Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250-1640

Richard H. Helmholz

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation
This article deals with the relationship between religious and secular law in England between 1250 and 1640, a period running from the establishment of the English spiritual courts to their abolition (temporary as it turned out) with the coming of the English civil war. It is based in large part upon the author's continuing examination of the records of the ecclesiastical courts, and thus focuses on the spiritual rather than the secular side of the question. It asks: How did the men who administered and enforced the law of the Church react when religious principles or rules of the canon law came into conflict—direct or indirect—with the secular law, in this instance the common law enforced in the courts of the English king? How did they deal with the dilemma of conflicting loyalties and in what ways did they seek to mitigate or avoid the penalties which each system of law visited upon those who violated its rules?

This is not a new topic. Conflicts between Church and State in England have long been the subject of scholarly inquiry. However, much of this work has concentrated upon moments of dramatic conflict or upon fundamental constitutional disputes. This article looks at the routine. It deals with ordinary litigation and the continuing actions and perceptions of ordinary lawyers. The resulting story, though not without conflict, is not particularly dramatic. It stands in stark contrast with the best known incident raising the larger issue: the conflict between King Henry II and Archbishop Thomas Becket during the late twelfth century. That conflict began over the question of how the law should deal with “criminous clerks,” that is cler-
ics who were accused of having committed a crime. Were they to be handed over to secular justice, or was the Church to retain jurisdiction over them? The quarrel ended, after many twists and snags, with the archbishop's murder, with his veneration as a Christian martyr, and with the establishment of what came to be known as "benefit of clergy."

The story of this conflict which begins in 1250, by contrast, has more to do with legal technicalities and with lawyerly habits of accommodation and compromise. It has nothing, or little, to do with martyrdom.

I. BACKGROUND TO THE QUESTION

Before coming to the evidence itself, a few words of background are in order. Not all readers will be familiar with the legal framework in which questions of conflicting loyalties between the claims of Church and State arose in England. Five continuing features of the English legal landscape are important for this study.

First, the persons subject to the jurisdiction of the ecclesiastical and the common-law courts were, roughly speaking, the same. The history of England does not present the assuredly more common situation of a religious minority existing within, and subject to, a system of law enacted and controlled by a majority that does not share the minority's beliefs. From the time Edward I expelled the Jews in the late thirteenth century until the time Cromwell readmitted them in the seventeenth, all English men and women would have been subject equally to the summons and the sentences of both sets of courts. All were Christians, and hence bound by the rules of the spiritual law. All were subjects of the King, and hence equally bound by the rules of the common law.

Second, there were several areas of human life where the law of the Church and the common law of the realm both claimed exclusive jurisdiction. In theory, this raised the question of ultimate allegiance: obedience to God or to Caesar. A clear, if unfamiliar, example is provided by jurisdiction over disputes involving advowsons. An advowson was the right to present a cleric for induction as parson of a parish church. This right was widely held by individual laymen (whose ancestors had financed the church building) or in the Middle Ages by religious houses (to whom the right had been granted by a layman). Because the right passed by inheritance and could also be conveyed inter vivos, it was inevitable that disputes about who held

---

the advowson would arise. The canon law claimed the right to decide all such disputes. So did the courts of the King. The common law claimed that the advowson, as a property right, was a secular matter, subject to its jurisdiction. The canon law claimed the reverse, that the advowson dealt with the provision of spiritual ministrations and was therefore inherently spiritual in character. On the subject, the two laws were in direct conflict.

Third, in circumstances like this one, where conflicting claims to jurisdiction existed, the courts of the King claimed and in fact exercised the right to limit and define the jurisdiction of the spiritual courts. The spiritual courts, by contrast, enjoyed no such right. This temporal supervision or oversight was exercised by means of a royal writ or order, the writ of prohibition, which directed the litigants and the judges of the spiritual courts not to proceed in a particular piece of litigation because, properly considered, it fell outside ecclesiastical competence. Whether or not a writ of prohibition would be issued depended on a mix of English statute, long established customary rule, and the current state of judicial activism. Some of the jurisdictional rules did not vary over the course of the long period covered here. Some did, generally towards freer availability, and thus greater restriction of spiritual jurisdiction. Since prohibitions were issued at the request of one of the litigants, who had the greatest incentive to use them when their chances in the ecclesiastical forum looked slim, they could be a powerful weapon in litigation within the Church courts. They posed the dilemma of dual allegiance in a particularly clear way.

Fourth, the religious system being covered here, the canon law, took it as axiomatic that there was a sphere of human life that was subject primarily to the claims of conscience. The axiom, however, did not render that sphere immune from regulation. Instead, it was subject to guidance from a huge body of casuistic literature and to regulation in the "internal" forum, that is, the confessional in medieval practice. The existence of the "internal" forum had the effect of hiving off from the Church's public jurisdiction many acts that we would consider distinctly spiritual in nature. Secret faults, of which all men and women are guilty in some measure, did not come before the courts discussed in this paper. By this means, the canonical rule

---

4 The standard work on the history of this writ is Flahiff, The Writ of Prohibition to Court Christian in the Thirteenth Century (pts. 1 & 2), 6 Mediaeval Stud. 261 (1944), 7 Mediaeval Stud. 229 (1945); see also Helmholz, The Writ of Prohibition to Court Christian before 1500, 43 Mediaeval Stud. 297 (1981).
de occultis non judicat ecclesia was put into effect.\textsuperscript{5} In the external sphere, therefore, the existence of the forum of conscience mitigated some of the practical problems raised by the tug of double allegiance, even while it exacerbated them in the hearts of the actors themselves.

Fifth, the Protestant Reformation of the sixteenth century intervened during the period being surveyed here. This event led to significant changes in belief and worship within the English Church, and of course it snuffed out all but the claims of the papacy to spiritual jurisdiction in England. From a practical point of view, the Reformation meant that appeals from the spiritual courts in England no longer went to the papal court, and that they were thereby cut off from a principal legislative source of the canon law. The Reformation settlement did not, however, materially alter either the form or the jurisdiction of the English spiritual courts.\textsuperscript{6} Nor did the move to Protestant belief fundamentally end the problems of conflict between common law and canon law which the English ecclesiastical lawyers had long confronted and which are the subject of this article. It did subject the ecclesiastical courts to more immediate regulation by acts of Parliament, and it did shift the balance between secular and spiritual power, but it did not change the basic nature of either the difficulties faced or the responses adopted by the English ecclesiastical lawyers, or civilians as they were called.

With these five points stated, we may now look at the reactions of the English civilians to conflicts of jurisdiction between canon law and secular law. The evidence from their court records shows that these reactions fell roughly into three categories. The first was an acquiescence in a division of jurisdiction based upon long established English custom, despite the fact that the division contradicted stated principles of the canon law. The second was a search for theories and rules of law which would minimize or even eliminate conflicts that existed between common law and the canon law. The third was the adoption of practical expedients designed to protect ecclesiastical jurisdiction against excesses and encroachments by the temporal courts.

\textsuperscript{5} See Kuttner, Ecclesia de occultis non iudicat: problemata ex doctrina poenali decretistarum et decretalistarum a Gratiano usque ad Gregorium Papam IX, 3 Actus Congressus iuridici internationalis Romeae, (12-17 Novembris 1934), at 225 (1936).

\textsuperscript{6} See Act for the Submission of the Clergy and Restraint of Appeals, 1533, 25 Hen. 8, ch. 19, § 7; it provided that the canon law should remain in force insofar as it was not "repugnant to the Laws, Statutes, and Customs of this Realm, nor to the Damage or Hurt of the King's Prerogative." This act, intended to last only until a more thoroughgoing revision of the canon law could be completed, in fact became the permanent rule of decision in the courts of the Church of England.
II. HABITS OF COMPROMISE AND RESPECT FOR ENGLISH USAGES

According to formal canonical rules, English ecclesiastical lawyers were subject to a real tug of allegiance. The jurisdictional claims which the canon law made upon them were undoubtedly great. For example, the texts of the law called for them to enforce a rule of clerical immunity, the principle that in ordinary litigation a cleric could be sued only before an ecclesiastical tribunal, never in a secular forum. This was called the *privilegium fori.* The canon law equally required the spiritual courts to open their doors to a litigant whenever that litigant had been subjected to a default in justice in a secular court. This potentially explosive principle was termed jurisdiction *ex defectu justiciae.* Moreover, the canon law reserved for its determination exclusive cognizance in several substantive areas of the law. Marriage and divorce, disputes over most kinds of ecclesiastical property (including advowsons), and a number of crimes such as heresy or sacrilege were held to belong in the ecclesiastical forum. Judges were required, according to the texts of the canon law, to turn all these jurisdictional principles into working rules of practice.

English common law did not coincide with some of these rules. As a general matter, it did not concede that the Church could determine the extent of its own jurisdiction. It insisted instead that the judges of the royal courts were the proper arbiters, and on specific points, that the common law was not prepared to allow either jurisdiction *ex defectu justiciae* or the full *privilegium fori* to the courts of the Church. While the common law did concede jurisdiction over matrimonial law to the Church, it insisted that the competence not be used to affect title to freehold land. It also refused to concede that the Church should exercise exclusive jurisdiction over Church property. The right of advowson, already mentioned, was a prime example of the sort of property right the common law treated as subject to its exclusive jurisdiction, despite canonical rules directly to the contrary.

In theory, such opposition might well have rent the fabric of society. In practice, it did not. Most of these conflicts were dealt with by a series of agreements and widely shared assumptions about jurisdiction, most of which were arrived at during the last part of the thirteenth century and the first years of the fourteenth. Professor Charles Donahue has aptly described these resolutions collectively as a

---


8 See *Decretales Gregorii IX,* at X 2.2.10.
"working, probably tacit, compromise." The compromises were based upon traditional ways of doing things and upon common habits of mind, going back at least to Henry II's Constitutions of Clarendon (1164). They largely depended upon what must have been a fairly broad consensus among the English people about the proper boundaries between the claims of Church and State. Under these settlements, for example, jurisdiction over advowsons was conceded to the common law courts, whereas jurisdiction to enforce contracts made with a sworn promise was tacitly allowed to the ecclesiastical courts.

The object of this article is not, however, to trace the way in which these compromises were worked out. A good deal of the relevant work on that subject has already been done. The question is rather: What was the attitude of the ecclesiastical lawyers towards the compromises? Remembering that many of the resulting rules violated stated principles of the canon law, one must ask how the English civilians regarded the situation, why the civilians adopted the attitudes they did, and whether there were significant changes in those attitudes over the long period between 1250 and 1640.

In general, their actions suggest that most English ecclesiastical lawyers accepted the traditional compromises, whatever their violation of canonical norms, and that this was true both before and after the Reformation. They obeyed writs of prohibition as a matter of course when the writs were received, though their obedience to one prohibition did not necessarily mean that they would follow the rule of law stated within it in the next case that came their way. When they presented lists of gravamina to King and Parliament, the complaints normally dealt with alleged abuses of the traditional rules.

---

10 Select Charters and Other Illustrations of English Constitutional History 161 (9th ed. 1913) [hereinafter Select Charters].
11 See Helmholtz, Assumpsit and Fidei Laesio, 91 Law Q. Rev. 406, 407 (1975); this violated the stated common law principle that pleas of lay debts and chattels belonged to the temporal forum as thoroughly as temporal jurisdiction over advowsons violated the canonical.
12 See Jones, Relations of the Two Jurisdictions: Conflict and Cooperation in England During the Thirteenth and Fourteenth Centuries, in 7 Studies in Medieval and Renaissance History 79 (W. Bowsky ed. 1970); Donahue, supra note 9; see also J. Wright, The Church and the English Crown 1305-1334, at 177-94 (1980).
13 E.g., Wolton c. Amys (Canterbury 1373), Canterbury Cathedral Library, Act book Y.1.1, f. 40r: the record stated that the defendant put in a writ of prohibition, "propter quam commissarius predictus protestabatur se nolle ulterius procedere in causa." A post-Reformation record looks much the same: e.g., Garret c. Bratwych (Chichester 1557), West Sussex Record Office, Act book Ep. II/9/1, f. 114v: the record notes that Gratwych introduced the writ, "ne ultra procederemus in causa, quam ut oportuit receipimus et obedivimus."
Only occasionally did the English ecclesiastical assembly seek, and still less did they demand, respect for and full enforcement of the canon law. While they objected, for example, that the common law courts were permitting pleas about advowsons to be used unlawfully to attack long-agreed spiritual jurisdiction over tithes, they did not complain that the common law courts had no right to deal with advowsons in the first place. It may be, of course, that they simply recognized that it would have been futile, even counterproductive, to attempt to secure full enforcement of the canon law. Whatever their reasoning was, however, they did not make the effort to upset established English usages.

Particularly revealing of their attitude towards traditional usages is the entire absence of evidence from the Church court records of attempts to enforce the canon law rules about the clerical *privilegium fori* or jurisdiction *ex defectu justiciae*. No such cases appear in any of the manuscript court records so far discovered. Indeed the English ecclesiastical lawyers went further. They actually enforced some of the English common law rules that contravened the canon law, as for instance in executing the royal writ *levare facias*. The writ required them to seize assets of clerics who had been sued in common law courts for the recovery of debts. They habitually did so in response to receipt of these writs, and it is hard to imagine a more glaring violation of the *privilegium fori* than this one.

Apparent disregard of this aspect of the canon law is all the more striking when set against a decision by the Roman Rota in the 1370s declaring expressly that the English practice was invalid. The decision had no apparent effect in English practice. Custom continued to override the canon law, even as that law had been declared by the Church's highest court of appeal. Although English bishops must have grumbled about the resulting situation, it seems that the bishops' courts, at least as shown by their records, tacitly accepted traditional English practices that confined their jurisdiction to certain subject

---


15 An example of this medieval practice can be found in The Register of Robert Hallum, Bishop of Salisbury 1407-17, No. 1104, 72 Canterbury & York Soc. 206 (J. Horn ed. 1982). A revealing later comment about the practice is found in Norfolk Record Office, MS. PCD/1, no. 2, characterizing the bishop as “becoming not only Sheriff but also Sheriff’s officer.”

16 Decisiones antiquae sacrae Romanae Rotae, No. 840 (1509). The case is also discussed in Ullmann, A Decision of the Rota Romana on the Benefit of Clergy in England, 13 Studia Gratiana 455 (1967).
matter areas. In many cases those areas were not coincident with those found in the canon law.

What explains this seeming and habitual pusillanimity on the part of the English ecclesiastical lawyers? This is not an altogether easy question. The difficulty lies in the nature of the surviving evidence. Few of the civilians wrote about the subject. If the historian is not simply to have recourse to his imagination, he must rely on their actions as much as or more than upon their words for his conclusions. But with that reservation, a pattern nonetheless emerges from the surviving evidence. It suggests the conjunction of several related factors.

The first and most obvious explanation is fear. Anyone who invoked or enforced the canon law in the teeth of common-law rules opened himself to serious secular penalties including fines and confiscation of goods. In practice, this did not happen often, but it happened often enough to be a source of concern both to litigants and to ecclesiastical lawyers. Judges in the spiritual courts thus had the most severely practical reasons for obeying writs of prohibition and for not enforcing the letter of the canon law. Human nature bears this out. Few of us are martyrs, even if the martyrdom extends only to our goods and chattels, and legal training does not normally train up men anxious to wear the martyr's crown.

Fear cannot, however, constitute a complete explanation. English ecclesiastical lawyers, both during the Middle Ages and afterwards, were entirely capable of taking action in defense of their jurisdiction. They may not have acted against the king’s judges themselves, but they wielded the sword of excommunication against those who invoked secular justice to interfere with the exercise of ecclesiastical jurisdiction. For instance, in 1321, a man named Henry Elham was cited by the consistory court of the diocese of Rochester for having made use of a royal prohibition in a case involving Elham’s attack on a cleric. Elham submitted and was required to take an oath not to use a prohibition in this or other similar circumstances. He was also required to pay the aggrieved cleric all the expenses the latter had incurred in the matter. Similarly, three centuries later, in the diocese of Winchester, an offender named King was disciplined in the consistory court for having brought a suit in a common-law court that properly belonged (according to the civilians) to the spiritual forum.

---

Like Elham, King was required to withdraw prosecution of the writ under threat of excommunication. Such initiatives show that the English civilians could act to defend their position, even when it meant indirect disobedience to a rule of a secular court.

If we look, therefore, for other explanations for their habitual disregard of the formal canon law, a number suggest themselves. First, the ecclesiastical officials actually profited from some aspects of the traditional English rules. In several ways the jurisdiction they enforced was wider than that envisioned by the formal canon law, and in some areas English customary law conceded rights to them that few of their Continental counterparts enjoyed. Defamation and probate jurisdiction, for example, belonged to the Church in England, even though neither was classed as spiritual in nature under the canon law. Since the latter of these, particularly the validation and enforcement of last wills and testaments, was the source of considerable income for the officers of the Church courts, to have insisted on exact compliance with the canon law might actually have ended in a net economic loss for the civilians involved.

Second, the canon law itself tolerated a disparity between formal rules and local customary practice. The English situation was by no means unique. Though the exact contents of juridictional compromise differed from one place to another in medieval and early modern Europe, in no place was every jot and tittle of the law found in the papal decretals enforced in practice. Even commentators on the canon law recognized the frequent disparity between text and practice. To take an uncontroversial example from the Continent, monks were prohibited by the canon law from serving as testamentary executors without the consent of their superiors. After reciting this rule at some length, Joannes Jacobus a Canis, a fifteenth-century writer of a treatise on the subject, ends: “Custom however admits them even without a license.” So it was observed in practice. This respect for customary practice means that the English civilians, who had been trained in the traditions of the European ius commune, would not have found the English situation surprising. It is what reading the Continental

---


20 This theme, with supporting evidence, is developed in R. Helmholz, Roman Canon Law in Reformation England, at 12-20 (1990).

21 Tractatus Insignis de Executoribus Ultimarum Voluntatum, in 8 Tractatus Universi Iuris (1584), tit. Antequam, no 31. See also Decisiones Capellae Tolosanae (1543), Additio ad Quaest. 154: “Addes quod quicquid sit de iure tamen consuetudine servatur quod maior xvii et minor xxv et femina possunt esse executores testamenti.”
law books would have led them to expect, and this may explain some-
thing of their habitual acquiescence in the situation as they found it
once they had left their studies behind.

Third, though most difficult to document, it seems probable that
English ecclesiastical lawyers, at least most of them, came to think of
the traditional compromises as sensible. They did not desire to upset
the apple cart. In this they were like most of the judges on the com-
mon-law bench. The royal court judges did not themselves enforce
every aspect of the common-law rules about jurisdiction. For in-
stance, during the Middle Ages, they left the significant area of en-
forcement of sworn contracts to the Church courts, despite the
theoretical violation of common law principles.\(^22\) Even during the
sixteenth and seventeenth centuries, they were prepared to allow parts
of the Church's probate jurisdiction to continue, though theoretically
illegal under the common law. An example was the making of a public
proclamation at a decedent's domicile requiring all creditors to file
claims with the probate court on penalty of being barred. The royal
judges tolerated this practice, despite its clear potential for contraven-
ing common law principles, because "it was the ancient custom."\(^23\)

It is well to consider that these men lived in a world in which a
normal test of legitimacy was what had always been. They shared
that conservative habit of mind. The principle was not universally
admitted, and there were exceptions to it, but it was the normal first
reaction of most thinking men. Moreover, the formal canon law itself
admitted a legitimate role for custom.\(^24\) Familiar maxims of the law
held that "[c]ustom confers jurisdiction,"\(^25\) and that "[t]he best inter-
preter of a law is custom."\(^26\) In this light, perhaps it is not surprising
that English ecclesiastical lawyers, both before and after the Reforma-
tion, felt more or less at home with the jurisdictional situation they
had inherited from the past. They came to share at least some of the
assumptions generally held in the society of which they were a part.

If this is an accurate reading of the evidence, then the conclusion
to the question asked at the outset—how did the English ecclesiastical

\(^{22}\) See B. Woodcock, Medieval Ecclesiastical Courts in the Diocese of Canterbury 84, 89-
92 (1952).

\(^{23}\) So stated c. 1610, in Guildhall (London) Library, MS. 11448, f. 219 (Dr. Henry Martin
reporting on the words of Sir William Peryam, Justice of the Court of Common Pleas and later
Chief Baron of the Exchequer).

\(^{24}\) See Gaudemet, La Coutume en Droit Canonique, 38 Revue de Droit Canonique 224
(1988).

\(^{25}\) The standard glossa ordinaria to the Decretales Gregorii IX (1591 ed.), at X 2.13.13, s.v.
in tua: "In his enim consuetudo servatur quae dat jurisdictionem."

\(^{26}\) E.g., Joannes Jacobus a Canis, Tractatus, supra note 21, no. 44: "Consuetudo optima est
legum interpres."
lawyers react to conflicts between religious law and secular law—must be that they took the position that, at least in most situations, only so much of religious law as was consistent with customary rules would be enforced. Those customary rules were not overtly antireligious, of course, and only in the heated imagination of zealots did they present a direct clash between duty to God and duty to man. Few men argued that a judge risked eternal damnation merely by allowing temporal courts to hear disputes between two parsons over which one was entitled to tithes. In that state of affairs, the English civilians took what must be a common position. That is, they came to share the assumptions and habits of mind of the society in which they lived. No doubt they admired Thomas Becket. They did not, however, care to emulate him.

III. Efforts to Harmonize Spiritual and Temporal Laws

The second aspect of the English civilians' reaction to conflicts between religious and secular law that emerges from the existing records consists of efforts to minimize differences between the two laws, in fact to harmonize them wherever possible. Their consistent desire was to avoid contests to the finish. Most of their consequent efforts took place in small things—legal details like the proper forms to be used in pleading or the appropriate designation to be assigned to a kind of legal procedure. Rarely did they touch spiritual essentials.

The aim of this aspect of the civilians' reaction to potential conflict between canon and common law grew from a combination of their desire to protect and extend the reach of ecclesiastical jurisdiction and their need to stake out a separate, independent sphere for the canon law in English society. Paradoxically, their desire to harmonize the two legal systems had the effect of emphasizing the distinctive nature of religious law. The English civilians understood their efforts as a demonstration that the spiritual law was both separate from temporal law and essential to the right ordering of society.

The desire to emphasize harmony between the two systems had two aspects. One led the ecclesiastical lawyers to separate themselves from common-law courts; the other, to seek doctrinal accommodation with them. Both were means of minimizing conflict. A well-known example of the first was the canonical reaction to imposing sentences of death in the common-law courts. The canon law held it unlawful for a cleric to shed blood. This rule came to be understood as for-

28 Decretales Gregorii IX, at X 3.50.5 (Clericis in sacris), in 2 Corpus Iuris Canonici, supra
bidding a clerical judge to participate in any judgment condemning a criminal to death. This posed a dilemma. Many clerics served as judges in the early common-law courts. They were in fact mainstays of the system.\textsuperscript{29} Of course the common law required judges to participate in sentences of blood whenever they heard pleas of the crown. The solution arrived at over the course of the thirteenth century was for the clerical judges to withdraw altogether from the bench. They did not seek to reform the common law. They did not attempt to eliminate the death penalty or even to reduce the number of situations where it applied. They simply refused to participate directly in its imposition.

Modern critics of the medieval Church see hypocrisy in this reaction. Would it not have been better, they ask, for the canon lawyers to have condemned barbarous common-law rules that could put a man to death for theft of a trifle? Perhaps it might have been. However, anything more than refusal to participate personally would not have been consistent with the desire not to stir up conflict with the common law and the canonical principle that each set of courts held an independent jurisdiction. Loud and likely ineffectual protest against practices of the temporal courts which did not directly infringe upon their jurisdiction was not something that came naturally to the English civilians. Harmony within separate spheres was what they sought.

The desire of English civilians to avoid direct conflict with the common law and to stress the separateness of their own law also led them to take an expansive view of ecclesiastical jurisdiction. For example, it is often possible for lawyers to characterize the same set of facts in different ways, emphasizing one or another aspect to give a different look to what has been done. English civilians took advantage of that possibility, notably in the law of obligations during the Middle Ages. If \(A\) buys grain from \(B\) and makes a promise to pay the purchase price which includes an oath invoking a sacred name or object, is a subsequent lawsuit by \(B\) against \(A\) one brought to collect the money owed, or is it one to compel \(A\) to fulfil a religious obligation? Obviously it depends on how one characterizes the suit, and the English ecclesiastical lawyers characterized it as the latter. They described it as requiring \(A\) to live up to his sworn promise, and they

called it a *causa perjurii* or a *causa fidei laesiosis*. Thus it could be said that the suit did not directly contravene the common-law principle that pleas of lay debts and chattels belonged only to the temporal courts even though a cynic might say that what B really cared about was not the violation of a spiritual oath or the health of A's soul, but recovering the money owed for the wheat. Unfortunately, the surviving evidence is too thin to say how the English ecclesiastical lawyers themselves thought about the question, although one of the most articulate among them during the sixteenth century regarded the medieval Church's jurisdiction over contracts as an abuse of a legitimate spiritual principle.

Efforts along these same lines, made to protect and enhance ecclesiastical jurisdiction, did not disappear with the coming of the English Reformation, although this particular one was ended by a broad-scale attack on spiritual jurisdiction that occurred towards the end of the fifteenth century and the first quarter of the sixteenth. Two examples can be given briefly. The first is that of physical attacks upon the clergy. If a man punches a parson in the nose, is that action a case of assault and battery, or is it the religious offense of impugning the Church's authority? Obviously it can be thought of both ways. The post-Reformation English civilians, acting in the Court of High Commission, continued the practice they had inherited of treating such assaults as attacks on the Church. They refused to admit that the temporal courts had exclusive jurisdiction over cases involving assaults. They did not contend that an assault upon the clergy constituted only a religious offense, but they did contend that the Church retained jurisdiction to punish it insofar as it was.

A second example is drunkenness. This was similar to the previous example in many ways, except that it had no medieval precedent. During the second half of the sixteenth century, the English ecclesiasti-
tical courts began to cite and discipline men and women (usually men) for habitual drunkenness. Why this happened is uncertain, but it was probably the result of the increasing moral seriousness associated with the name of Puritanism. Whatever the source, the ecclesiastical court records came to be filled with prosecutions against men described as "common drunkards," "abominable drunkards," "beastly drunkards," or even for having committed an offense which the scribe of the consistory court at Salisbury characterized as "extraordinary drinking."

Potential for conflict between Church and State arose after the passage of a series of Acts of Parliament during the early seventeenth century that made drunkenness a temporal crime. The opinion among English common lawyers held that, in the absence of an express savings clause, creation of a common-law offense ousted ecclesiastical jurisdiction. The English civilians responded to this argument by saying that this did not apply where the purpose of their jurisdiction was different from that of the secular courts, and that in the case of drunkenness, their purpose was not so much to punish the habitual drunk for a crime as it was to restore harmony among Christian neighbors. Hence, the ecclesiastical records normally stated that the drunkenness had been "greatly offensive unto all [the defendant's] neighbors." The prosecution was meant, in other words, to accomplish something quite different from punishing misdeeds proscribed by Act of Parliament. Truly considered, no conflict existed between secular and religious law.

The English civilians expressed what they were doing, here and elsewhere, by drawing a distinction between litigation begun for the sake of enforcing private rights and litigation begun for the good of the community. The civilians reacted to potential conflicts by

---

35 E.g., Ex officio c. Jones (Gloucester 1600), Gloucestershire Record Office, Act book GDR 86, at 142: "detected for a common drunkard."
36 Ex officio c. Owndell (Peterborough 1587), Northants Record Office, Northampton, Correction book 21, f. 7 (one of the few cases discovered in which the defendant was a woman).
37 Ex officio c. Warde (Winchester 1589), Hampshire Record Office, Act book CC B 60, f. 52v.
38 Ex officio c. Cooke (Salisbury 1616), Wiltshire Record Office, Trowbridge Act book D1/39/2/8, f. 16v: "presentatur for extraordinary drinkinge."
39 4 Jac., ch. 5; 7 Jac., ch. 10; 21 Jac., ch. 7.
40 See the evidence and judgment set out in Phillimore v. Machon, 1 P.D. 481 (Arches 1876).
stressing that their proceedings were meant only to accomplish the latter, thus avoiding any direct clash with the common law even where the subject matter that constituted the offense appeared outwardly identical. In this way, ecclesiastical proceedings against those who had fathered illegitimate children, or those who had lent money at usurious rates of interest, were brought into at least colorable harmony with the English common law. Both of these constituted secular offenses, but since the object of secular proceedings would have been an order to support the child or a direction to repay the excessive interest, the civilians contended that no conflict was raised by spiritual proceedings in the same matters. Their object was simply to reform the person involved and to set right relations among neighbors.

Modern observers may find this distinction trifling—a thin rationalization to allow the English civilians to continue doing what they had been doing without admitting to the reality: that they were entering into conflict with common-law rules. This reaction may be correct. In some instances the orders given by the English spiritual courts, though formally styled penances, in fact turned out to involve the payment of money. However, there is also evidence suggesting that the distinction had reality for contemporaries. The rationale was stated without either self-consciousness or apology by the civilians themselves, and it was backed by clear medieval precedent. Sixteenth and seventeenth century common law cases also drew upon the

42 See, e.g., the statement in a fifteenth century treatise on ecclesiastical law, British Library, London, Harl. MS. 6718, f. 38: “Nota quod licet curia ecclesiastica non deberet cognoscere in temporalibus contractibus hic ad corrigendam animam pro iuramento cognosci potest.”

43 The matter was made explicit in Ex officio c. Plimpton (Winchester 1589), Hampshire Record Office, Act book CC B 60, f. 12v. Plimpton was accused of fathering a child by Jane Sturle. He admitted this but prayed to be excused because, “[h]e hath been before M. Gifford Justice of the Peace,” and given bond for support of the infant. The judge rejected the plea, “et eundem absolvere recusavit donec penitenciam predictam peregeret.”

44 E.g., Ex officio c. Rawood (Archdeaconry of Nottingham 1597), Nottingham University Library, Act book A 11 (Pt. 2), p. 108: Rawood admitted to lending money at 10% interest, at least arguably legal under 13 Eliz., ch. 8 and 39 Eliz., ch. 18, but was nonetheless ordered to perform public penance, “iuxta formam schedule in ecclesia de Harworthe.”

45 Such cases became plentiful in the late sixteenth century, when orders to pay money for relief of the poor became normal practice in the Church courts. E.g., Ex officio c. Crawley (Archdeaconry of Buckingham 1606), Buckinghamshire Record Office, Aylesbury, Act book D/A/C/3, f. 117: “iniunxit ut in penam criminis et excessus sui et uxoris irrogaret in usus pauperum parochie de Lathburie predicte vi s. viii d.”

46 E.g., Treatise on ecclesiastical law, Bodleian Library, Oxford, Tanner MS. 164, no. 60, justifying proceedings in spiritual courts, “quia unum et idem crimine puniri poterit diversis modis seu respectis in utroque foro.”

47 See, e.g., The writ “Circumspecte agatis” (1286), in Councils & Synods, supra note 14, pt. 2, at 974-75 (defamation was conceded to spiritual jurisdiction, “dummodo non petatur pecunia sed agatur ad correctionem peccati.”).
identical distinction.\(^{48}\) Moreover, it is at least arguable that the distinction is a desirable function of legal practice. Our own law of defamation, for example, would likely be much improved if we could separate out the damages side from the part of the remedy that seeks to restore the plaintiff's reputation and make the defamer admit his error.

Finally, under this heading of efforts to harmonize religious and secular law, mention should be made of the civilians' regular adoption of forms and rules from the common law in matters of relative indifference under the spiritual law. By bringing their practices into line with those of the common law, English civilians minimized the possibility that objection would be taken to them. It must also have been an easy step for them to take. There was regular interchange between common lawyers and ecclesiastical lawyers. Advocates from Doctors' Commons appeared regularly in the common-law courts where they gave evidence on points of spiritual law.\(^ {49}\) Some of the civilians were in fact members of one or another of the Inns of Court, the educational and social centers of the common law.\(^ {50}\) On a more local level, there even existed an informal lawyers' club, drawn from both temporal and ecclesiastical spheres, meeting at Canterbury during the sixteenth and seventeenth centuries.\(^ {51}\) Such contacts led naturally to the exchange of ideas, and very likely, even without the motive of self-defense, some harmonization in rule and practice would have taken place.

Three examples support this conclusion. First, English civilians adopted the same rules of priority for the collection of debt claims against the estate of bankrupt decedents that prevailed in the common law. That is, claims based on a written contract came before claims based on an oral contract. Claims on behalf of the Crown came before either, and so on.\(^ {52}\) Second, the civilians adopted some of the pleading practices used in common law defamation.\(^ {53}\) Thus, claims about the character of words spoken and the defenses available to defendants tended to approximate each other in both secular and spiri-

\(^{50}\) See B. Levack, The Civil Lawyers in England 1603-1641, at 129 (1973).
\(^{52}\) See "Rata bonorum" (1558-64), Kent Archives Office, Maidstone, PRC 44/4/2-4.
\(^{53}\) Thus usage of the *innuendo* normal in common law practice insinuated itself into civilian practice. See W. Sheppard, Action upon the Case for Slander 106 (1662); In Dillingham c. Smith (Archdeaconry of Hertford 1597), Hertfordshire Record Office, Act book 5/3, fols. 69v-70, the plaintiff's lawyer managed to include the *innuendo* form no fewer than twelve separate times in a single plea.
tual tribunals. Third, when the spiritual courts began to prosecute married men and women for sexual relations before their marriage, an unsporting development that occurred during the sixteenth century, they justified it as based upon common law influence: "It seems we have some respect to the common law herein," said a Jacobean civilian about the practice, "by which law subsequent matrimony hath not such force as by the civil law."\(^{54}\)

None of these examples amounted to a major alteration of spiritual law or of Church court practice. None of them posed a real dilemma of conscience. They were simply ways of bringing the two systems into greater harmony. They had the potential of helping to stave off writs of prohibition, and they served to buttress the argument that there was nothing subversive about the existence or the enforcement of a separate body of English ecclesiastical law. For the post-Reformation English civilians, that was the important point. Protection of their own jurisdiction underlay their efforts to minimize the inevitable differences and conflicts that existed between canon law and English common law.

IV. PRACTICAL EXPEDIENTS IN DEFENSE OF SPIRITUAL JURISDICTION

The third response to conflicts of jurisdiction characteristic of the lawyers who practiced in England's ecclesiastical courts was the adoption of immediate practical expedients designed to protect their jurisdiction against excesses and encroachments from without. Unlike the previous efforts at harmonization, these measures admitted the existence of conflict between two legal systems and sought to defend against it. There was certainly a need for some such protection. Common law rules did threaten the courts of the Church, both before and after the sixteenth century. And at no point during the period under discussion did the English civilians accept the common lawyers' position that ecclesiastical jurisdiction was limited to what the common lawyers said it was. The civilians accepted most of the traditional jurisdictional rules, and they were able to harmonize much of what they did with the common law, but areas of real conflict and substantial disagreement inevitably remained. In these areas, their most common reaction was to devise practical strategies to prevent the full implementation of the common lawyers' claims. Some of these practical strategies bring to mind Maitland's characterization of the *cautelae* proposed by the thirteenth century canonist, William of

---

\(^{54}\) Collection of causes from the ecclesiastical courts, c. 1610, Borthwick Institute of Historical Research, York, Prec.Bk.11, f. 31v.
Drogheda; that is "tips" or "dodges" that "do not deserve very pretty names, for they are none too honest."  

Not all of these strategies deserved Maitland's barb. A few had actually come to be sanctioned by the "immemorial usages" of the common law itself. They were thus not open for argument, much less condemnation. For example, though the common law held that all pleas of debts and chattels belonged to secular cognizance, an exception was made in favor of ecclesiastical jurisdiction for debts existing at the time of the debtor's death. If a debtor directed in his last will and testament that his legitimate debts be paid, then the Church courts could deal with their collection. The theory was that the testamentary direction turned the debt into a quasi-legacy. Since the Church had undoubted jurisdiction over legacies, men reasoned that it might equally have jurisdiction over these quasi-legacies. Such directions were in fact often inserted into testaments, and this concession materially improved the ability of the spiritual courts to implement the probate process.

Some other protective responses used by English civilians, though enjoying no privileged status at common law, similarly involved no direct clash. Indeed they amounted to little more than avoiding the provision of an excuse for temporal intervention. For instance, when a suit over tithes in an ecclesiastical court was compromised, the civilians made it their practice never to reduce the award to an agreement. Instead they continued the suit and had their compromise embodied in a formal sentence of the court. Their reason for this apparently wasteful tactic was that if it later became necessary to bring suit to enforce the compromise, a writ of prohibition would lie against it, the theory being that a contract dispute was being unlawfully heard by a spiritual tribunal. If, however, a formal sentence were being enforced, then the ecclesiastical court undoubtedly retained jurisdiction. No prohibition would lie.

Most of the strategies adopted, however, fell outside these accepted categories. They enjoyed no common law recognition and in fact contradicted its rules. Maitland long ago called attention to one of them. Except in special cases, suing for money in an ecclesiastical

55 F. Maitland, supra note 1, at 110.
56 Lambeth Palace Library, London, MS. 1371 (Common Law treatise on spiritual jurisdiction), f. 11v: "If the testator inioyneth his executors to paie his debts thei maie bee sued in the Court Christian because of the injunction and promise."
57 This is the reason that so many of the sentences issued by the courts contained changes in the amount of tithes awarded. See, e.g., Beck c. Mylborne (York 1581), Borthwick Institute of Historical Research, York, Trans.CP.1581/1, in which the original 20s. was reduced to only 20d. on the sentence.
court called for issuance of a royal writ of prohibition, and William of Drogheda noted that even so, “you can gain your end by nominally asking that the defendant may be chastened for his soul’s health, since he will be unable to obtain absolution until he restores anything that he is wrongfully withholding.”58 William Lyndwood, the fifteenth century English canonist, gave essentially the same advice to ecclesiastical lawyers seeking to avoid prohibitions,59 and it is revealing, perhaps even startling, to see the identical technique being used with apparent effect in the seventeenth century. One of the effective ways of avoiding a writ of prohibition, noted the Jacobean civilian Sir Thomas Crompton, was to insert a protest in the libel or statement of claim to the effect that the proceeding was being brought merely *ad salutem animae*, and that no incursion into common law jurisdiction was intended.60

Full understanding of the mechanics by which such protests were effective has so far eluded the grasp of historians. We do not comprehend all the mechanics whereby the protests effectively barred common law jurisdiction, and, accustomed as we are today to more relaxed rules of civil procedure, it is hard to believe that common lawyers could not have devised a way of getting behind them. The historical testimony about such protests is, however, too continuous to leave much doubt that they were worth something. They were used, for example, during the Middle Ages by those who relied on papal letters to assert title to a benefice. The bearer averted royal wrath threatened for having trespassed on common law principles by making a protest that he did not mean to impugn the Crown or the royal dignity by virtue of any apostolic letter or dispensation.61 In the early seventeenth century, insertion into a plaintiff’s libel suit of an assertion that no more was being sought than was consistent with the laws and customs of the realm had the same effect.62 It was said to be an equally effective strategy to omit the nature of the underlying dispute entirely, and proceed against one who sought to take advantage of common-law rules by treating the action as one “against an in-

58 F. Maitland, supra note 1, at 111.
59 W. Lyndwood, Provinciale ( seu Constitutiones Angliae) 315 s.v. *perjurio* (1679).
60 Guildhall (London) Library, MS. 11448, f. 45: “Sir Thomas Crompton to barr a prohibition admitted an allegation in the consistorie quatenus spectaret ad iurisdictionem illam et non aliter.”
61 E.g., York Minster Library, Act book H 2(1)a, fols. 52v-53 (1420) (the proctor of M. Thomas Polton protested that, “non fuit nec est intentionis domini sui neque sui hoc privilegio sive dispensacione apostolica uti, . . . , si in aliquo displiceat regie maiestati.”).
62 See the formulary in Canterbury Cathedral Library, MS. Z.3.27, f. 74v, under the heading, “Protestationes ad evitandum prohibitionem regiam.”
fringer of ecclesiastical liberties.""}63

In these situations, the spiritual courts did not act against the common-law judge who issued or enforced the prohibition. Instead, they acted always against the party who had used the prohibition, normally by slightly changing the characterization of what this user had done. The best examples of this technique look very much like a modern injunction, issued against litigants to keep them from impugning the proceeding of an ecclesiastical court by suing at common law. During the Middle Ages, such injunctions required the party to take a formal oath not to sue outside the spiritual forum. If he did, action would be taken against him, not for suing in the temporal forum, but instead for having violated his oath.64

After the turn of the sixteenth century, when the Church’s jurisdiction over perjury had disappeared for all practical purposes, this strategy no longer served. What the civilians used in its place was the penal bond with a conditional defeasance clause.65 The litigant in similar circumstances was required to enter into a bond to pay a large sum of money, defeasible if he appeared regularly in the Church court. If he invoked temporal jurisdiction, he was not proceeded against directly for having done so. Instead the automatic forfeiture clause of the bond was invoked in a separate action, making it impossible for him to claim the benefit of the defeasance clause.66

Finally, and most effectively, the English civilians made use of the award of the expenses of litigation, costs in common lawyers’ parlance, to discourage inroads into their jurisdiction. The primary weapon used to prevent the exercise of spiritual jurisdiction was the writ of prohibition, and although the civilians obeyed these writs, they made their use expensive if the party proffering the writ ultimately

63 E.g., Ex officio c. Baxby (York 1323), Borthwick Institute of Historical Research, York, CP.F.135 (the judge protesting, “se velle procedere in presenti negotio pretense violationis ecclesiastice libertatis ex mero officio suo et non ad alicuius partis instantiam pro salute et ad correctionem animarum”); Ex officio c. Dieson (Durham 1593), Department of Paleography and Diplomatic, University of Durham, DDR IV/3, f. 96 (the defendant having sued for defamation in the temporal forum, here promised to drop the action “et in eadem ulterius non procedere”). See also the seventeenth century comment in “Clement Colemore’s Book” (c. 1586), ibid., DDR XVIII/3, f. 247: “Quere the ordinarye may proceede againste them as infrangantes libertatem ecclesiasticam.” For comment on the point, see M. Buck, Politics, Finance and the Church in the Reign of Edward II, 65-67 (1983).
64 E.g., Ex officio c. Beyten (London 1476), Guildhall (London) Library, MS. 9064/3, f. 223: “Johannes Beyten fregit fidem cuidam Galfrido Damys promittendo fide sua media quod non persequeretur eum in curia temporali.”
66 Guildhall (London) Library, MS. 11448, f. 132v: “If the judges in the common pleas shoule graunte a prohibition uppon an accounte or distribution ex officio, it weare good that the ordinarie shoule putte the bond in suyte in the kings bench.”
failed. A prohibition could be undone by a writ of consultation heard in the royal courts, allowing the original suit to continue in the ecclesiastical forum.\textsuperscript{67} If that happened—if it was subsequently determined that the underlying litigation was spiritual in nature—then the losing party was required to pay the full litigation expenses of the prevailing party, including all those associated with the original writ of prohibition.\textsuperscript{68} Given the contemporary legal uncertainty that surrounded the propriety of upholding the writ, it is fair to describe many prohibitions as akin to an expensive gamble. Men would have counted the potential for expense awards before seeking the writ, especially when (as so often happened) they thought they might prevail under the spiritual law itself. Thus did the English ecclesiastical lawyers react in a practical and self-protective way to the many jurisdictional conflicts with the temporal law that threatened them from without.

V. CONCLUSION

This is a descriptive article, so perhaps no more than a word or two is required in conclusion. Certainly the most obvious common theme to have emerged from the records of the ecclesiastical courts is the tendency for those who practiced in them to fit what they said and did into the patterns of prevailing temporal law. The civilians downplayed the potential for conflict that existed between canon law and common law whenever they could. Even where they asserted their claims against the common law, they did so mostly by indirection. Whether their response was the product of fear, conviction, or resignation is not entirely demonstrable. The civilians were not reflective enough, and the records they produced were not articulate enough, for the historian to be sure whether they ever felt the conflict between religious and secular obligation as keenly as Thomas Becket. Even if they did, the evidence is sufficiently clear to demonstrate that they did not regard the conflict as a call to take direct action against the courts of the King. There certainly was conflict between common law and

\textsuperscript{67} Statute of Consultation (1289-90), 1 Statutes of the Realm 108 (1810).

\textsuperscript{68} See, e.g., the award in Potts c. Davy (Archdeaconry of Buckingham 1597), Buckinghamshire Record Office, Aylesbury, Act book D/A/C/25, f. 29, (listing the expenses associated with procuring the writ of consultation). A medieval example is Prior of Wells c. Valeynes (Canterbury Court of Audience 1304), Lambeth Palace Library, London, MS. 244, f. 9v (ten pounds was awarded, "pro damnis et expensis que et quas dictus prior occasione cuiusdam vexacionis in curia regia sustinuit et fecit."). See also Singer c. Gill (St Alban's 1572), Hertford Record Office, ASA 7/9, f. 32; Grindall c. Thomson (Carlisle 1607), Cumbria Record Office, Carlisle, DRC/3/62 s.d. 20 October; Broughton c. Poval (Chester 1608), Chester Record Office, EDC 5 (1608) no. 75.
canon law at all times between 1250 and 1640. But the dominant themes in the responses to it on the part of English ecclesiastical lawyers did not include defiance. Rather, they were accommodation and self-defense through means that avoided, rather than confronted, the common-law rules.