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Charles Donahue, Jr.

ROMAN CANON LAW IN THE MEDIEVAL ENGLISH CHURCH: STUBBS VS. MATTLAND RE-EXAMINED AFTER 75 YEARS IN THE LIGHT OF SOME RECORDS FROM THE CHURCH COURTS†

Charles Donahue, Jr.*

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.¹ His *Constitutional History of England*² was, until quite recently, the standard work in the field, and his editions of texts for the Rolls Series³ 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.⁴ Maitland's *History of English Law Be-*

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As this Article was going to press, I received from England the sad news of Mrs. Gurney's untimely death. I regret I have nothing better; I offer this, an *indignum donum*, to her memory.

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1. 3 DICTIONARY OF NATIONAL BIOGRAPHY *William Stubbs* 444 (Supp. 1912).

2. W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT (5th ed. 1891). For a recent attack on Stubbs' *Constitutional History*, see H. RICHARDSON & G. SAYLES, THE GOVERNANCE OF MEDIAEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA (1963).

3. For a general description of the series and a listing of Stubbs' contributions to it, see E. MULLINS, TEXTS AND CALENDARS: AN ANALYTICAL GUIDE TO SERIAL PUBLICATIONS 49-56 (Royal Historical Soc., Guides & Handbooks No. 7, 1958).

4. 2 DICTIONARY OF NATIONAL BIOGRAPHY *Frederic Maitland* 552 (Supp. 1912).

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fore the Time of Edward I⁵ is still, in many ways, the standard work in the field, and his editions of texts for the Selden Society⁶ leave no doubt that he, too, was a man who knew the basic source material. 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 1883.⁷ 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.”⁸ 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,”⁹ that is, Gratian's *Decretum*,¹⁰ the *Decretals* of Gregory IX,¹¹ the *Sext* of Boniface VIII,¹² the *Clementines*,¹³ and the *Extravagants*.¹⁴ According to Stubbs, “a knowledge

5. F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2d ed. 1898).

6. For a general description of the series and a listing of Maitland's contributions, see E. MULLINS, *supra* note 3, at 276-79.

7. 1 ECCLESIASTICAL COURTS COMMISSION, *REPORT OF THE COMMISSIONERS INTO THE CONSTITUTION AND WORKING OF THE ECCLESIASTICAL COURTS* (Gr. Brit. 1883).

8. *Id.* at xviii.

9. Stubbs, *Historical Appendix*, in *id.* at 21, 25.

10. 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).

11. 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.

12. 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.

13. This is the fourth book of the *Corpus Juris Canonici*, a collection principally of canons promulgated by Clement V in the Council of Vienne (1311-1312). The *Clementines* were promulgated by Clement's successor, John XXII, in 1317. See generally *id.* §§ 371-72.

14. These are the last two books of the *Corpus Juris Canonici* and comprise the

of these was the scientific equipment of the ecclesiastical jurist, but the texts were not authoritative."¹⁵ 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."¹⁶ 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."¹⁷ 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.¹⁸

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.¹⁹ 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

Extravagants of John XXII and the *Common Extravagants*. The *Extravagants of John XXII* consists of decretals of that pope. The *Common Extravagants* consists principally of fourteenth and fifteenth century decretal letters. Neither collection was officially promulgated in the Middle Ages. See generally *id.* §§ 373-75.

Over the years standard citation forms have developed for the books of the *Corpus Juris Canonici*, and those forms will be used for those books that will be cited herein. The *Decretals* = "X" (from the fact that they were originally called *Liber Extra*, the book added onto Gratian's *Decretum*); the *Sext* = "VI" (from the fact that it was originally regarded as the sixth book after the five books of the *Decretals*); the *Clementines* = "CLEM." The arabic numbers following the indication of the collection refer to the book, title, and chapter, respectively. Thus, "CLEM. 5.11.2," cited in note 174 *infra*, refers to book 5, title 11, chapter 2 of the *Clementines*. This can be found in the standard modern edition on which all subsequent citations of the text and rubrics of these books is based: 2 CORPUS JURIS CANONICI col. 1200 (A. Friedberg ed. 1879). The Friedberg edition contains only the text and the rubrics. For the glosses it is necessary to refer to an early printed edition. Citations herein to the glosses to the *Decretals* are to the edition printed by Nicholas de Benedictis, *DECRETALES DOMINI PAPE GREGORII NONI* (Lyons 1510). For the *casus* I have used *DECRETALES CUM GLOSSIS* (Lyons 1584). See notes 189 & 213 *infra*.

15. Stubbs, *supra* note 9.

16. *Id.*

17. *Id.*

18. W. STUBBS, *SEVENTEEN LECTURES ON THE STUDY OF MEDIAEVAL AND MODERN HISTORY* 351, 354-57 (3d ed. 1900).

19. F. MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* (1898).

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*."²⁰

Maitland adduces three principal bodies of evidence to support his view. First,²¹ 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.²² 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,²³ 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 described²⁴ 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.²⁵ The pope not only authorized judges delegate to hear the cases but also instructed them as to the law that they were to apply.²⁶ These instructions, a remarkably large number of which are of English provenance, constitute a great part of the entries in the papal law collections.²⁷ Third,²⁸

20. Maitland, *Canon Law in England: I. William Lyndwood*, 11 *ENGLISH HISTORICAL REV.* 446, 447-48 (1896), reprinted in F. MAITLAND, *supra* note 19, at 1, 2-3.

21. Maitland, *supra* note 20, at 468, 470-71, reprinted in F. MAITLAND, *supra* note 19, at 3, 5, 38-39.

22. Lyndwood's dates are 1375-1446. See generally 12 *DICTIONARY OF NATIONAL BIOGRAPHY William Lyndwood* 340 (1893).

23. Maitland, *Canon Law in England: III. William of Drogheda and the Universal Ordinary*, 12 *ENGLISH HISTORICAL REV.* 625, 632-33 (1897), reprinted in F. MAITLAND, *supra* note 19, at 100, 111-13.

24. WILLIAM OF DROGHEDA, *SUMMA AUREA* in 2 *QUELLEN ZUR GESCHICHTE DES RÖMISCH-KANONISCHEN PROCESSES IM MITTELALTER* pt. 2 (L. Wahrmund ed. 1914).

25. See J. SAYERS, *PAPAL JUDGES DELEGATE IN THE PROVINCE OF CANTERBURY* 1198-1254 (1971).

26. See Maitland, *supra* note 23, at 628, reprinted in F. MAITLAND, *supra* note 19, at 104-05.

27. See Maitland, *supra* note 23, at 639, reprinted in F. MAITLAND, *supra* note 19, at 122.

28. Maitland, *Canon Law in England: II. Church, State, and Decretals*, 11 *ENGLISH*

there are the various medieval English "church-state" controversies, of which the Becket affair and the papal provision controversy are perhaps the most familiar.²⁹ 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 distorted 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' view³⁰ is generally regarded as a failure,³¹ and Stubbs himself, in later editions of *Seventeen Lectures*, published what might be regarded as a retraction of his position.³² 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 certainly cannot be accused of extreme papist views, specifically rejects the Ecclesiastical Court Commissioners' *Report* and adheres to the views of Maitland.³³

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 Duggan³⁴ the "but" is that Maitland³⁵ and, even more, Z. N. Brooke³⁶ were wrong in thinking that the large

HISTORICAL REV. 641, 647, 650 (1896), reprinted in F. MAITLAND, *supra* note 19, at 51, 62, 65.

29. For the Becket controversy, see A. POOLE, FROM DOMESDAY BOOK TO MAGNA CARTA 1087-1216, at 197-231 (Oxford History of England No. 3, 3d ed. 1970); for the papal provision controversy, see W. PANTIN, THE ENGLISH CHURCH IN THE FOURTEENTH CENTURY 47-75 (1955).

30. A. OGLE, CANON LAW IN MEDIAEVAL ENGLAND (1912).

31. The views expressed in this book are pretty well demolished in Davis, *The Canon Law in England*, 34(47) ZEITSCHRIFT DER SAVIGNY-STIFTUNG 344 (Kan. Abt. No. 3, 1913). Cf. Dibdin, *Roman Canon Law in England*, 217 Q. REV. 413 (1912).

32. See W. STUBBS, *supra* note 18, at 335-36, 351 n.2, 354 n.3, 356 n.11. Cf. Dibdin, *supra* note 31, at 424-27.

33. ARCHBISHOPS' COMMISSION ON CANON LAW, THE CANON LAW OF THE CHURCH OF ENGLAND 36-37 (Gr. Brit. 1947).

34. C. DUGGAN, TWELFTH CENTURY DECRETAL COLLECTIONS AND THEIR IMPORTANCE IN ENGLISH HISTORY (U. of London Historical Studies No. 12, 1963).

35. Maitland, *supra* note 23, at 640, reprinted in F. MAITLAND, *supra* note 19, at 123.

36. Z.N. BROOKE, THE ENGLISH CHURCH AND THE PAPACY FROM THE CONQUEST TO THE REIGN OF JOHN 191-214 (1931).

percentage of decretals addressed to England found in the *Decretals*

liarily 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.³⁷ 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.³⁸

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.³⁹

37. See C. DUGGAN, *supra* note 34, at 1-12.

38. Brooke argued that prior to Becket the English church had remained aloof from Rome, at least on a legal plane, and had closely identified itself with the king and the king's law. See generally Z. N. BROOKE, *supra* note 36. After the Compromise of Avranches (1172), Brooke hypothesized, the papal letters that we find in the *Decretals* came flooding into England in order to bring the English church up to date after its long isolation. See generally *id.* Duggan's work casts doubt on the proposition that England received more papal letters than other European countries or that there was any need to bring the English church up to date. His findings, however, do not disprove Brooke's hypothesis about the situation before Becket; they only take away some of its support. It may be that the English bishops had collections made of papal

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.⁴⁰ 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.⁴¹

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,⁴² 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, "[l]eading cases in canon law,"⁴³ it is positively misleading to call

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.⁴⁴ 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.⁴⁵ 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 methods of

promulgation that did not involve national councils were of ques-

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, scholars⁴⁷ have finally gotten around to examining a source that Maitland himself suggested⁴⁸ was crucial to the solution 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 Drogheda⁴⁹ 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;⁵⁰ 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,⁵¹ 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

46. On medieval canonists on promulgation, see M. LOHMULLER, *THE PROMULGATION OF LAW* 25-27, 68-92 (Catholic University of America, Studies in Canon Law No. 241, 1947); 2 C. PLÖCHL, *GESCHICHTE DES KIRCHENRECHTS* 62-63 (1955). Lyndwood, however, does not appear to have been among those who had doubts. See W. LYNDWOOD, *PROVINCIALE* lib. 1, tit. 3, c. [1] (*Hujus autem*), gloss on *publicam notionem* (1679). Cf. Davis, *supra* note 31, at 357 n.1.

47. E.g., Sheehan, *The Formation and Stability of Marriage in Fourteenth Century England: Evidence of an Ely Register*, 33 *MEDIAEVAL STUDIES* 228 (1971); Helmholz, *Canonical Defamation in Medieval England*, 15 *AM. J. LEGAL HISTORY* 255 (1971).

48. Maitland, *supra* note 23, at 644-45, reprinted in F. MAITLAND, *supra* note 19, at 130-31.

49. Maitland, *supra* note 28, at 641-42, reprinted in F. MAITLAND, *supra* note 19, at 51, 51-53.

50. Jones, *supra* note 39, at 99 n.47, contains a bibliography of most of what has been published.

51. Most of them are now in the hands of professional archivists and are available for examination by qualified scholars. Thorough sorting and calendaring has begun. See, e.g., D. SMITH, *A GUIDE TO THE ARCHIVE COLLECTIONS IN THE BORTHWICK INSTITUTE OF HISTORICAL RESEARCH* (Borthwick Texts & Calendars No. 1, 1973).

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.⁵²

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

52. Gray, *supra* note 39, contains an excellent summary of the ecclesiological debates of Stubbs' time and of the influence that they may have had on his work and on that of his followers.

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.⁵³ The Consistory

53. For a discussion of the relationship between York and its suffragan dioceses (including the Scottish diocese of Whithorn), see R. BRENTANO, *YORK METROPOLITAN JURISDICTION AND PAPAL JUDGES DELEGATE 1279-1299*, at 83-114 (U. of Cal. Publications in History No. 58, 1959).

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

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.⁵⁴ Since almost all the records of the Court of Arches, the appellate court of the Archbishop of Canterbury, have been lost,⁵⁵ 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,⁵⁶ documents actually used in litigation. Nothing comparable survives from any other church court of this period.⁵⁷ There are also some fragments of books of *acta*, journals of the court's daily business, from the years 1370-1375.⁵⁸

Because some cases are divided among two or more sets of cause papers, the 263 sets of cause papers actually represent some 232 cases,

provincial 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).

54. 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 five archdeacons: 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. See generally R. BRENTANO, *supra* note 53.

55. See D. OWEN, *THE RECORDS OF THE ESTABLISHED CHURCH IN ENGLAND* 50-51 (British Records Assn., Archives & the User No. 1, 1970).

56. These records have been deposited by the Archbishop in the Borthwick Institute of Historical Research, St. Anthony's Hall, York. They are numbered, more or less in chronological order, "C.P.E. 1" to "C.P.E. 263." Since the research for this paper was completed, the Borthwick has undertaken to renumber the C.P.E. series, moving cases that do not belong in the fourteenth century to their appropriate place, consolidating numbers where a given case is divided among two or more sets of papers, and adding numbers where two or more cases may be found in one set of papers. The citations in this article are to the C.P.E. numbers as they existed prior to the beginning of the renumbering effort. The new numbers may be traced by looking up the old numbers in a handlist kept at the Borthwick.

I am currently undertaking an edition of a selection of the fourteenth-century cause papers for the Selden Society.

57. A selection of similar records for the thirteenth-century Canterbury courts is being edited for the Selden Society by Professor Norma Adams. Curiously, the quantity of the Canterbury records declines markedly in the early fourteenth century, just when the York series begins.

58. These fragments are contained in M2(1)b and M2(1)c of the Dean and Chapter Library, York. M2(1)b contains entries from January to July, 1371. M2(1)c contains entries from October 1371 to October 1375, but there appear to be a number of gaps in the sequence.

bearing dates from 1301 to 1399.⁵⁹ 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 5-10,000.⁶⁰ 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.⁶¹

Table 1 lists the number of cases in the cause papers by decade and type.⁶² 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 finding of a chaplain for a church, and one each involving assault, trespass to land, breach of a guardian's

59. In addition to consolidating cases divided among two or more sets of papers, I have also excluded from the count nine cases that bear dates in the fifteenth century, five cases that can, with reasonable confidence, be assigned to the fifteenth or later centuries on the basis of paleographical and diplomatic evidence, and ten cases that seem to belong to the fourteenth century but cannot be assigned to any decade within that century. See note 62 *infra* and accompanying text.

CP.E. 1 (1301) is the earliest surviving set of York cause papers that has come to my attention. Over 300 sets of cause papers exist for the fifteenth century, and the number for each of the three succeeding centuries runs into the thousands.

60. *I.e.*, defining "case" as a piece of business coming before the court that was sufficiently contended to have produced cause papers. See Appendix A *infra*.

61. For a discussion of the statistical problem, see Appendix A *infra*.

62. For the truly ambitious reader who wishes to calculate the proportions after including the cases that can be assigned to the fourteenth century, although not to any particular decade within that century, I can report that CP.E. 258 and CP.E. 241z are tithe cases; that CP.E. 90, CP.E. 240, and CP.E. 241s are "other financial," the first involving the rebuilding of a parish church, the second a mortuary, and the third, an inquisition about dilapidations of a chancel; that CP.E. 42 apparently involves the jurisdiction (perhaps the tithes) of a parish church and a hospital; that CP.E. 166 and CP.E. 241o are defamation cases; and that CP.E. 241v is a marriage case and involves an appeal to Rome. I challenge anyone who enjoys straining his eyes under ultraviolet light to figure out what CP.E. 167 is about.

TABLE I
YORK CASES BY DECADE AND TYPE

	1300-1309	1310-1319	1320-1329	1330-1339	1340-1349	1350-1359	1360-1369	1370-1379	1380-1389	1390-1399	TOTAL
Marriage	3	1	5	7	6	6	13	12	10	27	89
Tithe		1		1		3	4	1	4	12	31
Benefice	2	2	2	4	5	5	4	1	5		29
Testamentary			2	1	4	2	2	3	5	7	22
Defamation				1	1	1	3		1	6	14
Breach of faith				1			1		2	8	11
Jurisdiction		1	1	1		2	2	1	2	2	10
Appeal				1			2		2	3	5
Pension				1			3		2	4	5
Other Financial	1			1	1	1		1	1	3	7
Miscellaneous											9
TOTAL	6	5	10	17	17	20	34	19	32	72	232

duties, violation of a sequestration, and procedural matters (the underlying substance being unclear).⁶³

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 Chancery⁶⁴ 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.⁶⁵ 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*,

63. At the 90 per cent confidence level we can estimate that the underlying marriage cases represent 33-44 per cent of the underlying population; ecclesiastical finances, 25-35 per cent; and miscellaneous, 25-35 per cent. See Appendix A *infra*. The confidence intervals for the totals of the types of cases of which there are more than 10 examples listed in Table 1 follow:

Type of Case	Number of Cases	Per cent of Total	Intervals (in per cent)
Marriage	89	38	33-44
Tithe	31	13	9-17
Benefice	29	13	9-17
Testamentary	22	9	6-12
Defamation	14	6	3-9
Breach/Faith	11	5	2-8
Jurisdiction	10	4	2-7

64. 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 debts 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 C.P.E. 141; C.P.E. 72.

On the writ of prohibition generally, see Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272 (1935); Flahiff, *The Writ of Prohibition to Court Christian in the Thirteenth Century* [pt. 1], 6 MEDIAEVAL STUDIES 261 (1944); Flahiff, *The Writ of Prohibition to Court Christian in the Thirteenth Century* [pt. 2], 7 MEDIAEVAL STUDIES 229 (1945); Jones, *supra* note 39, at 85-87.

65. See statements from yearbooks quoted in 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 305 (4th ed. 1936).

Kt.,⁶⁶ 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 £40.⁶⁷ 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,⁶⁸ and similar cases may be found in many surviving church court records of the period.⁶⁹

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.⁷⁰ Papal law, on the other hand, claimed jurisdiction over such disputes because of the spiritual nature of the advowson.⁷¹ Attempts by the church courts to hear disputes about advowsons, we learn from those who have examined the plea rolls, were regularly prohibited.⁷² The

York court did not claim to hear advowson cases as such, but it regularly heard cases involving the right to 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.⁷³

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:

66. C.P.E. 180 (1390).

67. See M2(1)b, *supra* note 58.

68. B. WOODCOCK, *MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* 89-92 (1952).

69. See R. Helmholz, *Private Actions for Breach of Faith in the Medieval Church Courts* (unpublished paper delivered at Am. Soc. for Legal History Third Annual Meeting, Chicago, Nov. 9, 1973).

70. 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. For a brief review of the history with further references, see Jones, *supra* note 39, at 102-32.

71. See X 3.38.21. See also X 3.38 (entire title).

72. See Jones, *supra* note 39, and sources cited therein. -- 72 Mich. L. Rev. 661 1973-1974

73. See, e.g., John de Singleton c. Simon de Hockyngham, C.P.E. 39 (1339); Peter

(1) None of the cases involves a suit by one patron against another. (2) Papal provisors⁷⁴ would bring their cases to the ecclesiastical courts (and ultimately to Rome) when the validity of the papal provision was at stake.⁷⁵ (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 vacant⁷⁶ or when he was disturbed in the possession of his living by threats of excommunication by the prior of a neighboring religious house.⁷⁷ (4) Many of the cases involve presentation of a vicar and not of a rector.⁷⁸ 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,⁷⁹ 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.⁸⁰ This rule appears to have been ignored by the York Consistory Court, which apparently relied on the papal law⁸¹ 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;⁸² other cases, however, seem to involve large sums, sums that must have been greater than one fourth of the value of the living.⁸³ The court heard both types of cases and

74. That is, clerks who had obtained a claim to the benefice from the pope by papal provision, a process that bypassed the presentation process. *See generally* W. PANTIN, *supra* note 29.

75. *E.g.*, Ubertino, Rector of Eggescliffe c. John de Hylawe [?], C.P.E. 35 (1338).

76. *See, e.g.*, William de Skipwith c. Robert de Rishton, C.P.E. 47 (1341).

77. *See, e.g.*, William Pulkowe c. Prior of Haltemprice, C.P.E. 64 (1352).

78. *E.g.*, John Godens [?] c. Richard de Sysonby, C.P.E. 24 (1325); Adam de Kilmington, Vicar of Kernetby [?] c. William Fynelay, C.P.E. 94 (1367). On the appropriation of benefices by monasteries and the resulting distinction between rectors and vicars of parish churches, see F. MAKOWER, *supra* note 53, at 329-32; R. HARTRIDGE, *A HISTORY OF VICARAGES IN THE MIDDLE AGES* (1930).

79. *See id.*

80. *See* Jones, *supra* note 39, at 161-62, and sources cited therein.

81. *See, e.g.*, X 3.30.25.

82. *See, e.g.*, John de Tewcates [?], Rector of Lofthouse c. Robert del Wode, C.P.E. 141 (1335) (six pence; prohibited (1), *see* text accompanying notes 80 *supra* & 83, 99 *infra*); Thomas Porter, Rector of Ryther c. John Webster, C.P.E. 228 (1394) (eighteen pence). Lofthouse was valued at eight pounds in 1318. *TAXATIO ECCLESIASTICA ANGLIAE ET WALLIAE* 324 (Gr. Br. 1802). Ryther was valued at £16 13s.4d. in 1291. *Id.* at 323.

83. *E.g.*, John Brimham, Rector of Walkington c. John Midilton, C.P.E. 222 (1394)

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 jurisdictional 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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.⁸⁷

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*,⁸⁸ is perhaps the most striking example. Walter Flemyng was a York priest and apparently a man of some substance.⁸⁹ He made a will leaving his

(10 pounds). Walkington was valued at 20 pounds in 1291. See *TAXATIO ECCLESIASTICA ANGLIAE ET WALLIAE*, *supra* note 82, at 302.

84. *Prior & Convent of Newburgh c. William Trolley*, C.P.E. 75 (1357). The prohibition *de transgression* (concerning trespass) might have lain here, even though the trespass is to a church and cemetery, and the pleadings indicate that excommunication on the ground of desecration seems to have been a possible sanction. On the writ *de transgression*, see Flahiff, 6 *MEDIAEVAL STUDIES* 261, *supra* note 64, at 279-80. See also text accompanying note 154 *infra*.

85. *Prioress of Handale c. Nicholas de Mersk* [?], C.P.E. 3 (1306). Chapter 3 of *Articuli Cleri*, 10 Edw. 2, stat. 1, c. 3 (1316) would probably permit the church courts to impose this sanction: "... if any lay violent hands on a clerk [including a religious woman?], the amends for the peace broken shall be before the King, and for excommunication before a prelate . . ."

86. See note 97 *infra* and accompanying text. But cf. Jones, *supra* note 39, at 161-62.

87. On jurisdiction *ratione personae* (by reason of the person), see P. FOURNIER, *LES OFFICIALITÉS AU MOYEN ÂGE* 64-82 (1880).

88. C.P.E. 169 (1369).

89. Walter may have been the son or brother of Nicholas Flemyng, who was Lord Mayor of York in the early fourteenth century. See P. TILLOTT, *A HISTORY OF YORK-*

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 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.⁹⁰ 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.⁹¹

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.

SHIRE: *THE CITY OF YORK* 55, 110, 404 (Victoria County Histories 1961). He was almost certainly a member of the landed York family of that name. *See id.* at 41.

90. 7 Edw. 1, stat. 2 (1279). In fact, the Flemyngs' proctor may have confused the common law rule prohibiting the devise of much of English land, which did not include, at least as a regular matter, an exception when the king's permission was obtained, with the statutory rule against conveying land to monasteries, which expressly allowed for royal dispensation. *See generally* M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* 266-81 (Pontifical Institute of Medieval Studies, Studies & Texts No. 6, 1963).

91. Of course, Peter or Johanna may ultimately have gone to the king's courts. The choice of the ecclesiastical forum did not preclude, at least in practice, the pursuit of a remedy in another forum. *See* note 248 *infra*.

The fact that church courts decided cases over which the king's 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 various times, claimed jurisdiction over most of these matters,⁹² 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

suggests that the English church simply acceded to the royal claims of jurisdiction, and the accepted view⁹³ 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.⁹⁴

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 cases⁹⁵ 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.⁹⁶ Why the party chose to submit these documents is unclear, since they do not, at least on their face, prohibit the hear-

the case had not previously been clarified. The remaining five are

identifiable cases that are directly prohibited—two pension,⁹⁷ one defamation,⁹⁸ one tithe,⁹⁹ and one involving a tax imposed on a chantry chapel.¹⁰⁰

The fact that the prohibitions all seem to have been obeyed and the fact that with but one exception¹⁰¹ 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

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 only one prohibited,¹⁰² 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

97. Prior & Convent of Blyth c. Roger de Kelk, C.P.E. 250 (1383) (*cum* clause of prohibition worded: "cum placita de annuis redditibus in regno nostro Anglie et coronam et dignitatem nostram specialiter pertineant"). This form does not appear in EARLY REGISTERS OF WRITS, *supra* note 64, nor in Flahiff, 6 MEDIAEVAL STUDIES 261, *supra* note 64, but does appear in REGISTRUM OMNIUM BREVIUM f. 38r (1595). See text accompanying note 86 *supra*. This is also the form of writ found in William Chese c. Katherine, widow of Henry Axiholm, C.P.E. 217 (1395). This case came to the York court as a breach of faith case—failure to abide by an agreed upon arbitration. For this reason I have classified it in Table I *supra* as a "contract" case. The underlying dispute, however, concerned a pension. See note 248 *infra*.

The encroachment of the king's courts into the area of ecclesiastical pensions in the fourteenth century is noted in Cheyette, *King's Courts, Cures and Sinecures. The Statute of Provisors and the Common Law*, 19 TRADITIO 295, 336 & n.135 (1963).

98. Alice Penynell c. John Ward, C.P.E. 72 (1356) (*prohibition de catallis et debitis*).

during this period (and a tentative examination of the public records for this period would indicate that the number was quite substantial),¹⁰³ the small number of prohibitions received at York in proportion to the number of cases being heard in violation of the king's jurisdictional 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.¹⁰⁴ 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.¹⁰⁵ 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 I 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.¹⁰⁶

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.¹⁰⁷ Further, there is a form of the prohibition writ (*de diffamacione*) that expressly forbids the church courts from entertaining defamation actions brought as a result of accusations made or evidence given in the royal courts.¹⁰⁸ Thus, we might summarize broadly the king's courts' rule as follows: The church courts will be

103. See, e.g., Jones, *supra* note 39, at 102-32.

104. 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 265-73 *infra*.

105. See Flahiff, 6 *MEDIAEVAL STUDIES* 261, *supra* note 64, at 290-91, 307 (describing thirteenth-century attempts to limit the jurisdiction of the church courts, so far as the laity were concerned, to marriage and testamentary matters).

106. 10 Edw. 2, stat. 1, c. 4 (1316).

107. The text of *Circumspecte Agatis* may be found in Flahiff, 6 *MEDIAEVAL STUDIES* 261, *supra* note 64, at 312-13. 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).

108. See Flahiff, 6 *MEDIAEVAL STUDIES* 261, *supra* note 64, at 281-82; Jones, *supra* note 39, at 201-02.

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 case¹⁰⁹ 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).¹¹⁰ 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 1000.¹¹¹ 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."¹¹² It has become widely accepted that this statute was directed, not so much against the ecclesiastical courts in England, as against the papal court in Rome.¹¹³ Its repercussions, however, may have been felt at York.¹¹⁴

109. *Alice Pepynell v. John Ward*, CP.E. 72 (1356).

110. See Flahiff, 6 *MEDIAEVAL STUDIES* 261, *supra* note 64, at 281 n.104, for an early (1230) instance in which this writ is used to prohibit a defamation case. It is possible that this writ was used in the *Pepynell* case because the prohibition *de diffamatione* only dealt with actions arising out of defamations alleged to have been made in royal courts (*id.* at 281) and not with the problem of money damages. There is, however, no indication that the *Pepynell* case involved money damages.

111. Our expectation would be that at least 13 per cent (the lower limit of the confidence interval at the .90 level) of these cases would be benefice cases. In fact there are none, yielding a *chi*² statistic of 10.3. Since .5 per cent of the distribution of a *chi*² with one degree of freedom lies beyond 7.9, and the .1 per cent distribution beyond 10.8, we may reject the hypothesis that the 1390-1399 cases show the same proportion of benefice cases as do the preceding years. See Appendix A *infra*.

112. 16 Rich. 2, c. 5 (1393).

113. The exact purpose and thrust of the statute are controverted. It seems to punish those who obtain papal bulls or sentences that interfere with judgments rendered by the king's courts in advowson cases. See Waugh, *The Great Statute of Praemunire*, 37 *ENGLISH HISTORICAL REV.* 173 (1922).

114. When we consider the fact that fully two thirds of the benefice cases heard

The king's victory, if such it was, was short-lived. Benefice cases appear again in York in the fifteenth century,¹¹⁵ 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.¹¹⁶

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.¹¹⁷ This jurisdiction rested, in large measure, on the Roman canon law's view of the appropriate role of the ecclesiastical courts.¹¹⁸ 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.¹¹⁹

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*,¹²⁰ 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 judg-

in the York court were bound for the papal court anyway, the effect of Praemunire becomes more understandable. See text accompanying notes 136-37 *infra*.

115. See, e.g., Leonard de Hedon c. William de Ganton, CP.E. 11, 12 (1404); Prior & Convent of Watton c. Bishop of Carlisle, CP.E. 26 (1406); Prior & Convent of Holme Cultram c. Lady Margaret de Wighton, CP.E. 53 (1410).

116. See Table I *supra*.

117. On possible royal motivation in this matter, see note 251 *infra* and accompanying text.

118. See text accompanying notes 71, 81, 87 & 92 *supra*.

119. "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 sat in 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* (1968).

120. M2(1)b [Dean & Chapter Library, York], ff. 1r, 1v, 2v, 3r (two entries), 3v, 5r (two entries), 6v, 7r, 7v (1371).

ment, 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."¹²¹ 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.¹²² By contrast, the final entry in *Richard del See c. William de Hexham*¹²³ states laconically: "A royal prohibition was published and therefore—."¹²⁴ 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.¹²⁵

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. 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,¹²⁶ and

121. M2(1)b, f. 7r.

122. M2(1)b, f. 7v.

123. M2(1)b [Dean & Chapter Library, York], ff. 8v (two entries), 9r, 9v (1371).

124. M2(1)b, f. 9v.

125. See Maitland, *supra* note 23.

126. See, e.g., Prior & Convent of St. Mary's, Carlisle c. Bishop of Carlisle, CP.E. 22

a number of others began elsewhere within the province and, again so far as we can tell, ended in the York court.¹²⁷

Further, while there are mentions of papal judges delegate in the York records, the small number of such mentions¹²⁸ lends support to the suggestion that others have made that this institution was on the decline in the fourteenth century.¹²⁹ Part of this decline may be attributed to the fact that more cases were being heard by the Rota during this period.¹³⁰ 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.¹³¹

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 books¹³² are problematic, and there is no full-scale treatment of it to be found in any of the standard medieval treatises.¹³³ The granting

(1331) (prior and convent claim advowson of church by papal indult; bishop, claiming a papal provision, gave the church to another and refused to accept the prior and convent's man; prior and convent appeal to York); Abbot & Convent of Furness c. Official of Archdeacon of Richmond, C.P.E. 31 (1335) (dispute concerning power of archdeacon to correct monks; monks, claiming papal privilege, appeal to York).

127. See, e.g., *William de Skirwith v. Robert de Dishington* C.P.E. 47 (1241) (procurator

of king sues in York court to obtain his benefice from prior incumbent, whom, he alleges, has been excommunicated); Katherine, daughter of Sir Ralph Paynell, Kt. c. Richard, son of Sir Walter Cantelupe, Kt., C.P.E. 259 (1368) (divorce for impotence, involving two noble families).

128. There are six sets of cause papers dealing with papal delegation: C.P.E. 262 (1331[?]); C.P.E. 48 (1342); C.P.E. 53 (1345); C.P.E. 54 (1345); C.P.E. 57 (1357 [?]); C.P.E. 172 (1365); C.P.E. 243 (1379). Of these, three sets deal with requests for tuition upon appeal from judges delegate (48, 53-54, 57), and three with proceedings taken by the York court in cases delegated by the pope to the archbishop (262, 172), or the official (243).

129. See, e.g., Pantin, *The Fourteenth Century*, in *THE ENGLISH CHURCH AND THE PAPACY IN THE MIDDLE AGES* 159, 177-78 (C. Lawrence ed. 1965).

130. 7 *Dictionnaire de Droit Canonique Rote Romaine* 742 (1960). The Tribunal of the Holy Roman Rota was the principal court of the pope by the end of this period.

131. Just how difficult the trip to Rome was is vividly described in C. CHENEY, *FROM BECKET TO LANGTON* 54-56 (1956).

132. See X 2.28.17.

133. The most extensive study of tuitorial appeal to date is P. Wood, *Tuitorial Appeal to the Archbishops of Canterbury and York in the Thirteenth Century* (1970) (unpublished M. Litt. thesis in Edinburgh University Library). See also I. I. CHURCHILL, *CANTERBURY ADMINISTRATION* 427-30, 460-65 (1933); B. Woodcock, *supra* note 68, at 64-67. P. Wood, *subra.* reports on a brief passage in Hostiensis' *Commentaria* concerning

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.¹³⁴ Tuition definitely seems to have been worth fighting for, since almost all the tutorial appeal cases contain elaborate and expensive records, many with extensive depositions.¹³⁵ It is at least possible, then, that tutorial appeal was a device by which the York court was filtering appeals to Rome.

Twenty of the thirty-one tutorial 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,¹³⁶ 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 ordinary¹³⁷ 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,

tutorial appeal in England. (*Hostiensis' Commentaria* is, unfortunately, unavailable to me.) Wood cites no other medieval academic commentary on the topic. Cf. Didier, *Henri de Suse en Angleterre* (1236?-1244), in 2 *STUDI IN ONORE DI VINCENZO ARANGIO-RUIZ* 333 (1953).

134. Compare, e.g., *Prior & Convent of Bridlington c. Bishop of Lincoln*, C.P.E. 4 (1308) (tuition request accompanied by documents of title) and *Thomas Hackness c. Abbot of Whitby*, C.P.E. 164 (1399) (tuition request opposed on grounds that abbot's disciplinary action against monk of Whitby was justified) with *Bishop of Christopolis c. William de Emelden* [?], C.P.E. 57 (1357 [?]) (documents in support simply outline procedural steps taken to perfect appeal).

135. See, e.g., cases cited in note 134 *supra*.

136. 29/232. See Table 1 *supra*.

137. For a definition, see Maitland, *supra* note 23, at 625-35, reprinted in F. MARRLAND, *supra* note 19, at 100-16.

have survived.¹³⁸ 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.¹³⁹ 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.¹⁴⁰

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.¹⁴¹ 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.¹⁴² 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.¹⁴³ These would seem to be the reasons why *tuition* was sought, and, if they are the

138. For a study and documentation of these records, see F. LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND* (Pontifical Institute of Medieval Studies, Studies & Texts No. 15, 1968).

139. *Id.* at 116-36.

140. Of 300 quashed *significavits* in the medieval period, Logan reports but five in which attempts were made to have the writ renewed. *Id.* at 132-33 & n.75.

141. See C. CHENEY, *supra* note 131.

142. See, e.g., Peter Gabun c. Bishop of Durham, CP.E. 127 (1382); Nicholas de Hull c. Robert de Dightom [?], Vicar of Northallerton, CP.E. 74 (1357).

143. See P. Wood, *supra* note 133, at 90-111.

correct reasons, the grant or denial of tutorial 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.¹⁴⁴ 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.¹⁴⁵ But, as Maitland warns us,¹⁴⁶ in inferior courts you must expect inferior law, and the case was appealed to the York court. The second exception¹⁴⁷ involves not a contradiction (at least on its face) of papal law, but an addition to it, the custom of abjuration *sub pena nubendi*.¹⁴⁸

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,

144. See Donahue, *The Policy of Alexander III's Consent Theory of Marriage*, in PROCEEDINGS OF THE FIFTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW (S. Kuttner ed. forthcoming).

145. Alice de Draycott c. William Crane, CP.E. 23 (1332).

146. Maitland, *supra* note 20, at 473, reprinted in F. MAITLAND, *supra* note 19, at 43.

147. *Middleton de Draycott v. William Crane*, CP.E. 23 (1332).

148. 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 became 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).

there is practically nothing in the papal law books¹⁴⁹ 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,¹⁵⁰ 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.¹⁵¹ 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.¹⁵²

Other cases turn, not on local legislation, but on local custom. For example, in the trespass case the plaintiff¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

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 on the most general of policy grounds.¹⁵⁷ 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

149. That is, the *Decretals*, *Sext*, and *Clementines*. Cf. X 5.26.1; X 5.36.9 (both only tangentially related to problem).

150. The provincial constitution is Synodal Statutes of the Diocese of York [c. 42] (date uncertain, but before 1276). See I F. POWICKE & C. CHENEY, *supra* note 39, at 496.

151. "Petit [actor reum] in sentenciam maioris excommunicationis sacrosancta synodo Ebor' contra diffamatores et crimen impositores proinde latam et promulgatam . . ." is the standard form. See, e.g., Alice Pepynell c. John Ward, CP.E. 72 (1356).

152. See Helmholz, *supra* note 47. See also W. LYNDWOOD, *supra* note 46, lib. 5, tit. 17, c.[1] (*Auctoritate Dei Patris*), and accompanying glosses. There is, however, no evidence that this development occurred through the conscious adherence to the precedents established in prior judgments. See text accompanying notes 177-81 *infra*.

153. I translate *actor* and *reus* as "plaintiff" and "defendant," respectively throughout. The connotations of the English don't quite fit the Latin, but any alternative seemed precious.

154. Prior & Convent of Newburgh c. William Trolley, CP.E. 75 (1357).

155. See, e.g., William Pulkowe c. Prior of Haltemprice, CP.E. 64 (1352).

156. Helmholz, *supra* note 148, at 81 & n.3.

157. Inhabitants of Subholme c. William Rowdon, CP.E. 151, 183, 260 (1389).

village. The custom alleged, the rector counters, is not "praiseworthy" but "damnable." The inhabitants of the area do not need a chaplain, 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.¹⁵⁸ Many cases turn on this latter concept, frequently allied with an invocation of immemorial custom (prescription of rights).¹⁵⁹ For example, the two most frequently litigated issues in the tithe cases are whether tithes are owing from somewhat specialized activities—such as coal mining¹⁶⁰ or salmon fishing¹⁶¹ or dairy farming¹⁶²—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.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

158. 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).

159. For a discussion of this concept, see BRUNS, *supra* note 158, and sources cited therein.

160. *E.g.*, *Ralph Elys c. John Bolhall*, C.P.E. 162 (1397).

161. *E.g.*, *Prior & Convent of Durham c. John Lokyk*, C.P.E. 96 (1367).

162. *E.g.*, *William Mowbray, Rector of Normanby c. Thomas de Crathorne*, C.P.E. 177 (1390).

163. 4 *DICIONAIRE DE DROIT CANONIQUE Dime* 1231, 1233 (1949).

164. *E.g.*, *Ralph, Vicar of Leeds c. John Aylsy*, C.P.E. 55 (1345); *Hugh de Saxton c. Roger de Darrington*, C.P.E. 67 (1354).

165. *E.g.*, *Prior & Convent of Pontefract c. Richard de Walton*, C.P.E. 9, 10, 18 (1317).

166. The cases cited in note 164 *supra* contain particularly good examples.

167. *E.g.*, *Rector & Parishioners of Hemingsborough c. Prior of Durham*, C.P.E. 66 (1354).

The pleadings in a pension case¹⁶⁸ 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*—"below said" 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 tacitly and expressly for each and every period aforesaid up to the time of the above written nonpayment and spoliation¹⁶⁹

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;¹⁷⁰ it recognizes the validity of custom supplementary to and in some instances contrary to the common law;¹⁷¹ 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.¹⁷² The fact remains, however, that the existence of these

168. Prior & Convent of Blyth c. Roger Kelk, CP.E. 250 (1384).

169. The portion of the articles translated above reads:

ex consuetudine rationabili legitime prescripta ac per omnia et singula tempora supradicta pacifice et inconcusse observata et ex causa justa et sufficientis antiquitus legitime constituta, ac a rectoribus dicte ecclesie de Elton [soluta] qui successive fuerunt a .x.xx.xxx.xl.l.x. annis, ac citra et ultra et per ipsa tempora necnon a tempore et per tempus cuius contrarium memoria harum non existet [D]icti religiosi fuerunt in plena sufficienti canonica et pacifica possessione [juris] vel quasi juris percipiendi et habendi nomine monasterii sui predicti dictam annuam pensionem et eam actualiter perceperunt et habuerunt et percipere et habere consueverunt a singulis rectoribus ipsius ecclesie qui successive fuerunt in ipsa ecclesia, archiepiscopis, decano et capitulo Ebor' . . . scientibus, scire volentibus, et non contra dicentibus, set tolerantibus et approbantibus tam tacite quam expresse per omnia et singula tempora supradicta usque ad tempora subtractionis et spoliacionis suprascripte

Prior & Convent of Blyth c. Roger Kelk, CP.E. 250 (1384). This case was prohibited. See note 97 *supra*.

170. See W. LYNDWOOD, *supra* note 46, lib. 5, tit. 14, c.[1] (*Presbyteri*), gloss on *juramento*.

171. See R. WEHRLÉ, *DE LA COUTUME DANS LE DROIT CANONIQUE* 100-252 (1928).

172. See C. BRUNS, *supra* note 158.

general principles in the papal law books makes the remaining contents of those books irrelevant to the substantive decision in close to half the cases in our sample.¹⁷³

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 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.¹⁷⁴

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.¹⁷⁵ 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,

173. That is, most of the cases other than the marriage cases. See Table I *supra*.

174. See 7 *Dictionnaire de Droit Canonique Procédure* 282, 295 (1959). The bull is *Saepe Contingit*, CLEM. 5.11.2. Cf. CLEM. 2.1.2.

175. For example, the papal law seemed to hold that, with some exceptions, the testimony of women and serfs was inadmissible. See P. FOURNIER, *supra* note 87, at 185; TANCRÉDUS, *ORDO JUDICIARIUS*, in PILH, TANCRÉDI, *GRATIAE LIBRI DE JUDICIORUM ORDINE* 96, 232 (F. Bergmann ed. 1842). Yet we find a number of cases in which women testify, seemingly without objection, including one (Thomas de Newton c. Richard de Monte.

CP.E. 16 (1327) (deposition of Agnes de Sanndby)) in which a woman testifies in a testamentary case in direct violation of the church's common law (see TANCRÉDUS, *supra*, at 223), and a number of cases in which people who are at least accused of being serfs testify (see, e.g., John Button c. Alice Reyny, CP.E. 92 (1365)). It is not always easy to tell how the court reacted to these accusations, but in the latter case it seems to have gone ahead, in the face of strong evidence that the witnesses were serfs, and rendered judgment on the basis of their testimony.

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, suggests¹⁷⁶ 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?

Neither Maitland nor Stubbs and Kemp fully develop the impli-

implies a view of the legal process by which a judge, faced with a binding statute, automatically applies the dictates of that statute to the case before him. The judge in this situation is not a law-maker, either in the Anglo-American sense that his judgments create precedents on which future judges rely or in the more narrow sense that he manipulates the inherently ambiguous dictates of the law to fashion a rule that does justice to the parties before him. When Stubbs and Kemp suggest that the papal law collections were case-books, they seem to imply that cases are less binding than statutes, that the judge has more flexibility in applying case law than he does in applying statute law, and perhaps that each judgment of an English ecclesiastical judge, unless overruled by a higher court, is to form a precedent for use in future judgments.

One of the implications of these arguments can be treated summarily. There is no evidence from this period that the judgments of the English ecclesiastical courts were regarded as precedent. To the author's knowledge, there are no collections of such judgments in a form that would in any way suggest that they were regarded as precedent nor any record of their having been cited as authority, either in actual cases or in academic commentary. If Stubbs and Kemp mean to imply that English ecclesiastical court judges made law by their judgments in the way that an Anglo-American common law judge makes law, that implication is not supported by the evidence.

There remains, however, the question of the appropriate characterization of the papal law books and the further question of what that characterization means for the way in which the law was applied. Let us look first to the papal law books themselves to see whether they are more appropriately categorized as statutes or as collections of cases, next to the academic law to see how contemporaries thought they should be used, and finally to some evidence of how they actually were used.

The Gregorian *Decretals* contain a number of canons of Councils, particularly the Third and Fourth Lateran Councils,¹⁷⁸ and the *Clementines* consists almost entirely of canons of the Council of Vienne.¹⁷⁹ These are statutes pretty much in the modern sense of the term. On the other hand, the vast bulk of the *Decretals* and hence the vast bulk of the papal law books¹⁸⁰ consists of decisions by the pope in actual cases heard before him, opinions in actual cases re-

178. For a listing of the decretals drawn from canons of the Third and Fourth Lateran Councils, see 2 *CORPUS JURIS CANONICI*, *supra* note 14, at xii.

179. See note 14 *supra*.

180. The *Sext* and *Clementines* are quite small in comparison.

ferred to him, or answers to hypothetical cases posed to him by bishops, roughly equivalent to the *decreta*, *subscriptiones* and *epistulae* of the Roman law.¹⁸¹ Frequently the compilers have edited these documents, usually, however, not beyond the point of recognition. It is clear from the fact that they were collected that these decretal letters were regarded as highly authoritative, and their collection, arrangement, and promulgation in official, and, in the case of the *Decretals* and the *Sext*, exclusive¹⁸² texts made them even more authoritative, in fact if not in law. But both cases and statutes can be authoritative, and the fact that the papal law collections were authoritative does not make them any more or less like statutes or like cases.

In fact, the distinction between statute books and case books is somewhat anachronistic when applied to the medieval papal law books. Since neither statute books nor case books existed in the thirteenth or fourteenth centuries, the distinction between the two was unknown to Gregory IX, Boniface VIII, John XXII, or their compilers.¹⁸³ What the papal law books are is authoritative collections of canons, partaking something of the nature of Justinian's *Digest* and more of the nature of his *Code* and *Novels*.¹⁸⁴ If we define a statute or code as an authoritative, orderly statement of legal rules that is at once as concise and as general as possible, we will certainly not regard the papal law books as books of statutes. What order they have is imposed by the compilers and is not inherent in the texts themselves. Many of the texts lack both generality and conciseness because of the presence of much material about the controversy out of which they arose. If, on the other hand, we define a case book as a collection of reasoned opinions deciding results of specific controversies and striving both to do justice in the individual case and to set a precedent for the decision of similar cases, then the papal law books are not case books either.¹⁸⁵ They rarely contain reasoned

181. On the Roman law, see H. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 368-70 (3d ed. 1972).

182. See the bulls of promulgation cited in note 186 *infra*.

183. Indeed, it might be argued that some notion of separation of powers, or at least of functions, is necessary for the distinction to be operative. At least, it is hardly conducive to the development of the distinction to have the functions of supreme court and law-giver combined in one man, as they were in the case of the pope.

184. The analogy was perceived by the canon lawyers of the time, although the tendency was to analogize Gratian's *Decretum* to the *Digest* and the *Decretals* to the *Code*. See Kuttner, *Quelques Observations sur l'Autorité des Collections Canoniques dans le Droit Classique de l'Église* in *ACTES DU CONGRÈS DE DROIT CANONIQUE, CINQUANTENAIRE DE LA FACULTÉ DE DROIT CANONIQUE, PARIS, 22-26 AVRIL 1947*, at 305, 308 (1949).

185. The reader who has read at all in the theory of the sources of law will recognize at once the folly of attempting brief general definitions of "case" or "statute." In

opinions; they frequently do not contain *enough* facts about the case to allow us to determine the precise holding (this is, of course, particularly true of the genuinely statutory material and the answers to hypothetical questions); and they rarely show much adherence to the doctrine of precedent.

If the nature of the papal law collections leaves us in doubt as to whether their contents are to be regarded as more like modern cases or more like modern statutes, the books themselves give us even less help as to how they are to be used. The bulls of promulgation,¹⁸⁶ for example, say nothing of *how* the books are to be used, only *that* they are to be used by the law schools and the courts.

There is, however, a considerable body of learning outside the papal law books on the use of the decretals. It states, for example, that only the dispositive part of a decretal has legal force, not the statement of facts or the arguments or even the rationale. Further, the rubrics have legal force, if they do not contradict the black letter.¹⁸⁷ This learning unfortunately doesn't help us much. In the first place, much of it is the product of the postmedieval period. Second, it is itself somewhat ambiguous: At times the insistence that the dispositive part of the decretal has the sole *vis legalis* seems to imply that the decretals are in fact a code with a great deal of unnecessary verbiage added, while at other times, it seems to approach

jurisdictions where there exists a separation of judicial and legislative functions a rough approximation of definitions can be achieved by saying that cases are what are

decided by the judiciary and statutes are what emanates from the legislature. The roughness of the approximation is apparent: Are private bills or impeachment resolutions "statutes"? Are general procedural rules promulgated by a court "cases"? The definitional problem is even more severe in jurisdictions where the judicial and legislative functions are not separated or are imperfectly separated. See note 183 *supra*. Yet the notion persists that the distinction between "case law" and "statute law" is a useful one, as the use of the terms in the Stubbs-Maitland literature illustrates. *But cf.* Diddin, *supra* note 31, at 420-23, for a suggestion of the limited usefulness of the distinction in this context. My attempt at definition in the text reflects the influence of J. GRAY, *THE NATURE AND SOURCES OF LAW* 152-259 (1963).

Partially as a result of my attempt to grapple with the case-statute distinction in the context of the medieval English canon law, I have come to the conclusion that efforts to clarify the distinction frequently divert attention from two more fundamental issues: How are authoritative legal texts actually used by decision makers, and what is the nature of the judicial function? See text between notes 242-43 *infra* and text accompanying notes 265-73 *infra*.

186. *Rex Pacificus*, X, in 2 *CORPUS JURIS CANONICI*, *supra* note 14, at 1-4; *Sacro-sanctae Romanae Ecclesiae*, VI, in *id.* at 933-36; *Quoniam nulla*, CLEM. in *id.* at 1129-32.

187. See A. VAN HOVE, *supra* note 10, at 360-61, 365-66; G. LE BRAS, C. LEFEBRE & J. RAMBAUD, *L'ÂGE CLASSIQUE 1140-1378*, at 240-43, 250-51, 253 (*Histoire du Droit et des Institutions de l'Angle en Occident* No. 7, 1965); sources cited in both. *But cf.* Kuttner, *supra* note 184, *Velitit De Mente Gregorii IX in Admonenda Collectione*

the common law notion that only the holding of a case is binding. Third, there are indications that these notions were not strictly followed throughout the Middle Ages. For example, despite the fact that even the bulls of promulgation seem to preclude the use of decretal material outside the *Decretals* and the *Sext*,¹⁸⁸ the authors of the ordinary gloss¹⁸⁹ may be found using such material.

Thus, neither the nature of the papal law collections nor the statements as to how they were to be used give us much help in determining how they should have been applied in the English church courts themselves, much less how they actually were applied. A more fruitful way of determining how they were applied is to look to the way in which they were used in the courts. Unfortunately, the evidence here is most thin. English canon law judges in the Middle Ages, like their secular counterparts for most of the period,¹⁹⁰ did not generally give reasoned opinions. Further, and even more unfortunately, we are lacking any regular record of legal argument, like that found in the yearbooks, for the ecclesiastical courts. Time and again the *acta* will tell us that there was an extended dispute about a matter,¹⁹¹ but rarely do we learn the nature of the dispute.

A few documents that have survived from the thirteenth-century ecclesiastical courts at Canterbury do contain arguments of counsel. Of course, the way a lawyer uses authority in a brief is not necessarily the way a judge uses it in arriving at a judgment. On the other hand, we may assume that a lawyer intends to convince a judge by his arguments. If he uses authorities that are not authoritative or uses proper authorities in a way that is impermissible, he might as well not bother to write the brief; the judge will just not be convinced. These Canterbury "briefs," then, may give us some idea of what authorities were being used in the English courts Christian and, hence, the extent to which the papal law collections were the exclu-

188. E.g.: "Volentes igitur, ut hac tantum compilatione universi utantur in iudiciis et in scholis, districtius prohibemus, ne quis praesumat aliam facere absque auctoritate sedis apostolicae speciali." *Rex Pacificus*, *supra* note 186, at 4.

189. E.g., X 2.19.6, gloss on *partibus*, suggests that the compilers distorted the meaning of the decretal by what they left out. For explanation of the "ordinary gloss," see note 213 *infra*. For edition used, see note 14 *supra*.

190. See J. DAWSON, *THE ORACLES OF THE LAW* 50-54 (1968).

191. *Habita disputatio diutina* is the standard phrase. See Donahue & Gordus, *A Case from Archbishop Stratford's Audience Act Book and Some Comments on the Book and Its Value*, 2 BULL. MEDIEVAL CANON L. 45, 56 (1972). These entries, coupled with the fact that the academic canon law indicates that the advocate is to make a legal argument at the close of the case (see, e.g., TANCREDUS, *supra* note 175, at 263-67), indicate that legal arguments were made before the ecclesiastical courts. Like the yearbook arguments, they seem, as a rule, to have been made orally, but, unlike the yearbook arguments, they were not recorded and so have been lost to us.

sive authority in the areas to which they applied. They may also give us some idea of the extent to which and the ways in which the papal law collections could be manipulated and, hence, how they were binding on the English courts Christian.

Two of the surviving Canterbury "briefs" are of particular interest. The first is contained in a set of documents from *Robert de Picheford c. Thomas de Nevill*¹⁹² and can be dated between April 1269 and the autumn of 1270. Thomas de Nevill, in 1267, complained to the legate Ottobono that he had been presented to the church of Houghton in Leicestershire and instituted and inducted to the same. Master Robert de Picheford claimed presentation to the same church by a different patron and also institution and induction. Ottobono delegated the case to the Prior of Bradley, who rendered judgment in favor of Thomas. Robert appealed to the legate, who delegated the case to the priors of St. James and St. John near Northampton and then left the country. While this appeal was pending, so Robert claimed, the Prior of Bradley put his sentence into execution. At this point Robert appealed to Rome and to the Court of Canterbury for tuition. The documents that we have include Robert's *rationes*¹⁹³ (literally, "reasons") and supplementary *rationes*¹⁹⁴ attacking the action of the Prior of Bradley before the Official of the Court of Canterbury.

While the details of Robert's arguments are not always easy to follow, their basic outline appears to be as follows: (1) The proceedings before the Prior of Bradley were void because Robert was not properly cited and had no notice of them; (2) the Prior had no power to put his sentence into execution because his authority did not include the power to institute to a benefice;¹⁹⁵ and (3) in any event, the Prior should not have acted while an appeal was pending, and therefore Robert should be restored to possession. Robert was ultimately successful, although we cannot tell which argument or combination of arguments the court found dispositive.

In Robert's *rationes* there are three citations to the *Decretum*, fourteen citations to the *Decretals* (two of which are repeated), five

192. Documents from this case are scattered in various classifications of the Cathedral Archives and Library, Canterbury: Ecclesiastical Suit Rolls Nos. 4i-iii, 7-8, 9i-iii, 18, 226, 331, 340; Sede Vacante Scrapbooks Nos. I at 132, II at 50, 64, III at 314; Chartae Antiquae B398a, Z152, Z183. The case is one of the cases that will be printed in Professor Norma Adams' forthcoming Selden Society volume of select Canterbury cases from the thirteenth century. I am most grateful to Professor Adams for allowing me to make use of her typescript of the case in preparing this article.

193. Ecclesiastical Suit Roll No. 4iii.

194. Ecclesiastical Suit Roll No. 131.

195. See note 70 *supra*.

citations to the legatine constitutions¹⁹⁶ (two of which are repeated), and ten citations to Roman law (three of which are repeated). The Roman law citations include three to the *Digest*, three to the *Code*, three to the *Novels*, and one to the *Institutes*.

The second "brief" comes from a marriage case, *John of Elham c. Alice, daughter of Richard Cissor [Tailor?]*,¹⁹⁷ and may be dated some time late in 1293 or in early 1294. It is a less formal document than the arguments in *Picheford c. Nevill* and is headed simply "for the information of the lord judge in sentencing." It contains arguments both of fact and law relevant to Alice's basic defense: that she had not freely consented to marry John. Although Alice seems ultimately to have lost the case, we cannot tell whether it was the legal arguments that failed to persuade the judge or whether he simply did not believe that Alice had made out her case as a factual matter. The arguments contain eight citations to the *Decretals*, one to the *Digest*, and one to the *Summa* of Geoffrey of Trani.¹⁹⁸

So few actual medieval canonic arguments with citations of authority survive¹⁹⁹ that one cannot be sure how typical this list of authorities is of actual court arguments of the period. Clearly, however, there is nothing in the lists of authorities in these briefs that should surprise the reader of medieval academic canon law writing. All of the authorities mentioned are in the romano-canonic tradition, but the papal law books are clearly not the only permissible authority. Particularly notable is the number of citations to Roman law in Robert's procedural arguments, citations not only to basic principles contained in the *Digest* and *Institutes* but also to detailed statutory regulations in the *Code* and *Novels*.²⁰⁰ There are also a number of citations to commentary rather than to authoritative texts. Sometimes these citations are apparent from the text of the citation itself, such as Alice's citation to Geoffrey of Trani's *Summa*; sometimes we must look to the cited source in order to discover that

196. That is, the canons promulgated by the provincial councils held under the authority of the papal legates Otto and Ottobono. See F. POWICKE, *THE THIRTEENTH CENTURY* 451 (Oxford History of England No. 4, 2d ed. 1962).

197. *Sede Vacante Scrap Book* No. III at 61 (no. 128), 62 (nos. 130-32). Number 131 is the "brief." It is transcribed in Appendix B *infra*. I am indebted to R.H. Helmholz for calling my attention to this document.

198. GEOFFREDUS TRANENSIS, *SUMMA IN TITULOS DECRETALIUM* (1563).

199. Silvestre, *Dix Plaidoiries Indédites du XII^e Siècle*, 10 *TRADITIO* 373 (1954), contains ten Belgian canonic arguments from the twelfth century with authorities cited. The editor, however, believes that these documents were not actually used in litigation but were school exercises—roughly equivalent to moot court briefs of our own day.

200. E.g., *CODE* 2.1.7; *NOVELS* 119.3. A summary of the thirteenth-century controversy over Roman law as an authority in the canonic courts and as a topic of study in the universities may be found in A. VAN HOVE, *supra* note 10, at 456-67, 523-28.

the citation is not to the authoritative text but to the accompanying marginal commentary.²⁰¹ The impression left by the breadth of the citations is not that there was a single authoritative text to which all arguments must be directed but rather that there was a large group of texts and commentary from which each counsel picked his authorities to suit his argument. In each of these respects the use of the authorities is similar to that made in such academic writing as the glosses to the *Decretals* or any of the numerous treatises of the period.²⁰²

In order to get some idea how and to what extent the authorities, particularly the papal law collections, were being manipulated and, hence, how they were binding, let us examine one of the arguments in the marriage case. The examination must necessarily be somewhat lengthy, since it is only as the argument unfolds that we can get some idea of the different kinds of arguments being made, the assumptions under which they are made, and, ultimately, and most importantly, how far from the letter of the papal texts, or even the accompanying commentary, we are being led.

Alice's counsel²⁰³ has alleged that four of his witnesses testified to the proposition that Alice was forced into the marriage contract. He now has to deal with the argument made by John's counsel that this testimony should not have been admitted because Alice had submitted her *articles*, written offers of proof, after the testimony of John's witnesses had been published. This argument addresses an issue that troubled the canonic courts and commentators throughout the thirteenth century and beyond.²⁰⁴ Under canonic procedure a party who wished to prove a point submitted to the judge written articles outlining what he wished to prove. The witnesses were then examined by the judge or other court official separately and in private, and their testimony was reduced to writing. When all the testimony was in, it was published in open court, and copies of it were given to each party.²⁰⁵ Because of the fear that the opposing party would suborn perjurious testimony to the contrary, canon law,

201. See, e.g., text accompanying notes 214-16 *infra*.

202. E.g., GOFFREDUS TRANENSIS, *supra* note 198.

203. Whether the author of this document was a proctor or an advocate we do not know. Woodcock reports that the distinction between the two does not seem to have been observed in the Canterbury Consistory Court. B. WOODCOCK, *supra* note 68, at 42. We can avoid the problem by calling him "Alice's counsel."

204. See, e.g., material cited in notes 210, 214, 217-22 *infra*. See also CLEM. 2.8.2 and accompanying glosses for a treatment of the problem some two decades after the *Elham* case.

205. A basic description of this procedure may be found in P. FOURNIER, *supra* note 87, at 189-92.

following Roman law, developed the notion that once the testimony about a given matter had been published no more evidence could be introduced on that matter.²⁰⁶

The principle was well established, but the difficulty came in devising a verbal formula that defined how far the bar on the introduction of more evidence extended. Did it encompass other proceedings in which the same issue was raised? Did it encompass what today we would call affirmative defenses? The issue was particularly troublesome in marriage cases, because the more that procedural rules interfered with getting to the truth of the matter, the more likely it was that undesirable conflicts would rise between the external forum, the forum of the courts, and the internal forum, the forum of conscience.²⁰⁷ Here is how Alice's counsel argues that the bar should not extend to the offer of proof of force after the publication of testimony concerning the marriage contract:²⁰⁸

So far as the argument of the plaintiff is concerned—that this defense and its proof should not be allowed to stand because it is an article contrary to the first and witnesses to such an article cannot be introduced after the publication of the testimony about the first—what he says about such articles is true but not relevant. There are four types of articles that should be considered with regard to the present matter: the same article or one completely contrary, one that completely and directly destroys the first, and about neither of these can there be a production of witnesses after the testimony about the first article has been published. X 2.20.38; X 2.19.6; and similar authorities. There are also articles completely diverse from the first but not contrary to it, and there is a fourth type of article that depends on the first, supposes the first and adds something to it, but does not completely destroy it. X 2.20.33; X 2.22.10; and similar authorities. Witnesses about these two types of articles are properly ad-

206. That the basic motivation for the rule in canon law was fear of subordination of perjury is clear. See authority cited in note 220 *infra* and accompanying text. The Roman law rule, however, may have been prompted more by a desire to expedite the proceedings. See CODE 7.62.4; NOVELS 90.4.

207. On the two fora, see 5 Dictionnaire de Droit Canonique For 871, 872-73 (1953). Because of the potential conflict between the two fora, there was even some doubt in this period as to whether a judgment in a marriage case could ever become *res judicata*. See X 2.27.7 and accompanying rubric and glosses; L. MUSSELLI, IL CONCETTO DI GIUDICATO NELLE FONTI STORICHE DEL DIRITTO CANONICO §§ 7, 15, 19 (Pubblicazioni della Università di Pavia, Studi Nelle Scienze Giuridiche e Sociali No. 7 (n.s.), 1972). Granted this doubt, one could see why some commentators would have thought that the general rule barring the introduction of new articles after the testimony had been published did not apply to marriage cases. See text accompanying note 214 *infra*.

208. Translation by the author. The text of the original is found in Appendix B *infra*. The translation is from the item beginning "Quarta exceptio," beginning at "quod autem dicitur" to "licet presens sit in corpore." The citation system has been modernized in the translation, and I have chosen some renderings that convey the brief-like style of the passage at the expense of literal accuracy.

mitted after the testimony has been published about the first articles, as the gloss on *novis* of X 2.20.17 notes. This is the case which we have at hand. Alice's defense of violence supposes that the form of the contract was present but that the substance, consent, was absent (for consent has no place where force intervenes (X 4.1.14)). Therefore, there is no reason why absence of consent or mind, like absence of body, cannot be proven after the testimony has been published. For just as it is possible to contract marriage by present consent even though you are not present in body, as for example by messenger or letter, so it is possible for there to be no contract between present parties if consent is absent. Just as a madman is said to be absent in mind even though he is present in body (*Digest* 50.17.40), so one who is coerced is said to be absent in that mind that is required for matrimony, even though he is present in body.

If we turn to the texts of the *Decretals* (the *Sext* and *Clementines* having not yet appeared), we will not find anything that directly answers the question that Alice's counsel was posing: Is a defense (exception) of force barred after publication of testimony concerning the contract? Nor do we find any text that makes the fourfold distinction that he suggests is dispositive. Rather, we find a number of cases that state the general rule, either by way of dictum or holding, that, once testimony about a matter has been published, further testimony about that matter is barred, and we find a few cases that expressly or by implication go the other way.²⁰⁹ If we examine the rubrics of Raymond of Peñafort, the compiler of the *Decretals*, we get the impression that the general rule is well-nigh inviolable. The only exception that he notes with approval is that where testimony has been received in a summary proceeding the same articles may be tried again in a full proceeding using the same or different witnesses.²¹⁰

What Alice's counsel has done, then, is to create a coherent pattern where no coherent pattern is directly suggested in the texts. To do this he employs cases that Raymond placed in the *Decretals* to illustrate quite different rules. He is helped to his result by the glosses, although none of them makes his point quite so precisely as he does.²¹¹

209. See text accompanying notes 211-28 *infra*.

210. X 2.20.38.

211. We need not, of course, assume that the pattern is original with Alice's counsel. It has all the hallmarks of academic commentary of the period, and it may have been something that he learned in the University. I know of no contemporary commentary, however, that approaches this particular problem in quite the way that he does. Durandus suggests a fourfold division in his treatment of the same problem. G. DURANDUS, *SPECULUM CUM ADDITIONIBUS* lib. 1, pt. 4, tit. *de attestationum publicatione*, § 7 (1508). The division, however, is not the same as that employed by Alice's

(1) "There are four types of articles that should be considered with regard to the present matter." None of the texts or glosses says this, and to reach this statement, Alice's counsel has had to ignore, as not pertinent to "the present matter," the one distinction that the rubrics make,²¹² that between articles introduced in the same proceeding and articles introduced in a different type of proceeding.

(2) "[A]bout neither of these can there be a production of witnesses after the testimony about the first article has been published. X 2.20.38; X 2.19.6 . . ." Here Alice's counsel partially concedes his opponent's argument, but in a way that suggests that he need not go even this far. X 2.20.38 deals with the introduction of the same article, but it is the decretal that holds that such an article may be introduced in a plenary proceeding even though the same article has been introduced in a prior summary proceeding. The citation seems to imply the argument that even where the same article is introduced, the rule is not so absolute as the plaintiff maintains. X 2.19.6 deals with an article directly to the contrary and also with a marriage case. The headnotes²¹³ state that the general rule applies even in marriage cases, but the glosses note that there is another decretal (X 2.20.35) that seems to go the other way.²¹⁴ Some commentators suggest, the gloss continues, that the distinction to be drawn between these two decretals lies in the fact that X 2.19.6 deals with a contract of marriage, while X 2.20.35 deals with a present marriage.²¹⁵ The gloss ultimately rejects this distinction and suggests that only "different articles or those pendent on the prior article"²¹⁶ should be admitted; but once again Alice's counsel seems to be suggesting that he may

counsel, although there is some similarity in the language and in the decretals cited. Cf. HOSTIENSIS, SUMMA AUREA lib. 2 (*de testibus*), c. 11 (Venice 1581).

212. X 2.20.38, rubric.

213. The marginal commentary on the *Decretals* is generally divided into two parts: the *casus*, a brief statement of the facts and holdings of a decretal much like a modern headnote, and the glosses, a set of elaborate footnotes keyed to specific words in the text. The final rescension of these latter, made by Bernardus Parmensis (died 1266), had already become the "ordinary gloss" (*glossa ordinaria*). Bernardus also wrote a set of *casus* that are found in some but by no means all manuscripts of the *Decretals*. We can be reasonably sure that Alice's counsel had the *glossa ordinaria* before him; we can be considerably less sure that he had Bernardus', or anyone else's, *casus* before him. See notes 14, 189 *supra*; 2 J. VON SCHULTE, GESCHICHTE DER QUELLEN UND LITERATUR DES KANONISCHEN RECHTS VON GRATIAN BIS AUF DIE GEGENWART 115-16 (1875).

214. X 2.19.6, gloss on *partibus*.

215. See note 207 *supra*. A contract of marriage, of course, created a merely contractual obligation, while a present marriage was a sacrament, indissoluble even by the parties and subject to the Biblical injunction, "What God has joined, let not man put asunder." *Matthew* 19:6. See generally G. JOYCE, CHRISTIAN MARRIAGE (2d ed. 1948).

216. "super alio articulo et super novo pendente ex priori." X 2.19.6, gloss on *partibus*.

have conceded too much, because one decretal and some commentators suggest that the general rule does not apply to cases of present marriage at all.

(3) "There are also articles completely diverse from the first but not contrary to it, and there is a fourth type of article that depends on the first . . . but does not completely destroy it. X 2.20.33; X 2.22.10 . . ." Here the symmetry breaks down. The statement of law is clearly derived from the gloss on X 2.19.6, but neither X 2.20.33 nor X 2.22.10 is precisely on point. X 2.20.33 is a case in which the pope, on appeal, disqualified some witnesses but nonetheless remanded the case for the taking of new testimony on the same article. The citation is interesting, however, because of the amount of effort Alice's counsel had to put in to see how it was relevant to his case at all. Neither the rubric, nor the headnotes, nor the glosses suggest that the case is contrary to the general rule. The focus of all three is on what the decretal has to say about the qualifications of witnesses. Alice's counsel, however, saw that the holding of the decretal necessarily involved an exception to the general rule, an exception perhaps broad enough to support the proposition that the rule will not be applied where it works manifest injustice. X 2.22.10 is closer to supporting the point for which it is cited. In X 2.22.10 the plaintiff, after the defendant's testimony had been published, introduced evidence to the effect that a contract, which the plaintiff had proved, was conditional, and the pope sustained the claim. Raymond put the case in the *Decretals* because it supports the proposition that three witnesses prevail over a written instrument.²¹⁷ The headnotes suggest that the case stands for the proposition that a *new* article may be introduced after the testimony has been published,²¹⁸ but the arguments of counsel reported in the case suggest that a completely new article could not have been introduced because the case was on appeal. Rather, the article that suggested that the contract was conditional "depended

on the old [article]."²¹⁹ Thus, the case supports Alice's counsel's proposition that dependent but not contrary articles may be introduced after publication.

(4) "Witnesses about these two types of articles are properly admitted after the testimony has been published . . . gloss on *novis* of X 2.20.17 . . ." X 2.20.17 is the only decretal cited by Alice's counsel that is not a decision in a specific case. Rather, it is the pope's response to a hypothetical question posed by a bishop: Can new wit-

²¹⁷ X 2.22.10, rubric.

²¹⁸ *Id.*, *casus*: "super novo articulo publicatis attestationibus testes recipiuntur."

²¹⁹ *Id.*, text: "etsi novum esset capitulum, pendebat tamen ex veteri."

nesses be introduced after the parties have renounced further production of witnesses? The pope's answer states the general rule but adds that in appeal cases witnesses either old or new may be introduced about a new article. The gloss, citing X 2.22.10,²²⁰ defines *new* as dependent upon or arising from the old. This is most helpful for Alice's counsel because it suggests that both new and dependent articles are included within the exception stated in the text of X 2.20.17. But what of the fact that both X 2.22.10 and X 2.20.17 seem to deal only with articles introduced on appeal? Here again the gloss comes to the rescue. The Roman law commentators, it says, attempt to reconcile the divergent texts of Roman law concerning the introduction of new articles on the basis of whether the new articles are introduced at first instance or on appeal. But the reason for the general rule, the gloss continues, is the danger of subornation of perjury, and this danger is just as great whether the case is on appeal or still before the judge of first instance. The true distinction, the gloss concludes, is based on the nature of the article: Those that are new but depend on the old may be admitted either at first instance or on appeal.²²¹

(5) The other two citations are of less interest. "[C]onsent has no place where force intervenes" is a direct quotation from X 4.1.14, where it is used in quite another context.²²² The invalidity, however, of matrimonial consent obtained by force was well established.²²³ That a madman is present in body but absent in mind is not found in *Digest* 50.17.40 but in the Accursian gloss on this passage.²²⁴ The statement, however, was commonplace.²²⁵

Despite the paucity of citation and the pedestrian nature of those

220. X 2.20.17, gloss on *novis*.

221. Sed domini legum satis frivolum adhibent solutionem. Intelligunt eum authenticum [NOVELS 90.4] in eadem causa ante sententiam diffinitivam, leges istas [CODE 7.62.4] in causa appellationis. Sed ratio prohibitionis remanet in eadem causa appellationis que fuit in principali, scilicet, periculum subornationis, et ideo quod causa remanet eadem utrobique eadem debet esse prohibitio utrobique, et ubi est eadem ratio idem iudicium habendum est. . . . Unde dicendum est quod apertis attestationibus ulterius non recipiantur super eisdem articulis alii testes, et leges predictae recte possunt intelligi ut habeant locum super novis articulis pendentibus ex prioribus, et sic concordabunt iuri canonico

X 2.20.17, gloss on *novis*.

222. X 4.1.14, text: "[L]ocum non habeat consensus ubi metus vel coactio intercedit." The case contains instructions to judges to provide a safe place for women pending the trial of cases where force seems to be at stake.

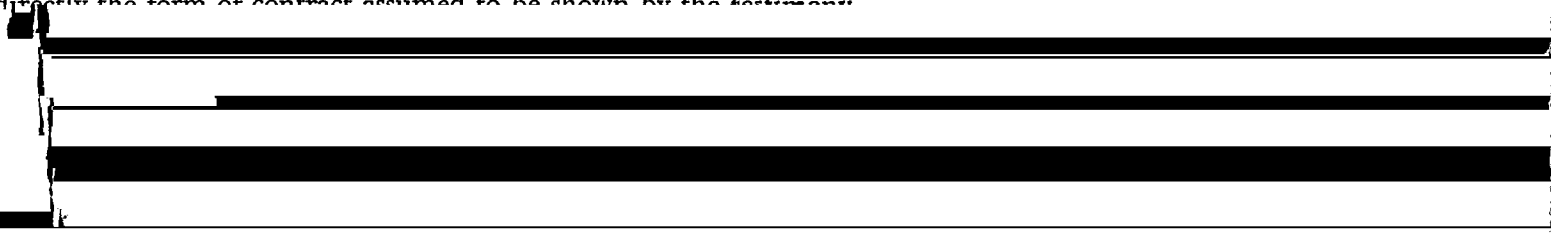
223. See, e.g., TANCREDUS, SUMMA DE MARTIMONIO tit. 25, at 44 (A. Wunderlich ed. 1841): "[Vis] ex sui natura sive constitutione ecclesiae matrimonialem consensum exclusit."

224. ACCURSII GLOSSA IN DIGESTUM 591 (Corpus Glossatorum Juris Civilis No. 9, 1968).

225. See, e.g., DIGEST 29.7.2.3.

authorities that are cited, these concluding sentences of the argument are critical. The argument so far has established that affirmative defenses, defenses that assume the truth of the first article but go on to deny its effect by adding something to it, are admissible. Alice's counsel must now show that her defense—that she was forced to consent to the marriage—is that kind of defense. Today we might phrase his argument this way: Once the plaintiff has sustained his burden of going forward and the defendant has put in his evidence denying the elements in the plaintiff's case, then, after this testimony is in, the defendant should have an opportunity to demonstrate those things about which he has the burden. Alice's counsel does not make this argument, however, because his authorities do not speak in terms of burdens of going forward. In fact, if we leave out the general statements in the glosses, his authorities are quite thin. The only case squarely on point is X 2.22.10, the conditional contract case, and even that one could be distinguished on the ground that in that case the second article was offered on appeal.

Faced with this problem, Alice's counsel plays an old lawyer's trick. He assumes that a much more extreme case would be decided in his favor, and then argues that his easier case should be decided the same way: The defense of force, he says, supposes the form of the contract but denies the substance. (True, but whoever said that all that John had proved was the form of the contract?) Absence of body, he continues, may be proved after the publication (who said so?), because it is possible to have a valid contract even though one of the contracting parties is not there. (If all that the first article showed was that there was a contract in form, then it might be argued that articles concerning absence could be introduced, because proof of a contract in form would not necessarily exclude the possibility of one of the parties being absent. But this again assumes that all that the first article alleged was that there was a contract in form. There is also a more fundamental problem: Proof of physical absence alone isn't going to do the defendant any good, since the law allowed an absent man to contract marriage by sending a messenger or a letter.²²⁶ He is going to have to show not only that he was absent, but also that he didn't authorize a messenger or send a letter. But if the defendant attempts to show that neither he nor his authorized messenger nor his letter was involved, he comes perilously close to contradicting directly the form of contract assumed to be shown by the testimony



about the first article.) Just as one can contract validly and be absent

226. See 1 A. ESMEIN, *LE MARIAGE EN DROIT CANONIQUE* 189-91 (R. Génestal rev. ed. 1929) and sources cited therein.

in body, Alice's counsel continues, so one can be present in body and absent in mind and thus not contract validly. This is the situation of a madman or one who is coerced, both of whom are present in body but absent in mind. (The fundamental problem is avoided by a neat turn of phrase. Of course one can be present in body and still not validly contract, and one does not have to be a madman or coerced in order to do so: One simply has not to agree to a bargain. The question is not one of the substantive law of contract, however much Alice's counsel would like to make us think it is; the question is whether John's proof of contract directly or by implication included proof of freely given consent, so that introduction of proof of absence of consent would constitute a direct denial of the prior proof.)

How is it that our thirteenth-century lawyer who seemed capable in the previous sentences of quite sophisticated argumentation suddenly drops into a line of argument that would make a first-year law student blush? It is possible that he was incapable of sustaining the effort of the previous sentences. There is nothing in the rest of

his brief that would give us much reason to trust in his abilities.²²⁷ It is possible, too, that John's articles did not allege that the consent was freely given or that they simply alleged a formally valid contract and that Alice's counsel is therefore arguing, without so saying, that only what the articles allege and not what the witnesses actually said is to be used in determining whether a new article involves a direct contradiction. It may also be that our lawyer thought that his cause was hopeless and that he could think of nothing better than the turn of phrase, "absent in body and absent in mind," to conceal its weakness. A still further possibility is that he thought that the turn of phrase solved his problem. Those who have read much in either medieval law or medieval philosophy know that the medieval mind put much more stock in purely verbal analysis and distinctions than we do.

We can rescue our lawyer, however, if we assume that it was so firmly established as not to require citation of authority that the defendant in a marriage case could introduce articles to prove his physical absence from the scene of the alleged marriage after the plaintiff's testimony was published and without regard to what the plaintiff's

227. See, e.g., the argument that he makes about proof of negative facts and words, in Appendix B *infra*. Here he seems to want to equate the two proofs except for the fact that proof of negative words must be accompanied by proof of circumstances. He seems to have confused totally the difference between the proof of the absence of something (which the canonists regarded as virtually impossible) and the proof that someone had made a negative statement.

articles or his witnesses said. Now, there is some support for this proposition in the decretal X 2.20.35, which Alice's counsel cites at least by implication because it is discussed in the gloss to X 2.19.6. Indeed, some quite respected commentators thought that X 2.20.35 meant just this: Exceptions of absence in marriage cases might be introduced at any time.²²⁸ But the writer of the gloss on X 2.19.6 and Raymond's rubrics on X 2.20.35 both suggested that X 2.20.35 was aberrant. If Alice's counsel had introduced that decretal for the proposition for which he wanted to use it, he would have undercut the authority of a gloss on which he was relying heavily for his basic distinctions among types of articles and would have called attention to Raymond's questioning rubric. So Alice's counsel did not cite X 2.20.35; instead, he wrote his brief as if he assumed that the proposition he would have used it for was so obvious as not to need citation.

All this makes the argument seem a bit more clever, but it is still a basically bad argument unless we go one step further and assume that the judge to whom the argument was addressed would also have assumed, without necessity for citation, that exceptions of absence could be introduced at any time. There is some evidence that he might have. The York court regularly²²⁹ allows the introduction of many kinds of exceptions after the testimony has been published—a striking divergence from the Church's common law. One of the more frequently allowed of these exceptions is the exception of absence in marriage cases.²³⁰ Of course, a peculiarity of York in the fourteenth century is not necessarily a peculiarity of Canterbury in the thirteenth. But if thirteenth-century Canterbury followed the same practice as fourteenth-century York, Alice's counsel's argument takes on considerably more weight: Alice's counsel has just shown that the only kinds of articles that the authorities allow to be introduced after the testimony is published are articles that contradict the first article only indirectly. Now, the only way to justify the regular allowance of exceptions of physical absence under this rule is to say that, whatever the first article alleging a marriage contract says and whatever the witnesses say, all that has been alleged and proved so far as the rule about new articles is concerned is that there was a contract in form. Since it is possible to have a contract in form without one of the contracting parties being physically present, an article that al-

228. See text accompanying notes 214-16 *supra*.

229. See cases cited in note 230 *infra*. Cf. *Alice, daughter of John Cressy v. William Whitened*, C.P.E. 97 (1368) (court allows plaintiff to introduce articles on appeal that completely change her testimony in the lower court).

230. See, e.g., *Alice Malmon v. John Belamy*, C.P.E. 131 (1373); *Marjory Spuret v. Thomas Hornby*, C.P.E. 205-07, 209 (1393).

leges that the party was not present and did not authorize such a contract is not directly contrary to the first article for purposes of the rule. If the rule has been stretched this far in the case of exceptions of physical absence, surely it is not stretching it any further to admit exceptions of mental absence. Indeed, allowing such exceptions would not go so far, because an exception of coercion or insanity will normally involve less direct contradiction of what the first article and witnesses have actually said and hence will involve less danger of subornation of perjury in violation of the policy of the general rule.

One legal argument from one case is not much on which to base conclusions about how papal law books were used in medieval England. Even when we add the rest of the arguments in *Elham c. Dover* and the arguments in *Picheford c. Neville*, we haven't got much to go on. But so few of these arguments have come to light that they should be considered as carefully as possible, and some preliminary conclusions should be drawn.

Since neither of the modern terms "case book" or "statute book" describes the papal law books, we should not expect to find that the papal law books are being used in a way that fits our ideas of how either type of authority should be used. It is not clear that even today we could define precisely how each type of authority is to be used. As a general matter, however, we might be able to obtain a consensus that the holding of a case is binding (unless overruled) in situations that have the same legally relevant facts; that the *ratio decidendi* (when defined as the reason given by the judge for his decision) may, but need not, be binding in cases with different facts; and that *dicta* are not binding at all, except insofar as the judge in the subsequent case independently finds them persuasive. Statutes, on the other hand, are absolutely binding on a judge in cases to which their language clearly applies; their rationale may be sought only in situations where their applicability, as determined from their language, is doubtful; and by and large they may not be used at all in situations that their language does not, at least arguably, cover.²³¹ Even when the distinctions are thus simplified (and distorted), Robert's and Alice's counsels' arguments, like those of the academic canon lawyers, clearly cannot be fitted into either mold.

We can find uses of authority in these arguments that seem to par-

231. These generalizations, of course, apply only to Anglo-American law. Even as so confined they raise numerous questions. See generally C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, *THE LEGAL PROCESS* 43-65, 424-54, 490-501, 504-18 (1961), and materials cited therein; A.R. CROSS, *PRECEDENT IN ENGLISH LAW* (1968); F. FRANKFURTER, *SOME REFLECTIONS ON THE READING OF STATUTES* (1947); J. MONTROSE, *PRECEDENT IN ENGLISH LAW AND OTHER ESSAYS* (1968).

take more of the statutory approach. For example, in Robert's *raciones*²³² the principle that the Prior of Bradley had no authority to execute his sentence is supported by citation to a decretal²³³ the dispositive part of which states that, in an advowson case that the pope has delegated for trial, the winner should be presented by the judge delegate to the bishop, and the bishop, not the judge, should institute him to the benefice he has won. Viewed as an Anglo-American common law case, the decretal is quite distinguishable from Robert's situation because in the decretal it was the bishop and not the defeated party who was complaining, and the rationale of the decision is that the delegation of the case should not be presumed to defeat episcopal rights, something not involved in the *Picheford* case, since the bishop had instituted Thomas Neville. Thus, Robert's counsel is here using a case as if it were a statute.

On the other hand, Alice's counsel uses X 2.20.33 in a way in which a statute could not be used. The dispositive part of this decretal states simply that the case is to be remanded for the taking of new testimony on the question of whether the defendant was disqualified to hold ecclesiastical office. The witnesses, the pope notes, may include suitable laymen or women. The case is collected for the proposition that laymen and women may testify about impediments to holding ecclesiastical offices. It is only if one reads the entire case that one realizes that the holding, although not the language of the case, also supports the proposition for which Alice's counsel used it: that in certain circumstances new testimony can be taken even after the testimony of other witnesses on the same issue has been published.²³⁴

Sometimes the citations show a search for the underlying rationale of a decretal in a way that is quite different from the way either cases or statutes are used in Anglo-American jurisdictions. For example, Robert's counsel, having established the general proposition that nothing should be innovated pending appeal, wishes to demonstrate that, pending appeal, the possession of a benefice should not be disturbed. He cites for this proposition a decretal²³⁵ that does not concern pending appeals at all, but, rather, holds that one who asks the pope to provide him to a benefice must mention that the benefice is possessed by another even if the possession is *de facto* only and not *de jure*. The rationale of this decretal, Robert's counsel seems to be telling us, is the same as the one he is seeking to have applied to this

232. See text accompanying notes 192-94 *supra*.

233. X 1.29.15.

234. See text between notes 216-17 *supra*.

235. X 3.8.6.

case: Possession of a benefice should not be disturbed unless and until there is a final judicial determination of the underlying right.

In fact, as Alice's counsel's argument indicates,²³⁶ the way in which these authorities were used can only be described as eclectic. We can, and the commentators will give us some support in this,²³⁷ arrange the authorities he uses into a hierarchy. First come papal pronouncements, of whatever type, the more recent taking precedence over the more ancient; next, decrees of local councils, those from the area in which the court is sitting taking precedence over those in other areas; next, in a somewhat shadowy status, Roman law; and finally, academic commentary. We can also, if we choose, classify authorities by types: decrees of general and local councils being most like statutes, papal decrees being almost the same, decisions by the popes in actual litigated cases being most like Anglo-American cases, and papal answers to questions—real or hypothetical—falling someplace in between. The arguments, however, give us no indication that such distinctions made any difference. It is all law; it is all authoritative; and it is all to be manipulated by whatever means come to hand, always, if our reading of Alice's argument is correct, with a keen awareness of the custom of the court to which the argument is addressed.²³⁸

Of course, in a case of direct conflict the hierarchy suggested above might dictate which rule would apply, although there would be some doubt as to where custom would fit on the scale. But direct conflicts are rare, particularly since the academic method of the

236. See text accompanying notes 204-30 *supra*.

237. See Kuttner, *supra* note 184, at 309-10, for the suggestion that the hierarchy, if it was used at all, was used only for the purpose of determining whether an authority should be admitted to the common law of the church. Once admitted, conflicting authorities were reconciled by other means. See also G. LE BRAS, C. LEFEBVRE & J. RAMBAUD, *supra* note 187, at 396-405.

238. Of course, Alice's counsel's argument is not the only evidence that we have of the importance of the custom of the court. See text accompanying notes 129-43, 152-68 *supra* for discussion of the custom of the York court with regard to tutorial appeal and the use of custom as a supplement to papal substantive law. On the other hand, I am not suggesting that either the manipulation of the contents of the law books or the reliance on custom was peculiar to the English ecclesiastical courts. A glance at the surviving fourteenth-century judgments of the Roman Rota indicates that more careful analysis would show that the auditors of the Rota manipulated the law in the same way that Robert's and Alice's counsel did. See, e.g., BERNARDUS DE BISIGNETO, *Decisiones*, tit. *de testibus*, *decisio* 1 (before 1365), in *ROTAE AUDITORUM DECISIONES NOVAE, ANTIQUAE ET ANTIQUIORES* (Venice ed. 1570) (contains two citations to the *Digest*, one to the *Decretals*, and one to a gloss on the *Decretals*). Certainly they did so in later periods. See generally J. NOONAN, *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia* (1972). Tancred's famous early thirteenth-century tract on procedure, *Ordo Iudicarius*, shows the same keen awareness of the importance of the custom of the church court of Bologna, with which he was intimately familiar. E.g., TANCRREDUS, *supra* note 175, at 279-80.

lawyers of this tradition greatly preferred reconciling conflicting authorities to selecting which of two conflicting authorities was of more weight.²³⁹ Of course, the way in which the authorities were manipulated depended on their nature. Thus, a seeming conflict between two actual cases could be reconciled on the basis of the facts.²⁴⁰ On the other hand, where the decretal was an abstract answer to an abstract hypothetical question, the manipulation had to be verbal. For example, when the pope, in an answer to a hypothetical question, referred to "new articles in appeal cases," he meant articles that depended on the old articles but did not contradict them.²⁴¹ Further, in the light of previous authority, including Roman law, the rule announced need not be confined to appeal cases but could be applied to "new" articles at any stage of the proceedings.²⁴²

In conclusion, then, the distinction between statutes and cases will not take us very far. It will take us this far, however: If Maitland meant to imply by "absolutely binding statute law" that the English ecclesiastical courts rigidly adhered to the letter of what was contained in the papal law books, and if what Stubbs and Kemp meant by their reference to case law was that there was quite a bit of room for interpretation of what was in the papal law books, then Stubbs and Kemp have the better of the argument, at least so far as we can tell from the evidence now before us.

The effect of this malleable quality of papal law on the attitude of the judges of the ecclesiastical courts toward the binding quality of that law must, because of the sparseness of the evidence examined to date, remain problematical. That the judges would, at least at times, manipulate the law in arriving at their judgments may fairly be inferred from the briefs we have examined; otherwise, it would have been foolish to write them. We have no direct evidence, however, that the judges thought that they were manipulating the law in order to arrive at their own body of law, different from if not completely at odds with papal law, and we may simply be witnessing an instance of the general phenomenon that no body of law, and certainly not medieval canon law, can be applied to the limitless variety of human situations that come before the courts without considerable manipulation. There may, however, be some indirect evi-

239. See generally S. KUTTNER, *HARMONY FROM DISSONANCE: AN INTERPRETATION OF MEDIEVAL CANON LAW* (1960).

240. E.g., the resolution of the seeming conflict between X 2.20.35 and X 2.19.6 by some commentators on the basis of the fact that the former case involved a contract to marry, the latter an actual marriage. See text accompanying notes 213-16 *supra*.

241. See text accompanying note 220 *supra*.

242. *Id.*

dence of judicial attitude to the law that can be derived from the nature of the English courts Christian as an institution. We will address this question as we attempt to draw some tentative conclusions.

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: (1) the institutions in question, (2) the time in question, and (3) the type of case involved:²⁴³

(1) Stubbs, as Maitland points out,²⁴⁴ is guilty of failing to distinguish carefully between the position of the kings vis-à-vis the pope and that of the English church vis-à-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.²⁴⁵

So far as the relationship between the king and the English church

243. 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 ecclesiastical 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 crimes 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, *supra* note 19, at 132, with P. FOURNIER, *supra* note 87, at 64-77, 94-127; R. GÉNÉSTAL, *LE PRIVILEGIUM FORI IN FRANCE* (1922); and O. MARTIN, *L'ASSEMBLÉE DE VINCENNES DE 1329 ET SES CONSÉQUENCES* (1909).

The full comparative study remains to be done, however, and France, because of its fine archival tradition, strikes me as a good place to start. See also R. BRENTANO, *TWO CHURCHES: ENGLAND AND ITALY IN THE THIRTEENTH CENTURY* (1968).

244. Maitland, *supra* note 28, at 641-42, reprinted in F. MAITLAND, *supra* note 19, at 51-53.

245. Recent research would add yet a fourth force, that of the lay magnates. See, e.g., W. PANTIN, *supra* note 29, at 82-84. For our purposes, however, we can regard the lay magnates as being part of the king's side, since at least the York records show little evidence that the lay magnates, independent of the king, exercised pressure on the court.

is concerned, 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;²⁴⁶ 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.²⁴⁷ 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.²⁴⁸

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.²⁴⁹ The blanket rejection of the attempt by counsel in *Flemyng*

246. See generally F. LOGAN, *supra* note 138.

247. See, e.g., Katherine, widow of John Hiliard c. Peter, son of the same, CP.E. 108-09 (1370), where the king's court asks the York court to determine a marriage question in connection with a dower action brought before the king's court.

248. E.g., in Thomas Kendall c. Henry, Rector of Foston, CP.E. 193 (1391), Thomas and his wife, executors of the will of one Peter Wolffe, alleged that Henry had goods of their deceased in his possession. They sued out a writ of trespass d.b.a. against Henry in the king's court and concurrently sued him for impeding the execution of the will in the York court. In William Chese c. Katherine, widow of Henry Axiholm, CP.E. 217, 218-20 (1395) (see note 97 *supra*) the parties pursued the matter, at various times, before the York court, the king's court, the court of the mayor and bailiffs of York, and specially chosen arbitrators.

249. In Robert Applegarth, Late Rector of All Saints' Northgate c. Executors of Sir Robert Hannsard, Kt., CP.E. 192 (1391), we find an extraordinary run of terms that must reflect, although somewhat confusedly, common law influence. The case concerns the Rector's claim to be entitled to one fourth of the candles and candelabra (or their value) used at Hannsard's funeral, even though the funeral had not taken place at All Saints', because Hannsard was a parishioner of All Saints'. The interesting thing, for our purposes, is what the Rector alleges that the executors did with the candles: They took them (*ceperunt*) from the church in which the funeral took place, asported (*asportaverunt*) them, and converted them to their own use (*converterunt ad usum suum*). The taking and asportation claims are the standard ones in the writ of trespass de bonis asportatis. See, e.g., EARLY REGISTERS OF WRITS, *supra* note 64, at 175 (no. 285). Conversion, however, was not a separate tort at common law until the sixteenth century, but the phrase "converted to his own use" does appear in common law sources of this time, frequently to describe the wrongful action of an executor. See S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 322-23 (1969). See also *id.* at 321-32. To my knowledge, none of these phrases is used in the academic romano-canon law.

In the libel in John Stanton, as curator of William, son of Geoffrey Smith c. Nicholas, son of Hugh Young, CP.E. 241r (1358), we find the phrase "devenerunt ad

c. St. Alban's to plead the king's law as local custom²⁵⁰ 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.²⁵¹ 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 Westminster to remove certain types of cases to his courts, but did not seek to prohibit cases on his own motion. The result was that many cases that could have been 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.

manus" used to describe the wrongful detention of chattel that had been bequeathed to the plaintiff. I know of no use of this phrase in academic romano-canon law; on the other hand, it played a considerable part in the development of the writ of detinue. See S. MILSOM, *supra*, at 233-34.

Another possible influence of the common law is the idea of "legal memory" (see I F. POLLOCK & F. MAITLAND, *supra* note 5, at 168) found in the pleadings in immemorial custom cases. See, e.g., text accompanying note 169 *supra*. But the presence of these ideas in both canon and common law may reflect a common Roman antecedent. See generally R. WHERLE, *supra* note 171.

250. See text accompanying notes 88-91 *supra*.

251. 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 courts' 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 107 *supra* and authorities cited therein.

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.²⁵² 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.²⁵³ 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.²⁵⁴ 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)²⁵⁵ seem to have had little effect on the York

252. See generally THE ENGLISH CHURCH AND THE PAPACY IN THE MIDDLE AGES (C.

Lawrence ed. 1965).

253. J. SAYERS, *supra* note 25, at xxiv-xxv. She notes, however, that the beginnings of the decline of the institution were shortly after the end of her period. *Id.* at 276-77.

254. See note 128 *supra*.

255. 25 Edw. 3, stat. 4 (1351); 27 Edw. 3, stat. 1, c. 1 (1353).

court's practice of hearing benefice cases.²⁵⁶ The second set of such statutes (1390, 1393),²⁵⁷ however, do seem to have had an effect, resulting, for a time, in the disappearance of benefice cases from the cause papers.²⁵⁸ Since over two thirds of the benefice cases had been tutorial 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

teenth 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 canonists called instance and office cases.²⁵⁹ 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.²⁶⁰

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.²⁶¹ There were

256. See Table I *supra*.

257. 13 Rich. 2, stat. 2, cc. 2-3 (1390); 16 Rich. 2, c. 5 (1393).

258. See text accompanying notes 111-14 *supra*.

259. Like most analogies, the statement "civil cases : criminal cases :: office matters : instance matters" is not quite exact. In addition to instance matters and office matters (negotia ex officio mero), the English canon law also recognized a hybrid—"promoted" office matters (negotia ex officio promoto). These last were roughly

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 Chapter of York consists of brief and generally unhelpful entries in what appear to be predominantly cases of fornication.²⁶² If the com-

than one benefice) were being enforced at all, it is doubtful that we will find records of their enforcement in this type of court.²⁶³ It seems more likely that such matters would not have been handled in a lower level "bawdy court"²⁶⁴ 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 element²⁶⁵ 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."²⁶⁶ 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

battled 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.²⁶⁷ 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.²⁶⁸

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 entirely 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.

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

267. The records, unfortunately, do not allow us to determine precisely what percentage of the cases were abandoned and what percentage compromised, nor can we be completely sure that some of the cases did not reach the sentence stage, the sentence now being lost. This last possibility, however, would not explain the large number of cases that never reach a sentence in the act books, even though the *acta* of the court go on.

268. *E.g.*, Alice, wife of John Clerk c. William de Stapleton, CP.E. 196 (1393). This is a straightforward defamation case in which Alice alleges that William falsely accused her of stealing a robe and a kerchief and receives judgment in her favor. The list of expenses that she claims is long and complicated, and the figures do not seem to add up to the total. Be that as it may be, 11s.13d. are identifiable on the list as having been paid to the court or its officers. Of this sum 7s.8d. were paid at the sentence stage: 2s. "for the sentence," 4d. "for the summoner" (at the sentence stage), 2s.18d. "for citing the defendant anew," and 2s.6d. "for execution of the sentence." Expenses this high at the sentence stage are by no means atypical. *See, e.g.*, William Mowbray, Rector of Normanby c. Thomas Crathorne, CP.E. 177 (1390); Marjory Spuret c. Thomas de Hornby, CP.E. 205-07, 209 (1394).

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 as 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

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,²⁶⁹ 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.²⁷⁰ 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

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 us²⁷¹ 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 before 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 tells us 'there is plainly a fault among you, that you have lawsuits one with another'²⁷² and again, in another place, 'but the greatest of these is charity.' "²⁷³

APPENDIX A

A Note on Statistics

Much survives from the medieval English ecclesiastical courts, but what survives shows us that much more has been lost. The extent to which we can make meaningful generalizations about the whole and not just about the portion that has survived depends on the surviving records' being fairly typical of the whole. The extent to which we can make meaningful statistical statements about the whole depends on much more: The surviving records must be a random sample of the whole.

In the process of trying to determine whether the surviving fourteenth-century York cause papers are a random sample of all the cause papers filed in York for that century, I have convinced myself that the surviving papers are, at the least, "fairly typical" of the whole.

Nothing that I have found in the fourteenth-century act book fragments or in the fuller act books from the early portions of the fifteenth century would lead one to believe that any given type of case was systematically culled from the cause papers or that any given type of case has been preferred for selection. Thus, most of the statements made in this paper about the general nature of the York jurisdiction in the fourteenth century seem to be valid when judged against the criterion of "fair typicality."

In a few places, however, I have gone further and have tried to make statements about (a) the proportions of types of cases actually heard in the consistory court during the century (note 63 *supra*) and (b) the significance of the absence of benefice cases from the surviving cause papers for the years 1390-1399 (note 111 *supra*). Although my thesis does not stand or fall on either of these statements, they do help to round out the picture, and they represent an attempt to use church court records in a way that, to my knowledge, they have not been used before. Some explanation, then, of the assumptions made and techniques used may be useful.

Both the note 63 proportions and the note 111 significance test are valid only if the surviving cause papers are a random sample. That they are cannot be irrefutably proved. The records of the

²⁷² 1 *Corinthians* 6:7.

²⁷³ *Id.* 13:13.

underlying population of cases have been lost, and, however the records were kept, their preservation clearly did not depend on the use of a random number table. The randomness of the sample must be shown, if at all, from inferences drawn from the nature of what has survived and what we know about the history of how the records were kept.

Two hypotheses as to why these particular records survived come immediately to mind. The process by which the other records have been lost could be an essentially random one. Damp, fire, dust, casual loss, and random destruction (for example, throwing out all the records on the top of randomly sorted piles) could have taken their toll over the centuries until we are left with what we have now. Alternatively, someone at some period could have made selections from the papers for whatever purpose and have destroyed the rest. The two possibilities are not mutually exclusive; various combinations of haphazard and conscious processes could have resulted in the loss or destruction of those records that do not survive.

The nature of the records today lends support to the notion that their survival is the result of haphazard, if not random, processes. Most of the fourteenth-century cause papers were written on parchment, and parchment is tough stuff. But the 600-odd years that separate us from the time the cause papers were written have taken their toll. There is no evidence of fire visible on the records themselves, but there is some evidence of damp and a great deal of evidence of dust, apparently coal dust. This dust has reduced many of the records to an extremely fragile state, some to the point of illegibility. It is not hard to imagine that some of the original sets of records simply disintegrated over time. Further, there is considerable evidence of rough treatment. Many of the records are torn, particularly on the edges, and virtually all of them were folded or rolled many times, processes that lead to cracking and further disintegration, particularly as the parchment dries out.

The surviving records show little indication that they have been consciously selected for preservation as a part of a general housecleaning in which other records were discarded. There is no perceptible pattern in the persons, places, or legal issues involved in the cases. Unusual cases and routine cases, files containing over fifty documents and files containing just one document are jumbled together in a seemingly haphazard fashion. Indeed, from the time that the fourteenth-century endorsements were placed on the records to the time when they were re-endorsed in the nineteenth century, there is no evidence that anyone attempted to sort the documents, much less cull them.

There are three possible exceptions to these generalizations. First, one file (CP.E. 107) contains three cases, one each from the early

fourteenth, late fourteenth, and early fifteenth centuries, all of which deal with the same parish church. While this grouping may have occurred in the nineteenth century, it is possible that these causes were gathered together as precedents either for the fifteenth-century case or for some later case involving the same church. There is, however, no other grouping of this sort, and one biased selection does not seriously jeopardize the randomness of a sample of over 200 cases. Second, there is one file (CP.E. 241) that contains single documents from a miscellany of fourteenth-century cases. Although no particular pattern can be discerned in these cases, the documents may have been culled from the files at some time for the purpose of compiling a collection of precedents. There is, however, no evidence that these documents were grouped together before the cause papers were sorted and modern numbers assigned to them at the Borthwick, and it may have been convenient at that time to put all the one-document files together. Third, there is a run of cases from the 1380's in which the names of two proctors appear with disturbing regularity.²⁷⁴ While the possibility that these cases survive from the private collections of these proctors cannot be completely excluded, the evidence would seem to point in another direction: With few exceptions what survives is the court's copy of the documents. This appears from the fact that they contain the registry endorsement telling who filed the document and when. Further, there are breaks in the run—cases in which the name of neither proctor appears.²⁷⁵ Finally, the number of proctors admitted to practice before the court was probably quite small, and the number of active proctors even smaller.²⁷⁶ It is quite

274. The regular practice of endorsing the document with the name of the proctor who filed it begins in the York courts around the middle of the 1360's. From this time onwards we can get a fairly good idea of who the proctors were. Beginning in 1380 and extending to 1389, for a run of twenty-five cases, the name of either Nicholas Esyngwald or John Stanton, Jr., appears in all but two sets of papers. In eight cases both men appear either on the same or opposite sides. The two exceptions are cases in which the name of the proctor on only one side is recorded; hence it is possible that either Stanton or Esyngwald represented the other side. Of course, other proctors' names appear as well and not all the documents in these cases were filed in either Stanton's or Esyngwald's name. There is a possibility, however, that both of them collected documents in cases in which they were involved and that these documents form the basis of the current collection for this decade. Even if this were true, our random sample would not completely collapse. The decade 1380-1389 looks very much like the other decades in terms of the types of cases heard. See Table I *supra*. Further, for reasons stated in the text *infra*, I am inclined to the view that the Stanton-Esyngwald private collection hypothesis is implausible.

275. CP.E. 124 (1381); CP.E. 146 (1386). See note 274 *supra*.

276. In 1311, Archbishop Greenfield limited the number of proctors that could be admitted to practice before the court to eight. 2 D. WILKINS, *CONCILIA MAGNAE BRITANNIAE ET HIBERNIAE* 410 (1737). This number seems to have been held constant. At least, we find evidence of its being held to eight in both the fifteenth and sixteenth centuries. See R. MARCHANT, *THE CHURCH UNDER THE LAW: JUSTICE, ADMINISTRATION AND DISCIPLINE IN THE DIOCESE OF YORK, 1560-1640*, at 55-56 (1969); K. Burns, *The Administrative System of the Ecclesiastical Courts in the Diocese and Province of York:*

conceivable that two proctors took one or the other side of virtually every case heard during this period.

What little is known of the history of these records also tends to support the notion that the survival of these particular cause papers was the product of an essentially random process. That the court had a registrar (chief clerk) in the fourteenth century may be determined from the numerous references to this officer in the cause papers themselves.²⁷⁷ No evidence, however, has come to my attention that would indicate where the registrar had his registry and what the relation was between his office and that of the Archbishop's registrar. At some time, probably quite early on, the cause papers found their way into the keeping of the York diocesan registrar where they were kept with a much larger set of records.

The glimpses that we have of how the diocesan records were kept are depressing to the archivist but encouraging to the historical statistician looking for evidence of a random process of survival. Thomas Jubb, the Registrar in the early eighteenth century, reports:²⁷⁸

In the search made from the Restauration till 1714 when Mr. Mawde dyed and I Thomas Jubb was made Registrar for the Dean and Chapter of York the following things are to be observed.

1. That when I entered upon the said office every thing was in great disorder and confusion and so indeed Mr. Mawde found that Office at Mr. Squire's death.

The "great disorder and confusion" is probably a result of the seige and occupation of York by Cromwell's troops. Indeed, in the same report Jubb notes that during the "Troublesome Times" the registry office was gutted and loose papers destroyed.²⁷⁹

In his contribution to the *First Report on the Public Records* in 1800 the then-Deputy Registrar, Joseph Buckle, notes, perhaps overly optimistically, that the records were secure from fire and damp and that certain classes of older records were dirty, injured, and mutilated.²⁸⁰

Finally, the Reverend Canon J. S. Purvis, the first director of the Borthwick, reports on the condition of the records prior to World War II:²⁸¹

Part I, *The Medieval Courts 145-47* (1962) (unpublished manuscript on file at the Borthwick Institute, York). On the smaller number of active proctors, see K. Burns, *id.*

277. *E.g.*, C.P.E. 93 (1376).

278. Quoted in J. PURVIS, *THE ARCHIVES OF YORK DIOCESAN REGISTRY 6* (St. Anthony's Hall Publications No. 2, 1952).

279. *Id.*

280. *Id.* at 7.

281. *Id.* at 8.

The conditions of storage left very much to be desired; in general, files were roughly bound up in brown paper, and many documents were rolled, crushed or folded into bundles, and thrust much too closely together on the shelves; a large number suffered damage, either from damp or from nearness to the heat of the pipes which warmed the Strong Rooms in winter, or from the rough folding or the constriction of the strings with which they were tied; all suffered severely from dirt, the accumulation of a thick coat of fine black dust. Old files of which the strings had burst, allowing the members to be scattered, had been gathered up hastily and made into bundles and thrust away into any handy nook on the shelves, where they remained unwanted and undisturbed for year after year. As documents steadily accumulated, the congestion became worse, and there was never time for any systematic arrangement or even inspection by the Registry clerks, and the contents of the Registry became more and more unknown.

Another possible source of essentially random loss is moving. Prior to the removal of the records to the Borthwick, there are two recorded moves, one in 1790, the other around 1840.²⁸² The custody of the records, moreover, was the personal responsibility of the registrar, and during the earlier period before there was a formal registry office, they may well have been kept in his house. Each transfer from old to new registrar would have been an occasion for loss.

In sum, while the evidence is not completely conclusive, it does point to a random process of survival of these records.²⁸³

The statistical techniques that I have employed are relatively simple. In note 63, I have calculated the confidence intervals for the proportion that each major type of case in the sample bears to the whole. The technique may be illustrated by supposing that we have a tub containing a very large number of balls of different colors. Rather than counting all the balls to determine the proportion of balls of each color to all the rest, we take a random sample of 100

proposition that exactly 30 per cent of all the balls are red, our chances of being right are very low. On the other hand if we rely

282. *Id.* at 7.

283. One more doubt: The surviving act books for the latter part of the fourteenth and the fifteenth centuries indicate that the court heard between 50 and 100 cases a year that would have had cause papers. *See, e.g.*, [Dean & Chapter Library, York] M2(b)1 (about 30 cases over a six-month period); K. Burns, *supra* note 276, at 167 (modal figure between 90-100 for six years in fifteenth century). The small number of sets of papers that survive from the first three decades of the century means either that the court was hearing far fewer cases at this time or that time has been less kind to

on the sample for the proposition that somewhere between 20 per cent and 40 per cent of the balls in the underlying population are red, our chances of being right are much higher. In fact, by consulting standard statistical tables²⁸⁴ we discover that we will be right more

than 19 out of 20 times.

The figures given in note 63 are based on an assumption that we are willing to be wrong one out of ten times (a confidence coefficient of .90). Given that confidence coefficient and a sample of roughly 250 cases, the standard statistical tables tell us within what range (confidence interval) the proportions in the sample of cases represent the actual proportions in the underlying population of cases. Selection of a higher confidence coefficient would have resulted in wider confidence intervals; selection of a lower coefficient, in narrower intervals. Raising or lowering the confidence coefficient by .05, however, changes most of the intervals by only a few percentage points.

The technique involved in note 111 is a bit more complicated. Suppose we have that same tub of colored balls and suppose this time that we have some reason to believe that 50 per cent of them are red. We draw a random sample of 100 balls and come up with 30 red balls. This is surprising, but before we reject our theory that half of the balls are red, we want to test to see what the chances are that a random draw of balls from a population, 50 per cent of which are red, would yield only 30 per cent red balls. A most useful statistic for doing this is *chi*². *Chi*² can be calculated for any sample of decent size where the expected value (50/50 in our balls case) and the actual value (30/70) of the statistics we wish to examine are known. From there the calculation of the probability that the divergence between actual and expected could have arisen by chance becomes a matter of consulting standard tables.²⁸⁵

In note 111 we wished to determine what the chances were that the absence of benefice cases in the years 1390-1399 was caused by chance. On the basis of the number of benefice cases in the preceding decades we would expect that 13 per cent of the cases in this decade would be benefice cases. Thus, we would expect to find 9 benefice cases in a random sample of 72 cases, and, in fact, we find none. Since a sample size of 72 is quite large enough for the calculation of *chi*², we apply the following formula:

$$\chi^2 = \frac{(O_b - E_b)^2}{E_b} + \frac{(O_o - E_o)^2}{E_o}$$

Where: O_b = the number of benefice cases observed in the sample
 E_b = the number of benefice cases expected
 O_o = the number of other (nonbenefice) cases observed
 E_o = the number of other cases expected

$$\chi^2 = \frac{(0 - 9)^2}{9} + \frac{(72 - 63)^2}{63} = 10.3$$

Consultation of the tables reveals that a *chi*² statistic for a proportion (one degree of freedom) will be greater than 7.9 only 1 in 200 times and greater than 10.8 only 1 in 1000 times. Thus, the chances that we would get a sample with no benefice cases drawn from a population with 13 per cent benefice cases appears to be about 1 in 1000. It is far more probable that our expectation was mistaken and that the proportion of benefice to other cases heard in the 1390-1399 decade was far smaller than it had been in the previous decades of the century.

APPENDIX B

*"Brief" for the Defendant in John of Elham c.
 Alice, daughter of Richard Cissor [Tailor?]²⁸⁶*

Ad informacionem domini Judicis ad sentenciandum in causa matrimoniali Inter Johannem de Elham petentem et Aliciam filiam Ricardi Cissor de davor' rem tentem, lecto libello et contestacione ad eundem, recitatis attestacionibus partis actricis, inspiciantur intime excepciones ex parte rea proponite quarum prima est de diversitate, contrarietate seu singularitate forme contractus quam testes exprimunt que ex ipsis deposicionibus clare colligitur prout in dicta prima excepcione vel eius racione rubricatur.

ff. secunda excepcio vel ratio de contrarietate et periurio eorundem testium super repugnancia personarum presencium in dicto contractu eodem modo colligitur et rubricatur.

ff. tertia, scilicet, de diversitate loci in quo dicitur contractus celebratus a sedentibus, clare liquet. Hii sunt defectus evidentes primarum attestacionum.

ff. Quarta excepcio que facta est super violencia in dicto contractu mulieri adhibita probatur per iiij^{or} testes, scilicet, per Garth, Adam, Johannem, Luciam, in suis deposicionibus sic figitur hec [*sic*] littera "a,"—Quod autem dicitur et allegatur pro parte actrice quod

286. Sede Vacante Scrapbook No. III, at 62 (No. 131) (Cathedral Library, Canterbury). See notes 197-218 *supra* and accompanying text. Extensions and modernization of punctuation have been made without comment. The capitalization, except at the beginning of sentences, strives to be faithful to the original. Additions to the text are indicated in square brackets ([]), conjectural readings in diamond brackets (< >).

hec exceptio et ipsius probatio non subsistit, eo quod est articulus primo contrarius super quo non possunt testes produci post publicas attestaciones, verum dicunt sed male discernunt. Sunt enim *iii*^{or} genera articulorum quantum ad materiam presentem considerandi [*sic*]: idem articulus vel penitus contrarius, talis, scilicet, qui primum penitus et directe interimat, et super neutro istorum potest fieri productio post attestaciones publicas super primo, ut de testibus, c. veniens, secundo [X 2.20.38.¶2], et de probacionibus, iuravit [X 2.19.6], cum suis concordanciis. Est et articulus penitus a primo diversus [sed] non contrarius, et est quartus articulus ex primo dependens, primum supponens et aliquid adiciens primo, [sed] non ipsum penitus interimens, ut de testibus, c. tam litteris, § quia vero super matrimonio [X 2.20.23], et de fide instrumentorum, cum Johannes [X 2.22.10], cum suis concordanciis. Et super istis duobus articulis bene admittuntur testes post attestaciones publicas super primis articulis, sicut notat de testibus, fraternitatis, in glossa super *novis* [X 2.20.17]. Talis est casus quem pre manibus habemus. Exceptio enim violencie supponit formam contractus affuisse sed substantiam defuisse, scilicet, consensum, qui locum non habet ubi coactio intercedit, ut de sponsalibus, cum locum [X 4.1.14]. Nec est ratio aliqua quare non ita bene possit probari post attestaciones publicas, absencia consensus vel animi, sicut absencia corporis. Nam sicut potest contrahi matrimonium per presentem consensum corpore absente, ut per nuncium vel epistolam, sic potest deficere inter presentes si consensus absit. Sicut enim furiosus dicitur absens animo, licet presens corpore, ut ff. de regulis iuris, sic non vocem, § furiosus [Digest 50.17.40], sic et coactus dicitur absens, scilicet, animo qui requiritur in matrimonio, licet presens sit corpore. Probatur ulterius quod medius testis viri non interfuit per *iii*^{or} qua testes predictos a pucto "b," et licet sit negativa, quia tamen limitatur per certum factum, tempus et locum multum dicitur movere iudicem inter alia, secus si cetera vaga et indiscreta, nullo certo facto, tempore, et loco determinata, qualis est quod <is> numquam contraxit vel citatus non exstitit, que probari non potest.

ff. probantur etiam verba mulieris dissensum denotantia. Ubi ipsi instant, dantes quod non usque sunt verba negativa, quod <verende[?]> est dicere et contra matrimoniam manifeste. Ut notat Goffredus, titulus de probacionibus, § debet enim, <verso>: "Item factum negativum probari non potest sed dictum negativum. Sic de probacionibus, c. tercio [X 2.19.5], de desponsacione impuberum, ex litteris [X 4.2.11]."²⁸⁷ Et est ratio quia omnes circumstantie et

287. The quotation from Geoffrey is exact except that the citations have been expanded and a citation to Gratian's *Decretum* (causa 31, questio 2, c. 4) has been omitted. See GEOFFREDUS TRANSENSIS, *supra* note 198, tit. *de probacionibus*, § *debet enim*.

cause sciencie possunt concurrere in dicto negativo que in dicto affirmativo, videlicet, loci, temporis, personarum, et alie infinite. Probatur ulterius quod publica vox et fama in villa Dovor' [est] quod dolus et violencia intercesserunt in dicto facto et quod testes corrupti ad perhibendum falsum testimonium exstiterunt, que fama equipollens uni testi et unus peroptime deposuit de corrupcione. Predicta vox et fama probatur per omnes testes a pucto "c."

ff. Quod de eodem facto deponunt primi testes et secundi manifestat ydemptitas loci, diei et hore, presencia earumdem personarum, unitas contractus in quem omnes concurrunt quoad formam, licet secundi adiciannt primis quoad substanciam, et quoad in litteris <remtentiam> reliqua supleat riligio [sic] iudicantis si placet.