litigated in the spiritual courts. They show that, except where they were prevented by a writ of prohibition, the ecclesiastical lawyers acted in accordance with their principles. The English civilians thus continued not only to think within the framework of the *ius commune* after the Reformation, they also continued to *act* within it virtually whenever they had the choice.

The 'independent-mindedness' of the English civilians did not, however, mean that writs of prohibition had no or little effect on them. They did not pretend that the common law did not exist. They could not. When judges in the spiritual tribunals received an order from the common law judges, they invariably obeyed its letter. They ceased to hear the cause, pending application by the party aggrieved for a consultation. A consultation was a writ, issued by the royal courts after further argument and consideration of the nature of the litigation, permitting the original cause to proceed in the spiritual forum notwithstanding the earlier issuance of a writ of prohibition. Most of the cases about the law of prohibitions found in the common law reports from this period in fact arose upon applications for the grant of this writ, and their very frequency in the common law reports shows the civilians bending to the determinations of the judges of the King's Bench and Common Pleas. The civilians became accustomed to attempting to justify their jurisdiction in terms the common law judges would accept, because they appeared in person before the common law courts with some frequency during this period.⁷⁷ Many of them seem in fact to have become something like experts in the common law of prohibitions through having had to oppose them.

What these men refused to admit was that arguments over prohibitions in the royal courts should be identical with arguments over the law in the spiritual courts. Within the areas of their traditional competence, the civilians would not allow the theoretical availability of a writ to control the disposition of a cause in which no writ had actually been introduced. A prohibition was an exercise of power, one the civilians

⁷⁷ Bodl. MS. Eng.misc.f.473, p. 27, drawing the distinction between Common Pleas and King's Bench, that none but serjeants could appear in the former.

had perforce to obey. It was not, however, a precedent necessarily to be followed in subsequent litigation involving the same legal issues. On this point, the post-Reformation civilians held an attitude that was essentially identical with that held by their medieval predecessors.

An account of the impact of writs of prohibition in the spiritual tribunals must not, however, be based entirely on those cases where the writ was (or was not) actually produced. The act books show that many 'prohibitable' causes were not in fact prohibited, but it would be a mistake to assume that the common law rules had no effect whatsoever in those causes. It would be too schematic. The threat of a prohibition hung over much of the litigation found in the act books. That was the reality. And it was a powerful threat in the hands of defendants. A contemporary civilian noted, for instance, that although *de iure* the spiritual courts had the power to exercise jurisdiction over all sorts of defamation, in practice, that jurisdiction was infrequently exercised, 'because of the fear of prohibitions'.⁷⁸

A more immediate example comes from tithe causes. Where the defendants had originally pleaded a *modus decimandi*, it often happened in the course of litigation that the parties reached a compromise for less than what had originally been demanded. During the course of the trial, the defendant would offer a smaller amount, and the plaintiff would accept it to settle the dispute.⁷⁹ This happened even at the end of many disputes. Sentences given for the plaintiff often contain lesser awards than the amount sought, evidence that the parties had in fact agreed to a compromise.⁸⁰ Sometimes the document itself shows this, because on it the original amount was crossed out and a lesser sum written in.⁸¹ The threat of a prohibition must lie behind much of this. It gave tithe payers something to negotiate with.

Of course it can be truly said that most disputes in most legal systems are ultimately compromised. I am saying something more than that. Compromises almost always begin with an assessment of the chances of victory if a cause is fought through to the end. In post-Reformation England the possibility of a writ of prohibition

⁷⁸ BL Lansd. MS. 253 (titled 'A distinction between the Ecclesiasticall Law and the Common Law', temp. Jac. I), f. 142v: 'sed non utitur metu prohibitionis'.

⁷⁹ *Ackworth c. Wyn* (1578–9), Canterbury Act book Y.3.16, f. 133 ff. (esp. at f. 326) and Deposition book X.10.18, fols. 127v–29, 147v, 149v.

⁸⁰ *Beck c. Mylborne* (1581), York BI Trans.Cp.1581/1; the original claim was for 20s worth of tithes withheld; the sentence, nominally for the plaintiff, awarded only 20d.

⁸¹ *Taylor c. Wood* (1582–3), Lincoln Court papers RP/6, fols. 33–37v (22s reduced to 20s).

weighed heavily in such assessments. The pattern of compromise found in English tithe causes demonstrates the effect of many such assessments. Prohibitions, whether actually produced or not, counted.

This said, one must wonder why more defendants did not procure writs of prohibition as a matter of course. Contemporary act books in fact produce very few causes where a writ was introduced. If the judges would obey the writ, why not procure one? Why compromise at all? It seems that a defendant would have had nothing to lose, and at the very least the writ would serve as a more powerful 'bargaining chip'. To this obvious question no clear answer emerges from the contemporary court records, even though the number of causes they contain that seem 'prohibitible', but which were not in fact prohibited is large enough to require some attempt at explanation. In my opinion, the most likely explanation lies in the conjunction of contemporary uncertainty about the reach of the law of prohibitions and the disincentives created both by the initial costs of procuring a writ of prohibition and by the rules about expenses in the ecclesiastical courts. These two reinforced each other.

Uncertainty about whether or not a prohibition would lie must have entered into the calculations of many of the parties to litigation in ecclesiastical courts. Contemporary common law reports contain many apparently contradictory statements about the subject. In one case, for instance, it was said that a prohibition should not be granted after sentence in an ecclesiastical court, since this would be allowing the applicant to consent to ecclesiastical jurisdiction at one moment and then to repudiate it as soon as things turned against him.⁸² On the other hand, other cases held the opposite, that a prohibition could be sued out even after sentence.⁸³ In one case the availability of a prohibition after sentence was actually used as the reason for denying one beforehand. The judges felt that it would be better to wait and see

⁸² *Hollmast's Case* (K.B. 1577), Noy 70. The issuance of such writs was much resented by the civilians; see the discussion in BL MS. Cleo F 11, f. 329.

⁸³ *Cundy v. Newman* (C.P. 1609), 2 Br. & G. 38. For the confused state of the common law on the question of how far the ecclesiastical courts would be able to enforce their two witness requirement for full proof, compare *Chadron v. Harris* (K.B. 1605), Noy 12 (allowing lack of two witnesses to validate refusal of a will), with Anon. (C.P. 1604), CUL MS. Gg.5.6, f. 13v (prohibition to be allowed if the spiritual court demanded two witnesses to prove a prior *inter vivos* gift). See also *Armiger Brown v. Wentworth* (K.B. 1606), Yelv. 92; *Bellamy v. Alden* (K.B. 1627), Latch 117.

whether the ecclesiastical courts refused the applicant's plea than to assume they would do so.⁸⁴

Even a cursory examination of the early reports produces many such instances. Could one secure a prohibition to stop a defamation cause where nonincriminating words like 'cuckold' or 'knave' were the only slanderous language at issue?⁸⁵ Were suits involving pew rights prohibitible?⁸⁶ Would a custom of tithing, though proved, be rejected as the basis for a prohibition because the common law judges found it to be 'unreasonable'?⁸⁷ These questions, and others like them, were uncertain in the common law at the time. It would not always have been easy to predict the outcome of full argument on application for a writ of consultation.

That such uncertainties existed is no stain on the reputation of the common law judges. In some ways, they were in a difficult position. They thought it their duty to supervise the ecclesiastical courts, and when they looked at what was happening there, they saw much in need of supervision. On the other hand, the common law judges were sensitive to the dangers of too frequent and intrusive interference with the internal workings of the spiritual tribunals. The English judges were conservative men. They believed that the courts of the Church played an essential role in ordering the lives of most men and women, and it would have seemed neither politic nor just to undermine the Church's legitimate authority.⁸⁸ The common lawyers were quite reluctant, for example, to take any action against the persons of the judges in the ecclesiastical courts.⁸⁹ Consequent hesitation, coupled

⁸⁴ *Bagnall v. Stokes* (K.B. 1588), Cro. Eliz 88; *Bristow v. Bristowe* (C.P. 1611) Godb. 161.

⁸⁵ See, e.g., *Saunders Ayliff's Case* (C.P. 1627), Lit. 46; *Hye v. Dr Wells* (K.B. 1632), Godb. 446.

⁸⁶ Compare *Carlton v. Hutton* (K.B. 1625), Noy 78 (allowing the writ) with *May v. Gilbert* (K.B. 1613), 2 Bulstr. 150 (refusing the writ, because 'We are not here to meddle with seats in the church').

⁸⁷ *Anon.* (K.B. 1586), Godb. 60; *Baxter v. Hopes* (C.P. 1611), 2 Br. & G. 30; *Jucks v. Cavendish* (K.B. 1613) Godb. 234.

⁸⁸ See, e.g., *Robert's Case* (K.B. 1611), Cro. Jac. 269: 'for if such a surmise should be sufficient, all suits in the Ecclesiastical Court should be stayed, or otherwise taken away'; *Churchwardens of Uffington's Case* (K.B. 1615), 1 Rolle 259: 'Si soit prohibition en le case al barre grand invonveniences poient surger.'

⁸⁹ *Anon.* (K.B. 1616), CUL Dd.10.51, fols 202-02v, in which attachment was prayed against Dr Dun after it was alleged that he had been shown a prohibition and disregarded it. The report continues, 'mes les judges voilont parler et mitter pur luy et idem dies sera done al luy et nemy agard attachment ver Sir Daniell'.

with the innovative nature of some of the rules being developed, led inevitably to doctrinal uncertainty. Uncertainty is probably inevitable in any new area of the law, and it would be wholly wrong to suggest that it was a sign of incompetence on the part of the common law judges. For litigants themselves, however, it would often have been hard to predict how an application for a specific writ of prohibition would ultimately fare.

Securing a writ of prohibition was therefore no sure thing. It might end simply in fruitless expenditure. Moreover, if it failed, the effort would certainly cost the loser significant expenses awarded by the ecclesiastical courts themselves. The expenses of both parties in canonical litigation were normally borne by the losing party, and in England these expenses could include what the victorious party had spent defending the common law action involving the prohibition.⁹⁰ Such awards were made. The common law courts almost never upset them.⁹¹ As a result, if the action on the prohibition went wrong, the losing party would have to pay not only the costs associated with the original writ,⁹² but also the expenses both parties had spent litigating the question of legality in the application for a writ of consultation. This must have discouraged suing out a writ of prohibition in the first place. At least it was a reason for threatening first – waiting to see what sort of compromise would be forthcoming – before actually securing the writ. The threat was always a strong one. If the prohibition succeeded, the plaintiff in the ecclesiastical court would have lost all. Both sides therefore had reasons for hesitation. Many litigants would have counted the costs before having recourse to the common law courts, particularly where (as so often happened) they believed they had a meritorious cause under the ecclesiastical law itself.

⁹⁰ E.g., *Broughton c. Povae* (1602–8), Chester Cause papers EDC 5 (1608), No. 75 (including expenses 'pro copia de prohibitione' and 'pro exhibitione et admissione brevis de consultatione'); *Potts c. Davy* (1601), Buckingham Act book D/A/C/25, f. 29 (taxation of 53s 4d expenses relating to procuring writ of consultation). That it was the practice is confirmed by Ely Notebook F/5/48, f. 44v; Anon. (1605), Worcester 'Collectanea B' MS. 794.093 BA 2470, f. 9v; and *Reade v. Stonehouse* (K.B. 1619), 2 Rolle 119. The civilians sought to have their rule adopted by the common law itself; see 'An Act for Payment of Costes in Prohibitions for Tythes', in *Commons Debates 1621* (Wallace Notestein et al. eds. 1935) VII:211.

⁹¹ See, e.g., *Stransham v. Medcalfe* (K.B. 1588), 1 Leo. 130.

⁹² They are set out (temp. Jac. I) in BL MS. Cleo F II, fols. 440–2.

Other effects of writs of prohibition

Besides changing the balance of negotiation between parties to litigation the regular threat of prohibitions had a second effect on ecclesiastical court practice. It caused the civilians to adopt expedients to avoid the force of the writs. One reason, for example, that compromises in tithe causes were usually embodied in formal sentences rather than compromise agreements was that execution of a formal sentence would not be prohibited, whereas enforcement of a simple compromise agreement might. If the parties merely agreed to settle the suit, and the defendant subsequently refused to pay, any attempt to enforce the agreement in an ecclesiastical court could be met by the argument that since an action of *assumpsit* would lie in the royal courts, the attempt should be prohibited.⁹³ Hence, the civilians varied their practice to take account of the possibility. Similarly, proctors suing for their fees were advised to allege, not a promise to pay for their services, but rather that they had been legitimately constituted proctor and had performed their office faithfully.⁹⁴ That was nothing more than a method of avoiding a writ of prohibition. In this way the existence of prohibitions indirectly but significantly affected spiritual court practice.

Some of the devices hit upon by the ecclesiastical lawyers could not be called elegant. The formal insertion in libels of a clause that no more was being sought than the laws and customs of England allowed is one common example.⁹⁵ The terms of the libel continued to be the first thing the common law courts looked at,⁹⁶ and such clauses apparently threw the burden of proof on the person seeking the

⁹³ Noted in York BI Precedent book 11, f. 29v: 'Therefore lett the parson or vicar who hath the advantage in the ecclesiasticall Court take heed of Agreement.'

⁹⁴ Ely Precedent book EDR F/5/41, f. 304 (1609): 'When a proctour doth sewe for his fees he must not pleade any promisse or assumpsit although it be not amisse to take such promisse.' This problem could lead to some oddly styled entries: *Snow c. Allen* (1602), Berkshire Act book D/ED 2/C 45, f. 198v: 'causa laesionis fidei sive subtractionis salarii sive iuris ecclesiastici'.

⁹⁵ Suggested in Canterbury Precedent book Z.3.27 (temp. Jac. I), f. 74v, under the heading, 'Protestationes ad evitandum prohibitionem regiam' and in Durham DDR XVIII/3, f. 247, said to be 'To avoide the jurisdiction of the temporelle judge in taking knowledge of legacies, filial portions etc.' See also London Guildhall MS. 11448, f. 45: 'Sir Thomas Crompton to barr a prohibition admitted an allegation in the consistorie quatenus spectaret ad iurisdictionem et non aliter.' That the clause was also inserted to encourage the judge of the consistory court to hear the cause is suggested by *Suckley c. Wyndour* (1590), Worcester Act book 794.011 (BA 2513/4), p. 163a, where the cause was nevertheless dismissed 'ad forum seculare'.

⁹⁶ See, e.g., *Lady Waterhouse v. Bawde* (K.B. 1606), Cro. Jac. 133.

prohibition. Avoidance of prohibitions was also the reason given for avoiding express use of the word 'detinet' in all libels in testamentary causes. Better to use 'habet' or 'occupat' instead, for then it would be harder to argue that the common law action of *detinue* lay.⁹⁷ Placing the details of the claim in a separate 'schedule', a common practice in tithe and testamentary causes, seems also to have been part of an effort to keep libels and all formal pleading from being used against the plaintiff if the cause came before the common law courts.⁹⁸

The use of penal bonds to perform the awards of the judges, routinely required of parties at the inception of litigation, was another much used tactic to protect spiritual jurisdiction.⁹⁹ The terms of these bonds commonly incorporated a promise to pay a large amount of money, defeasible upon continued and dutiful appearance before the spiritual tribunal. The bonds said nothing about the underlying nature of the cause, and would therefore have involved any party who was subsequently contumacious in a struggle to extricate himself from his promise to pay.¹⁰⁰ He would have been obliged to find a way around the bond's automatic terms, since he would not have been able to allege that his conduct in itself warranted invocation of the defeasance clause.

Subsequent and formally unrelated legal actions by Church court officials against procurers of prohibitions were yet another means of defence. One ecclesiastical reporter had this to say about the use of prohibitions in controversies over collations to benefices: 'And if [the defendant] bring the matter by prohibition to the common law, the archbishop will be even with him some other way and pick some hole in his coat to suspend him, as Archbishop Whitgift did often profess.'¹⁰¹ This frank comment about retaliation is a valuable one for a legal historian. Much besides the theoretical availability of a writ of prohibition went into decisions about where, when, and whether to bring suit.

It is undeniable that the civilians chafed under the constant threat

⁹⁷ Marginalia in manuscript copy of Clerke's *Praxis*, CUL Collect. Admin. 32, f. 34v.

⁹⁸ E.g., *Petter c. Luxmore* (1580), Exeter Precedent book Chanter MS. 8301, No. 79: 'Schedula interserenda sexto articulo predicti libelli.'

⁹⁹ Suggested in London Guildhall MS. 11448, f. 132v: 'If the judges in the common pleas shoulde graunte a prohibicion uppon an accounte or distribution ex officio, it weare good that the ordinarie shoulde putt the bond in suyte in the kinges bench.' See the confused reception given to such a bond in *Anon.* (C.P. 1610), 2 Br. & G.

¹⁰⁰ For an example, see Peterborough Act book 9, f. 48.

¹⁰¹ York BI Precedent book 11, f. 13v.

of prohibitions that hung over them. They bent their practice to take account of it. They protested against, and argued with, the common lawyers about what they regarded as the too ready granting of these writs. They sought and found ways to live with some of them. They struck back where they could. They grumbled where they could not. The exasperated comment of one Jacobean civilian: 'The common law will take *any* advantage'¹⁰² must sum up feelings all of them shared at one time or another. But with all this, they did not surrender. The ecclesiastical lawyers continued to enforce the Roman canon law as it had been received in England, despite the very considerable impact that prohibitions had on the litigation in their courts.

Positive influences of the common law

The reactions discussed so far were defensive measures, aimed at preventing the spread of the common law to the ecclesiastical courts. Alongside this, however, there existed a less discordant side to relations between the two court systems. The civilians learned from the common law, and their practice in some areas of law was affected positively by it. I believe that the process also worked the other way – that the common lawyers adopted some ideas drawn from the Roman canon law. But that is a controverted view and properly the subject of another study. Here it is proper only to show how the ecclesiastical lawyers made affirmative use of what the Roman canon law taught them to call 'the municipal law' of England.

Elizabethan and Jacobean ecclesiastical lawyers certainly knew something about English common law. Many of them knew it as well as anyone outside the profession might. A part of their familiarity came naturally from conflict. Dr Richard Cosin, for instance, wrote his *Apologie* for ecclesiastical jurisdiction largely from common law sources. He condemned the contemporary common lawyers out of the mouths of their predecessors. For this, knowledge of the common law was essential. The same reference to the common law is found, albeit in lesser degree, in many of the ecclesiastical reports and treatises. 'The common lawyers do hold for this'¹⁰³ or 'The common lawyers

¹⁰² *Marginalia to Herbert c. ap Evan* (1605), London Guildhall MS. 11448, f. 81 (emphasis supplied). See also L. M. Hill, *Bench and Bureaucracy: the Public Career of Sir Julius Caesar, 1580–1636* (1988) 72–5; Brian P. Levack, *The Civil Lawyers in England, 1603–1641* (1973) 72–81.

¹⁰³ Bodl. MS. Eng. misc. f. 473, p. 14.

allow a prohibition for that'¹⁰⁴ are not unusual comments found in them. A civilian's notebook, now at the Guildhall in London, contains a series of such references to common law practice under the rubric, 'Notes taken in the Common Pleas'.¹⁰⁵ Conflict sparked interest.

Contacts in areas of the law where the civilians habitually deferred to the common law also led to knowledge and indirect influence on ecclesiastical practice. Most of this occurred in areas the English spiritual courts had long conceded to the jurisdiction of the royal courts. The law of advowsons provides the best example. Despite formal canonical rules about the *jus patronatus*, in England this jurisdiction had long belonged to the common law courts.¹⁰⁶ English civilians did not dispute this. However, it was impossible to maintain a total separation, since the Church retained the right to determine the canonical qualifications of anyone presented to an ecclesiastical benefice and because disputes over ecclesiastical matters like who had the right to tithes in a parish might depend ultimately on who held the advowson. In this situation the ecclesiastical officials normally looked to decisions of the common lawyers where there was a doubtful point of law. In one such case heard in one of the London courts in 1601, the judge ordered, 'Do nothing in this cause until the judgement be past in the Common Pleas touching the *quare impedit*'.¹⁰⁷ In another, heard at Durham in 1606, decision was postponed, 'until after Serjeant Hutton [at] the next assizes should deliver his opinion'.¹⁰⁸ Presumably the court would then follow it. As another civilian put it, the

¹⁰⁴ York BI Precedent book 11, f. 33. Or see *Butcher c. Hodges* (1619), 'Mark Tabor's Book', Bath & Wells D/D/O Box 5 of 5, *marginalia* at f. 34v, where differences and parallels between ecclesiastical and common law defamation are noted.

¹⁰⁵ MS. 11448, fols. 249–49v; 254v; another example is found in 'Civilian's Notebook', Berkshire Record Office, Reading, D/ED O 48, pp. 110–11: 'Some Common Law Cases'.

¹⁰⁶ See W. R. Jones, 'Relations of the two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries', in *Studies in Medieval and Renaissance History*, Vol. 7, ed. William Bowsky (1970) 102–32.

¹⁰⁷ *Dilke c. Allen* (1600), Bodl. Tanner MS. 427, f. 115. See also Jones' case, Durham, Library of the Dean and Chapter, MS. Hunter 70, fols. 35–35v, a case relating to a benefice, in which Brooke's *Abridgement* is cited along with the reports of Dyer and Yelverton, this in a collection of causes that otherwise contains very few citations to common law cases. It also includes citation to Continental treatises.

¹⁰⁸ *Estate of John Dickenson* (1606), Durham DDR XVIII/3, f. 240v. This cause involved a question of succession to land, an area where the generalization about advowsons found in the text also held.

spiritual courts must follow the common law in such cases and also 'must be informed in such points by common lawyers if need be.'¹⁰⁹

Consultations like these can only be described as friendly, or at least as professional and unantagonistic. The civilian just quoted also noted that, 'Likewise, the Justices of the common laws must be sometimes informed by advocates.'¹¹⁰ This in fact occurred. Meetings between ecclesiastical and common lawyers, held to work out lawyers' problems, were not infrequent in Tudor and Stuart England. The 'Doctors of the Arches' appeared with some regularity in the common law courts, called there to answer questions about the Roman canon law that were pertinent to doubtful cases.¹¹¹ They were listened to with respect, though not always with agreement. Informal discussion also occurred. Conversations that had been held with common lawyers are often referred to in the professional literature of the English civilians.¹¹² Peter Clark has even found evidence that an informal lawyers' club met regularly at Canterbury, 'its membership drawn from the legal personnel of both the Church and the secular courts'.¹¹³ Although there *was* rivalry and hostility between the civilians and the common lawyers, that is not *all* there was.

Regular discussion among professionals requires listening, and listening can lead to the exchange of ideas. Certainly it did in this instance, because it is demonstrable that the civilians took ideas from the common law into their own court practice. Here are a few examples. Most English ecclesiastical courts adopted the division of the legal year into four terms: Michaelmas, Hilary, Easter and Trinity, in evident imitation of the common law system.¹¹⁴ The civilians adopted the *innuendo* form used in common law actions for slander as a regular part of their own defamation practice.¹¹⁵ The civilians came

¹⁰⁹ York BI Precedent book 11, f. 42. ¹¹⁰ *Ibid.*

¹¹¹ See, e.g., *Lady Lodge's Case* (K.B. 1584), 1 Leo. 277.

¹¹² E.g., London Guildhall MS. 11448, f. 219, referring to a discussion about probate administration between Dr Sir Henry Marten, chancellor of the diocese of London, and Sir William Peryam, Chief Baron of the Exchequer. Marten was an honorary member of Lincoln's Inn; several of the civilians had been admitted to the Inns of Court.

¹¹³ *English Provincial Society from the Reformation to the Revolution: Religion, Politics and Society in Kent 1500-1640* (1977) 275.

¹¹⁴ There are in fact occasional examples of this from before the Reformation: e.g., London Guildhall MS. 9065, f. 58 (1489). The impetus of the Reformation evidently accelerated such borrowings, but did not initiate them.

¹¹⁵ For examples, see pp. 66-9.

in some instances to allow proof of an executor's accounts by the testimony of only one witness, as at least one proctor believed, 'because this proof is admitted before secular judges'.¹¹⁶ Ecclesiastical lawyers found good reason to punish pre-nuptial pregnancy in the English common law's traditional refusal to admit the legitimization of children by subsequent marriage of the parents.¹¹⁷ The searcher in the records occasionally finds some quite incongruous borrowings, like the inclusion of an allegation of money damages in a 1589 suit brought to establish a contract of marriage at York.¹¹⁸ The English ecclesiastical courts would not award damages for breach of a marriage contract. The proctor who drew these particular pleadings must have used a common law form through inexperience, or because he thought it would somehow enhance the weight of his client's claim.

None of these borrowings amounted to a major displacement of the Roman canon law. Nor can it be maintained that the civilians felt themselves bound to adopt them by anything but their own free choice. None the less they did make use of common law ideas. The same generalization holds true for the more important subject of the citation of common law cases in the working literature of the civilians. The literature includes references to the early common law reports, although virtually always as additional support for a point also buttressed by citations from the Roman canon law. For example, in dealing with the validity of marriages entered into by girls under the age of puberty, a Jacobean civilian cited a case from Coke's Reports and one from Dyer's. However, he also cited *De matrimonio* by Thomas Sanchez (d. 1610), the *Tractatus de causis matrimonialibus* by Melchior Kling (d. 1571), and the medieval *Decisiones capellae Tholosanae*.¹¹⁹ In the report of a tithe cause heard at London in 1602, one finds reference made to *Grendon v. Bishop of Lincoln*, a case taken from Plowden's Reports. But it appears together with more numerous citations to the Decretals and attendant glosses, to the Roman law

¹¹⁶ Marginalia to manuscript copy of Clerke's *Praxis*, Cheshire Record Office, Chester, EDR 6/18, fols. 29v-30: 'ad hoc inducti quia coram iudice seculari haec probatio admittitur'.

¹¹⁷ York BI Precedent book 11, f. 31v: 'It seems wee have some respect to the Common lawe heerin, by which lawe subsequens matrimonium hath not such force as by civill lawe.'

¹¹⁸ *Pulleyne c. Bolton & Foster*, York BI HC.CP.1589/7.

¹¹⁹ Marginalia to manuscript copy of Clerke's *Praxis*, LPL Arches MS. N/3, tit. 105. The common law references are to 3 Dyer 369 and to Mildmay's Case, 6 Co. Rep. 40a.

Digest and to commentaries by Panormitanus and Ulrich Zasius (d. 1535).¹²⁰ Where the question in a third case was whether a testator's debts were chargeable to his executor's executor, Rastall's *Abridgement of Statutes* was cited, but so were texts from the *Liber sextus*, the Digest, and the treatise *De conjecturis ultimarum voluntatum* by Franciscus Mantica (d. 1614).¹²¹ Evidently common law decisions could be cited in the spiritual courts, though they normally played a supplementary role to the traditional authorities of the Roman canon law.

Citation of common law cases in ecclesiastical litigation was a development pregnant with possibilities for momentous change. Canonical authorities are also occasionally found in common law reports of this period, but by contrast it seems that this occurred only when evidence of ecclesiastical law was needed.¹²² This was a different sort of use. One could easily see ecclesiastical citation of Coke and Dyer as opening up a much larger role for the temporal law, because it could be used actually to displace Continental sources. If these common law cases came to be accepted by the civilians as having equal, or even greater, weight than the Roman canon law, then the door would be open for the true triumph of the common law in the spiritual forum. The only major obstacle to it would be the absence of common law precedent on any particular subject, and that would to some extent be remediable by the common law judges themselves. That would be the day when the civilians truly did, in Maitland's phrase, acquire a 'common law mind'. A preliminary look suggests that the day may indeed have come after the Restoration.¹²³ However, one would be mistaken to anticipate its arrival. Before 1640 the use of common law cases by civilians was occasional, supplemental, and a matter of choice.

A decision to employ common law precedents was of course particularly appropriate where the Roman canon law failed. For instance, there was very little in the formal law about the rights and duties of churchwardens. When English officials began in the sixteenth century to make systematic and effective use of churchwardens to secure conformity to the law of the Church, new and difficult problems

¹²⁰ *Smith c. Grove* (1602), Bodl. Tanner MS. 427, f. 221. The common law case, an action of *quare impedit*, is at 2 Plowd. 493.

¹²¹ Anon. (c. 1605), London Guildhall MS. 11448, f. 53v.

¹²² See, e.g., *Regina v. Page & Bishop of London* (C.P. 1599), Cro. Eliz. 719.

¹²³ This impression is based on the relative abundance of common law citation in the literature noted above p. 141.

arose. Suppose a vicar accidentally broke the parish church's bell. Could the churchwardens bring a suit against him for dilapidations? And if they could, should it be the churchwardens at the time of the accident or those in office at the time of the suit who held the right to sue? This case arose in the diocese of Norwich late in Elizabeth's reign and was in due course appealed to the Court of Archbishops.¹²⁴ There, at least according to one reporter, the lawyer arguing the cause answered both these questions from Brooke's *Abridgement* and Lambarde's *Eirenarcha*, not from the Roman canon law or commentaries on it.

This cause is particularly revealing of the possibilities open to English civilians because it presented a choice. Granted the absence of *direct* canonical authority on the point, still an analogy to other matters under the canon or civil law could well have been drawn. The nature of the bell could have been compared with other items belonging to the parish to discover whether it fit within the definition of the church's patrimony, and the office of the churchwarden could have been analogized to that of an archdeacon or even a lay patron.¹²⁵ However, the civilian lawyer working on the cause did not make that choice. He chose the English common law instead. Perhaps he thought the office of justice of the peace a closer analogy to that of churchwarden. Or perhaps he thought use of common law authorities would furnish a better protection against a possible writ of prohibition. Possibly he simply preferred the answer given by the common law cases. Whatever the reason, this lawyer found that it was in the interest of his client to prefer the common law to the canon law analogy. At this distance, we cannot tell exactly why.

Occasionally, we can. Early in James I's reign a parson named Keemish obtained a dispensation from the archbishop of Canterbury to hold two benefices with cure of souls, provided they were not more than thirty miles apart. The restriction in permissible distance had been enacted by the 1604 Canons,¹²⁶ and the archbishop had issued the dispensation from the canon under an Henrician statute which vested in him powers formerly exercised by the pope.¹²⁷ His dispensation in hand, Keemish managed to acquire two such benefices, the one in Huntingdonshire, the other in Northamptonshire. The

¹²⁴ *Petche c. Tiler & Janson* (1601), Bodl. Tanner MS. 427, f. 207. There are canonical citations in the report, but they concern procedural matters.

¹²⁵ The obvious analogy was to the *testis synodalis*; it failed because the churchwarden held a distinct office and because of the year-long nature of his appointment.

¹²⁶ Canon 41. ¹²⁷ 25 Hen. VIII c. 21 (1533).

distance between them was, as the reporter put it, 'by common computation of the miles by the ordinary way more than 30 miles asunder. But as the crow flieth, they are not above 28 miles asunder'.¹²⁸ The question was how the distance should be computed.

The better interpretation under the Roman canon law, it seemed, was the former. The reporter cited the opinions of Bartolus (d. 1357), Joannes Bertachinus (d. 1506) and Jacobus Menochius (d. 1607) to that effect. However, this interpretation would have deprived Keemish of one of his benefices, and in this difficult position, the reporter continued, 'Mr Keemish provided himself of defences out of the common law, if the ecclesiastical law should be against him.' Keemish cited cases from the reports of Coke and Dyer in formulating his argument. It was a good example of the possibility of fundamental change in the nature of English ecclesiastical jurisdiction.

CONCLUSION

As with many cases found in the common law reports of the period, it is impossible to know how Mr Keemish's cause was ultimately resolved. The reporter leaves it undetermined. Nevertheless, it is a good piece of litigation with which to end this survey. Mr Keemish's cause raised *in parvo* most of the issues that emerge from examination of relations between the post-Reformation civilians and the common lawyers. First, the cause involved enforcement of an Act of Parliament in the ecclesiastical tribunals, and even a question of the integration of that Act with canons enacted by the Church. This was undoubtedly the greatest change, and the largest challenge, for English civilians. Second, the case allowed for the possibility of interpreting both the Act and the new canon *secundum ius commune*. The civilians, determined to retain their power to interpret the king's ecclesiastical law in accord with the Continental traditions, could read them as if they were one more text from the Roman canon law. And third, over the cause hung the threat of a writ of prohibition. Though none was produced that we know of, since the common lawyers claimed a monopoly over interpreting statutes, that claim might easily have been invoked to justify intervention from without. None of the actors in Mr Keemish's case could have ignored the possibility.

The inconclusiveness of Mr Keemish's case also usefully empha-

¹²⁸ Mr Keemish's case (c. 1600), York BI Precedent book 11, fols. 23-23v.

sizes the room for uncertainty, argument and innovation left open in post-Reformation practice within the English spiritual courts. Although the Roman canon law remained the touchstone of litigation in the ecclesiastical forum, the English common law could not be kept out entirely. It stood as the threat against which Dr Aylett and his fellow civilians both sought divine protection and devised strategies of defence. It also served as a resource upon which the civilians and their clients sometimes called for ideas.

One begins an investigation of ecclesiastical jurisdiction in Reformation England with a clear issue in mind: Was there continuity in legal practice, or did the abolition of papal jurisdiction cause upheaval and fundamental change? One ends that study with cases like Mr Keemish's. In the meantime, the investigator will have seen many instances of both continuity and discontinuity, but he will have found that the clarity of the original issue has disappeared. Instead he will be left with two slightly different and more difficult questions. First: In what ways had specific statutes, royal interests, and extra-judicial pressures affected the substance of the Roman canon law and frustrated the desire of the English civilians to continue to apply it? Second: Where from within the resources of the Roman canon law, its ocean of commentators, and from English law and custom would come the material to deal with new and immediate legal problems? Mr Keemish's case raised both of these questions. They were questions that did not always admit of easy answers, and often they did not admit of the *same* answer when asked in different circumstances. In their answering, however, lies a better understanding of this chapter in the history of English law.

APPENDIX 1

Pre-1640 Manuscript Copies of Francis Clerke, *Praxis in Curis Ecclesiasticis*

(Supplemental to list by J. D. M. Derrett in
Studia et documenta historiae et iuris 40 (1974) 65–6)

COPIES WITH GLOSSING TO LITERATURE OF THE IUS COMMUNE

- Aberystwyth, Wales, National Library of Wales, SD/Misc. B/6, fols. 11–120 (minimal glossing).
Cambridge, University Library, Collect. Admin. MS. 32 (minimal glossing).
Cambridge, Mass., Harvard Law School, MS. 1050 (minimal glossing).
Chester, Cheshire Record Office, EDR 6/18.
Chichester, West Sussex Record Office, Ep I/51/6 (minimal glossing).
Dublin, Trinity College Library, MS. 1193.
London, British Library, Add. MS. 11507.
Add. MS. 29439.
Harl. MS. 878 (minimal glossing).
London, Lambeth Palace Library, Arches MS. N/3 (extensive glossing).
MS. 2451.
Oxford, Bodleian Library, Tanner MS. 112 (extensive glossing).
Tanner MS. 176.
Reading, Berkshire Record Office, D/ED O 45/4, pp. 3–220 (extensive glossing).
San Marino, California, Huntington Library, MS. HM 35072.
Trowbridge, Wiltshire Record Office, D 5/24/8 (minimal glossing).
Washington, D.C., Catholic University of America Library, Special Collections, MS. 180.
Wells, Cathedral Library, Mark Tabor's book (extensive glossing).
York, Borthwick Institute, Precedent book 5 (minimal glossing).

COPIES WITHOUT GLOSSING (NOT FOUND IN DERRETT'S LISTING)

- Bury St Edmunds, Suffolk Record Office, MS. E14/11/9.
Cambridge, University Library, Collect. Admin. MS. 31.
Cambridge, Mass., Harvard Law School, MS. 1037.
MS. 1214.
Carlisle, Cumbria Record Office, DRC 3/62 (incomplete).
Chester, Cheshire Record Office, EDR 6/3.
Durham, University Library, Mickleton & Spearman MS. 51.
Gloucester, Gloucestershire Record Office, GDR 390.
Norwich, Norfolk Record Office, ANW/21/3.
ANW/21/4.

Nottingham, University Library Manuscripts Department, P 284.

Trowbridge, Wiltshire Record Office, D 5/24/12.

D 5/24/13.

D 5/24/18 (lacking titles 1–15).

Wells, Cathedral Library (unclassified).

APPENDIX 2

Ecclesiastical Reports, 1580–1640

Bury St Edmunds, Suffolk Record Office, E14/11/7 (1623–40). 36 fols., but with gaps.

Durham, Department of Palaeography and Diplomatic, University of Durham, DDR XVIII/3 (1603–18). 262 fols. 'Clement Colemore's Book'. The causes are taken from the northern dioceses; also contains a short account of the reporter's domestic life at f. 262.

Durham, Library of the Dean and Chapter, Hunter MS. 70 (c. 1600). 102 fols., but with blanks *passim*.

London, British Library, Lansd. MSS. 129–31 (1588–1605). 142, 254, and 301 fols. From the papers of Sir Julius Caesar. Most of the reports concern admiralty cases, but there are some ecclesiastical causes found herein.

London, British Library, Lansd. MS. 135 (1582). 146 fols. A mixture of admiralty and ecclesiastical reports; also from the papers of Sir Julius Caesar.

London, Guildhall Library, MS. 11448 (1604–20). 254 fols., with gaps. Most causes from London courts, including the High Commission. Notes on the common law courts collected by a civilian, at fols. 249–53.

Nottingham, University Library, MS. A 43 (1634–7). 4 fols. (at start and end of act book). No citation to canonical or civilian authority.

Oxford, Bodl. Eng. misc.f.473 (c. 1620). 29 pp. Considerable overlap with London Guildhall Library MS. 11448.

Oxford, Tanner MS. 176 (1620s). 51 fols. The cases begin at f. 135v of the manuscript. Ecclesiastical causes mixed in with other civilian material; bound with Francis Clerke's *Praxis*.

Oxford, Tanner MS. 427 (1597–1603). 227 fols. Causes taken from the Court of Arches and other ecclesiastical courts in London.

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