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Bastardy Litigation in Medieval England

by R. H. HELMHOLZ*

Of the areas of conflict between Church and State in medieval England, not many present the apparent clarity of opposition that bastardy litigation does. Maitland described it as a "collision between the claims" of secular and ecclesiastical jurisdictions. The most famous instance of this collision, to which Maitland was in fact referring, is a familiar one. It is the story of the Council of Merton.¹ The bishops, anxious to bring English law into accord with what they conceived to be the clear dictates of religion, reason and civil law, urged upon the baronage the proposition that children born before the marriage of their parents should be counted as legitimate at English law. The barons refused. And their unanimous shout, "Nolumus mutare leges Angliae," has since been celebrated for more reasons than one.

The history of the dispute does not, however, end there. The legal issues involved are more varied, more complex, and more ambiguous than the incident at Merton alone suggests. And the response of the English courts to the problems created by the areas of disagreement was far from static. The more one examines the history of bastardy litigation, the clearer it becomes that the story cannot adequately be described strictly in the terms of a collision at Merton. Rather, one finds substantial areas of compromise and even of agreement, on the part of both sides. The purpose of this article is to explore the development of the handling of the disputed questions, both from the point of view of the canonists and from that of the English Common Law courts. Working through that development provides an instructive chapter in the history of legal relations between Church and State in the Middle Ages. It

* Department of History, University of California, Berkeley.

1. For a reconstruction of the chronology of the events surrounding this incident, see F. W. Maitland's introduction to *Bracton's Notebook* (London, 1887), 14-17. Maitland's more extended treatment of the conflict is in *Roman Canon Law in the Church of England* (London, 1898), 52 et seq. Felix Makower's *Constitutional History of the Church of England*, (London, 1895), 422-23 is also useful. The best, straightforward presentation of the English law on the subject is W. Hooper, *The Law of Illegitimacy* (London, 1911). See also J. D. White, "Legitimation by Subsequent Marriage", 36 *L. Q. Rev.*, 255-67 (1920).

also sheds light on an important aspect of the growth and maturing of the English Common Law in the fourteenth century.

It is well to start with the precise problem firmly in mind. No dispute between *regnum* and *sacerdotium* in the Middle Ages existed in a vacuum, dependent on rhetoric or theory alone, and this dispute was, if anything, more concrete than most. It turned around a precise legal issue, namely inheritance of real property. Whatever ideological problems bastardy litigation might ultimately raise, jurisdiction over land was always at its center. Now, land held in lay fee was within the cognizance of the secular courts. All sides agreed on that. It was equally agreed, however, that determination of a man's legitimacy belonged to the spiritual courts. As long as marriage, divorce and adultery were thought of as distinctly spiritual, this was perhaps natural. In concrete terms, the distinction meant that whenever an issue of bastardy was raised in the royal courts, the process there was suspended and a writ sent to the bishop, asking for a resolution of the bastardy issue. Not that the bishops had any very expert way of determining the question. Before the very end of the Middle Ages, there were no parish registers or other records to help them. In fact, the issue was usually determined by a sworn inquisition of neighbours, no more reliable and not at bottom much different from a Common law jury. The common fame of the country was the source of the verdict in both forums.² There was no intrinsic reason for having the Church decide the issue. But it seemed more fitting. After the ecclesiastical inquisition, the bishop or his officials certified the answer to the secular court, which could then finish the case accordingly.³ In

2. The following extract from a case heard in the diocese of Canterbury and on this problem will perhaps make the point. Dean and Chapter Archives, Ecclesiastical Suit 310: ". . . facta fuit inquisitio si ultimus partus dicte Johanne post formam factam procreatus esset partus dicti Ricardi. Dicebat inquisitio iurata quod fuerat partus dicti Ricardi et non alterius, quia de alio non fuerat defamata et talis est communis fama patrie." When witnesses were asked in the church courts about the source of their knowledge on legitimacy, their answers usually came down to this: "communis fama laborat quod dicta C. fuerat nata in legitimo matrimonio," or that the knowledge came "de relatu seniorum suorum qui habuerunt plenam noticiam;" Canterbury Consistory Court Deposition Book, X. 10.1, f. 47_v (1420). An interesting side light on the ecclesiastical attitude comes from an attempt in 1294 to oust a clerk from his benefice for illegitimacy. He argued that he could not be illegitimate because his elder brother had succeeded as legitimate heir "secundum legem Anglie;" Sede Vacante Scrapbook III, no. 396.

3. A number of the king's writs with the episcopal returns from the 14th and 15th centuries are preserved in the Public Record Office, London, C.47/15/4 and E.135/7.

most cases, determination of the bastardy question would necessarily decide the outcome of the principal case.

The problems arose, as in the situation of the Statute of Merton, when Church and State did not apply the same substantive law. Whom one considers a bastard depends, after all, entirely on one's definition of legitimacy. When the two laws accepted definitions at variance with each other the question came down to this: would the secular courts be bound to follow the canonical definition of legitimacy because of the acknowledged principle that the subject lay within the Church's jurisdiction? Or would the ecclesiastical courts agree that the secular law should prevail because land was the subject of the action? It is worth pointing out that this was not a problem confined to England. Although Continental jurisdictions, following more closely the Roman Law texts, were closer to agreement with the canonical definition of bastardy, the definitions were not always identical.⁴ The conflict was not a strictly insular one.

I

For canonists, the question of how bastardy should be settled could not be without some degree of ambiguity. On the one hand, a decretal of Alexander III (X 4.17.1) stated clearly that a pre-nuptial child was legitimate and could not be disinherited for that reason. On the other hand, no matter how one dissected the matter, it came in the end down to a question of real property. A man sued not to have his legitimacy publicly proclaimed, but to recover land he thought belonged to him. And here canonists had to deal with another decretal of Alexander III (X 4.17.7) which seemed to say that feudal law controlled. This decretal grew out of an English case in which papal judges delegate had adjudged possession of land to a man whose mother (through whom he claimed the land) was challenged as illegitimate. Henry II objected strenuously to this invasion of his rights. He was, in the decretal's words "motus et turbatus." Because of that objection, Alexander III ordered the case returned to the royal courts. The matter of legitimacy alone remained to the Church, "although," the decretal says, the double procedure "may seem incongruous." The decretal does not authorise the royal court to go ahead without the canonical determination of bastardy, but it was to acknowledge that on the fundamental

4. For example, at Roman Law the consent of the parents was required to legitimate the child (D. 1.6.11). On this subject see Constant Van de Wiel, *La Légitimation par mariage subséquent chez les romainistes et les décrétalistes jusqu'en 1650* (Antwerp, 1962). The author doubts, however, whether in practice the Roman law categories were always observed.

issue of what court should try ownership of the land, the secular court has jurisdiction. This the canonists themselves clearly perceived, as they showed by their efforts to distinguish it. One said that this second decretal applied only to cases of spoliation, not to claims for inheritance.⁵ Another said that because the events which gave rise to the decretal occurred before John had granted and received back his kingdom as a papal fief, it was no longer good law for England.⁶ But these convinced no one, not even their authors.

The canon law position had really to rest on the argument that the secular courts were *bound* to follow the canon law's determination of legitimacy for inheritance purposes, because of the inherent superiority of Church to State. This was the only clear way out of a logical impasse. Hostiensis took the occasion of commenting on the question to launch into the standard medieval comparison of the *sacerdotium* to the sun, the *regnum* to the moon, the obvious point being that the State, like the moon, was totally dependent for its light on the priestly sun.⁷ In truth, the situation raised exactly that problem. If the king were really the moon, he had no choice but to let the light of canon law settle the determinative question of bastardy. If the pope were the sun, there could be no question that secular law was derivative, subject to correction by the pope's law. Accept the premise, and the logical problem is solved. The Church courts should determine legitimacy for inheritance purposes. Hostiensis put it with clarity: "in no way does it belong to the secular court to judge, but rather execution and admittance of the legitimate person belongs to it."⁸

In general, this was the position taken by canonists. There was, nonetheless, some appreciation for the arguments on the other side. Antonius de Butrio noted in his analysis of this problem

5. *gl. ord. ad X 4.17.1 s.v. hac occasione*: "Non est contra; ibi principaliter committitur causa super questione spoliationis, quae ad papam non pertinet inter eos qui non sunt suae iurisdictionis."

6. Joannes Andreae, *Novella Commentaria in Libros Decretalium ad X 4.17.7* (Venice, 1581), ". . . , sed hodie secus esset, cum postea Johannes rex Anglie filius Henrici maioris, quando Johannes successit in regno Ricardo fratri suo, recepit ab ecclesia Romana in feudum totum regnum."

7. *Summa Aurea*, t. *qui filii sunt legitimi*, c. 9 (Venice, 1574), col. 1385. And see Panormitanus, *Commentaria in quartum et quintum decretalium ad X 4.17.5* (Lyons, 1555), f. 39v; Note also X 2.10.3.

8. *Summa Aurea*, col. 1386: ". . . nullo modo ad secularem pertinet iudicare, sed bene pertinet ad eum executio et admittere legitimum, eo quod de legitimatione fuerit coram ecclesia facta fides." This theme is treated in the recent work by J. Watt, "The Theory of Papal Monarchy in the Thirteenth Century", *Traditio*, Vol. 20, 281 et seq. (1964) and also reprinted in book form (London 1965), 107 et seq.

that the Church should not disturb the jurisdiction of laymen, and that "it seems to detract from it to judge a case belonging to its judgement according to another law."⁹ Joannes Andreae noted, though he did not unequivocally endorse, a more technical position favourable to secular jurisdiction. When, he wrote, bastardy was raised only "in the manner of an exception," the secular court could reasonably retain the case instead of sending it to the Church.¹⁰ And Panormitanus, in the fifteenth century, held that a man legitimate for canon law purposes would not *ipso facto* be a legitimate heir, since the "custom of the country" might stand in the way.¹¹ Still, even for these writers, logic dictated that bastardy was a matter for determination by the tribunals of the Church.

The strongest sentiment mitigating the logic of the hierocratic point of view was the knowledge that, in the fact, it was not widely accepted. Joannes Andreae, after the passage just mentioned, went on to say that in principle the king's claims to jurisdiction over bastardy in inheritance cases might not be justified, but added that it was well to accept them, since "we do not wish to scandalize him."¹² And the marginal gloss to the standard *glossa ordinaria* noted, "But today in this kingdom the secular judge takes cognizance no matter what, and there is no remission to the Church."¹³ As an appendage to his strong stand, Hostiensis wrote: "this, however, the legists hardly concede to us, but by strictness and natural reason I do not doubt that it is to be held."¹⁴

9. *Lectura super quarto decretalium* ad X 4.17.7 (Rome, 1474), f. 86^v: "Nota quarto quod ad iudicium ecclesie non pertinet iudicare de temporalibus inter puros laicos et quod ecclesia non debet turbare iurisdictionem laicorum, quod detrahere videtur iuri alterius eo quod iudicat de causa ad eius non spectante iudicium."

10. *Novella Commentaria* ad X 4.17.5: "Verum tamen cum in modo exceptionis fuerit hoc oppositum coram iudice seculari, videtur quod sicut ipse cognosceret de exceptione que in suam iurisdictionem caderet sine libelli exceptione, sicut iudex ecclesiasticus qui in locum illius succedit sine libello procedere poterit." A useful discussion is contained in Innocent IV, *Apparatus super decretalibus* ad X 4.17.7 (Lyons, 1525), f. 183, noting disagreement among the canonists themselves.

11. *Lectura* ad X 2.10.3: "non sequitur est legitimus, ergo heres, quia posset obstatere consuetudo patrie; ideo semper est hec questio remittenda ad secularem."

12. *ibid.* ad X 4.17.7: "... asserit pertinere sibi; non tamen est ita in hoc casu, sed nolumus ipsum scandalizare."

13. See *gl. ord.* ad X 4.17.4: "Sed hodie in hoc regno indistincte iudex secularis cognoscit, nec fit remissio ad ecclesiam."

14. *Summa Aurea*, col. 1386: "Hoc tamen legistae vix concederent nobis, sed de rigore et ratione naturali non dubito sic tenendum." And see Raymond de Peñafort, *Summa de Poenitentia et Matrimonio* (Avignon, 1715), 431-32.

What had happened is that, on the Continent, the practice of sending questions of bastardy to the Church courts gradually disappeared.¹⁵ Beaumanoir, writing in the 1280's, gave it as the rule that in inheritance disputes secular courts in his area might make their own determination of legitimacy.¹⁶ The practice was not uniform in his day, but it was all but universal by the fourteenth century. The Church's theoretical rights were simply ignored. Canonists had little choice but to acquiesce in this decision and content themselves with the reminder that, by strict logic, the result ought perhaps to have been otherwise. Surely there were strong practical reasons for acquiescence. Reference to the ecclesiastical courts was time-consuming, necessarily irksome to the parties, and usually unnecessary. And when the subject of the ultimate dispute was, by the canon law's own principles, within the jurisdiction of secular law, the whole matter was not one in which the strictest sort of logic alone could control. This the canonists came close to admitting. They recognised the arguments on both sides and raised little objection to the fact that the "clerical" argument was not being followed.

In England, the Church certainly took this temperate position. Trial of bastardy in inheritance cases by the Church courts found few churchmen willing to lend it strong support. The very judges who insisted on the rights of the secular courts to determine the issue according to English law were, in the middle years of the thirteenth century, themselves clerics. It is interesting to note that Grosseteste, the leading figure among the bishops at the time of the Council of Merton, argued not that Church courts must decide the question, but that English law should be changed to accord with the only position, as he thought, in harmony with reason and divine law. Few men accepted more fully the hierocratic doctrines of subordination of secular to spiritual power than did Robert Grosseteste. In a letter he wrote to William Raleigh, then a royal judge, urging the legitimacy of children born before their parents' marriage,

15. For a more thorough modern treatment, see R. Génestal, *Histoire de la légitimation des enfants naturels en droit canonique* (Paris, 1905), 100 et seq.; A. Friedberg, *De finium inter ecclesiam et civitatem regundorum iudicio* (Leipzig, 1861), 121; A. Esmein, *Le mariage en droit canonique* (Paris, 1891), Vol. 1, 31. The issue was not entirely an historical one for Charles Fevret, *Traité de l'abus* (Lyons, 1736), Vol. 1, 539 et seq. He discusses, and dismisses, the "distinctions subtiles des Ultramontains" on which, he claims, the ecclesiastical case depended.

16. Philippe de Beaumanoir, *Coutumes de Beauvaisis*, ed. A. Salmon (Paris, 1899), no. 578, "Et pour ce que teus debas depent de l'eritage, convient il a la fois que juges seculiers s'entremete de connoistre la bastardie qui es proposee par devant li."

Grosseteste rehearsed these very arguments at length.¹⁷ But even he did not say that only the Church could try the issue of bastardy. This is to admit, at least by implication, that the English courts might exercise that jurisdiction. If only they would do so in accord with the correct definition of bastardy.

What the bishops at Merton, following Grosseteste's lead, were unwilling to do, no matter whether they conceded that the royal courts could try bastrady, was to use their own courts to enforce the substantive position of English law. To sanction the use of their own courts to deny inheritance to a man who was canonically legitimate was quite a different matter from accepting, without great protest, that the English courts might do so. Practice prior to the Statute of Merton had required them to co-operate, in unmistakable fashion, in reaching that result. The writ from the royal justices asked them to specify whether the person had been born before or after wedlock.¹⁸ To answer this made them co-workers in English legal practice, whereas if asked merely to determine bastardy in general terms, the bishop's court could follow its own law.

Where an answer to a specific question on the cause of alleged bastardy was demanded, and we shall see that it was demanded in other cases besides that of pre-nuptial children, the bishops baulked. But the long lists of clerical grievances surviving from the next two centuries after the Statute of Merton mention nothing of demands that jurisdiction should be returned to the Church in bastardy cases. I have found but one exception, and it is only apparent. During the reign of Edward II, attempts were made by some lawyers, through the use of changes in the wording of the pleadings, to deprive the Church courts of jurisdiction over even those bastardy cases where no substantive conflict between the two laws existed.¹⁹

17. *Roberti Grosseteste Epistolae*, ed. J. R. Luard (R. S., Vol. 35), 77 et seq. Grosseteste wrote that the ancient practice of England on children born before their parents' marriage had been in accord with the canon law. There does not appear to be any very positive evidence one way or the other on this point, but it is worth noting that Généstal concluded in his history of the subject (at 136) that legitimation by subsequent marriage was no part of Church law prior to the 12th century. The ecclesiastical writing he studied seemed, in fact, to assume that no legitimation would take place.

18. In Glanvill's day the bishop was asked to judge if the party "bastardus fuit natus ante matrimonium." *Tractatus de legibus*, ed. G. D. G. Hall (London, 1967), 87. Bracton argued that the bishops were still obliged to answer the specific question, and gave an expanded version of suitable writs, but it seems clear that by his time they were no longer co-operating with the English position. See *De legibus et consuetudinibus Angliae*, ed. G. E. Woodbine (New Haven, 1915-42), f. 419b.

19. See below.

The words used to make the claim of bastardy, it was argued, should control how the question should be tried. Here the bishops could answer the writ without difficulty; technicality alone robbed them of jurisdiction. But otherwise, Grosseteste had no successors. Even more than the canonists, the English Church was content to observe that practice did not conform to the ideal standard, to avoid direct involvement in reaching the result sanctioned by the English law, and to live, not unhappily, with the result.²⁰

II

The bishops' refusal to answer writs on bastardy in accord with English inheritance law necessarily forced the Common Law justices to draw a line between those cases they would send to the Church and those they would not. Where the two laws had different views of bastardy, the question would have to be kept out of the bishops' hands. In the eyes of Bracton and those of following centuries, the date of the Statute of Merton was commonly regarded as the landmark date, one which forced on English lawyers a realization of the divergence of the laws of Church and State. In the Year Book case of 1338, for example, Scrope, J. remarked that "before the Statute if it was alleged that a man was born outside espousals, the practice was to send to the bishop to certify . . . ; ever since the custom is not to inquire anything in those cases, except where bastardy is purely alleged."²¹ Modern writers have generally adopted that description. Prior to Merton, the Church heard bastardy cases; afterwards only those where the law of bastardy was identical under both laws. Cases where there was a conflict were tried by assize as any other issue might be.

Investigation of the pre-1234 cases shows, however, that practice was not so uniformly in favor of ecclesiastical jurisdiction as Scrope's opinion indicates. Many cases of alleged bastardy went to the bishops which would afterwards have been tried by assize, that certainly is clear. But on the other hand, there are many which were being tried by assize even before that date. It seems impossible to explain the divergence of practice along any very consistent prin-

20. How unanimous in following Grosseteste's position the bishops were, or how consistent when it came to their own interest, is illustrated by a case in *Bracton's Notebook* (no. 1181) from 1237. The bishop of Carlisle sued Adam Wigenhale, arguing that Adam had no right to land in dispute, since his title descended through a man born before his parents had married. This was, of course, to stand with the barons. On the English clergy's attitude towards the whole problem see F. M. Powicke, *The Thirteenth Century* (Oxford, 1953), 70-71.

21. 11 Lib. Ass. no. 20, f. 32 (1337).

ciples. A possessory action in 1226 was determined by assize, resulting in a decision that the claimant was born before the espousal of his parents, and hence incapable of inheriting. Three years later, a similar case was sent to the bishop of Norwich.²² In other cases we meet this same lack of consistency.²³ Probably the question of where to send the bastardy issue was settled case by case, considering the wishes of the parties. This almost certainly was the practice later on, for we find on the plea rolls cases in which the parties agree to trial by other than the usual method.²⁴

It is one of Bracton's most impressive achievements to have taken the confused mass of English legal material and to have extracted from it generally consistent principles of law. When we consider the lack of legal handbooks and the miscellaneous recruitment of the English judges in the first half of the thirteenth century, it is no surprise that practice did not always conform exactly to what Bracton or other commentators wrote. Anything else would have been virtually impossible. But on this specific point of the decisiveness of the decisions of the Council of Merton, it is an exaggeration to say that the decision to try bastardy by assize was an innovation. The Common Law justices had submitted questions of bastardy to jurors before; thereafter they had merely to continue, and to extend, that practice. But they did have to be more careful. It had been pointed out in clear fashion that the bishops would refuse to co-operate in reaching a result they were bound to regard as iniquitous.

By retaining questions of bastardy for trial by assize, the royal justices took a course which in fact restricted the jurisdiction of the Church. And because that restriction went, as we shall see, beyond the case of pre-nuptial children, it is often cited as an area of struggle for jurisdiction between Church and State. Or at least an area of encroachment by the royal courts on ecclesiastical jurisdiction. The matter was, of course, entirely in the hands of the common law-

22. Compare *Bracton's Notebook*, no. 1879, with *Curia Regis Rolls*, XIII, no. 2133.

23. For pre-1234 cases in which bastardy was tried by assize, see *Bracton's Notebook*, nos. 227, 257, 1879; *Curia Regis Rolls*, IV, 16; VIII, 43; XII, no. 2075; XIII, nos. 211, 1339.

24. For example, P.R.O. K.B. 27/373 (Mich. 27 Edw. III) m. 46: "Et predicti Willelmus et Joannes Petche dicunt quod . . . predicta Joanna bastarda est, ita quod nullius heres potest, et hoc petunt quod inquiretur per assisam. Et predictus Henricus dicit quod predicta Joanna legitima est et non bastarda, et paratus est verificare per assisam. Et predicti Willelmus et Johannes Petche similiter; ideo capiatur inter eos assisa." See also C.P. 40/121 (Mich. 25-26 Edw. I) m. 129d; K.B. 27/198 (Mich. 3 Edw. II) m. 126; C.P. 40/395 (Trin. 32 Edw. III) m. 458.

yers. After Grosseteste's protest, the Church did not raise objections on the matter, perhaps considering the ambiguity of its own law, and the royal courts were left to fix the line between spiritual and secular. Watching them fix that line shows something of their attitude towards Church-State relations. It is equally revealing in showing the growth of the English Common Law in the fourteenth century. We shall see that only in the middle of that century did the question of bastardy litigation reach a state of clear and consistent definition. That definition was not, we shall also see, achieved at the expense of ecclesiastical jurisdiction. As a way of tracing the development, let me take the specific instances of conflict beyond that of pre-nuptial children, one at a time. This requires delaying examination of the difficulties and changes in the fourteenth century, but it is necessary to appreciate the legal background from which they arose. Some have been well set out by Maitland and others, and require only statement. Some require more.

First, English law and canon law took quite different positions on the legitimacy of children born within wedlock but of adulterous liaisons. The reluctance of English law to bastardize any child born to a married woman goes back at least to the 12th Century.²⁵ But it was not until after the events surrounding Merton that the royal courts made consistent efforts to keep these cases out of the bishops' courts. A case from 1229 well illustrates the practice before that date. It arose in a writ of right for some land in Gloucestershire. To the claim the tenant answered, admitting the marriage on which the demandant's title depended, but saying that on the wedding night the bridegroom had found his new wife "gross and pregnant" and had expelled her from his bed.²⁶ He had had no access to her prior to the demandant's birth. Thus there could be, he argued, no question of inheritance of the land. The issue of bastardy, thus raised, was sent to the Church courts. Now this is just the sort of case the English courts had an interest in keeping out of the canon law system. Assuming the truth of the allegations of bastardy, the demandant would have

25. *Magna Vita Sancti Hugonis*, eds. D. L. Douie and H. Farmer (London, 1962) Vol. II, 20 et seq. A somewhat similar case is found in the Chancery Miscellaneous Records from 1390 (P.R.O. C. 47/15/4 no. 9). The wife of Ralph Basset had smuggled in the child of another woman and treated that child as her own. The true mother, some thirteen years later, the record asserts, admitted the fraud to a cleric, who urged that she seek "restitution" of the child. The whole matter came before the Chancery when the inheritance of Ralph was in dispute, but unfortunately, I have been unable to find any sign of the final result of the case.

26. *Bracton's Notebook*, no. 1229.

lost his case by canon law, and won it by English law.²⁷ Whether in 1229 the bishops were answering the writ in specific terms, allowing the courts to apply the English rule of refusing to bastardize adulterine children, as they did with pre-nuptial children, or whether the royal justices were simply not alert to the difference, does not appear from the record. We do not know. But cases after 1234 show that the difference was being taken into account.²⁸ Where bastardy because of adultery was alleged, the matter would not be sent to the bishop.

The reasoning used to justify the English law's unwillingness to bastardize children born of adultery is curious. Common lawyers were led to make some extravagant arguments in favor of a position which so clearly violated common sense. For instance, it was said that if a husband was in France at any time when conception could have taken place, the child was legitimate, no matter how clear the adultery. The reason: the husband might have slipped across the Channel at night. Only if he were as far off as the Holy Land was the result otherwise.²⁹ Finally, the even more mechanical test of the four seas, that is the limits of the kingdom, was settled on as the dividing line. And when called upon to produce an argument for legitimacy, the pleaders of the fifteenth century retreated to the homely analogy, "Whoso bulleth my cow, the calf is mine."³⁰ The "four seas" test was given up only in 1732, and then only (as Nicolas said) "on account of its absolute nonsense."³¹ But even today, although perhaps for other reasons, the presumption that a child born in wedlock is legitimate is "one of the strongest and most persuasive known to the law."³²

27. See Littleton's statement in Y.B. 18 Edw. IV, Hil. no. 28, f. 29 (1478), ". . . si home espouse un feme grosment enseint ove un auter et deins iii jours apres ele est deliver, en nostre ley l'issue est mulier, et par le ley de seint Esglise bastard."

28. Y.B.B. 2 Edw. II (Selden Soc. Vol. 19) 55 (1308-09); 39 Edw. III, Mich., f. 31 (1365); 44 Edw. III, Pasch. no. 21, f. 12 (1370). But see Y.B. 39 Edw. III, Pasch., f. 14 (1365), a case in which one party was obliged to petition Parliament for a remedy after the question of bastardy had been sent to the Church. For English law on this subject, see Harris Nicolas, *A Treatise on the Law of Adulterine Bastardy* (London, 1836).

29. Bracton, f. 418; Y.B. Hil. 32-33 Edw. I (Rolls Series), 63. A case from Hil. 35 Edw. I, in which it was held that even where the husband had been in the Holy Land, the child was held legitimate, is reported in the unprinted "Pleas at Law 1300-12", Brit. Mus. Add. MS. 35,116, f. 65v.

30. Y.B.B. 43 Edw. III, Trin. no. 5, f. 19 (1369); 9 Hen. IV, Hil. no. 13, f. 9 (1407).

31. *Treatise*, 164. The rule was abrogated in *Pendrell v. Pendrell* 2 Stra. 925. See also Co. Lit. 244a.

32. 10 *Corpus Juris Secundum* 21 sec. 3.

Second, English law differed from canon law on the legitimacy of the children of divorced parents. The Church evolved a number of standards for judging the matter, the most important of which involved investigation of the formal correctness of the marriage and the good faith of the parents.³³ If they were innocent of wrongdoing and knowledge of the impediment which rendered their union unlawful, or at least if one of them was, their children were legitimate. Otherwise, the children were not. English law required a simpler rule, one easier to state, less difficult to prove, and not so open to fraud. By the reign of Edward III, this had been adopted: divorce for affinity or consanguinity did not bastardize the child, while divorce for pre-contract did.³⁴

It seems obvious that the same rationale of visiting the parents' fault on their children lay behind both the English and the canonical rule. One may more easily believe that a person has ignored the extent of his kinship than that he has forgotten contracting marriage or professing monastic vows. Thus it seemed right to impose the penalty of bastardy more readily in the latter case. It may also be fair to think that the early English rule shows signs of a sensible dislike of the wide sweeping net of kinship disqualifications that complicate, and in a measure discredit, the medieval law of marriage. But, in any event, English substantive law took a different position from that of the canon law, and royal justices would, at least if one party demanded it, force the other to state the specific cause of divorce. If the cause was pre-contract, the ordinary writ would be sent to the bishop, since the substantive result would be the same under both laws. If it was consanguinity, that ended the matter. The court would not issue the writ, but would instead force the party to proceed to another issue or be non-suited. It is well to note, however, that this was true only when the case involved inheritance of real property. Where the issue was the marriage itself, the question of divorce went to the bishop, no matter what the cause for divorce was. If, for example, the question of the validity of a marriage were raised in a suit for dower, it was referred to the bishops. This without regard for the grounds of challenge, or the form in which it was made.³⁵ The point was to safeguard

33. X 4.17.2.

34. Bracton, f. 299, Y.B. Pasch. 11-12 Edw. III (R.S.), 480-87. The law was later changed to the even simpler rule of bastardizing even children born to parents divorced for affinity or consanguinity, although it is fair to say that the law continued to be uncertain on the subject. See Y.B. 18 Edw. IV, Hil. no. 28, f. 19 (1479), Hooper, *Law of Illegitimacy*, 51.

35. Y.B.B. Hil. 32-33 Edw. I (R.S.), 4-7; Trin. 14 Edw. III (R.S.), 322-325; C.P. 40/115 (Mich. 24-25 Edw. I) mm. 40, 86; C.P. 40/129 (Trin. 27 Edw. I) m. 137d.

principles of English inheritance law, not to seize upon every excuse to exclude episcopal jurisdiction.

Common lawyers sometimes had harsh things to say about the handling of divorce litigation in the Church courts. A case from 1365 illustrates one reason. The bishop of Ely's commissary had, during his visitation, uncovered information showing that John T's father had been godfather to his wife's cousin. According to canon law rules, this relationship made marriage without grace of dispensation impossible, and the commissary, zealous for the rigor of the law, or wishing to harass the unfortunate John, proceeded to celebrate a divorce between John's parents. That those parents were themselves dead at the time was not a necessary canonical impediment to the divorce.³⁶ Subsequently, and perhaps inevitably, John was involved in litigation over his inheritance, and bastardy was objected against him. Whether or not he would have been held legitimate in the spiritual courts depends on factors not given in either the Year Book or the plea roll account of the case. But it was not impossible that he would have been held a bastard, and this the English courts would not admit. Thorp, J. expressed the opinion of the court when he said that if such questions were submitted to the Church, "... every Commissary could bastardize every man of the World without his even knowing about it, which would be great mischief."³⁷

36. There was, it is true, some argument against these *post mortem* divorces, and Roman Church law today excludes them (*Corpus Juris Canonici* c. 1972). But it is not true, as is sometimes said, that they were canonically illegal in the Middle Ages. See the discussion in Antonius de Butrio's *Lectura ad X 4.17.7*, f. 87r. An example of such *post mortem* divorces, in the instance between a couple who had married seventy years before, can be found in the Dean and Chapter Archives, Canterbury, Sede Vacante Scrapbook, III, no. 396 (1294). The ruling that the action would be entertained was, however, vigorously contested and appealed to the Court of Arches.

37. Y.B. 39 Edw. III, Mich., f. 31 (1365); C.P. 40/421 (Mich. 39 Edw. III) m. 354. The English Common lawyers also complained with some frequency, and with some reason, about the long delays in the Church courts. In this same case, it was argued that bastardy ought not be submitted to the bishop because "il purra estre delay per ans per appeals." In another case, reported Y.B. 38 Edw. III, Mich., f. 27, a lawyer complained that the party "aura grands delais devant l'Evesque. Et si l'Evesque ne vient pas accepter les proves, le party suera per appel, et aura long proces." These two cases also illustrate the Church's unwillingness to submit the procedure in its own courts to English law. Bracton argued, at f. 420, that there could be no appeal of a judgement on bastardy from the bishop to whom the king's writ had been sent. But it is clear that this rule could not be enforced against the bishops, for they

Third, there were some other cases the royal justices refused to send to the church courts, although the two laws were not so clearly different in substance. If the bastardy of a dead man were alleged, the question was tried by assize, not sent to the bishop, without regard for the reason for the bastardy.³⁸ If the legitimacy of one who was not party to the action was questioned (as where the title to land descended through, and depended on, an alleged bastard), the issue likewise went to a jury.³⁹ In these instances, where no substantive difference in the two laws could affect the outcome, the English courts took a more restrictive view of ecclesiastical jurisdiction than principle alone warranted. The main reason they gave for the restriction was that non-parties would not be adequately represented before the Church court. In some ways, this seems more an excuse than a reason. The bishops could summon those who were alive, and the same problem of inadequate representation existed in trials by assize. It looks like a plain attempt to curtail ecclesiastical jurisdiction.

The Common lawyers had an answer to this charge. They said that in the royal courts, the bishops' certificates had a conclusive, pre-emptory force which jury verdicts did not.⁴⁰ That is, a certificate of legitimacy or bastardy coming from the Church could not be challenged in a subsequent lawsuit, even between different parties. The verdict of jurors bound no one beyond the individual parties. Thus it was essential to hedge recourse to the bishops with procedural safeguards. If a man's legitimacy could be conclusively settled by the bishops in a suit to which he was not a party, he might be

would not answer the writ if there were an appeal. In a case heard in the Common Pleas in 1277, the party who had appealed in the Church court was ordered to remit that appeal "si sibi videtur expedire ita quod episcopus procedere possit," C.P. 40/17 (Mich. 4-5 Edw. I) m. 144. But, as the cautious language suggests, it is not clear how far this remedy was enforced.

38. Bracton f. 269; Y.B.B. 20 Edw. I. (R.S.), 172-73; 2 Edw. II (S.S., Vol. 17), 95; 39 Edw. III, Hil., f. 2 (1365). The situation did not in fact arise as frequently as it might have because of the exception made for the *bastard eigne*. If a bastard entered as son and heir, and held the land until his death, title based on his possession could not be challenged later. See F. E. Farrer, "The Bastard Eigné" in 33 *L. Q. Rev.*, 135-53 (1917) and Vol. 34, 27-34 (1918). The rule did not, apparently, hold against the king; K.B. 27/392 (Trin. 32 Edw. III) Rex m. 3.

39. Y.B.B. 9 Edw. III, Trin. no. 4, f. 19 (1335), 17 Edw. III, Mich. no. 54, f. 59 (1343). That the rule was not in every case respected is indicated by *Rotuli Parliamentorum*, ii, 171a (1347), a complaint that a case of bastardy of a non-party had been sent to the Church, to his later prejudice.

40. See Y.B. 12 Ric. II (Ames Foundation), 74; *Rot. Parl.*, iii, 490a; Hooper, *Law of Illegitimacy*, 77.

deprived of the chance to bring forward all the proof he had. This is true because in a lawsuit in which he had no interest in the outcome, he would have little incentive to present his strongest case. Such, at any rate, was the lawyers' argument, and there is some cogency to it.

The argument depends, of course, entirely on the effectiveness of the bishops' certificates in the English courts. And although the rule of conclusiveness was often cited and mostly followed, a number of cases show an unwillingness by the judges to enforce it when injustice or fraud would result. The Common law justices were sometimes tied to mechanical application of technical rules in the fourteenth century, but on more than one occasion they dealt freely with this one. In a case from 1337, for example, it was pleaded that the plaintiff was a bastard by reason of birth before his parents' marriage. The plaintiff countered by showing record of a bishop's certificate from a previous decision testifying to his legitimacy. The court, however, refused to accept it as conclusive. As Shareshull, J. said, "I cannot have this answer because with it a man would gain inheritance against the law of the land."⁴¹ Even where the situation was not so clearly that of the Council of Merton, the justices were willing on occasion to disregard the rule. In Trinity term of 1354, another litigant sought to introduce a bishop's certificate from a previous action of formedon and was driven to answer when the court again refused to accept it.⁴²

A legitimate reason for the justices' disregard of the rule of conclusiveness was that it encouraged fraud on the English law. It was easy enough to set up one collusive lawsuit which raised bastardy without involving substantive conflict between the laws, get a bishop's certificate on the court records, then plead the certificate as conclusive when bastardy was raised in a subsequent dispute. It was a subterfuge, though not a particularly clever one.⁴³

41. Y.B. Mich. 11-12 Edw. III (R.S.), 223-35.

42. 26 Lib. Ass. no. 64 (1352). A similar result was reached in Y.B. Mich. 18-19 Edw. III (R.S.), 32-41. And in a case heard as early as 1277, the Common Pleas refused to accept as proof of a valid marriage the letter of the archbishop of Canterbury certifying the legitimacy of one son for entry into a benefice. The ground given was that where there had been no former plea in the royal courts, no ecclesiastical certificate could have conclusive force; C.P. 40/17 (Mich. 4-5 Edw. I) m. 144.

43. It is interesting to note that Innocent IV was well aware of this abuse and sought to find a way to stop it; *Apparatus* ad X 4.17.7, f. 188 ". . . nec debet quis admitti ad petendum se pronunciari legitimum nisi habet contradictorem et iustum, et si admissus fuerit, nulla est sententia." But as a fictitious "contradictor" could be set up, and since the bishop's certificate was ordinarily conclusive once on the English court records, this solution did little good. Complaints in Parliament gave rise

To allow it defeated a strong policy of English law. The justices were sometimes, but not always, willing to disregard the procedural rule of the force of the certificate. They invoked it freely as an excuse for limiting the jurisdiction of the Church courts, but were less ready to apply it when it meant the application of canon law to questions of inheritance of English land.

The foregoing restrictions of the Church's jurisdiction to determine bastardy were probably less important than a fourth, the distinction between proprietary and possessory actions. Maitland has pointed it out: only when the action went to the right would recourse be had to the Church to determine legitimacy. Otherwise, bastardy would be tried "in what we may call a possessory spirit," that is by assize.⁴⁴ It is possible that this distinction was evolved after Bracton's time for there is no explicit mention of it in his discussion of bastardy, but it was an established part of English law by the end of the century.⁴⁵

The justification for the rule is a familiar one, the same which had originally made possible the wide introduction of possessory assizes in the royal courts. Since it was theoretically always possible to follow a possessory action with a writ of right, no one could be obliged to have his legitimacy tried by assize. He could always sue later by an action going fully to the right, and the question would be sent to the bishop.

In this form, however, the argument is largely specious. The only class of cases which a party would especially want tried by the

to a poorly worded and ineffective statute designed to curb the abuse (9 Hen. VI, c. 11). In the 16th century Christopher St. Germain took note of it, but all he could suggest was a moral obligation on the part of the defrauder to return the property so acquired. *Doctor and Student*, Second Dialogue, c. 5 (London, 1721), 139. This is the weakest of solutions, obviously, for if such a man were minded to return the property, he would not have brought the fraudulent suit in the first place. No doubt, also, such a man would think it was the English law, not his collusive law suit, which was of dubious morality.

44. Pollock and Maitland, *History of English Law* (Cambridge, (1898), Vol. II, 380; Bastardy questions in writs of entry seem also to have gone to the country. C.P. 40/183 (Mich. 4 Edw. II) m. 111d; C.P. 40/216 (Mich. 10 Edw. II) m. 23.

45. Compare Bracton, f. 216b with Britton, f. 128. It is perhaps worth noting that support could be found for the English distinction in canonical-civilian theory, as set out in Guillelmus Durandus, *Speculum Iuris* t. *de ordine cognitionum* (Frankfort, 1668), II, 202. Durandus held that both when the spiritual question was prejudicial to the secular, as it always was in bastardy cases, the prejudicial question must be tried first, that is by the ecclesiastical court. He goes on to say, however, that this is true only for proprietary actions. "Si vero agitur possessorie et reus obiciat preiudicalem exceptionem, secus est."

Church were those in which English and canon law were at variance. These, we have seen, it was the policy of the English courts to refuse to submit to the Church in the first place. Where the two laws were identical, it made little difference how the issue was tried. Thus, the result of the distinction between actions of right and of possession was, or ought to have been, to considerably restrict the number of cases which would be sent to the ecclesiastical tribunals. Actions of right were less frequent in the royal courts than possessory actions, so that the distinction, if rigorously followed, would have very largely removed bastardy litigation from the jurisdiction of the Church. We do know that it was not absolutely applied, for there were a few possessory actions which did in the event go to the bishops. But certainly, the distinction was very largely followed in the first half of the 14th century.⁴⁶

To summarize briefly, the practice of sending questions of bastardy to the Church at the start of the fourteenth century was this. A number of specific situations had been developed in which the royal courts would not, unless the parties agreed otherwise, refer to the ecclesiastical forum. They were of two sorts. The first included cases where a substantive difference in the definition of legitimacy existed. Children of adulterous liaisons, those born before their parents' espousals, and those whose parents' marriage had been dissolved came under this heading. The second consisted of cases where the refusal was based on procedural grounds. Bastardy of dead men and other non-parties, and most importantly, possessory as against proprietary actions came under this second.

Retention for trial by jury, we noted above, was a necessary step in the first class, a step required to vindicate the principle that English law, not canon law, should determine inheritance of English land. As to the second group, reasons could likewise be given for each of its categories, but especially with the right-possession distinction, the result was not at all required by English law, in the same way that keeping cases of pre-nuptial or adulterous children out of the bishops' hands was. Retention of the cases in the second class was rather a slightly veiled attack on ecclesiastical jurisdiction than a vindication of English principles of inheritance. And it had one unfortunate result. The wide use of the second class focused attention almost entirely on the form in which the claim of bastardy had been raised. The essential question became, not what the reason for bastardy was, but how it had been raised. Whether or not the issue went to the Courts Christian depended not

46. K.B. 27/373 (Mich. 27 Edw. III) m. 45; Y.B.B. 5 Edw. II (S.S. Vol. 33), 161-69 (1312); Pasch. 14 Edw. III (R.S.), 55 (1340); 26 Lib. Ass. no. 64 (1352), in which, however, Thorp, J. appears to have dissented.

on a question in which English inheritance law was at stake, but on a question of form.

It should not be totally surprising, then, that the end result of the possessory-right distinction in bastardy cases, and to a lesser extent that of the other procedural distinctions, was not a happy one. Theoretically, it should have been possible to keep all the cases straight. Mastery of technical pleading, we may say, was an essential part of an English lawyer's job; it was not a business for amateurs, and as long as the pleading reflected the real issues of conflict between Church and State, there need have been no difficulties. But in fact there were difficulties. The English lawyers were not the masters of pleading such distinctions required. In the first half of the fourteenth century, the emptiest of formalism seemed often to control, and the substance of English law was often sacrificed to considerations of pleading alone. Citation of a specific case may make this clear. *Le Fevre v. Sleght*, heard in 1313, was brought on a writ of right in which the demandant was challenged as being born before espousals, the classic Statute of Merton situation. But Scrope, for the demandant, argued: "This is a writ of right; judgement if such an answer should be allowed if you do not say simply bastard." This argument was accepted, and the court drove the tenant to allege general bastardy, which had to go to the Church for trial.⁴⁷

It need hardly be said that this was bad law. *Le Fevre v. Sleght* raised exactly the issue which the events at Merton and after had made clear the royal courts had to retain for decision. Instead, that distinction was ignored. The distinction between writs of right and possessory actions and the technicalities of pleading had taken over and obscured the substantive issue of the inheritance claims of pre-nuptial children. But the same result was reached in other cases, notably one from 1334, in which the court sought to escape it by saying that it would accept a spontaneous finding of bastardy returned by the jurors, but that if bastardy were pleaded at all, the matter had to go to the bishop.⁴⁸ Confirmation of the unfortunate result comes from the Parliament records of 1327, when a petition complained that the bishops were hearing such bastardy cases and requested that henceforth the king's justices would themselves determine the issue by jury verdict.⁴⁹

47. Y.B. 7 Edw. II (S.S. Vol. 36), 158.

48. 8 Lib. Ass. no. 5 (1334). See also K.B. 27/326 (Mich. 15 Edw. III) m. 165d; C.P. 40/195a (Mich. 6 Edw. II) m. 397; Y.B.B. 6 Edw. II (S.S., Vol. 43), 72; 7 Edw. II (S.S., Vol. 36), 105-06.

49. *Rotuli Parliamentorum Anglie hactenus inediti*, eds. H. G. Richardson and G. Sayles (Camden Soc., 1935), Vol. II, 125: "Item pur ceo qe grant debate ad este entre frers dont lun nasquist devant les esposails et lauter apres, et grant delaye ad este en court cristien, qe desormes

Just as the right-possession distinction caused confusion, so the rule that the legitimacy of dead men would be tried by assize likewise gave rise to difficulty. We saw above that for procedural reasons, the legitimacy of non-parties was tried by assize. But we now begin to find the contention made that bastardy of living men could only be tried by Court Christian.⁵⁰ Also, we find cases in which it was said that the bastardy of a tenant of land in dispute could only be tried by the bishops.⁵¹ Neither of these arguments made sense. The essential matter was to protect the English inheritance law, and these in fact thwarted it. They sent questions to the bishops which should have been retained. That the question of a dead man's legitimacy could not go to the bishops does not prove that a live man's must, for he may have been born of adultery or before his parents' *espousals*. That the law accorded some procedural advantages to the tenant as against the demandant is no reason to grant him trial of bastardy by bishop's certificate, for a tenant may be bastard by English law, legitimate by canon law as well as a demandant.

It is not always clear how far these arguments were adopted by the courts. The Year Book accounts concentrate on pleading rather than on judgements, so that we very often do not know how a particular case came out. But the plea rolls show that the court often did sanction a result contrary to English law. And when the arguments were repeated in case after case, over the course of years, and answered with neither good sense nor good law, it is clear that the law was in a confused state as regards trial of bastardy. And in the instances above the result of the confusion was to submit some cases of disputed inheritance to the jurisdiction of the Church, the exact opposite of what the barons at Merton had desired.

The conflicting results and confused arguments of the Year Book cases of the first half of the fourteenth century show that concentration on considerations of form and the lack of mastery of the art of pleading had confused the issue which had been more clearly drawn by Bracton. We have seen that this confusion led to

ne soit tiel delaye, mes qe les iustices pernent enqueste sil nasquist devant ou non et sur ceo face jugement."

50. See, for example, Y.B. 7 Edw. II (S.S., Vol. 36), 96, where it was objected, "*. . . la manere de vostre repouns est insufficient encountre cely qest en pleyne vie, qe ne put james estre bastard saunz certification del Evesqe.*" Or see Y.B. 9 Edw. III, Trin., f. 19 (1335).

51. Y.B.B. 6 Edw. II (S.S., Vol. 43), 72-74; 9 Edw. III, Trin., f. 19 (1335). Bracton, at f. 418b, gave it as the rule that the burden of proof would be on the demandant, so that the tenant had this advantage, but there is nothing of the rule argued for in this Y.B. Case.

some cases being sent to the Church which should have been kept by the royal courts. But we should also note that it opened the way for attempts to avoid sending to the bishops cases which rightfully belonged to ecclesiastical jurisdiction. This was possible through a series of verbal tricks. It began to be argued that if one avoided using the actual word "bastard" in the pleadings, jurisdiction could be withdrawn from the Church. Thus, allegations in such forms as these appeared: the claimant was "not of the blood of," or "his father never married his mother," or "he was not the son of," his alleged ancestor.⁵² Such pleadings neither raised any issue on which English law differed from canon law, nor amounted to anything more than a plain exception of bastardy. All they did was to avoid the use of the word "bastard," so that it could be argued that "special matter" had been introduced. This practice was senseless. The point of pleading special matter, as Bracton had explained it, was to determine whether the case was one in which English law and canon law were different, not to give the party raising the bastardy issue the choice of which forum he wanted.⁵³

Of course, such "dodges" were not in every instance accepted. But it is clear that they sometimes were, and the testimony from the Church's side makes it obvious that these cases were not going unnoticed. Most of the examples of this sort of pleading that we have come from the first part of Edward II's reign. And the lone ecclesiastical complaint, of which we have record, against trial of bastardy in the royal courts comes from just that period. At the Council of London and Lambeth in 1309, a petition to the King was formulated, objecting that "certain justices of late, if the exception is proposed before them in this form, 'he is not legitimate,' take cognisance of it in fact." The bishops asked that "notwithstanding the variation of the words, the judges desist from hearing such cases."⁵⁴ We do not know what immediate effect the petition had. Perhaps very little. All the same, attempts to evade ecclesiastical jurisdiction by mere "variation of words" do very largely disappear from the Year Books after Edward II's reign.

We should note here that it was largely by the use of such purely formal variations that jurisdiction over bastardy was with-

52. Y.B.B. 5 Edw. II (S.S., Vol. 31), 186-91, 7 Edw. II (S.S., Vol. 36), 105-107; 11 Lib. Ass. no. 20 (1337); "Pleas at Law 1300-1312", Brit. Mus. Add. MS. 35, 116, f. 34r; C.P. 40/195a (Mich. 6 Edw. II) m. 92; C.P. 40/216 (Mich. 10 Edw. II) m. 122.

53. Bracton, f. 416: "sed quoniam ubi causa non adicitur sub tali responsione poterit esse obscuritas et incertitudo, quia cum sciri non poterit ad quod forum pertinere debeat cognitio . . ."

54. *Council and Synods with other Documents relating to the English Church II*, eds. F. M. Powicke and C. R. Cheney (Oxford, 1964), Pt. I, 1273.

drawn from the Church on the Continent. Rather than by frontal attacks on the rights of the Church courts, Continental jurists used indirect and technical distinctions to achieve the same result. Perhaps we should see in the English practices to which the 1309 Council objected the start of the same process in England. But, in the event, it was a road the English lawyers did not take. Having advanced some steps down it, the Common lawyers withdrew, leaving the English Church's rights unimpaired. Whether they did so because of the unfortunate results which had followed we cannot be sure. But it is certain that most of the confusion in the pleading which is found in the reign of Edward II on this issue had disappeared by the middle of the century. It is difficult not to see in this a growing understanding of the issues involved. And we must note that in the process the justices rejected the method of restricting ecclesiastical jurisdiction through purely formal variation in pleading. Here, at least, they did not show themselves jealous of the Church's jurisdiction.

If the Churchmen's protest, or judicial astuteness, gradually eliminated this particularly obnoxious trick, the possession-right distinction which had, by its emphasis on form, created a part of the climate in which such confusion could flourish was left untouched. Though it had doubtless kept a large number of cases out of the Church courts, the "possessory spirit" had led, like the others mentioned, to difficulty and some confusion. Solution came in 1364, in a case of novel disseisin from Surrey. It is worth setting out the facts. The original holder of the land in dispute had had two daughters. The plaintiff was the issue of one of them. The defendant had been enfeoffed with the entire piece of land by the other daughter, and was in possession. One daughter had, in other words, alienated the entire inheritance as if she held the fee, not simply the half which came to her by English law. Thus the plaintiff had a good claim to her mother's share of the inheritance, except that the defendant objected that she was illegitimate. If that were true, of course, none of the land could have descended to the plaintiff and the feoffment to the defendant was perfectly lawful.

For some reason, perhaps with prompting, the plaintiff asked for a writ to the bishop of Winchester to try the bastardy. The defendant demanded trial by assize, "since that has been the use up to now". Finch, J. agreed that this was the practice, but said he saw no good reason for it. Since, in fact if not in theory, "blood will be tried in a writ of assize for ever as well as in any other writ," the distinction did not seem sensible to him. "There is," he said, "as much good reason to send to Court Christian in this case as in any other writ." ⁵⁵

55. Y.B. 38 Edw. III, Mich., f. 26: ". . . mes jeo ne scay pas voier per

Finally, the matter was adjourned before the Court of Common Pleas, where the justices said (in the words of the Year Book), "We have taken advice of all our masters herein, and are all of one accord. As well in assizes as in other writs if bastardy is alleged against a party, it will be sent to Court Christian."⁵⁶ With that, they abolished a rule of practice which had been good law for at least seventy-five years. Thereafter, there were some attempts made by pleaders to get the justices to return to the old rule, but they came to naught.⁵⁷

The happy issue of this decision was to concentrate attention once more on the substantive differences between English law and canon law. If a child were said to be born before his parents' marriage, the royal courts kept the case, whatever the form of the action. If bastardy was alleged generally, without special matter, then the issue was submitted to the bishops. In this decision lay some of the means for clearing away the confusion which clouded thinking on this issue of conflict between Church and State. The Year Books of the later fourteenth and the fifteenth centuries have little of the variety of treatment and disorder of argument about this subject which mark their predecessors. The readings at the Inns of Court and the treatises of Fortescue, Littleton, and Coke are clear on the essential issue: the substantive differences in definition of bastardy by Church and State.⁵⁸ The refusal to send allegations of bastardy of non-parties was retained, but the reason que nous poiomes mults trier de bastardie in Assize que in auter bref, car le sank sera try in ceo bref d'Assize pur toujours auxi bien come in auter brief. Unfortunately, one of the few *De Banco* rolls missing from this period is this one from the Michaelmas term of 38 Edward III.

56. *ibid.*, "Purque nous avons priz avis de tous nos Masters cyens, et sumes tout d'un accorde; et auxi bien in Assise come in auter bref si bastardie suit allege in cesty qui est party, home mandra au Court Chrestien."

57. Y.B. 4 Edw. IV, Mich. no. 16, f. 34 (1464): "Et issint est de bastard, l'issue pris sur ceo en action personel serra trie per le Evesque auxibien come en le plea real, en uncore devant ceo temps en eigne temps le use fuist auterment, scilicet en actions personel a trier per le pais, mes ore change." Cf. also Y.B. 49 Edw. III Pasch. no. 11, f. 18 (1375); C.P. 40/458 (Pasch. 49 Edw. III) m. 395. Confirmation of the effectiveness of the ruling can be found in an unprinted Lincoln Episcopal Register, containing a collection of royal writs from the late fourteenth century. It has three judicial writs sent to the bishop to certify bastardy in possessory actions: Lincolnshire Archives Office, Reg. XIIb, f. 19v (1369); f. 48r (1386); f. 73v (1396).

58. *Readings and Moots at the Inns of Court in the fifteenth century*, ed. S. E. Thorne (S.S., Vol. 71), cxi-cxii; Fortescue, *De Laudibus Legum Anglie*, ed. S. E. Chrimes (Cambridge, 1949), 99; Co. Lit. 245a.

possessory-right distinction made no further appearance. The 1364 decision was a sign, perhaps also a condition, of the maturing of one area of English Common law.

On the question of conflict between Church and State, the significance of that decision is that it was taken actually in favor of ecclesiastical jurisdiction. From the point of view of strict logic, the confusion might have as easily been cleared away by trying all bastardy cases by assize. This would have removed the problem entirely. And it was the attitude adopted in most Continental jurisdictions. Surely there was much to recommend it. But here, in the same year a Statute of Praemunire was adopted, the royal judges went out of their way to uphold, and in fact to increase, the extent of ecclesiastical jurisdiction. Whether they did so from conservatism, piety, or good sense, I do not know. But they must have realised that the real issue of conflict between Church and State was over inheritance of land by children of questionable birth, not one of competition between rival court systems. On the substantive issue, English law would not yield. But in this instance at least, the English justices showed themselves far from wishing to diminish the jurisdiction of the Courts Christian in their own favor.

In conclusion then, it can be said that the story of bastardy litigation in the Middle Ages is one in which there were very real elements of disagreement between Church and State, but that this disagreement is perhaps overshadowed by mutual accommodation and even harmony. The Church found, we saw in the first part of this paper, good reasons within its own law not to push the elements of disagreement. Where inheritance of lay fee was the basic issue, the canonists and churchmen recognized the force, if not perhaps the unimpeachable logic, of the secular jurists' arguments. And the English courts, for their part, rejected several precedents which allowed avoidance of ecclesiastical jurisdiction over bastardy cases by formal or procedural techniques. They abolished a long-standing rule of procedure so as to favor ecclesiastical jurisdiction.

In this, the Common law courts give evidence of an important growth in sophistication and control of pleading which took place in the middle years of the fourteenth century. Coke, who professed to be quoting a judge of the reign of Henry IV, wrote that, "In the reign of Edward the third, pleadings grew to perfection both without lameness and curiosity, . . . , for before that time the manner of pleading was but feeble in comparison of that it was afterward in the reign of the same king."⁵⁹ The source Coke claimed for this assertion has never been traced. But the history of bastardy litigation gives some warrant for accepting its substance.

59. Co. Lit. 304b.

III

The sequel to this account of bastardy litigation in the Middle Ages is perhaps worth telling. The English Reformation made no apparent changes in the practice. Questions of general bastardy still went to the bishops for decision. The system was still in operation in Blackstone's day, and it was only in the nineteenth century that bastardy jurisdiction was finally removed from the Church courts.⁶⁰

The stand of the barons at the Council of Merton has had an even longer life. In the 1830's, the highest English courts found reason to again approve the rule, and in striking language. The rule, they said "is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule of law whatsoever."⁶¹ As in the Middle Ages, the outcome depended on land. It was only in 1920 by Act of Parliament, that the principle which had earned the unanimous and long-time disapproval of English barons was finally accepted. The Legitimacy Act of that year extended fully legitimate status to children born before their parents' wedlock.⁶² It is difficult not to wonder what Grosseteste's reaction would be to the delay.

60. 3 *Bl. Comm.* 355; William Clerk's *The Trial of Bastardie* (London, 1594) gives instructions on how the process is to be carried out. And see Hooper, *The Law of Illegitimacy*, 76.

61. *Birtwhistle v. Vardill*, 2 Cl.-Fin. 571, at 579, 6 Eng. Rep. 1270 (1835), affirmed 7 Cl.-Fin. 895, 7 Eng. Rep. 1308 (1840).

62. 16-17 Geo. V, c. 60.