that many times directly against the words of the feoffment, fine, or recovery: and that is done by the law of reason, as is aforesaid.

Doct. May not a use be assigned to a stranger as well as to be reserved to the feoffor, if the feoffor so appointed it upon his feoffment?

Stud. Yes, as well, and in like wise to the feoffee, and upon that a free gift, without any bargain or recompence, if the feoffor so will.

Doct. What if no feoffment be made, but that a man grant to his feoffee, that from henceforth he shall stand seised to his own use? Is not that use changed, though there be no recompence?

Stud. I think yes, for there was an use *in esse* before the gift, which he might as lawfully give away, as he might the land if he had it in possession.[84]

Doct. And what if, a man being seised in fee grant to another of his mere motion, without bargain or recompence, that he from thenceforth shall be seised to the use of the other; is not that grant good?

Stud. I suppose that it is not good; for, as I take the law, a man cannot commence an use but by livery of seisin, or upon a bargain, or some other recompence.[85]

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[84] Post. 171.

[85] Shep. Touch. 485.

B. ECCLESIASTICAL JURISDICTION: 1250–1600

CHRONOLOGY

1163–1300 — Development of writs of prohibition
1286 — *Circumspecte agatis*
1316 — *Articuli Cleri*
1351, 1352 — First statutes of Provisors and *Praemunire*
1391, 1393 — Second statutes of Provisors and *Praemunire*
1401 — Statute *De heretico comburendo*
1533 — Ecclesiastical Appeals Act

DOCUMENTS

Writs of Prohibition

[See above, Section 4B; below pp. 48–49, 50–52.]

The Writ "Circumspecte Agatis" (1285)

in Gee and Hardy, pp. 83–5 [marginal summaries omitted]

The authorities for this writ are a Cotton and two Harleian MSS., 1285. Cott. Claud. D. ii. f. 249b, Harl. 395 and 667. The Cotton MS. is endorsed *Examinatur per rotulum*. All three differ in points of detail. The following translation is made from the collated texts as printed in the Statutes of the Realm, i. 101, with some use of the various readings there given. [The document in the statute books is, in fact, a pastiche of a writ sent by the king from Paris in the summer of 1286 and some of the replies that the king made to clerical *gravamina* (complaints) in November of 1280. The attribution to 1285 is apparently the result of the fact that the same issues were debated in connection with the Westminster parliament of that year. See Powicke and Cheney, *Councils and Synods II* 2:974–5. Language given in brackets below comes from the best copy we have of the original writ.

[Tr. Statutes of the Realm. i. 101.]

[Edward by king of England, etc., to Richard de Boylond and his companions, greeting.] The king to such and such judges, greeting. See that ye act circumspectly in the matter touching the Bishop of Norwich and his clergy, in not punishing them if they shall hold pleas in the Court Christian concerning those things which are merely spiritual, to wit:—concerning corrections which prelates inflict for deadly sin, to wit, for

fornication, adultery, and such like, for which, sometimes corporal punishment is inflicted, and sometimes pecuniary, especially if a freeman be convicted of such things.

Also if a prelate impose a penalty for not enclosing a churchyard, leaving the church uncovered or without proper ornament, in which cases no other than a pecuniary fine can be inflicted.

Also if a rector demand the greater or the lesser tithe, provided the fourth part of any church be not demanded.

Also if a rector demand a mortuary in places where a mortuary has been usually given.

Also if a prelate of any church demand a pension from the rector as due to him:—all such demands are to be made in the ecclesiastical court.

Concerning laying violent hands on a cleric, and in case of defamation, it has been granted formerly that pleas thereof may be held in the Court Christian, provided money be not demanded; but proceedings may be taken for correction of the sin; and likewise for breach of faith. In all these cases the ecclesiastical judge has to take cognizance, the king's prohibition notwithstanding, although it be put forward. [Given at Paris in the 14th year of our reign.]

[The *gravamen* of the bishops.] In this form [i.e., without giving their names in the writ] laymen generally obtain a prohibition for tithes, oblations, mortuaries, redemptions of penance, laying violent hands on a clerk or a lay-brother, and in case of defamation, in which cases proceedings are taken to exact canonical punishment.

The lord the king made answer to these articles, that in tithes, obventions, oblations, and mortuaries, when proceedings are taken, as is aforesaid, there is no place for prohibition. And if a clerk or religious person shall sell for money to any one his tithes stored in the barn, or being elsewhere, and be impleaded in the Court Christian, the royal prohibition has place, for by reason of sales, spiritual things are temporal, and then tithes pass into chattels.

Also if dispute arise concerning the right of tithes, having its origin in the right of patronage, and the quantity of these tithes exceeds the fourth part of the church, the king's prohibition has place.

Also if a prelate impose pecuniarg penalty on any one for sin, and demand the money, the king's prohibition has place, if the money is exacted before prelates.

Also if any one shall lay violent hands on a cleric, amends must be made for a breach of the peace of the lord the king, before the king, and for excommunication before the bishop; and if corporal penalty be imposed which, if the defendant will, he may redeem by giving money to the prelate or person injured, neither in such cases is there place for prohibition.

In defamations of freemen let the prelates correct, the king's prohibition notwithstanding, although it be tendered.

The Articuli Cleri (1316)

in Gee and Hardy, pp. 96–102 [marginal summaries omitted]

Question having arisen with regard to the limits of the relative jurisdictions of the spiritual and temporal courts, the following authoritative answers were given by the king at York, Nov. 24, 10 Edw. 11, A.D. 1316. This document was considered as a concordat between the Church and State on the questions involved. See Stubbs, *Const. Hist.* ii. 354.

[Tr. Statutes of the Realm, i. 171.]

The king to all to whom, etc., greeting. Know ye, that whereas of late in the times of our progenitors formerly kings of England, in divers their Parliaments, and likewise after that we had undertaken the governance of our realm, in our Parliaments, many articles containing divers grievances, committed, as was asserted in the same, against the English Church, the prelates and clergy, were propounded by the prelates and clerks of our realm; and further, great instance was made that convenient remedy might be provided therein: and of late in our Parliament holden at Lincoln, the ninth year of our reign, we caused the articles

underwritten, with certain answers made to some of them heretofore, to be rehearsed before our council, and caused certain answers to be corrected; and to the residue of the articles underwritten, answers were made by us and our council; of which said articles, with the answers to the same, the tenors here ensue:

[1] First, laymen purchase prohibitions generally upon tithes, obventions, oblations, mortuaries, redemption of penance, violent laying hands on clerk or conversus, and in cases of defamation; in which cases proceeding is had to enjoin canonical penance. The king answers to this article, that in tithes, oblations, obventions, mortuaries, when they are propounded under these names, the king's prohibition has no place, even if for the long withholding of these they come to a pecuniary settlement of the same. But if a clerk or a religious man sells his tithes, being gathered in his barn, or otherwise, to any man for money, if the money be demanded before a spiritual judge, the probibition shall lie; for by the sale spiritual goods are made temporal, and the tithes turned into chattels.

[2] Also if dispute arise upon the right of tithes, having its origin in the right of patronage, and the quantity of the same tithes comes to the fourth part of the goods of the church, the king's prohibition has place, if this cause come before a judge spritual. Also if a prelate enjoin a pecuniary penance to a man for his offence, and it be demanded, the king's probibition has place. But if prelates enjoin penances corporal, and they which be so punished will redeem, upon their own accord, such penances by money, if money be demanded before a judge spiritual, the king's prohibition has no place.

[3] Moreover, if any lay violent hands on a clerk, the amends for the peace broken shall be before the king, and for excommunication before the prelate, that penance corporal may be enjoined; which if the offender will redeem of his owm good will, by giving money to the prelate, or to the party grieved, it can be required (*repeti*) before the prelate, and the king's prohibition shall not lie.

[4] In defamations also, prelates shall correct in the manner abovesaid, the king's prohibition notwithstanding, first enjoining a penance corporal, which if the offender will redeem, the prelate may freely receive the money, though the king's prohibition be tendered.

[*For the above see also supra, [Circumspecte Agatis]*.]

[5] Also if any erect on his soil a new mill, and afterwards the parson of the place demands tithe for the same, the king's prohibition issues in this form: 'Quia de molendino tali hactenus decimae non fuerunt solutae, prohibemus, &c. et sententiam excommunicationis, si quam hac occasione promulgaveritis revocetis omnino.' ['Because tithes were not heretofor paid for this mill, we prohibit, etc., and you are completely to revoke the sentence of excommunication if you have promulgated one in this instance.'] The answer: In such case the king's prohibition never issued by the king's assent; who also decrees that such shall never at any time issue.

[6] Also if any cause or matter, the knowledge whereof belongs to a court spiritual, and shall be definitively determined before a spiritual judge, and pass into a judgment, and shall not be suspended by an appeal, and afterwards, if upon the same thing a question is moved before a temporal judge between the same parties, and it be proved by witnesses or instruments, such an exception shall not be admitted in a temporal court. The answer: When the same case is debated before judges spiritual or temporal (as above appears upon the case of laying violent hands on a clerk) they say, that notwithstanding the spiritual judgment, the king's court shall discuss the same matter as the party shall think expedient for himself.

[7] Also the king's letter is directed to ordinaries that have involved those that be in subjection to them in the sentence of excommunication, that they should assoil them by a certain day, or else that they should appear, and show wherefore they have excommunicated them. The answer: The king decrees, that hereafter no such letters shall be suffered to issue, except in case where it is found that the king's liberty is prejudiced by the excommunication.

[8] Also barons of the king's Exchequer—claiming by their privilege that they ought to make answer to no complaint out of the same place—extend the same privilege to clerks abiding there, called to orders or to residence, and inhibit ordinaries that by no means or for any cause, so long as they be in the Exchequer or in

the king's service, shall they call them to judgment. The answer: It pleases our lord the king, that such clerks as attend in his service, if they offend, shall be corrected by their ordinaries like as other; but so long as they are occupied about the Exchequer, they shall not be bound to keep residence in their churches. Here it is thus added anew by the king's council: The king and his ancestors, time out of mind, have used that clerks, who are employed in his service, during such time as they are in service, shall not be compelled to keep residence at their benefices; and such things as be thought necessary for the king and the commonwealth, ought not to be said to be prejudicial to the liberty of the Church.

[9] Also the king's officers, as sheriffs and others, enter into the fees of the Church to take distresses, and they sometimes take the rector's beasts in the king's highway, where they have nothing but the land belonging to Church. The answer: The king's pleasure is, that from henceforth such distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in times past have been endowed; nevertheless he wills that distresses be taken in possessions newly purchased by ecclesiastical persons.

[10] Also where some, flying to the church, abjure the land, according to the custom of the realm, and laymen, or their enemies, do pursue them, and they are taken from the king's highway, and are hanged or beheaded, and whilst they be in the church are kept in the churchyard by armed men, and sometimes in the church, so straitly, that they cannot depart from the hallowed ground to relieve nature, and are not suffered to have necessaries brought to them for their living. The answer: They that abjure the land, so long as they be on the common way, are in the king's peace, nor ought they to be disturbed by any man; and when they be in the church, their keepers ought not to abide in the churchyard, except necessity or peril of escape so require it. And so long as they be in the chuch they shall not be compelled to flee away, but they shall have necessaries for their living, and may go forth to relieve nature. And the king's pleasure is, that robbers being appellants, whensoever they will, may confess their offences to priests; but let the confessors beware lest such appellants erroneously inform.

[11] Also it is prayed that our lord the king, and the great men of the realm, do not charge religious houses, or spiritual persons, for corrodies, pensions, or provisions in religious houses, and other places of the Church, or with taking up horses [and] carts, whereby such houses are impoverished, and God's service is diminished, and, by reason of such charges, priests and other ministers of the Church, deputed to divine service, are oftentimes compelled to depart from the places aforesaid. The answer: The king's pleasure upon the contents in the petition is that from henceforth they shall not be unduly charged. And if the contrary be done by great men or others, they shall have remedy after the form of the statutes made in the time of King Edward, father to the king that now is. And like remedy shall be made for corrodies and pensions extracted by compulsion, whereof no mention is made in the statutes.

[12] Also if any persons of the king's tenure be called before their ordinaries out of the parish where they continue, and they be excommunicated for their manifest contumacy, and after forty days a writ goes forth to take them, they pretend their privilege that they ought not to be cited out of the town and parish where their dwelling is, and so the king's writ for taking the same is denied. The answer: It was never yet denied, nor shall be hereafter.

[13] Also it is prayed that spiritual persons—whom our lord the king presents to benefices of the Church, if the bishop will not admit them, either for lack of learning or for other cause reasonable—may not be under the examination of lay persons in the cases aforesaid, as it is at this time, in fact, attempted contrary to the decrees canonical; but that they may sue for remedy to the spiritual judge, to whom of right it belongs. The answer: Of the ability of a parson presented to a benefice of the Church, the examination belongs to a spiritual judge; and so it has been used heretofore, and shall be hereafter.

[14] Also if any dignity be vacant where election is to be made, it is prayed that the electors may freely make their election without fear of any temporal power, and that all prayers and oppressions shall in this behalf cease. The answer: They shall be freely made according to the form of statutes and ordinances.

[15] Also, though a cleric ought not to be judged before a temporal judge, nor anything done against him that concerns life or member; nevertheless temporal judges cause clerics fleeing to the church, and

peradventure confessing their offences, to abjure the realm, and for the same cause admit their abjurations, although hereupon they cannot be their judges, and so power is wrongfully [*indirecte*] given to lay persons to put to death such clerks, if they chance to be found within the realm after their abjuration. The prelates and clergy desire such remedy to be provided herein, that the immunity or privilege of the Churcb and spiritual persons may be saved and unbroken. The answer: A cleric fleeing to the church for felony, to obtain the privilege of the Church, if he affirm himself to be a clerk, shall not be compelled to abjure the realm; but yielding himself to the law of the realm, shall enjoy the privilege of the Church, according to the laudable custom of the realm heretofore used.

[16] Also notwithstanding that a confession made before him that is not lawful judge thereof, is not sufficient whereon process may be awarded, or sentence given; yet some temporal judges with respect to clerks—who in this behalf are not of their jurisdiction—confessing before them their heinous offences, such as thefts, robberies, or murders, do admit them to an accusation against others, which such judges call an appeal [*appellum*], and do not after the premises, deliver them, so confessing, accusing, or making appeal, to their prelates, although they [the judges] be sufficiently required therein; albeit they cannot be judged or condemned before them by their own confession without breaking the Church's privilege. The answer: The privilege of the Church shall not be denied to one appealing, when summoned in due form, as a cleric, by his ordinary.

We—desiring to provide for the state of the English Church, and for the tranquillity and quiet of the prelates and clergy aforesaid, so far as we may laufully do, to the honour of God, and emendation of the Church, prelates, and clergy of the same, ratifying, confirming, and approving all and every of the articles aforesaid, with all and every of the answers made and contained in the same—do grant and command them to be kept firmly, and observed for ever; willing and granting for us and our heirs, that the aforesaid prelates and clergy, and their successors, shall use, execute, and practise for ever the jurisdiction of the Church in the premises after the tenor of the answers aforesaid, without let, molestation, or vexation of us or of our heirs, or of any of our officers whosoever they be. Witness the king at York, the 24th day of November, in the tenth year of the reign of King Edward, the son of King Edward.

By the king himself and the Council.

Statute of Provisors (1351)

S&M, p. 226 (No. 62E)

. . . Our lord the king, perceiving the mischief and damage mentioned above, and having regard to the said statute made in the time of his said grandfather[1] . . . , and also giving attention to the grievous complaints made to him by his people in various parliaments held in times past . . . , with the assent of all the lords and commons ot his said kingdom, for the honour of God and the benefit of the said Church of England and [the welfare] of all his kingdom, has ordained and established that the free elections of archbishops and bishops, and [the elections to] all other dignities and benefices that are elective in England, shall continue to be held in such fashion as when they were granted by the ancestors of our said lord the king or founded by the ancestors of other lords; that all prelates and men of Holy Church, who hold advowsons of any benefices by gift of our lord the king and of his ancestors, or of other lords and donors . . . shall freely have their collations and presentations according to the terms of the enfeoffment by the donors. And in case reservation, collation, or provision is by the court of Rome made of any archbishopric, bishopric, dignity, or other benefice whatsoever, to the disturbance of the elections, collations, or presentations aforesaid, [it is ordained] that, at the very time of the vacancies when such reservations, collations, or provisions should take effect, our lord the king and his heirs are to have and enjoy, for the time heing, the collations to

[1] The reference is to the Statute of Carlisle (1307) and the parliamentary petition against encroachments by the see of Rome: Stubbs, *Constitutional History*, II, 163.

archbishoprics, bishoprics, and other elective dignities that are under his advowry, just as his ancestors had them before free election was granted. . . .[2]

(French) *Statutes of the Realm*, I, 317 f.

Ordinance and Statute of Praemunire (1353)[3]

S&M, pp. 227–28 (No. 62G).

Our lord the king, with the assent and by the prayer of the lords and commons of his kingdom of England, in his great council[4] held at Westminster on Monday next after the feast of St. Matthew the Apostle, in the twenty-seventh year of his reign—that is to say in England; in France the fourteenth—for the improvement of his said kingdom and for the maintenance of its laws and usages, has ordained and established the measures hereinunder written:—

First, whereas our lord the king has been shown by the clamorous and grievous complaints of his lords and commons aforesaid how numerous persons have been and are being taken out of the kingdom to respond in cases of which the cognizance pertains to the court of our lord the king; and also how the judgments rendered in the same court are being impeached in the court of another, to the prejudice and disherison of our lord the king and of his crown and of all the people of his said kingdom, and to the undoing and annulment of the common law of the same kingdom at all times customary: therefore, after good deliberation held with the lords and others of the said council, it is granted and agreed by our said lord the king and by the lords and commons aforesaid that all persons of the king's allegiance, of whatever condition they may be who take any one out of the kingdom in a plea of which the cognizance pertains to the king's court or in matters regarding which judgments have been rendered in the king's court, or who bring suit in the court of another to undo or impede the judgments rendered in the king's court, shall be given a day . . . [on which] to appear before the king and his council, or in his chancery, or before the king's justices in their courts, either the one bench or the other or before other justices of the king who may be deputed for the purpose, there to answer to the king in proper person regarding the contempt involved in such action. And if they do not come in proper person on the said day to stand trial, let them, their procurators, attorneys, executors, notaries, and supporters, from this day forth be put outside the king's protection, and let their lands, goods, and chattels be forfeit to the king, and let their bodies, wherever they may be found, be taken and imprisoned and redeemed at the king's pleasure. . . .

(French) *Ibid.*, I, 329.

Second Statute of Praemunire (1393)[5]

S&M, p. 246 (No. 64F)

. . . Wherefore our said lord the king, by the assent aforesaid and at the prayer of his said commons, has ordained and established that, if any one purchases or pursues, or causes to be purchased or pursued, in the court of Rome or elsewhere, any such translations,[6] processes, sentences of excommunication, bulls, instruments, or anything else touching our lord the king that is inimical to him, his crown, his regality, or his aforesaid kingdom, as aforesaid, or if any one brings them into the kingdom, receives them, or thereof makes notification or any other execution, either within the said kingdom or outside it; such persons, their notaries, procurators, partisans, supporters, abettors, and counsellors are to be put outside the protection of our said lord the king, and their lands, tenements, goods, and chattels are to be forfeit to our lord the king. And [it is

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[2] Similar enactment is made with regard to papal provision in religious houses; other lay patrons besides the king are given the same kind of protection, and means of enforcement is prescribed.

[3] Technically, this ordinance became a statute when it was confirmed by the parliament of the ensuing year; cf. [S&M, no. 62H]. For the name, see no. 64F; for interpretation, see W. T. Waugh, in the *English Historical Review*, XXXVII, 173 f., and E. B. Graves, in *Anniversary Essays by Students of C. H. Haskins*, pp. 57 f.

[4] Cf. nos. 60B, 62H (last paragraph).

[5] The extremely long preamble is omitted.

[6] Removals of ecclesiastics from one office to another.

ordained] that, if they can be found, they are to be bodily attached and taken before the king and his council, there to respond in the cases aforesaid, or that process shall be brought against them by *praemunire facias*[7]; in the manner provided by other statutes concerning provisors and other men who, in derogation of our lord the king's regality, bring suit in the court of another.

(French) *Ibid*., II, 85 f.

STATUTE DE HERETICO COMBURENDO

[See above, Section 6C]

ECCLESIASTICAL APPEALS ACT

[See above, Section 8A]

[7] The special writ after which the statute came to be named; cf. no. 62G.

Donahue, "Roman Canon Law in the Medieval English Church"

Mich. L. Rev. 72 (1974) 647–79, 699–708 [many footnotes omitted]

I. INTRODUCTION

THE Right Reverend William Stubbs, D.D. (1825–1901), was the Anglican Bishop of Oxford, sometime Regius Professor of Modern History at Oxford, and a scholar of considerable repute. His *Constitutional History of England* was, until quite recently, the standard work in the field, and his editions of texts for the Rolls Series leave no doubt that he spent long hours with basic source material. Frederic William Maitland, M.A. (1850–1906), was an agnostic, the Downing Professor of the Laws of England at Cambridge, and a scholar whose reputation during his life was perhaps not so wide as Stubbs' but whose work commanded the instant respect of those who knew it. Maitland's *History of English Law Before the Time of Edward I* is still, in many ways, the standard work in the field, and his editions of texts for the Selden Society leave no doubt that he, too, was a man who knew the basic source naterial. Believing churchman vs. agnostic lawyer, constitutional and ecclesiastical historian vs. legal and constitutional historian, editor of chronicles vs. editor of legal documents, professor at Oxford vs. professor at Cambridge—what more fitting pair to debate the question of the authority of the "Roman canon law" in medieval England?

The best known statement of Stubbs' position on this question may be found in the Report of the Ecclesiastical Courts Commissioners, published in 1883. The text of the Report, subscribed to if not written by Stubbs, states that "the canon law of Rome, though always regarded as of great authority in England, was not held to be binding on the courts." From the context of the sentence, it is quite clear that the Commissioners thought that neither the lay nor the ecclesiastical courts felt bound by "the canon law of Rome." Stubbs' Historical Appendix to the Commission's Report expands on this theme. According to this appendix, the sources of law for the English church courts up to the time of the Reformation were three. First, was "the canon law of Rome," that is, Gratian's *Decretum*,[1] the *Decretals* of Gregory IX,[2] the *Sext* of Boniface VIII,[3] the *Clementines*,[4] and the *Extravagants*.[5] According to Stubbs, "a knowledge of these was

[1] This is the first book of the *Corpus Juris Canonici*. It was composed circa 1140 by the monk Gratian of Bologna. The book is a compilation of canonic materials, canons of general and provincial councils, papal letters, and excerpts from theological writings, from the entire range of sources known in Gratian's time, arranged systematically, with Gratian's interspersed commentary. *See generally* A. VAN HOVE, PROLEGOMENA IN CODICEM JURIS CANONICI §§ 343–51 (2d ed. 1945).

[2] This is the second book of the *Corpus Juris Canonici* and is principally a collection of papal decretal letters dating between 1140 and 1234. The book was compiled by the Dominican, Raymond of Peñafort, and promulgated by the pope, Gregory IX, in 1234. *See generally id*. §§ 362–65.

[3] This is the third book of the *Corpus Juris Canonici* and is a collection of decretal letters and conciliar legislation dating between 1234 and the end of the thirteenth century, promulgated by Boniface VIII in 1298. *See generally id*. §§ 368–70.

[4] This is the fourth book of the *Corpus Juris Canonici*, a collection principally ot canons promulgated by Clement V in the Council of Vienne (1311–1312). The *Clementines* were promulgated by Clement's successor, John XXII, in 1311. *See generally id*. §§ 371–72.

the scientific equipment of the ecclesiastical jurist, but the texts were not authoritative." Second was "the civil law of Rome," which, "from the reign of Stephen [mid-twelfth century] onwards, was refused any recognition except as a scientific authority in England." Third was "the provincial law of the Church of England contained in the constitutions of the archbishops from Langton downwards and the canons passed in the legatine councils under Otho and Othobon. The latter, which might possibly be treated as in themselves wanting the sanction of the national church, were ratified in councils held by Peckham." In *Seventeen Lectures* Stubbs develops the theme of ratification and suggests that the canon law of Rome was authoritative only if it had been ratified in national or provincial church councils.

In a series of witty articles, which were published in book form seventy-five years ago last year, Maitland launched a broadside against Stubbs' position. The first three articles are each devoted to a different facet of Maitland's argument, but perhaps the best summary of his position is found in the first article, in which he answers the Commissioners' statement that the canon law of Rome was regarded as of great, but not binding, authority: "In all probability, large portions (to say the least) of the 'canon law of Rome' were regarded by the courts Christian in this country as absolutely binding statute law. . . . Each of them [the *Decretals*, *Sext*, and *Clementines*] was a statute book deriving its force from the pope who published it, and who, being pope, was competent to ordain binding statutes for the catholic church and every part thereof, at all events within those spacious limits that were set even to papal power by the *ius divinum* and *ius naturale*."

Maitland adduces three principal bodies of evidence to support his view. First, there is William Lyndwood's *Provinciale*, a collection of English ecclesiastical legislation with elaborate glosses that was completed in 1430. Lyndwood was perhaps the most distinguished of all English medieval canonists, the Official (chief judge) of the Court of Canterbury and, later, bishop of St. David's. The book contains numerous statements of the binding authority of the papal law collections; indeed, one must assume the binding authority of the papal law collections to make sense of the book, for what it contains can only be regarded as a set of "bye-laws," as Maitland called them, with vast gaps, particularly in the important area of marriage, that must be filled in from papal sources. Second, there is the system by which the pope delegated the authority to hear cases brought before him to judges in the area in which the case originated. The judge delegate system is described by William of Drogheda, an Anglo-Irish canonist of the thirteenth century. Drogheda's book assumes that the most important ecclesiastical cases will be heard before judges delegate, and recent research seems to confirm that this assumption is correct for Drogheda's time. The pope not only authorized judges delegate to hear the cases but also instructed them as to the law that they were to apply. These instructions, a remarkably large number of which are of English provenance, constitute a great part of the entries in the papal law collections. Third, there are the various medieval English "church-state" controversies, of which the Becket affair and the papal provision controversy are perhaps the most familiar. During these controversies the English church maintained—stoutly in the case of Becket, and less stoutly but still maintained in the case of papal provisions—the position of the canon law of Rome against the royal assertion of native English law and custom. Lyndwood's book, the judge delegate system, and the positions that the church took in opposition to the king are matters of fact. To the extent that Stubbs ignored them, he gave a disorted picture of what was actually going on.

It is fair to say that the seventy-five years since the publication of *Roman Canon Law in the Church of England* have seen the general acceptance of the Maitland view. The one serious attempt to restore Stubbs' view is generally regarded as a failure, and Stubbs himself, in later editions of *Seventeen Lectures*, published what might be regarded as a retraction of his position. Perhaps the best measure of Maitland's success is the fact that the report of the Anglican Archbishops' Commission on Canon Law, the work of a body that

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[5] These are the last two books of the *Corpus Juris Canonici* and comprise the *Extravagants of John XXII* and the *Common Extravagants*. The *Extravagants of John XXII* consist of decretals of that pope. The *Common Extravagants* consists pnncipally of fourteenth and fifteenth century decretal letters. Neither collection was officially promulgated in the Middle Ages. *See generally id.* §§ 373–75.

certainly cannot be accused of extreme papist views, specifically rejects the Ecclesiastical Court Commissioners' Report and adheres to the views of Maitland.

Despite this general acceptance, Maitland's views have recently been subject to some attempts at revision, and there seems to be emerging what we might call a "yes-but" school of thought on the matter: Yes, Maitland was basically right and Stubbs basically wrong, but . . . .

In the case of Charles Duggan the "but" is that Maitland—and, even more, Z. N. Brooke—were wrong in thinking that the large percentage of decretals addressed to England found in the *Decretals* of Gregory IX gives any indication that English bishops were peculiarly prone to asking questions of the papacy. The large percentage of English decretals, as Duggan's study shows, can be accounted for by the fact that many of the twelfth-century decretal collections on which the Decretals were ultimately based were of English provenance. Now, the fact that English bishops had such collections made may indicate a peculiar devotion to papal law, but we certainly have no evidence from which to assume that English bishops received a disproportionate number of decretals.

In the case of J. W. Gray the "but" is more serious. Maitland, says Gray, may be right as a matter of legal theory, but in practice the dominance of papal law was subject to two major qualifications: the English bishops' systematic nonenforcement of some of the papal law and the bishops' refusal to press specifically papal *gravamina* before the king.[6]

Finally, Dean E. W. Kemp, in his Litchfield lectures of a few years ago, suggests that Maitland's view of the *Decretals*, *Sext*, and *Clementines* as "absolutely binding statute law" must be modified in light of the fact that a large portion of these books is devoted to reporting papal decisions in specific cases. Thus, the papal law books may more fittingly be analogized to collections of cases than to collections of statutes. Since case law is more malleable than statute law, Maitland must be regarded as having overstated his position. Further, Dean Kemp points out, no discussion of the authoritative nature of the canon law in England is complete if one ignores the fact that canon law specifically recognizes custom as a source of law and recognizes that at times custom may override specific law to the contrary.

We can go even further than the "yes, but" school. Some of Stubbs' most questionable statements, if slightly recast, point to issues that are still unresolved. For example, that the papal collections were not authoritative in the English ecclesiastical courts cannot be maintained, but precisely how they were authoritative may still be regarded as an open question. While it may be somewhat anachronistic to call the papal collections, as Dean Kemp does, "leading cases in canon law," it is positively misleading to call then statute books, in the same sense that the *Internal Revenue Code* is a statute or even that a modern civil code, such as the French *Code Civil* or the *Codex Juris Canonici* of the Roman Catholic Church, is a statute book. Again, it cannot be maintained that it was necessary that papal law be ratified by national or provincial councils for it to be binding on the English Church. On the other hand, canonic writers of the period generally held that a law had to have been promulgated before it was binding, and promulgation by a provincial council was a traditional and accepted method of giving a canon law binding force. Further, there was a respectable body of medieval canonic opinion that held that at least some of the papal methodi of promulgation that did not involve national councils were of questionable validity.

Thus, there is some doubt whether Maitland said the last word on the authoritative nature of the Roman canon law in medieval England. That doubt suggests that the time may have come for a re-examination of the question. Since Maitland wrote, considerably more evidence has come to light. In particular, scholars have finally gotten around to examining a source that Maitland himself suggested was crucial to the solution

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[6] Gray, *Canon Law in England: Some Reflections on the Stubbs-Maitland Controversy*, in 3 STUDIES IN CHURCH HISTORY 48 (G. Cuming ed. 1966). *Gravamina* were the formal grievances that the English church presented to the king. Records of many of these *gravamina* survive, together with, in some cases, the king's reply, and they constitute important evidence for our knowledge of English medieval "church-state" relations on a political level. Exclusive reliance on these records is, however, dangerous. They frequently contain irreconcilable statements of principle, and they do not give us a clear view of how these conflicts were resolved in practice. . . .

of the problem—the records of the English medieval ecclesiastical courts themselves. These records are important because it is only through them that we can find out whether and how the theory that we find in Lyndwood was applied in practice, and it is only through them that we can confirm or refute the suggestion Maitland made on the basis of Drogheda; that all significant questions of canon law were resolved by papal rescript. Further, these records can give another dimension to our understanding of how the king's and the church's seemingly irreconcilable statements of jurisdictional principle were resolved in practice.

Although the records of the ecclesiastical courts are not the uncharted sea that they were in Maitland's day, few of the many surviving records have been published; many have not been carefully examined in manuscript; and many, indeed, still need to be sorted and calendared. A sufficient amount of work has been done with these records, however, that segments of them can be examined for the light they shed on the Stubbs-Maitland debate. Any general conclusions, of course, will only be valid to the extent that they prove to be true of the records that cannot be so examined at this time. But the time seems ripe for making an initial examination and drawing some tentative conclusions, subject to revision in the light of new evidence. The succeeding parts of this essay will be devoted to those tasks.

Before we get to that, however, let us try to define more carefully the purpose and scope of the inquiry. The question of how binding the authority of the Roman canon law was in medieval England was an important one for Stubbs because he wanted to use the results of his inquiry to support his position in the ecclesiological controversies of his day. If he could demonstrate the independence of the English church from Rome prior to the Reformation, he could use that independence to counteract the arguments of the "Romish" churchmen of his time. If he could demonstrate an identity of position of the medieval English church and the medieval English kings, he could use that identity to argue, at least on historical grounds, against disestablishment of the Anglican Church.

While the results of our inquiry may still have some relevance for the ecclesiological debates of our own time, modern scholarship has seen an importance in the question beyond the polemical purposes to which its answer might be put. The ecclesiastical historian wants to understand more fully the interrelationship between the papacy, the state, and the local churches in the Middle Ages. This understanding may, depending on his philosophy of history, be important to him simply for its intrinsic interest, or to help him understand how we have gotten to where we are, or because a knowledge of the true nature of these relationships in the past, although they cannot be recreated, may help him or others to shape similar relations in the future.

For us as legal historians or as lawyers, on the other hand, the purpose of the inquiry is different. An inquiry into the binding nature of the canon law in medieval England may help us to explore two separate groups of questions. First, is it possible for two different legal systems—canon law and common law—to operate simultaneously in the same geographic area, particularly when those two legal systems make overlapping jurisdictional claims? Since the king had an army in England and the pope did not, wouldn't all such conflicts be resolved in favor of the king, and if this were the case, in what sense could papal law be said to be "binding"? How would a court behave if it were subject to a theoretically binding law emanating from the Court of Rome when there was a competing law, backed by secular force, emanating from the Court of Westminster? More generally, how did these three sets of legal institutions—the papal courts, the royal courts, and the local ecclesiastical courts—relate to each other?

Second, putting to one side the potential institutional conflicts, to what extent is any body of law "binding" on a judge called upon to decide a given case? To what extent and in what way does a judge use law to decide a case? Specifically, how were the papal law books used in the English courts Christian?

With these two broad sets of questions in mind, we can further subdivide the inquiry. In Part II we shall examine, in the light of the records of the Consistory Court of York from the years 1300–1399, two sets of institutional relationships—that between the English church courts and the king's courts and that between the English church courts and the papal court—and we shall also examine the sources of the law applied in the English church courts. In Part III we shall turn to the question of how the papal law was applied by

examining some "briefs" that survive from the Canterbury ecclesiastical courts in the thirteenth century. In Part IV we shall essay some tentative conclusions.

II. THE YORK CONSISTORY COURT, 1300–1399

One way of getting a feel for what the records of the ecclesiastical courts have to offer is to look at the work of one court over an extended period of time. For this purpose, let us look at the Consistory Court of York in the fourteenth century. Two reasons prompt this selection: the importance of the court and the number and richness of its surviving records. The Archbishop of York not only had jurisdiction over his own large diocese but also had appellate jurisdiction over the suffragan dioceses of Durham and Carlisle.[7] The Consistory Court of York, which exercised a large part of the Archbishop's "civil" jurisdiction, heard both first instance cases from within the York diocese and appeals from inferior courts of both the diocese and the larger province.[8] Since almost all the records of the Court of Arches, the appellate court of the Archbishop of Canterbury, have been lost, the York court's records are the only records that survive in any quantity from a medieval English provincial church court. Further, the records of the York court for the fourteenth century are not only numerous but extraordinarily rich. There exist some 263 sets of cause papers, documents actually used in litigation. Nothing comparable survives from any other church court of this period. There are also some fragments of books of acta, journals of the court's daily business, from the years 1370–1375.

Because some cases are divided among two or more sets of cause papers, the 263 sets of cause papers actually represent some 232 cases, bearing dates from 1301 to 1399. We have reason to believe that the court handled roughly 50–100 cases a year, so that the total number of cases heard over the century was probably in the range of 5–10,000. Thus, cause papers survive from two to four per cent of the cases heard in this period. There is also evidence that the process by which these cases, rather than others, have survived is random. If this is correct, then the surviving cause papers represent a statistically valid random sample of cases heard in the York Consistory Court during the fourteenth century.

Table I lists the number of cases in the cause papers by decade and type. To summarize, marriage cases (including both actions for restoration of conjugal rights and for divorce) account for about forty per cent of the total. Cases involving ecclesiastical finances, including cases concerning the right to the income of a parish church or other ecclesiastical office (benefice), and litigation about church taxes (tithes), about a portion of the income of a benefice (pension), or about miscellaneous moneys owing or usually paid (other financial), represent about thirty per cent. The remaining thirty per cent are divided roughly as follows: cases concerning wills (testamentary), nine per cent; defamation, six per cent; breach of faith, five per cent; ecclesiastical jurisdiction, four per cent. The remaining four per cent represents a miscellaneous group of cases, including five appeal cases, the underlying substance of which is unclear, four cases involving the

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[7] . . . For the reader who is unfamiliar with medieval ecclesiastical jurisdiction, a brief and simplified introduction may be in order. The smallest unit of jurisdiction was the *parish*. Parishes were grouped into *deaneries*, and deaneries into *archdeaconries*, the smallest unit in which one normally finds a regularly sitting court, presided over by the archdeacon's official. Archdeaconries were grouped in dioceses, headed by a bishop or an archbishop. Each diocese had at least one consistory court presided over by the bishop's or archbishop's official. The bishop or archbishop might also have had a personal court, frequently called the *court of audience*.

Provinces were groupings of dioceses headed by an archbishop and containing his diocese and one or more *suffragan dioceses*, each headed by a bishop. Appeals from the suffragan dioceses could be heard in the archbishop's consistory court, as at York, or in a separate court established for the purpose, such as the only other medieval English povincial church court, the Court of Arches in the Canterbury province. *See generally* 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 598–603 (7th ed. rev. 1956); F. MAKOWER, THE CONSTITUTIONAL HISTORY OF THE CHURCH OF ENGLAND §§ 33–44, 59–66 (1895).

[8] It seems that any litigant could, if he chose, bring his case before the York Consistory, if the *reus* (defendant) resided within the York diocese. Because of the great distances within the York diocese, however, less important cases were frequently begun before an official of one of the seven archdeaconries: York, East Riding, West Riding, Richmond, or Nottingham. Appeals lay to the York Consistory from the archdeacons' courts and also from the various peculiars (special jurisdictions within the diocese, such as the peculiar of the collegiate church of Beverley or that of the Dean and Chapter of York Minster (Cathedral)). Appeals, but apparently not first instance cases, could be brought to York from the consistory courts of the bishops of Durham and Carlisle. . . .

finding of a chaplain for a church, and one each involving assault, trespass to land, breach of a guardian's duties, violation of a sequestration, and procedural matters (the underlying substance being unclear).

TABLE I
YORK CASES BY DECADE AND TYPE

	1300–9	1310–9	1320–9	1330–9	1340–9	1350–9	1360–9	1370–9	1380–9	1390–9	TOTAL
Marriage	3	1	5	7	6	6	13	12	10	27	89
Tithe		1		1	5	3	4	1	4	12	31
Benefice	2	2	2	4	4	5	4	1	5		29
Testamentary			2	1		2	2	3	5	7	22
Defamation				1	1	1	3		1	6	14
Breach of faith							1		2	8	11
Jurisdiction		1	1	1		2	2	1		2	10
Appeal									2	3	5
Pension				1			2		2		5
Other Financial	1						3			4	7
Miscellaneous				1	1	1		1	1	3	9
TOTAL	6	5	10	17	17	20	34	19	32	72	232

From the point of view of the relationship of the king to the English church, a most striking characteristic of the York court's jurisdiction is the number of cases that the court heard that "ought" to have been in the king's courts. In fact, there are "jurisdictional problems" with over forty per cent of the cases that the court was hearing—with every category other than the marriage, testamentary, and jurisdiction cases. For example, an examination of the texts of the various writs of prohibition that might issue from the Chancery[9] would lead one to the conclusion that the king's courts claimed jurisdiction of ordinary cases of breach of contract to the exclusion of the ecclesiastical courts, and there is evidence that the king's judges thought that this was the law. Yet we find a number of cases before the York court in which disputes about ordinary commercial contracts were heard under the rubric of breach of faith (*laesio fidei*). For example, *Lawrence Litster c. Lady Katherine, wife of Sir John Ward, Kt.*, involves a suit by a York dyer for 76s.8d., which he claims the lady agreed to pay him for dying a batch of wool.

Not only did the York court hear breach of contract cases, but it also served as a kind of registry for recording contracts. The *acta* for the period from January to July 1371 contain eleven entries of promises to pay, for a variety of reasons, sums ranging from 3s.2d. to £40. This contract jurisdiction is not peculiar to York. The fourteenth- and fifteenth-century act books of the Canterbury Consistory Court reveal thousands of breach of contract cases, and similar cases may be found in many surviving church court records of the period.

The breach of faith cases are not the only ones that we would be surprised to find in a church court. From at least the time of the Becket controversy (third quarter of the twelfth century) the English king had claimed jurisdiction over disputes involving advowsons.[10] Papal law, on the other hand, claimed jurisdiction over such disputes because of the spiritual nature of the advowson. Attempts by the church courts to hear disputes about advowsons, we learn from those who have examined the plea rolls, were regularly prohibited. The York court did not claim to hear advowson cases as such, but it regularly heard cases involving the right to

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[9] For example, Writ No. 121 in a register of writs of the early fourteenth century reads, in pertinent part:

> We prohibit you [the official of the bishop of Durham] from holding in Court Christian a plea concerning chattels or debts whereof A. complains that B. is driving him into a plea before you in Court Christian unless those chattels or debts relate to a testament or a marriage, because pleas concerning chattels and debt which do not relate to a testament or a marriage pertain to our crown and dignity.

EARLY REGISTERS OF WRITS 137 (Selden Society No. 87, E. de Hass & G. Hall ed. 1970) (register can be found in Bodleian Library, Oxford, MS. Rawlinson C292, ff. 9a–104a). For York examples, see CPE. 141; CP.E. 72. . . .

[10] An advowson is a species of incorporeal property that gives the patron (the owner of the advowson) the right to present a clerk (a generic term for an ecclesiastic who had taken even minor orders) to some vacant benefice (an ecclesiastical office, like that of parish priest, which carried with it an income). Normally, the patron would present his candidate to the bishop; the bishop would determine if the candidate were qualified; and, if the candidate were found qualified, the bishop would institute the candidate to the benefice. . . .

possession of a given church. Since the possessor normally had some kind of claim of right, these benefice cases frequently involved an underlying dispute over the patronage.

Considerably more work needs to be done with these fourteenth-century benefice cases before we can be sure precisely what is at stake in each of them. A few statements, however, can be made at this time: (1) None of the cases involves a suit by one patron against another. (2) Papal provisors[11] would bring their cases to the ecclesiastical oourts (and ultimately to Rome) when the validity of the papal provision was at stake. (3) Even a presentee of the king would bring his suit to the ecclesiastical courts when the issue was whether the benefice to which he was presented was in fact vacant, or when he was disturbed in the possession of his living by threats of excommunication by the prior of a neighboring religious house. (4) Many of the cases involve presentation of a vicar and not of a rector.[12] The right to present a vicar was normally held by a monastery. This fact, coupled with the relative newness of the institution and the confused nature of the law surrounding it, may have raised some doubt whether the king's law applied and may account for the presence of these cases in ecclesiastical courts.

It was fairly well established as a matter of royal law that a dispute over tithes that involved one quarter or more of the income of the living (the benefice to which the tithes were attached) was cognizable in the king's courts, because the decision in such a case would affect the value of the advowson. This rule appears to have been ignored by the York Consistory Court, which apparently relied on the papal law that declared all tithes to be cognizable by the ecclesiastical courts because of their spiritual nature. Many of the tithe cases, of course, involve sums that must have been less than one fourth of the value of the living, other cases, however, seem to involve large sums, sums that must have been greater than one fourth of the value of the living. The court heard both types of cases and proceeded in the same way regardless of the amount involved. There is no evidence in these or in any other cases in the fourteenth-century papers that the court was concerned about whether it exceeded its junsdictional boundaries, as those boundaries were viewed by the king's law, and there is no record in any of these cases, even in the ones that were prohibited, of counsel's attempting to argue that the court was exceeding its royally defined jurisdiction or even of counsel's suggesting that a prohibition might lie.

The contract, benefice, and tithe cases do not exhaust the types of cases that, from the point of view of the king's law, are surprising to find in an ecclesiastical court. The trespass to land case (brought by a clerk against a layman) is certainly an odd one to find in an ecclesiastical court. Similarly, we might wonder about the assault case, although it involved assault on a prioress and resulted, therefore, in the defendants' being subjected to the ecclesiastical sanction of excommunication. We might even wonder about the five pension cases (all involving churchmen) in the light of the text of the writ prohibiting one of them. In many of these cases it would seem that the court's claim to jurisdiction rested on the canon law's notion that cases involving churchmen belonged before the ecclesiastical courts regardless of the subject matter of the suit.

Further, even the cases that we might expect to find in ecclesiastical courts frequently involve holdings that would certainly have seemed odd to the judges of the king's courts. *Abbot & Convent of St. Alban's c. Peter Flemyng & Johanna, daughter of Mariota*, is perhaps the most striking example. Walter Flemyng was a York priest and apparently a man of some substance. He made a will leaving his property to his niece, Johanna, his sister's daughter, and to one Peter Flemyng, who may have been his brother or his nephew—the relationship is not stated. When the will was duly probated, the Abbot and Convent appeared before the York court and offered a competing document, a subsequent will of Walter's that had been probated before the official of the bishop of Avignon. Apparently Walter had spent his last days at the papal court in Avignon. There he had duly executed a will with a decidedly continental flavor in that he made one Robert of Worms his universal heir and devised all his land to St. Alban's. After failing to show that the second will

[11] That is, clerks who had obtained a claim to the benefice from the pope by papal provision, a process that bypassed the presentation process.

[12] . . . On the appropriation of benefices by monasteries and the resulting distinction between rectors and vicars of parish churches, see F. MAKOWER, *supra* note 15, at 329–32; R. HARTRIDGE, A HISTORY OF VICARAGES IN THE MIDDLE AGES (1930).

was formally defective, Peter and Johanna's proctor filed a brief in which he patiently explained that, with some exceptions not applicable to the case, English land could not be devised without leave of the king. He might have added, although he did not, that conveyances of land to monasteries were void under the Statute of Mortmain. The court brushed his arguments aside and rendered judgment for the monastery. One would have thought that Peter and Johanna would then have brought an action in the king's courts. They seem not to have, however; instead, they appealed to the pope, and at this point the case disappears from view.

The *Flemyng* case leaves many tantalizing questions unanswered. If either Peter or Johanna were Walter's heir at law, why did the heir not bring an Assize of Mort d'Ancestor or writ of entry against the monastery, which, they alleged, had seized the rents of the land? If neither of them were Walter's heir, why did they argue that a will of English land was void? This argument, if it had been accepted, would have undercut their claim under the prior will just as much as it would have undercut the monastery's. Nonetheless, the case provides a fascinating insight into the independence of the church courts from the rules of the king's law and also indicates that at least some litigants preferred to pursue their cases within the church system even when they ought not have been there. Once the litigants got into the church courts, they discovered there a system prepared to deal with their cases according to its own rules. The fact that church courts decided cases over which the kings law claimed jurisdiction and decided issues in cases where it concededly had jurisdiction in a way that undercut the king's law is of some relevance to the Stubbs-Maitland debate. The papal law, at most times, claimed jurisdiction over most of these matters, despite what the secular law said, and the fact that the York court heard such cases indicates that this claim was more than a theoretical one. This finding, however, is not a new one. No recent scholarship suggests that the English church simply acceded to the royal claims of jurisdiction, and the accepted view seems to be that, at least in the fourteenth century, the king did not attempt to force cases in the disputed jurisdictional area out of the church courts and into his own if the parties to the case did not object to having the case proceed in the church courts. If either of the parties wished the case removed to the king's courts, however, that party could obtain a writ of prohibition, thereby stopping the church court proceedings and effectively demonstrating the superiority of the king's law. In this way, as one recent writer has put it, the king kept a steady, gentle pressure on the church courts to bring them into line.

The York records contain evidence both to support and to undercut this view. There are eight cases in the sample that involve writs of prohibition. There is no evidence that any of the writs was disobeyed. Two of the cases are in the *acta*, but not in the cause papers. The acta entries indicate that these cases were prohibited, but we have no idea of the nature of the underlying suit. Of the cases in the cause papers involving prohibitions, one is a benefice case in which two writs of prohibition are found in documents submitted to the court. Why the party chose to submit these documents is unclear, since they do not, at least on their face, prohibit the hearing of the case currently before the court. They may be there as a warning to the court not to proceed with a certain aspect of the case or they may be there simply to explain why the underlying issue in the case had not previously been clarified. The remaining five are identifiable cases that are directly prohibited—two pension, one defamation, one tithe, and one involving a tax imposed on a chantry chapel.[13]

The fact that the prohibitions all seem to have been obeyed and the fact that with but one exception[14] they all seem to have been directed toward preventing the hearing of cases that ought not, from the king's point of view, have been in the York court in the first place lend support to the steady, gentle pressure view. On the other hand, the weight of the evidence seems to point in a quite different direction. There are twenty-nine benefice cases over the century in only one of which is there even a suggestion of prohibition, five pension cases and only one prohibited, fourteen defamation cases and only one prohibited, eleven contract cases and

[13] Robert Lord c. Executors of Bishop of Lincoln, CP.E. 172 (1365) (form of prohibition indeterminable).

[14] Robert Lord c. Executors of Bishop of Lincoln, CP.E. 172 (1365). See note 17 *supra*. I can think of no compelling reason why this case should not be in an ecclesiastical court. It seems to involve a challenge to the bishop's authority to impose a tax on the chapel. Perhaps the theory of the prohibition is that the tax affected the value of the income of the chantry chaplain and hence the value of the advowson.

only one prohibited, thirty-one tithe cases (of which an indefinite number violate the one-fourth-of-the-revenues rule) and, again, only one prohibited. This is not a steady, gentle pressure molding the church courts to the king's liking but an occasional scoop of water drawn out of the incoming tide.

However many prohibitions were being issued from Chancery during this period (and a tentative examination of the public records for this period would indicate that the number was quite substantial), the small number of prohibitions received at York in proportion to the number of cases being heard in violation of the king's junsdictional rules could hardly have given the court the impression that it was being subjected to much pressure to remove such cases from its docket. Rather, the relatively small number of prohibitions received, combined with some of the details of the system's operation, must have made the system seem like an occasional, arbitrary, and not always effective interference with the court's exercise of its jurisdiction.[15] For example, the jurisdiction of the church courts in defamation cases was a matter of some controversy. In the thirteenth century questions had been raised as to whether the church courts should be hearing such cases at all. By the fourteenth century, the king's law conceded that the church courts could entertain defamation cases, at least in some circumstances. The composition between Edward II and the bishops known as *Articuli Cleri* specifically recognizes ecclesiastical jurisdiction in defamation cases so long as the church court confines itself to ecclesiastical sanctions.[16]

The reference to ecclesiastical sanctions in *Articuli Cleri* is probably intended to prevent the church courts from assessing money damages in defamation cases, although an earlier royal statement of church court jurisdiction, known as *Circumspecte Agatis*, allows the church courts to commute corporeal penances for money payments.[17] Further, there is a form of the prohibition writ (*de diffamatione*) that expressly forbids the church courts from entertaining defamation actions brought as a result of accusations made or evidence given in the royal courts. Thus, we might summarize broadly the king's courts' rule as follows: The church courts will be prohibited if they entertain defamation cases that might impede royal justice or if they attempt to assess damages for the defamation.

But if this were the theory on which the king's courts were proceeding, the one prohibition of a defamation case in the cause papers would have given the York court no inkling of it. In the York papers the prohibition writ appears to be simply mistaken, since it says nothing about defamation, the king's courts, or money damages but, rather, prohibits the court from dealing with the case because it involves lay chattels or debts (which it does not). Further, the writ was ineffective because it was received by the York court after the defendant in the case had been excommunicated. The court simply suspended proceedings and left the defendant to find a remedy from the king, if he could.

There is one bit of evidence that would indicate that royal pressure had some effect on the cases that the York court heard, but the source of that pressure was not the prohibition system. As Table 1 indicates, more than twice as many cases survive from the decade 1390–1399 as from any other decade; yet there are no benefice cases during this decade, although benefice cases make up thirteen per cent of the total. Now the chances of this happening just by the luck of the draw are about 1 in 1000. It is far more likely that the reason we see no benefice cases in our sample of this decade is that the number of such cases fell off drastically at this time. One possible explanation for this decline would be the passage of the so-called "Great Statute of Praemunire."[18] It has become widely accepted that this statute was directed, not so much

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[15] One might argue that the prohibition system was psychologically effective, even if it operated sporadically, because it interfered with the York court's pattern of orderly law enforcement. This might be called the "Chinese water torture" or the "waiting-for-the-other-shoe-to-fall" theory of prohibitions. The theory depends, however, on the premise that the York court viewed its role as one of law enforcement, and the evidence points in quite another direction. *See* text accompanying notes 26–28 *infra*.

[16] 10 Edw. 2, stat. 1, c. 4 (1316).

[17] The text of *Circumspecte Agatis* may be found in Flahiff, 6 MEDIAEVAL STUDIES 261, . . . , at 312–13 [above pp. 15–15]. The document may be dated in 1286. For an account of the events leading up to it, see *id*. at 302–09; for the problem of money damages, *see id*. at 291. *See also* Graves, *Circumspecte Agatis*, 43 ENGLISH HISTORICAL REV. 1 (1928).

[18] 16 Rich. 2. c. 5 (1393).

against the ecclesiastical courts in England, as against the papal court in Rome. Its repercussions, however, may have been felt at York.

The king's victory, if such it was, was short-lived. Benefice cases appear again in York in the fifteenth century, although a casual examination of the records indicates that they never again became quite the staple of the court's jurisdiction that they were in the first half of the fourteenth century. Nor does the praemunire statute seem to have had any effect on cases, other than benefice cases, that the York court should not, from the point of view of the king's law, have been hearing. The very decade that saw the disappearance of benefice cases also witnessed the largest number of contract cases, both absolutely and in proportion to other types of cases.

So far, the evidence of the York cases seems to support Maitland's view of the role of the Roman canon law in medieval England. We see a church court that exercised a broader jurisdiction than the king's law—at least the statements of it that we find in the text of the prohibition writs, in various statutory instruments like *Articuli Cleri*, and in judicial statements like those in the yearbooks concerning contract cases—would seem to have allowed. This jurisdiction rested, in large measure, on the Roman canon law's view of the appropriate role of the ecclesiastical courts. Indeed, Maitland might have been a bit surprised at how far the York court was able to go in the face of the more restrictive view that the king's law took of the role that it was supposed to play. Let us now look more closely at the second relationship we proposed to examine, that between the York court and the Court of Rome.[19]

The *acta* illustrate papal and royal interference operating in approximately the same way on the court. In *Prior & Convent of Ecclesfield c. William Fulmer, Vicar of Ecclesfield*, the Prior sues Fulmer about a tithe matter, and William is contumacious. The Prior introduces evidence *ex parte*, and the court is prepared to render judgment, when a priest named John of Lanercost appears and offers some papal letters that purport to excuse Fulmer's failure to appear. The judge states, and the *acta* are unusually full at this point, that he is "prepared humbly to obey apostolic mandates in all things." The next day, when Lanercost explains that he does not have authority to continue to represent Fulmer in the latter's absence, the judge says that he is prepared to do Fulmer the "complement of justice" should Fulmer or his proctor wish to continue the case and that he will not proceed without Fulmer because of the papal letters. By contrast, that in *Richard del See c. William de Hexham* states laconically: "A royal prohibition was published and therefore—"

The effect was the same; in both cases the proceedings ceased. But it is hard not to see in the difference between the unusually full explanation of the court's deference in *Ecclesfield* and the terse entry in *del See* a reflection of quite different attitudes to the two superior authorities.

Forty-one of the sets of cause papers contain at least a stated intention by one of the parties to appeal to the Court of Rome, and another three involve proceedings held after a matter had been delegated back to York by the pope. From the point of view of the binding quality of papal law these facts are important. Even if the York court was not applying papal law, litigants clearly could appeal to the Court of Rome where that law would be applied. Further, the mention of papal delegation calls to mind the fact that cases may be begun before the pope as a matter of first instance and that these may be heard before delegates in the way that Maitland describes in the Drogheda article.

On the other hand, contrary to what we would expect from reading Maitland, the York court was not simply a lower level court that passed all cases of any importance to the Court of Rome, or which all important litigants bypassed in order to begin their cases before the pope as a matter of first instance. We cannot, of course, tell how many cases began in Rome at a matter of first instance, but the York court was quite capable of calling litigants before it and providing them with a forum for resolving their differences.

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[19] "Court of Rome," *Curia Romana*, is a shorthand found in the documents to refer to a number of papal institutions to which appeal might be had or cases brought at first instance. The "Court of Rome," during most of the fourteenth century, in fact at Avignon, where the popes resided during the "Babylonian Captivity" of the papacy and where the pope to whom the English adhered resided during most of the Great Schism. *See generally* G. BARRACLOUGH, THE MEDIEVAL PAPACY 140–85.

However many cases began in Rome or were appealed to it, a number of significant cases began and, so far as we can tell, ended in the York court, and a number of others began elsewhere within tne province and, again so far as we can tell, ended in the York court.

Further, while there are mentions of papal judges delegate in the York records, the small number of such mentions lends support to the suggestion that others have made that this institution was on the decline in the fourteenth century. Part of this decline may be attributed to the fact that more cases were being heard by the Rota during this period. Part of the explanation may, however, lie in the fact that, at least at York, there was a relatively efficient disputes resolution mechanism that could decide cases to the satisfaction of the parties without the trouble and expense of a trip to the continent.

Not only did the York court play a significant role in disputes resolution institutionally independent of the Court of Rome, but it also played a significant role in cases that were being appealed to that court. Thirty-one of the forty-one appeals to Rome mentioned in the York records are tuitorial appeals, cases in which the appellant is seeking the protection (tuition) of the York court pending the appeal to Rome. Tuitorial appeal seems to have been an institution peculiar to the two English archdioceses. The references to it in the papal law books are problematic, and there is no full-scale treatment of it to be found in any of the standard medieval treatises. The granting of tuition, like the modern grant of a stay pending appeal, seems to have called for an exercise of some discretion. The extent of that discretion and precisely how the judge exercised it are questions that need further examination. Some of the cases seem to turn simply on whether the appellant had followed the proper canonic procedure in taking his appeal; other cases, however, seem to involve an examination into the merits of the appellant's case. Tuition definitely seems to have been worth fighting for, since almost all the tuitorial appeal cases contain elaborate and expensive records, many with extensive depositions. It is at least possible, then, that tuitorial appeal was a device by which the York court was filtering appeals to Rome.

Twenty of the thirty-one tuitorial appeals found among the York papers are in benefice cases, a far greater proportion than the proportion of benefice cases to the total number of cases in the sample, and these twenty cases represent more than two thirds of all the benefice cases found in the sample. These statistics seem to indicate that, however important the pope's jurisdiction as universal ordinary may have been in the fourteenth century, his power as the fountain of all benefices was clearly of first significance. Why, however, would the appellant in a benefice case be so anxious to obtain tuition? Clearly, appellants must have thought that they might incur something akin to irreparable injury if the situation were disturbed pending appeal.

Some help in solving this problem may be found in the somewhat analogous records of significavits. When a litigant remained excommunicate for forty days, the bishop could ask the Chancery to order the sheriff to seize the excommunicate and put him in jail until he made his peace with the Church. Numerous records of such significavits, as the process of requesting the order to seize was called, have survived. During the fourteenth century it became possible for the excommunicate who had appealed his excommunication to have the significavit quashed pending his appeal, a process that had an effect on the litigation like that of the granting of tuition—it protected the litigant for a time in order to allow him to perfect his appeal, if he could. Although some of the litigants who had the significavits against them quashed probably succeeded on appeal, we would expect that for many quashing would provide only a temporary respite. Many would lose their appeals; many more would probably never carry their appeals through. The interesting thing about the records of quashed significavits is that the quashing of the writ seems to have provided not a temporary, but a permanent respite: With but a few exceptions quashed significavits were not renewed. It stretches credulity to suggest that all these appellants either won on appeal or immediately capitulated when they lost their appeals or failed to perfect them. A supplementary reason must be found for the virtual absence of renewals of the writ. Medieval litigation was every bit as protracted as it is today and, because of the greater difficulties of travel and communication, even more time-consuming. The advantage lay on the side of the litigant who could stall the process, because his opponent might well run out of energy

or money, or both. Further, the litigant who could restore the status quo ante was in a far better position to bargain for a compromise than one who was faced with an adverse judgment.

These considerations apply with even more force to tuition in benefice cases than they do to quashed significavits. The litigant who applied for tuition in a benefice case was almost always the party who possessed the benefice. If he obtained tuition, time was on his side. Even if he failed to perfect his appeal, the other party had to reinstate the action. Further, the party with possession of the benefice had the income from the benefice to pay his litigation expenses and was in a strong position to bargain for a compromise. These would seem to be the reasons why tuition was sought, and, if they are the corect reasons, the grant or denial of tuitorial appeal by the York court may, as a practical matter, have been as important a step in the litigation process as the appeal to the Roman court on which the grant of tuition was based.

The appeal route from the York court to the Court of Rome was not, of course, the only contact between the York court and Roman canon law. There was, as well, the law itself as it was embodied in the papal law books and a multitude of commentaries. To what extent was this law being applied by the York court?

Because most of the cases heard by the York court were either abandoned or compromised and because those that did reach the sentence stage were decided without citation of authority, the law being applied by the court must be determined by inference from the pleadings and from the facts developed in the depositions. Nonetheless, there can be little doubt that, where papal law was directly relevant to the substantive issue of the case at hand, the York court regarded that law as binding and applied it to the case. For example, a careful examination of the twenty-one sets of marriage cause papers dating from the first half of the century reveals but two decisions the substance of which are not fully supported by Book IV of the *Decretals*, the relevant papal law book. Of the two exceptions, one involves a decision by an archdeacon's official who seems to have been a bit confused about the canonic age of consent. But, as Maitland warns us, in inferior courts you must expect inferior law, and the case was appealed to the York court. The second exception involves not a contradiction (at least on its face) of papal law, but an addition to it, the custom of abjuration *sub pena nubendi*.[20]

Apart from the marriage cases, we still find very few cases in which the court seems to be applying a substantive law contrary to papal law, but many cases turn on matters that the papal law either does not cover or covers in the most general of terms. For example, there is practically nothing in the papal law books on the topic of defamation; yet defamation cases make up roughly six per cent of our total. The court was basing its authority to hear these cases on a provincial constitution, as can be seen from the fact that the plaintiffs in such cases invariably ask that the court pronounce upon the defendant the sentence of major excommunication that was decreed by the Holy Synod of York against defamers. To the extent that the substantive law applied in these cases cannot be found in the constitution it seems to have been developed on a case-by-case basis by the court.

Other cases turn, not on local legislation, but on local custom. For example, in the trespass case the plaintiff specifically invokes the praiseworthy (a term of art apparently necessary for validity) custom of the York archdiocese that cemeteries belong to the church to which they are attached. Other cases involve both local legislation and custom in combination. For example, the pleadings in the tuitorial appeal cases sometimes invoke the praiseworthy statutes and customs of the Court of York regarding such appeals. Some cases involve customs so well engrained that they are not specifically invoked. The cases of abjuration sub pena nubendi may fall into this category, although there are provincial constitutions on the topic.

By and large, the validity of these local customs and ordinances is accepted without challenge. One specific challenge to an alleged custom is based, not on the fact that it is contrary to a specific papal law, but

[20] When a man and woman capable of marrying each other were found guilty of fornication, they were frequently required to exchange words of consent of matrimony in this form: "I take thee as husband (wife) if I have further carnal knowledge of thee." Under the prevailing marriage law such an exchange of consent automatically bacame a valid marriage if the condition were fulfilled. *See generally* Helmholz, *Abjuration Sub Pena Nubendi in the Church Courts in Medieval England*, 32 THE JURIST 80 (1972).

on the most general of policy grounds. The case is one in which the inhabitants of a village allege that the rector of a nearby church has customarily provided a chaplain to serve a chapel in the village. The custom alleged, the rector counters, is not "praise-worthy" but "damnable." The inhabitants of the area do not need a cbaplain, and if the rector were compelled to provide one, a diversion of funds that could be better put to other uses would result.

Closely related to the concept of custom is the concept of the possession of rights.[21] Many cases turn on this latter concept, frequently allied with an invocation of immemorial custom (prescription of rights). For example, the two most frequently litigated issues in the tithe cases are whether tithes are owing from somewhat specialized activities—such as coal mining or salmon fishing or dairy farming —and to whom the tithe from a tithable item was owed. The first issue is by and large conceded by papal law to be a matter of local custom. The second usually is a local matter, at least in the York cases, because of the nature of the issue: It usually involves the location of parish boundaries. The pleadings and depositions in tithe cases illustrate the interplay of the concepts of custom, and possession and prescription of rights in tithe litigation. The plaintiff alleges that the defendant has withheld or despoiled him of tithes, the right or quasi-right to which the plaintiff and his predecessors have peaceably possessed. The depositions, frequently with many witnesses, seek to elicit testimony on both sides of this proposition with, where it is relevant, further testimony on the location of parish boundaries. Similarly, in the jurisdiction cases, the litigated issue sometimes is not whether the official who has attempted to exercise his jurisdiction against the plaintiff has that jurisdiction as a matter of the common law of the Church or papal exemption, but whether the plaintiff has established a prescriptive right against the official to be free from the official's jurisdiction.

The pleadings in a pension case illustrate well the blending of the concepts of possession of quasi-rights and immemorial custom. The Prior and Convent of Blyth allege that Roger, the Rector of Elton, owes them an annual pension of 26s.8d.,

> by reasonable custom, properly prescriptive, peacefully and uninterruptedly observed for the entire time aforesaid [*sic*, "belowsaid" is probably meant], founded on just cause and of sufficient antiquity, and [paid] by the rectors of the said church of Elton who succeeded each other from 10, 20, 30, 40, 50, 60 years, and within, beyond and through these periods and from time and through time the contrary of which memory of these [things] does not exist. . . . [Further,] the said religious [the Prior and Convent] were in full, sufficient, canonic and peaceable possession of the [right] or quasi-right of receiving and having the aforesaid annual pension in the name of their aforesaid monastery, and actually received it and had it, and were accustomed to receive it and have it from each rector of the said church who was successively in that church, the Archbishops and Dean and Chapter of York . . . knowing, wanting to know and not contradicting but tolerating and approving both silently and expressly for each and every period aforesaid up to the tune of the above written nonpayment and spoliation . . . .

It should be emphasized that all of this is not contrary to papal law. Papal law specifically recognizes the validity of local legislation when that legislation is not contrary to the common law of the church; it recognizes the validity of custom supplementary to and in some instances contrary to the common law; and it authorizes possessors not only of things but also of rights or quasi-rights to bring possessory actions to recover those rights without having to prove title. The fact remains, however, tnat the existence of these general principles in the papal law boolks makes the remaining contents of those books irrelevant to the substantive decision in close to half the cases in our sample.

In summary, if we frame the question of the authority of the canon law in the English church courts in the terms in which Stubbs and Maitland chose to frame it, then Maitland was right; the papal law was binding. If, however, we regard "law," not as a series of general propositions to which judges give assent, but rather

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[21] This is the idea that one's exercise of a right will be protected in somewhat the same fashion that one's possession of a thing will be protected—without proof of title. For a discussion of this concept, see C. BRUNS, DAS RECHT DES BESITZES §§ 24–26 (1848); E. FINZI, IL POSSESSO DEI DIRITTI (1915).

as the set of rules by which they resolve actual cases, then Stubbs and Maitland were asking the wrong question. The question is not "Was papal law binding?" It is, in a great many cases, "Was it law?"

When we turn from substantive law to adjective law, the situation becomes even more confused. There is a great deal in the papal law books about procedure, and the system of procedure described in them is highly sophisticated, complex, and subject to numerous detailed rules. There is evidence, however, that the procedure had become too complicated to be useful, particularly in simple cases, by the end of the thirteenth century, and Clement V, in a bull of wide-ranging implications, gave general authorization for the courts to simplify the procedure in those cases that called for more "summary" treatment.

The procedure followed by the York court is clearly recognizable as canonic procedure. On the other hand, there is much in it that cannot be explained solely by reference to the papal law books. To what extent these deviations can be explained by legitimate local custom and the changes authorized by Clement V and to what extent they must be regarded as violations, conscious or unconscious, of papal law are questions that require further research.

III. HOW WAS THE PAPAL LAW USED?

The picture that we have drawn of the York court so far is one of an institution—and, if the York example proves valid for the whole, of a set of institutions—quite independent of both pope and king. There were, of course, institutional limits. The writs of prohibition that we find in the York cause papers seem to have been obeyed, and there was never any question that any party to a case had the right to appeal to the Court of Rome. The over-all impression remains, however, of an institution both stronger and more independent than a reading of Stubbs or Maitland would lead us to expect.

Stubbs' arguments lead us to expect to find that the medieval English church courts were strong institutions because the Roman canon law was not binding on them. The source of the strength, so we might infer, would lie in the fact that these courts were not closely identified with the pope but were dependent on the king. Maitland's arguments, on the other hand, would lead us to expect that the church courts were weak because the canon law was binding. They would be in conflict with the king because of their identification with the pope, and the king, so we might infer, would ultimately triumph because of his greater power. The evidence of the York court seems to suggest that the institution was strong, quite independent, and attractive to litigants, and that the canon law was binding. One reason for this seeming paradox may be that the binding quality of the canon law did not result in a close institutional identification between the local church courts and the papal court nor between the law that the church courts applied and papal law. Another possible reason, as we will suggest in the conclusion, may be that the function of the institution was not to enforce the law but to resolve disputes. But before we get to that we have to examine more closely just how the papal law bound the court.

We have also discovered that the sources of law for the York court were far more diverse than Maitland would lead us to suspect. Local legislation and local custom play considerably larger roles in actual litigation than Maitland, relying on Lyndwood, suggests that they did. On the other hand, there is little to suggest, as Stubbs would have us believe, that the York court felt that it could choose to ignore papal law in those situations to which it applied. The question remains: Was papal law "absolutely binding statute law," as Maitland calls it, or were the papal law books collections of cases, as Stubbs and Kemp prefer to call them?
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[The ensuing discussion, based on hoth the academic law and documents of practice, concludes that the distinction between "statute law" and "case law" is not helpful in this context.]

IV. TENTATIVE CONCLUSIONS

The Stubbs-Maitland debate and the ensuing scholarship suggest that the binding quality of papal law in England may be viewed in the light of three sets of variables: (l) the institutions in question, (2) the time in question, and (3) the type of case involved:[22]

(1) Stubbs, as Maitland points out, is guilty of failing to distinguish carefully between the position of the kings vis-a-vis the pope and that of the English church vis-a-vis the pope. Stubbs assumed that the position of the king and what he was able to enforce were the same thing as the position of the English church and what it consented to. The records of the church courts provide us little direct information about the king-pope relationship, but they do tell us something about the king-English church and English church-pope relationships.

So far as the relationship betureen the king and the English church is coocerned, the evidence indicates that the church courts were quite independent of the king's law, but this independence should not be exaggerated. The church courts depended on the king to bring physical force to bear in support of their jurisdiction and sanctions; they were subject to having cases being heard before them prohibited; and they aided the king's courts by making rulings about matters peculiarly within their own competence. Further, there is considerable evidence that litigants did not regard the choice of one forum as precluding choice of the other but pursued remedies in two or more fora serially or even concurrently as it suited their purposes.

On the other hand, the king's law definitely was not the church's law. The citations of authorities from Canterbury and the decided cases from York show us clearly that the "Roman canon law" supplemented by local ecclesiastical statute and custom were the authorities to which the church courts turned to decide cases. There are only two documents in the entire collection that even suggest an influence of the king's law on the law the church courts were applying. The blanket rejection of the attempt by counsel in *Flemyng c. St. Alban's* to plead the king's law as local custom, and the total absence of any argument based on the king's law about church court jurisdiction characterize the attitude of the court to the king's law.

We should not, however, get the impression that because the church courts were independent of the king, the relations between the two were necessarily strained, despite the seemingly irreconcilable statements of jurisdictional principle that we find in the *gravamina*, on the one hand, and in the prohibition writs and such statutory documents as *Articuli Cleri*, on the other. The considerable areas of cooperation indicate quite the contrary. Even the operations of the prohibition system, at least as viewed from the York court, may be seen as the product of a working, probably tacit, compromise.[23] On its side the York court seems to have obeyed those prohibitions that it received; on his side the king permitted those litigants who chose to undertake the trouble and expense of a trip to Westminstcr to remove certain types of cases to his courts, but did not seek

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[22] There is one more variable of obvious significance: the similarities or differences between the binding quality of papal law in England and on the continent. Stubbs' arguments would suggest that papal law was less binding in England than on the continent, Maitland's that it was at least as binding, if not more so. In order to get some feel for the question, it would be necessary to look at the surviving records of the continental esclesiastical courts in somewhat the same way that I have looked at the English records and then draw the comparison. I have not done so in this paper both because of limits of time and space and because of my unfamiliarity with the continental records. What little work I have been able to do would indicate that the differences were ones of detail but not of over-all effect. For example, in France the church was apparently more successful than in England in obtaining jurisdiction over the crirnes of clerks as a matter of first instance, but less successful in seeing to it that the criminous clerk was not subject to secular punishment after the church courts were through with him. *Compare* L. GABEL, BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES (Smith College Studies in History No. 14, 1929); Cheney, *The Punishment of Felonious Clerks*, 51 ENGLISH HISTORICAL REV. 215 (1936); and Maitland, *Henry II and the Criminous Clerks*, 7 ENGLISH HISTORICAL REV. 224 (1892), *reprinted in* F. MAITLAND, [ROMAN CANON LAW IN THE MEDIEVAL ENGLISH CHURCH], at 132, *with* P. FOURNIER, [LES OFFICIALITÉS AU MOYEN AGE], at 64–77, 94–127, R. GÉNESTAL, LE PRIVILEGIUM FORI EN FRANCE (1922); *and* O. MARTIN, L'ASSEMBLÉE DE VINCENNES DE 1329 ET SES CONSÉQUENCES (1909). . . .

[23] One bit of evidence supporting the hypothesis that such a compromise was made is the fact that, to my knowledge, the king made no attempt to limit the church court's jurisdiction on his own motion, after the unsuccessful attempt to do so in Norfolk in 1286. The king's abandonment of this Norfolk effort is the immediate cause of the document known as *Circumspecte Agatis*. See note 18 *supra* and authorities cited therein.

to prohibit cases on his own motion. The result was that many cases that could have bcen prohibited were heard by the York court.

The relationship between the English church courts and the pope operated on both an institutional and a legal plane. On the institutional plane the Court of Rome took many, but not all, important cases to itself, but the English courts exercised an important filtering function through the grant or denial of tuition. On the legal plane, the courts applied, and felt themselves bound by, the papal law books, but supplemented these books in a number of significant areas by local statute and custom. Further, the papal law was subject to considerable manipulation in its application to specific cases. The relationship might be characterized as one of great deference but not of blind adherence.

In summary, royal interference was not such that papal law can, as a practical matter, be said not to be binding because the king prevents it from so being. On the other hand, the nature of the church courts as institutions, the sources of the law applied in them, and the way in which they applied the papal law considerably reduced the importance, if they did not change the binding quality, of papal law.

(2) Both Stubbs and Maitland speak at times as if the period from Becket to Henry VIII were all of a piece. We know, however, that the political influence of the papacy in England changed considerably over this period. Do the church court records provide any evidence that these changes were accompanied by corresponding changes in the binding quality of papal law?

The records show some changes in the fourteenth century that may reflect the decline of papal power associated with the Avignon papacy. Writing of the period 1198–1254, Jane Sayers states that all ecclesiastical cases of any importance went to Rome, and that those that were not heard there were heard by judges in England specially delegated for the purpose. Our examination of the York records has shown that this is not true for York in the fourteenth century. In theory, of course, the pope remains universal ordinary, and any case may be brought to him at any stage of the proceeding. In practice, however, the universal ordinary is not universal to quite the same extent in the fourteenth century that he was in the thirteenth. Cases still come to him, but not all important cases, and judges delegate are not nearly so much in evidence, their place having been taken, at least in part, by the local ecclesiastical courts. Significantly, of the six delegations mentioned in the York records, two are to the Archbishop of York and one is to his Official. All three cases are heard in the regular channels of the York court. These changes do not necessarily imply a change in the binding power of papal law, but they do show that the local ecclesiastical courts are becoming institutionally more independent of the pope.

The relationship between the king and the church courts, as viewed at least from York, does not seem to change much until the end of the fourteenth century. The first statutes of Provisors and Praemunire (1351, 1353) seem to have had littte effect on the York court's practice of hearing benefice cases. The second set of such statutes (1390, 1393),[24] however, do seem to have had an effect, resulting, for a time, in the disappearance of benefice cases from the cause papers. Since over two thirds of the benefice cases had been tuitorial appeals, the change is more at the expense of the Roman court's jurisdiction than of the York court's. Other prohibitable types of cases continue, and, indeed, contract cases increase in the same period.

On the whole, however, these changes are slight. There is no perceptible change in attitude toward papal law or the uses to which it was put. The records exist for carrying the study on into the fifteenth century (where we might expect to find a decline in papal influence), but, unfortunately, the work remains to be done.

(3) Both Stubbs and Maitland write on the question of the binding quality of papal law irrespective of the type of case in which it is to be applied. They ignore the distinction between laws that are enforced only if some private party seeks to have them enforced and laws that the law-giver or his agents enforce on their own motion—in short, the distinction between what we today call civil and criminal law and what the

[24] 13 Rich. 2, stat. 2, cc. 2–3 (1390); 16 Rich. 2, c. 5 (1393).

canonists called instance and office cases.[25] Some scholars seem to suggest that some of the papal law, although intended to be enforced as criminal law, was only enforced if the private party sought its enforcement, and hence that it was less binding than intended.

Unfortunately, the evidence we have examined in this Article affords little opportunity to compare instance and office cases. The only office cases that survive from the York Consistory Court records of the fourteenth century are cases in which the official is seeking to enforce one of his own orders in an instance matter. There were indubitably other kinds of office cases heard in York in this period, but the surviving records strongly suggest that they were heard by some other court. The situation in thirteenth-century Canterbury is less clear, but the records of office matters that have come to light have not yet been examined in sufficient depth for us to know whether they are detailed and copious enough to permit comparisons of the law being applied with that being applied in instance matters.

The office records that the author has examined are not very helpful. For example, the earliest act book of the Court of the Dean and Cbapter of York consists of brief and generally unhelpful entries in it appear to be predominantly cases of fornication. If the complex papal rules concerning, let us say, pluralism (the holding of more than one benefice) were being enforced at all, it is doubtful that we will find records of their enforcement in this type of court. It seems more likely that such matters would not have been handled in a lower-level "bawdy court" but by the archbishop or bishop personally, either during visitations or in his personal court of audience. Unfortunately, visitation and audience records for our period do not seem to have had a high survival rate, and, again, more work needs to be done with those that have survived.

There is, however, one final element in the instance records that we have examined that has some bearing on the Stubbs-Maitland debate: Without too much overreading, we can get from Stubbs a picture of an embattled English church struggling to enforce native English law and custom against an ever-increasing flood of bulls, "hot from Rome." On the other hand, again without too much overreading, we can get from Maitland a picture of an equally embattled English church struggling to enforce every jot and tittle of the papal law in the face of ever-increasing royal pressure to limit the field of application of that law. If we read at least the instance records of the ecclesiastical courts, however, we do not get the picture of an embattled institution at all, and we find strikingly little evidence of substantive law.

Most of the cases never reach the sentence stage. They are either abandoned by the plaintiff or compromised. Litigation is controlled by the parties. If they do not choose to force an issue, the court rarely does. There is even some evidence that the York court positively discouraged the litigants from obtaining a sentence, for it charged litigants a very high fee for the sentence in comparison to the fees that it charged at other stages of the proceedings.

Rarely do we see the court taking an active role in the litigation beyond making procedural rulings. Even in marriage cases we see little evidence that the court felt that the law, papal or local, should be enforced if the parties to the case did not seek its enforcement. In fact, if we seek a modern analogy to the court's function, arbitration, rather than adjudication, comes more immediately to mind.

We have seen how, on many occasions, the papal law gets lost in local law or custom. The phenomenon is of broader applicability. Time and again substantive law is continually lost in the specifics of the dispute; the general gives way to the particular. It may be that the reason why so few records of legal argument survive is that legal arguments just weren't very important.

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[25] Like most analogies, the statement "civil cases : criminal cases :: offce matters : instance matters" is not quite exact. In addition to instance matters and "pure" office matters (*negocia ex officio mero*), the English canon law also recognized a hybrid—"promoted" office matters (*negocia ex officio promoto*). These last were roughly equivalent to private criminal prosecutions. *See* B. WOODCOCK, [MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY], at 50–62, 68–71. Further, the remedy sought in many straight instance cases, excommunication of the defendant, would probably be regarded today as penal rather than civil. *See* text accompanying notes 17–17 *supra*. Finally, in office matters it is the judge, by virtue of his office, and not the state or the crown (or the Church), who is the nominal party plaintiff, and, except in promoted office matters, there seems to have been no one who performed the function of the modern prosecutor. *See* B. WOODCOCK, *supra*.

Now, there should be nothing surprising to the student of the legal system today that far more cases were filed in York than ever reached sentence. Far more cases are filed today than ever reach judgment, and there is no reason why we should think that this characteristic of litigation is a purely modern phenomenon. Since the York court was primarily a court of first instance, it also should not surprise us that the facts of the case and adjective law are far more important than substantive law. We are familiar today with trial judges who actively encourage settlement, and many modern judges, not only trial judges, do not regard it as their function in civil cases to enforce the law to any greater extent than the parties ask them to enforce it. The striking thing about the York court is not the presence of these characteristics but their dominance. The relative unimportance of substantive law characterizes not only first instance cases but also appeal cases, where we might expect to find substantive law more important. The encouragement of settlement prevailed despite a relatively uncrowded docket—docket overload being thought to be the chief source today of pressure on judges to get cases settled. And the passive attitude of the court toward the enforcement of substantive law is found in the court of an institution that, unlike today's state, felt that the enforcement of its laws was its duty so that men's souls might thereby be saved.

Now, all of this does not make the papal law any less binding, but it does make it considerably less important. Earlier we suggested that it was somewhat paradoxical that the York court seems to have been a strong institution despite the fact that papal law was binding upon it. Its strength is paradoxical, however, only if the enforcement of papal law was an important element in the court's function and was so perceived by the participants in the process. Much of what we have found about the court would indicate that it was not. Many of the cases it heard involved claims based on local statute or custom, with papal law only indirectly involved. The way that papal law was applied in those cases where it was directly involved seems to have given the court considerable leeway in choosing a rule for the case. Further, many cases were settled or compromised, and there is no suggestion that the court felt compelled to see that these settlements or compromises accorded with the papal law.

The relative unimportance of papal law suggests that the York court was not viewed by contemporary society, and perhaps that it was not viewed by the personnel of the court themselves, primarily the place where papal law was enforced but, rather, as one of a number of alternative places where disputes could be resolved. The court would summon litigants before it; it would fix, where necessary, the position of the litigants during the pendency of the dispute; it would provide a quite sophisticated mechanism for bringing to light the facts of the case; and it would listen to the arguments on each side. It would even render a judgment within the broad confines of the law found in the papal law books, if the litigants insisted upon it. But rendering judgments was not what the court spent the vast bulk of its time doing, nor was it the way that most cases were terminated. Most of the records are devoted to the process itself, not to the end result. Perhaps this is because the process was the important thing, and the desired result was not a sentence by the judge but accord between the parties.

Maitland's Lyndwood essay closes with a vivid imaginary conversation between Lyndwood and Maitland in which Maitland suggests the Stubbs position to Lyndwood and Lyndwood replies that if Maitland persists in that view he will be turned over to the secular arm to be burned. Perhaps we should recast that conversation in the light of what we have said above: "My dear fellow," we would have Lyndwood say to Maitland's posing of the Stubbs view, "if you are making that proposition to me because I am a doctor of laws and have written a book called *Provinciale*, I would have to tell you that if you propose that view in a disputation I will demolish it, and if you put that view into a book, I will do my best to have the book burned. Indeed, if that view were yours and you persisted in it, you might well be burned too. But I know it is not your view, but that of the heretical Bishop of Oxford, and that your own view is much closer to the mind of Holy Mother the Church, however peculiar your views on other matters may be.

"But if you are asking me this question because I am the Official of the Court of Canterbury, then I will tell you that we at the court have found your whole debate with Bishop Stubbs somewhat beside the point. You are talking of matters that concern kings and popes and professors. We, on the other hand, see before us every day men whose souls are in peril because they are quarreling. If one of them persists in offending his

brother, Our Lord tells us[26] that we must cast him out from the Church, and if we do and he remains unrepentant, he will surely be damned. But what of him who has had his brother cast out and what of us who have done the casting? Shall we not have to answer betore the judgment seat for the damnation of one for whom Christ died? How much better it would be if the quarrel ceased and peace were restored, for as the Apostle telIs us 'there is plainly a fault among you, that you have lawsuits one with another'[27] and again, in another place, 'but the greatest of these is charity.'"[28]

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[26] *Matthew* 18:17.

[27] 1 *Corinthians* 6:7.

[28] *Id.* 13:13.

William Smith c. Alice Dolling (Court of Canterbury, 1271–72)

in N. Adams & C. Donahue, eds., Select Cases from the Ecclesiastical Courts of the Province of Canterbury (Selden Soc'y no. 95, 1981) 127–38

Alice Dolling of Winterbourne Stoke (Wilts) complained to the official of the bishop of Salisbury that a certain William Smith had married her and should be adjudged her husband. The case was heard by the official in the consistory court, and he gave sentence for the plaintiff. William appealed to the Court of Canterbury. We have the *processus* sent to the higher court by the official of Salisbury, giving a brief summary of the proceedings, depositions of witnesses, and the original sentence. We also have various entries from the rolls of acta of the Court, and a separate document which contains the report of the examiners of the Court who examine the *processus* from Salisbury. The final entry in the case contains the definitive sentence reversing the judgment of the lower court. Translated below are the original *processus* (no. 1) and the examiners' report (no. 4).

No. 1

Processus before the official of Salisbury, 10 July, 1271 — 11 May, 1272

A.D. 1271, Friday after the feast of the translation of St. Thomas, martyr [10 July], Alice of Winterbourne Stoke appeared against William Smith saying against him that he contracted marriage with her, wherefore she asked that he be adjudged her husband by sentence; she says this, etc. The man, joining issue, denies the contract; the parties sworn to tell the truth say the same thing as before. The reception and examination of witnesses is committed to the dean of Amesbury.

Thursday next after the feast of St. Peter in chains [30 July], the parties appeared personally and the woman asked for a second production and got it.

Wednesday next after the feast of St. Matthew the apostle [23 September], the parties appeared personally; the woman renounced further production; the attestations were published with the consent of the parties; the parties were given a copy; a day was given for sentencing if it was clear. The woman constituted her brother Roger her proctor in the acts to hear the definitive sentence.

Monday next after the feast of the apostles Simon and Jude [26 October], the parties appeared personally; the man under interrogation confessed in court that he had carnal knowledge of the said Alice a half a year ago. The same man proposed an exception in the following form: "Before you, sir judge, I, William of Winterbourne Stoke, peremptorily excepting propose against the witnesses of Alice Dolling that they depose falsely because from the ninth hour of the day on which her witnesses depose that I contracted marriage with her until the first hour of the subsequent day I was continuously at Bulford, so that it would have been impossible for me at the hour about which the witnesses depose to have contracted marriage at Winterbourne Stoke. And this I offer to prove."

The reception of the witnesses produced by the man on his exception and their examination is committed to the dean of Amesbury.

Wednesday next before the feast of St. Edmund, king and martyr [28 October], the parties appeared personally; the woman made a replication of presence; let the woman produce her witnesses before the rectors of Berwick and Orcheston, however many she wishes to produce before the next consistory; let the

man also produce however many witnesses he wishes to produce about his absence before the said dean and the chaplain of Amesbury before the next consistory.

Tuesday after the feast of St. Lucy the virgin [15 December, 1271], the parties appeared personally; the woman excepting proposed that it was not her fault that her witnesses had not been examined and asked that they be admitted in court; they were sworn, their examination committed to the dean of Amesbury and Richard de Rodbourne, and the way of further production precluded for her. On the same day the attestations both on absence and presence were published with the consent of the parties; copies of the attestations were offered to and obtained by the parties, and a day was given for doing what law shall dictate.

Wednesday next after the octave of St. Hilary [27 January, 1271/2], the parties appeared personally, and when there had been some dispute among the parties about the attestations of the parties, a day was given for sentencing if it was clear.

The day after St. Scholastica the virgin [11 February, 1271/2] the parties appeared personally. It was decreed that the aforesaid W. produce in the next consistory all his witnesses whom he had previously produced on his exception so that it might be inquired more fully about the continuity of absence.

Production of Alice Dolling on the principal

Celia daughter of Richard Long sworn and carefully examined about the contract of marriage between William Smith of Stoke Winterbourne and Alice Dolling says that she saw and was present when the said William gave his faith in the hand of the said Alice by these words: “I William will have you Alice as wife so long as we both live, and thereto I give you my faith.” And she replied, “And I Alice will have you as husband, and thereto I give you my faith.” Asked about the hour, she says it was at the hour of sunset. Asked about the place, she says in the house of John le Ankere before the bed of the said women, Celia and Alice, on the west side of the house. Asked if they were standing or sitting, she says sitting. Asked about their clothes, she says that the man was dressed in a black tunic of Irish, an overtunic of russet, and a hood of the same color, and the woman was dressed in a tunic of white and a blue hood, and on her feet she had strapped shoes. Asked how she knows this, she says that she was present in the house when all this happened. Asked why the said William came there, she says to have carnal intercourse with her if he could. Asked if she ever saw them having intercourse, she says no, but she saw them naked in one bed. Asked who were present at the said contract, she says the contracting parties, she herself, Margaret, her sister, and no more.

Margaret, sister of the said Celia, sworn and carefully examined about the aforesaid contract says that she saw and was present when the said William gave his faith to the said Alice by these words: “I William will have you Alice as wife as long as we shall live, and thereto I give you my faith.” And she replied, “And I Alice will have you William as husband by such a pact.” About the year, the day, the hour and the place, she agrees with the said Celia, her cowitness. Asked about their clothing, she says that the man was wearing a gray tunic of Irish cloth, and an overtunic of gray and a hood of gray. About the clothes of the woman she agrees with her cowitness. About her knowledge, she agrees with the said Celia. Asked why the said W. came there, she says that she does not know, unless it was to have carnal intercourse with her. Concerning those in the house, she agrees with the said Celia. Asked if she ever saw them having intercourse, she says no, nor did she see them together in one bed.

Margaret daughter of Michael sworn and carefully examined about the marriage contract between William Smith of Stoke Winterbourne and Alice Dolling, says that on St. Stephen martyr’s day at Christmas, two years ago, she was present and saw that William Smith whom the case is about gave his faith to the said Alice by these words: “I William take you Alice as my wife if holy church permits, and thereto I give you my faith.” And Alice replied by these words. “And I Alice will have you as husband and will hold you as my husband.” Asked about the hour she says that this was done before the hour of sunset. Asked about the place, she says in the house of John le Ankre in the southern part before the bed of the said Alice. Asked who were present, she says Celia daughter of Richard Long and Margaret the sister of Alice whom the case is about and the contracting parties and no more. Asked why the said William came there, she says she does not know. Asked if she ever saw them having intercourse, she says no. Asked in what garments they were

clothed, she says that the said William was wearing an overtunic of russet and a hood and a tunic of grey Irish, and Alice was wearing a white tunic and a blue hood.

Production of the said Alice about the presence of the said William

Edith of Winterbourne Stoke sworn and carefully examined about the presence of William Smith says that she saw the aforesaid William Smith in the eastern part of the church of St. Peter of Winterbourne Stoke, leading a crowd of women[1] after him on the day of St. Stephen martyr there were three years past. Asked about the hour of the day, she says that it was after dinner before the hour of sunset. Asked about clothing, she says the she does not recall. Asked where he went, she says she does not know. Asked how she remembers the lapse of time, she gives no cause of her knowledge. Asked if she saw him many times, she says only once. Asked who saw him with her, she says Edith, Alice and Agnes, her cowitnesses and many others of the parish.

Edith Dolling, the sister of her whom the case is about, sworn and carefully examined about the presence of William Smith, says the same as the aforesaid Edith in all things, adding that she saw him many times that day and that the man was dressed in a cloak of russet and a hood of blue, and that she herself went in his hand.[2]

Agnes Grey sworn and examined says the same in all things as Edith the next previously sworn, except that she gives the reason for her knowledge of the lapse of time that she was pregnant at the time.

Alice daughter of William Chaplain sworn and carefully examined says the same in all things as the aforesworn Edith Dolling.

Production of William Smith on his exception of absence previously proposed

John Chaplain, sworn and carefully examined, asked for what he was produced, says to prove a certain exception proposed by William Smith against Alice Dolling of Winterbourne in court. Asked what the exception is, he says that the said William proposed by way of exception that he was not present on St. Stephen's day on which the witnesses of the said woman depose that he ought to have contracted marriage with her. Asked where the said William was on the said day, he says that he well knows and that he saw him and spoke with him on the day of St. Stephen martyr, at Christmas there will be three years passed, at Bulford from the ninth hour of the aforesaid day of St. Stephen and for the entire night following up to midday on the following St. John's day [26–27 December, 1268 or 1269; see below fn. 3]. Asked how he knows this, he says that they serve[d] a guild of parishioners in the said town of Bulford finding food and other things necessary for those serving, as is customary, along with Alice his mother. Asked where he was at table that day, he says in the house of Alice his mother at Bulford. Asked if he left at any hour of the aforesaid day or night, he says no. Asked how he knows this, he says that both of them were together at the said guild and in eating at the house of Alice the mother of the aforesaid William from the ninth hour until midnight, and immediately afterwards they went to the house of the mother of the aforesaid William where the said William spent the night. Asked who were at the guild, he says the guild brothers. Asked who the guild brothers are, he says almost all the better men of the parish. Asked if all his cowitnesses were present, he says yes. Asked if he knows Alice whom the case is about, he says no. Asked how far Winterbourne Stoke is from the town of Bulford, he says four miles. Asked how he recalls such a lapse of time, he says by this: that in the same year, the guild ceased.

Richard Sturre sworn, examined and carefully asked, says that William Smith whom the case is about was present in the town of Bulford from the ninth hour of St. Stephen, at Christmas there will be three years passed, continuously for the whole day and the night following and St. John's day until noon. Asked how he knows this he says by this that he saw him at the guild of Bulford and spoke with him and saw him serving as butler at the said guild until midnight. And the same day, along with Alice his mother, he found food and

[1] Textual problem here. This may mean "leading a lewd woman".

[2] An obscure phrase.

other necessaries for the guild, as is customary, for each guild bother in his course when he came to him. About the rest he agrees with John, previously sworn.

Walter de Ponte, sworn, examined and carefully asked, agrees in all things with the previously sworn John and Richard, adding however that they lay in one bed in the house of his mother at Bulford. Asked who spent the night in that house that night, he says the witness himself, William whom the case is about, and their mother and a serving maid and no more.

John le Devenes sworn and carefully examined agrees in all things and through all things with the previously sworn John and Richard.

Hugh Baghe sworn and carefully examined agrees in all things and through all things with the previously sworn.

Peter son of Alice sworn and carefully examined says that he well knows and it well comes to his memory that William Smith whom the case is about was continuously in the town of Bulford on St. Stephen's day from the ninth hour through the whole day and the following night until the third hour of the next day, this year there will be three years elapsed. Asked how he knows this, he says that he saw him on the said St. Stephen's day eating and drinking at the table of the mother of the said William. Asked where the said W. went after dinner, he says to the guild at the hour of sunset and he stayed there with many others drinking until almost midnight, and afterwards he went to the home of his mother to bed and lay there until morning. Asked how he knows this, he says that he was in his company and is his next-door neighbor. Asked how he remembers when so much time has elapsed, he says by this that in the same year the guild ceased. Asked how far Bulford is from Maiden Winterbourne, he says three leagues. Asked if the said William left Bulford any hour of the day or night between the ninth hour of the aforesaid St. Stephen's day and the third hour of the following St. John's day, he says no.

John son of the weaver sworn and carefully examined agrees in all things and through all things with the previously sworn Peter.

Roger de Cowland sworn and carefully examined agrees in all things and through all things with the previously sworn P. and J. except that he does not give the reason for his knowledge.

* * *

Tuesday after the feast of St. Mathias the apostle, continued until Wednesday, Thursday, Friday, Saturday next following [1–5 March, 1271/2], the parties appeared personally. The same man alleged that he could not produce his witnesses before us because some of them did not exist in the nature of things and some of them had left the province for a journey and for other necessary cause. And when the parties had disputed for a while about the *processus*, the same

William demanded that a copy of the entire processus be made for him, which decreed and obtained, a day was given for doing what law shall dictate in the next consistory after Easter. Wednesday after 'Misericordia' Sunday [11 May], A.D. 1272, the parties appeared personally and concluding the case asked that sentence be given. We the official of Salisbury proceeded to definitive sentence in this way: "In the name of the Father, amen. We the official of Salisbury having examined the merits of the aforesaid cause and having gone over the acts of court carefully, because we find the claim of the said Alice sufficiently proven, notwithstanding the exception proposed on the part of William, which is not proved clearly in its form, as it ought to be, adjudge William by sentence and definitively to be husband to the same Alice."

No. 4

An initial long paragraph in this document recites the procedural steps in the Salisbury court and those taken in the Court of Canterbury. The only thing worth noting is that the woman at no time appears in the proceedings at Canterbury.

Item, having examined the statements of the witnesses of the said Alice on the *de presenti* marriage contract that she proposed, the first two witnesses seem to depose that they contracted between themselves

by words of the future tense. And these witnesses were sisters of each other, as the second witness seems to depose. Item, the third witness seems to depose that the man contracted by words of the present tense and the woman by words of the future tense, and she says that the second witness is the sister of Alice.

Item, having examined the witnesses of William produced on his exception of absence it seems that he proved by ten witnesses his absence at the same hour about which the witnesses of the said woman depose. Item, having inspected the statements of the witnesses produced on the replication of presence, they do not seem to obviate the statements of the witnesses on the exception of absence nor do they help the claim of the woman because they seem to speak of the previous year,[3] and even if they are speaking about the same year they seem to depose less fully, and they are only four in number and the witnesses of the man are ten.

[3]A neat point—Alice's witnesses on the principal claim speak of an event on St. Stephen's day, there were two years passed; William's witnesses on his absence speak of period on St. Stephen's day, there will be three years passed, i.e., on next St. Stephen's day; Alice's witnesses in replication speak of a period on St. Stephen's day, there were three years passed. We cannot exclude the possibility of scribal error ('erant' for 'erunt'), nor, it seems, could the examiners. The explanation may be, however, that Alice's replication witnesses were examined after 26 December, 1271.

C. THE DEVELOPMENT OF CHANCERY

PETITIONS IN CHANCERY

S&M, pp. 285–88 (No. 71) [expanded by CD from the original ed.]

(A) PETITION FOR GENERAL RELIEF (1399)

To the most reverend father in God and most gracious lord, the bishop of Exeter, chancellor of England,[1] Simon Hilgay, Parson of the church of Hilgay, humbly makes petition [as follows]:—

Whereas he has charge and cure of souls in the same parish and is menaced by one Robert of Wesnam and by . . . ,[2] associates and confederates of the same Robert, who daily menace him to the extent that, through fear of unmerited death he does not dare to approach the said parsonage to hear the confessions of his parishioners in this most holy time of Lent, and [whereas] for purpose of their evil design, the said Robert de Wesnam, with the others above named, on the Tuesday in the first week of Lent last past, 22 Richard II [18 February, 1399], chased and pursued the said suppliant with force and arms, to wit, naked swords drawn, clubs and bucklers, from the town of Fincham in the county of Norfolk to the town of Crimplesham, which are two leagues distant, in order to have killed him, and there did beat one overe, who wwas in his company at that time, and [whereas], furthermore, the said Robert of Wesnam, with so many miscreants for associates and confederates, has such horrid maintenance that the said petitioner will never be able at common law to secure recovery against him and the rest without your most gracious aid: [therefore] may it please your most gracious lordship to consider the aforesaid matter and therein at your most wise discretion, to provide remedy for the said petitioner—for the sake of God and as a work of charity.

[Endorsed:] By virtue of this petition the herein named Simon Hilgay, parson of the church of Hilgay obtains four writs directed to the herein named persons, [summoning them] to appear before the said king and his council in his chancery on Tuesday next after the coming feast of St. Gregory, to make answer regarding the content [of the said petition].[3]

(Latin and French) Baildon, *Select Cases in Chancery*, pp. 44–5.

[1] Edmund Stafford, Chancellor, 1396–0, 1401–3; bishop of Exeter, 1395–1419.

[2] Six other persons named.

[3] Note that the defendants are to come before the council and not just the chancellor.