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Debt Claims and Probate Jurisdiction in Historical Perspective

by R. H. HELMHOLZ*

By all accounts the separation of probate jurisdiction from jurisdiction over claims in favor of and against a decedent's estate is an ancient one. Wills are proved in a probate court. Debt claims are litigated in a court of general jurisdiction; this being a continuation of early English practice under which, in the absence of special circumstances, debt claims fell outside the probate jurisdiction of the Church courts.¹ Maitland said it well. When in the reign of Edward I (1272-1307), the king's justices had "thrown open the doors of their court to the executor, he could there sue the debtor, he could there be sued by the creditors. Such suits were not 'testamentary causes'."² They were cognizable only in secular courts, not in the tribunals of the Church, and a Church court which attempted to hear such a claim would be restrained by issuance of a royal writ of prohibition.³ That testamentary debt was not a part of early probate jurisdiction has become the settled opinion.⁴

* Professor of Law and History, Washington University, St. Louis. An earlier version of this article was given at the Third Conference on English Legal History, Edinburgh, Scotland, on July 11, 1977. The author would like to thank Dr. J. H. Baker for drawing his attention to the existence of actions of *praemunire*, referred to in the text accompanying notes 45-53, *infra*, and to Professor William McGovern for helpful criticism of an earlier draft.

1. *E.g.*, T. Atkinson, *Law of Wills* § 127, at 704 (2d ed. 1953): "At common law claims against a decedent's estate were not established in the court of probate."

2. 2 F. Pollock & F. W. Maitland, *History of English Law*, 348 (2d ed. re-issued 1968).

3. See the royal response to the bishops' petition of 1285 in 2 *Councils and Synods with Other Documents Relating to the English Church II, A.D. 1205-1313*, at 958 (F. Powicke and C. R. Cheney eds. 1964). On the writ of prohibition generally, see N. Adams, "The Writ of Prohibition to Court Christian," 20 *Minn. L. Rev.* 272 (1936); G. Flahiff, "The Writ of Prohibition to Court Chris-

The opinion became settled, however, before anyone had looked seriously at the records of the Church courts. It has always rested on the rules of the secular courts, not on investigation of the ecclesiastical court records themselves.⁵ Research in recent years has shown that the rules developed by the royal justices are not always reliable guides to medieval practice,⁶ and in fact, Maitland's statement of the relative jurisdictional competence of Church and State will not survive an examination of actual practice in the Church courts. Suits concerning the debts of decedents, brought both by and against executors are found in significant quantities in the medieval Act books of the Church courts. This article is intended to demonstrate this fact, to describe briefly the nature of the litigation, to establish when the Church courts lost their jurisdiction over testamentary debt, and to assess the importance of the evidence for legal history generally.

tian in the Thirteenth Century [pt. 1]," 6 *Medieval Studies* 261 (1944) and *idem* "[pt. 2]," 7 *Medieval Studies* 229 (1945); R. H. Helmholz, "Writs of prohibition and Ecclesiastical Sanctions in the English Courts Christian," 60 *Minn. L. Rev.* 1011 (1976).

4. See James Barr Ames, *Lectures on Legal History* 95 (1913); R. Goffin, *The Testamentary Executor in England and Elsewhere* 46-7 (1901); 3 W. Holdsworth, *A History of English Law* 585-95 (5th ed. 1942); T. F. T. Plucknett, *A Concise History of the Common Law* 741-2 (5th ed. 1956); M. M. Sheehan, *The Will in Medieval England* 227-28 (1963); A. W. B. Simpson, *A History of the Common Law of Contract* 559-60 (1975).

5. These records are the sources for this article. Consisting principally of Act books, that is, official records of the procedure taken in every cause which came before a Consistory court, the diocesan court records examined, with corresponding modern archives are the following:

Canterbury	Library of the Dean and Chapter, Canterbury.
Chichester	West Sussex Record Office, Chichester.
Durham	Library of the Department of Palaeography and Diplomatic, University of Durham
Ely	Ely Diocesan Records, The University Library, Cambridge.
Exeter	Devon County Record Office, Exeter.
Hereford	Hereford County Record Office, Hereford.
Lichfield	Joint Record Office, Lichfield.
London	Guildhall Library, London.
Norwich	Norfolk Record Office, Norwich.
Rochester	Kent County Record Office, Maidstone.
St. Albans	Hertfordshire Record Office, Hertford.
York	Borthwick Institute of Historical Research.

For a description of these records, together with the use to which they can be put, see Dorothy M. Owen, *The Records of the Established Church in England Excluding Parochial Records* (1974); B. Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952).

6. See, for example, Charles Donahue, "Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years in the Light of Some Records from the Church Courts," 72 *Mich. L. Rev.* 647 (1974).

I. THE CANONICAL REMEDY

A. *Suits by the Executor*

The remaining records of the Church courts show that executors sued frequently to recover property owned by the decedent and money owed to him. The ecclesiastical courts' refusal to observe the royal rules can be seen easily from two unexceptional examples. In 1377 the executor of Alexander Hall sued John Stryk of Chesterton before the bishop's Consistory court at Ely for ten marks Stryk had allegedly owed to Hall. Stryk appeared before the court. He did not contest the court's jurisdiction. He did not introduce a royal prohibition, as he was entitled to do under common law. Instead he admitted the debt, and when at a later date he still had not paid, he pleaded only "that he was poor and stricken with poverty so that he had been unable and still was unable to pay out the aforesaid sum."⁷ At Rochester in 1439 the executors of William Clyft of Offham sued John Palmer before the Consistory court on a simple debt which Palmer had owed to Clyft. Palmer defended by alleging payment in the testator's lifetime. At least at first he did; the cause was later compromised.⁸ The essential point is that neither defendant made the response which the royal court rule would lead us to expect. Both apparently accepted that the ecclesiastical courts had jurisdiction over the claims in favor of the decedent's estate.⁹

It is impossible to give reliable figures for the number of such suits heard by the medieval Church courts. Act books, which furnish the only surviving record of litigation in most dioceses, were basically records of procedural steps taken in each matter coming before the courts, and they normally described each case only in general terms as a "testamentary cause." Besides a testamentary debt case, the term was sometimes used to refer to a dispute over a testament's validity, a claim for a legacy, or other matter falling within probate jurisdiction. Only when the court scribe set down some of the details of litigation can one be sure of the underlying nature of the suit. Fortunately this happened often enough to show that testamentary debt was a common subject of litigation. Of the twenty-eight testamentary causes heard at Canterbury in 1517, for example, five clearly concerned testamentary debt, although most of the rest cannot be

7. Rede c. Stryk, Ely Act book EDR D/2/1, fols. 67r, 77r, 130r: "Pars rea allegat et proponit quod est inops et paupertate gravata adeo quod non potuit solvisse nec adhuc potest summam predictam."

8. Rochester Act book DRb Pa 1, f. 104r (3s. 4d.)

9. William Lyndwood, the fifteenth century English canonist, refers to it in respect to goods as *practica communis*. *Provinciale (seu Constitutiones Angliae)* 175 s.v. *effectum* (1679) [hereafter cited as Lynwood, *Provinciale*].

described.¹⁰ Recognizable suits brought by executors to recover money owing to the decedent also appear in the records of the dioceses of Chichester,¹¹ Ely,¹² Hereford,¹³ Lichfield¹⁴ London,¹⁵ Norwich¹⁶ Rochester,¹⁷ and York.¹⁸ That is every diocese with surviving medieval records examined in the preparation of this article.

In theory, of course, the underlying nature of all these suits made them subject to a royal writ of prohibition. But few were in fact prohibited. Whether through technical problems inherent in the writ itself,¹⁹ acquiescence by both parties in the Church's jurisdiction,²⁰ or the threat of counter sanctions by the ecclesiastical courts,²¹ few defendant-debtors invoked the secular remedy. By at least the middle of the fourteenth century, testamentary debt had become a staple part of medieval probate jurisdiction.

The normal elements of a suit by the executor on the decedent's claim were the following: he alleged 1) his appointment as executor of the testament, 2) the commission of administration to him by the Church court, 3) the transaction which created the debt in the testator's lifetime, 4) his request for payment by the debtor, 5) the debtor's refusal to pay, and 6) his consequent inability to carry out

10. Taken from Act book Y.2.6, fols. 30v-65r; the five causes are found at fols. 33v, 59v, 61r, 61r, and 63v.

11. *E.g.*, Belchambyr c. Moundevyle, Act book Ep I/10/1, f. 99v (1507). The amount claimed was £4.

12. *See* Rede c. Stryk, *supra* note 7. The Ely Act book which covers the years 1374 to 1382, has the fewest recognizable testamentary debt cases of the Act books examined. The reasons for this fact are unclear to me. No Ely court records survive from the Middle Ages except this single book.

13. *E.g.*, Bole c. Smyth, Act book O/3, 41 (1445). The amount claimed was 6s. 8d.

14. *E.g.*, Executors of Sternesdale c. Wodshawe, Act book B/C/1/2, f. 155r (1474). The amount claimed was £3.

15. *E.g.*, Executors of Helmych c. Spynell, Act book MS. 9064/2, f. 24r (1483). The amount claimed was £8 11s.

16. *E.g.*, *Ex officio* c. Burman, Act book ACT/1 s.d. 2 December 1510. The amount claimed was 20s.

17. *E.g.*, Totesham c. Byssshop, Act book DRb Pa 1, fol. 55v, 61r, 66v (1438). The amount claimed was 7 marks.

18. *E.g.*, Tydd c. Eley, CP.F.264 (c. 1481). The amount claimed was £7 3s. 10d.

19. The principal weakness of the medieval writ of prohibition, as developed in the course of the fourteenth century, seems to have been an unwillingness by Chancery to look beyond the canonical libel in deciding whether or not the writ was warranted. I am indebted to Mr. John Barton for initially calling this point to my attention, and I hope to return to the subject of how the issue was tried in medieval prohibition cases in a later article.

20. *See, e.g.*, D. Dobbs, "The Decline of Jurisdiction by Consent," 40 *N. Car. L. Rev.* 49 (1961).

21. *See* Helmholz, "Writs of Prohibition," *supra* note 3, at 1021-27.

fully the last will of the decedent.²² No allegation of an oath to pay by the debtor, such as the Church Courts normally required before they heard contract disputes between living parties, was necessary to found the action.²³ It sometimes happened, of course, that the decedent had contracted the debt by sworn oath; the pleading often reflects this by calling the suit a *causa testamentaria et fidei lesionis*.²⁴ But the oath was not legally required.

Nor do the remaining records produce only cases where the debt had been recognized or reduced to judgment during the testator's lifetime, cases in which Bracton conceded that the executor might sue in a Church court.²⁵ Neither the pleading nor the depositions of witnesses ever mention this exception as a possible source of ecclesiastical jurisdiction. The debts subject to probate jurisdiction need be no more than obligations to pay for goods delivered, loans made or services performed, that is, simple debts for money owed.

Proof of the debt (or of its absence) was made either by witnesses or by oath of the party supported by compurgators, the canonical equivalent of wager of law. How the choice of method was made is now difficult to say. One can reasonably think that the discretion of the judge, the choice of the plaintiff, and the availability of witnesses played a role, but until there has been a more thorough investigation of methods of proof actually used in the Church courts, little can be said with confidence. Apparently similar cases in the same set of Act books could call for either form of proof.²⁶ If there was a guiding principle other than individual choice at work, the record does not state it.

22. Taken from the plaintiff's "positions" or statement of claim in York CP.F. 264. It does not vary significantly from other causes, at least those heard at York. York is the only diocese from which substantial numbers of cause papers, as distinct from Act books, remain.

23. See R. H. Helmholz, "Assumpsit and Fidei Laesio," 91 *Law Q. Rev.* 406 (1975).

24. E.g., Executors of Backer c. Sevyngham et al., Canterbury Act book Y.1.2, f. 111v (1398), styled a *causa testamentaria sive fidei lesionis et periurii*.

25. See 4 H. Bracton, *De Legibus et Consuetudinibus Angliae*, f. 407b (G. Woodbine ed., S. Thorne trans. 1968-77, at 267). I have been unable to find any authority for this exception apart from Bracton and query its continued vitality in the fourteenth and fifteenth centuries.

26. Compare, e.g., Watyrfeld c. Lende, Chichester Act book Ep I/10/1, f. 83v. in which proof was by oath, with Wyllat c. Smyth, Chichester Act book Ep I/10/1, f. 31r, in which proof was by witnesses. That the choice rested with the plaintiff is suggested by Frawnceys c. May, Canterbury Act book Y.1.3, f. 68r (1418); after the defendant's denial of the claim, the court scribe recorded: "Ex delacione actoris datur eidem parti ree iurandum quarta manu. . . ."

Once the debt was proved, the judge ordered the debtor to pay, under threat of excommunication. The debtor was considered an "impeder" of the decedent's testament. The theory was that his detention of the decedent's assets (the money owed) made full administration of his estate impossible.²⁷ For this reason, the Church courts drew no clear distinction between recovery of the testator's chattels and recovery of debts owed to him.²⁸ Also for this reason the Church enjoined the frequent reading in parish churches of the Provincial Constitution excommunicating all those who impeded the last wishes of decedents, including the decedent's debtors.²⁹ Surviving depositions show that this was no empty injunction. The parish clergy in fact read the Constitution publicly.³⁰ To carry out fully the last wishes of the decedent, the Church courts had to retain some jurisdiction over testamentary debt. As a contemporary clerical spokesman put it, "The final expediting of a testament ought to be one and undivided."³¹ So it seemed at any rate to many Churchmen and litigants in the later Middle Ages.

27. *E.g.*, Canterbury Ecclesiastical Suit Roll, no. 140 (1293); the document specifies that all those who impede last wills and testaments, "sunt auctoritate concilii excommunicationis sententia involuti et contra ipsos tanquam ecclesiasticarum libertatum violatores per censuram ecclesiasticam procedi debeat." In an early fifteenth century suit against an executrix, the plaintiff's witness was asked specifically whether she was impeding the decedent's last will; he said that she was and that he knew it because "irascitur cum parte actrice in eo quod petit dictam summam." *Northwode c. Hakenblen*. Canterbury Deposition Book X.10.1, fols. 109-109v (1417). For contemporary commentary, see Lyndwood, *Provinciale* at 175 s.v. *effectum*; he deals with the case where the assets in the executor's hands are sufficient to pay all specific legacies even without payment of the debt, and manages to bring even that case under the Constitution by stressing that the residuary legatees or the takers under intestacy will be deprived of their proper share unless the Constitution is invoked against the debtor. *See also* M. M. Sheehan, *supra* note 4, at 226-7.

28. *E.g.*, *Wynstall c. Wynstall*, Canterbury Act book Y.1.1, f. 99v (1375); the defendant was ordered "quod restituat eidem executori omnia bona mobilia que fuerunt dicti defuncti dum vixit." In *Mercaunt c. Mercaunt*, Norwich Act book ACT/1, s.d. 21 October 1510, the judge warned the defendant "quod restituat et adducat bona per eum subtracta ad locum in quo reposita erant." The causes do not differ from testamentary debt except that goods were involved.

29. The text of the Constitution is given in Lyndwood, *Provinciale* 171-9.

30. *E.g.*, Deposition by John Engham, a witness in *Broke c. Wallys*, Canterbury Deposition book X.10.1, fols. 62v-63r (1415): "Interrogatus an impediens ultimas voluntates defunctorum sunt excommunicati, dicit quod sic et audivit sic sepius publicatum in ecclesia parochiali ubi moram trahit et aliis locis convicinis."

31. *See Registrum Johannis de Pontissara, Episcopi Wyntoniensis* 773 (19 Surrey Record Soc., C. Deedes ed. 1923): "Preterea cum una et indivisa esse debeat finalis expeditio testamenti." *See also* the clergy's response to the king's refusal to grant their request of 1285, in *2 Councils & Synods*, *supra* note 3, at 961.

There was, of course, some justification for this belief. Enforcement of testamentary debt claims within probate jurisdiction had practical advantages. To take one example, in a 1374 cause from Canterbury, the executor of Alice Baker sued William Williams on a debt owed to Alice. William's defense was that Alice's last will and testament required him to spend the sum of the debt on the repair of roads in Herne. The executor claimed that Alice had revoked that part of the will, and that the debt was therefore still owing.³² This was not, of course, an insoluble problem under the divided system of courts which came to be the rule. Proof of the will and decision of the question of revocation in one court and enforcement of claims in favor of the estate in another court could ultimately accomplish full administration. But the divided system did cause and has continued to cause practical problems. It gives rise to uncertainty about where to sue in some cases, and it can cause delays in the collection of assets.³³ As an original proposition it made sense for one court to handle all disputes arising over a debt like the one owed to Alice Baker at Canterbury. This was possible under the system enforced by the Church courts in medieval England.³⁴

B. *Suits against Executors*

The same considerations of convenience apply to the reverse situation, suits against the personal representative by creditors of the decedent. These were also a regular part of medieval ecclesiastical jurisdiction, although there are fewer recognizable in the remaining court records than suits brought by executors. Consider, for example, a fifteenth century case from the diocese of Rochester. Denise Stephen had three claims on the estate of the decedent, her former employer

32. Canterbury Act book Y.1.1, f. 71 v.

33. See generally 3 W. Page, *Treatise on the Law of Wills* § 26.17, at 54 (Bowe-Parker ed. 1961).

34. These remarks should not be taken to imply that the Church courts enforced, or even desired, exclusive competence over testamentary debt. By canon law and secular law both, the Church's probate jurisdiction was based on custom, not divine imperative. See Lyndwood, *Provinciale* 170 s.v. *insinuationem*; Y.B. 11 Hen. 7, f. 12, pl. 1 (1496). The royal court plea rolls for the medieval period are also full of debt actions brought by executors against debtors. Likewise, local and manorial courts heard suits involving testamentary debt. For example, Dr. Elaine Clark has found that 12.6 percent of the debt actions in the Essex manor of Writtle involved executors or administrators. See *Debt Litigation in Medieval Essex and Norfolk, 1270-1490* (unpublished paper delivered at American Hist. Assoc. Annual Meeting, Dallas, Dec. 30, 1977). In some courts the royal court rule requiring a specialty to sue an executor may have been applied. At the manor court for Sutton, Lincs., an executrix demurred to the creditor's plea in a debt action, "eo quod non monstrat nullum speciale factum quod potest eos executores ligare." Public Record Office, London [hereafter cited as P.R.O.] DL 30/86/1170, m. 2 (1335).

Thomas Hermon: a legacy, a debt for past services, and what amounted to a tort claim, because (as the record laconically states) Hermon "carnally knew her and for other reasons."³⁵ Of these, the first and third were within the Church's jurisdiction. What sense did it make to require that a suit for the second, the debt, be brought in a secular court? Of course, if the second went forward in the Church court, the plaintiff would have gained a choice of forum denied her had Hermon lived. Thereby royal jurisdiction was theoretically infringed; a prohibition lay. But from a practical point of view, it made sense for the ecclesiastical court to hear all three claims. That is what the Consistory court at Rochester in fact did.

The argument of convenience appears all the stronger when one considers that prior to the rise of *assumpsit* for money in the sixteenth century, a creditor could not sue the executor at all in the royal courts unless he had a specialty.³⁶ Commentators explained this result by saying that one of the rights of defendants in actions of debt was the right to wage their law. The executor, who might have no personal knowledge of the debt, could not without risk of perjury wage his law, as the decedent could have done had he been alive.³⁷ Therefore, it was a safer course to forbid the suit entirely. Hard things can be said about this rule.³⁸ Whatever its merits may be, from a practical standpoint the situation demanded a remedy. Should the man with a valid debt but no specialty be cheated of a legitimate claim by the accident of death? Surely one reason the common law rule was tolerable is that the creditor had an alternative forum.³⁹ As the Act books demonstrate, in practice the creditor had the alternative of suing in the Church courts.

The common law did permit suit in the Church courts under one condition. They might hear the claim of a creditor if the testator had specifically directed in his testament that the executor pay his debts.⁴⁰ The claim could then be treated as a legacy. However, this

35. Rochester Act book DRb Pa 3, f. 462v (1463); the claim was successful, and the executor was ordered to pay the former servant 5 marks and 10s. worth of goods.

36. See W. McGovern, "Contract in Medieval England: Wager of Law and the Effect of Death," 54 *Iowa L. Rev.* 19, 41-44 (1968).

37. Y.B. Trin. 41 Edw. 3, f. 13b, pl. 3 (1367); Y.B. Trin. 12 Hen. 4, f. 23, pl. 3 (1411).

38. See G. D. G. Hall's remarks in *Glanvill, Tractatus de Legibus et Consuetudinibus Regni Angliae* 191 (1965); A. W. B. Simpson, *supra* note 4, at 559.

39. The creditor also had the option, in places at least, of suing in a local court. See note 34, *supra*; M. M. Sheehan, *supra* note 4, at 229. Why there should earlier have been more suits brought by executors than against executors in the Church courts, in view of the lacuna in secular remedy, is puzzling.

40. *Bracton's Note-Book*, no. 162 (1222) F. W. Maitland ed. 1887; A. Fitzherbert, *New Natura Brevium* *44B (1677).

exception will not explain the many suits against personal representatives remaining in the Act books. Many wills contained no direction to pay debts,⁴¹ and some of the claims were brought in cases of intestacy, where by definition there could have been no direction to pay debts.⁴² In fact, none of the remaining records in suits against executors mentions a direction to pay debts, either as part of the preliminary pleading or as a defense by the executor. The records suggest, on the contrary, that the executor was bound by virtue of his office. In a cause heard at York in 1517, for instance, John Symson sued the executor of James Fawcett to recover £5 6s. 11d. allegedly owed for grain received by Fawcett during his lifetime. The plaintiff's pleading does not allege a direction to pay debts, and in fact examination of Fawcett's testament, which happened to be included in the cause file, shows that it contained no such direction. What the pleading does contain is the allegation that the executor "was sworn upon the Holy Gospels, corporally touched by him, by the ordinary of the place at the time administration was committed to him to pay the [testator's] debts."⁴³ The executor's status as personal representative, his oath to pay the testator's legitimate debts, and his possession of sufficient assets of the decedent were the foundation of his liability. As with debt claims brought by the executor, it was the integrity of the process of probate administration which seemed to require the extension of ecclesiastical jurisdiction to the decedent's creditors.

In sum, the record evidence shows that disputed claims over debts owed by and to decedents continued to be heard regularly by the ecclesiastical courts long after the royal courts offered a remedy to the executor and long after writs of prohibition were available to

41. Wills included in the episcopal register of Archbishop Chichele without directions to pay debts outnumber those with directions, by a margin of 34 to 21, for the first four years of his episcopate (1414-17). 2 *Register of Henry Chichele* 1-137 (E. F. Jacob & H. Johnson eds. 1938). The pre-1510 wills without directions outnumber wills with directions by a margin of 29 to 4 in 1 *Lincoln Wills, A.D. 1271 to A.D. 1526*, at 1-44 (5 Lincoln Record Soc., C. Foster ed. 1914). Buckinghamshire testaments registered between 1483 and 1491 have no directions in 43 of 51 instances. *Courts of the Archdeaconry of Buckingham, 1483-1523*, at 1-104 (19 Buckinghamshire Record Soc., E. M. Elvey ed. 1975).

42. Examples are found in London Act book, MS 9064/2, f. 51v (1484); Rochester Act book DRb Pa 2, f. 53r (1446); St. Albans Act book ASA 7/1, f. 37r (1525). The nature of the records often makes it impossible, however, to tell whether the decedent had died testate or intestate, since the terms administrator and administration were used in both situations.

43. York CP.G.85 (1517): "Ricardus Fawshede executor testamenti dicti Jacobi patris sui ad solucionem debitorum eiusdem erat per loci ordinarium tempore administrationis sibi commisse in forma iuris ad sancta dei evangelia per ipsum corporaliter tacta iuratus."

prevent them. The claim could be made in either jurisdiction, and the choice of where to sue in an individual case must have depended on convenience and local circumstance. During the last century many American jurisdictions and the framers of the Uniform Probate Code have opted for a system of concurrent jurisdiction.⁴⁴ Within the confines of the constitutional guarantees to jury trial, the plaintiff has his choice of forum. Although there are many differences in detail, that decision restores something like the situation which existed in medieval England.

II. DISAPPEARANCE OF THE CANONICAL REMEDY

When did the Church lose its jurisdiction? When and how did testamentary debt come to rest solely within secular jurisdiction in English practice? Unfortunately the question admits of no easy answer, because of the nature of the record evidence and the absence of contemporary commentary. Nonetheless, what evidence there is suggests that the change took place gradually, without appreciable struggle by the Church, and that it occurred during the last years of the fifteenth century and the first decades of the sixteenth.

In the records for 1483-84 from the Commissary court at London, for example, there are causes recognizably about testamentary debt. The Act book for the same court from 1514, on the other hand, contains none.⁴⁵ The fifteenth century Rochester court records produce numerous suits over debts brought by and against executors. But the same records from 1527-28 produce none.⁴⁶ At Chichester, the Consistory court was clearly hearing litigation over testamentary debt in 1506-07. However, the Act book from 1526-27 contains only three testamentary causes, and all three concern the payment of a legacy.⁴⁷ None concerns a testator's debts.

In two dioceses, Hereford and Canterbury, where we cannot penetrate beyond the general rubric, the records are consistent with the same conclusion. At Canterbury the number of testamentary causes dropped from 31 in 1476 to 18 in 1527.⁴⁸ At Hereford the drop was from an average in excess of 18 between 1509 and 1513

44. *Uniform Probate Code* § 3-105.

45. Comparing Act book MS. 9064/2, fols. 19r, 24r, 43r, 51v, with Act book MS. 9064/11, fols. 146-208.

46. Comparing Act book DRb Pa 1, fols. 49r, 55v, 82r, 104r (1438) with Act book DRb Pa 12, which covers the years in the 1520's, and contains a number of actions for money allegedly owed by a decedent to a parish church, but none certainly involving testamentary debt.

47. Comparing Act book Ep I/10/1, fols. 2r, 58r, 58v, 66v, 71r, 83v, 98v with Act book Ep I/10/4.

48. Comparing Act book Y.1.12 with Act book Y.2.12.

to an average of 10 between 1536 to 1538.⁴⁹ Although this proves nothing conclusively, it is at least reasonable to suppose that the decline in total numbers reflects the dropping out of litigation about debts from the courts' testamentary jurisdiction.

There is no reason to suppose that the disappearance must have occurred in every place at exactly the same time. Suits over testamentary debt may well have ceased in the dioceses of Norwich and Winchester,⁵⁰ for instance, while the Consistory court at Lichfield was still hearing them.⁵¹ But taken together, the evidence from seven or eight dioceses suggests that the disappearance had occurred by the second decade of the sixteenth century. That is, the common law position that debts owed to and by testators were not testamentary causes, and were not cognizable in the courts of the Church, had come to describe the true state of affairs by the late 1520's.

Exactly how this change occurred must remain, at least for the present, a matter of some uncertainty. There is no sign of a fundamental shift in the royal position. It had long held that suits over testamentary debt belonged to secular jurisdiction, even though, as noted above, writs of prohibition had not been effective to prevent the Church from hearing testamentary debt claims.

However, there is one sign of change in the records of the royal courts: during the last decade of the fifteenth century and increasingly in the early years of the sixteenth, the plea rolls of the Court of King's Bench contain private actions, based on the Statute of *Praemunire*, against litigants who had sued in the ecclesiastical courts over matters belonging to royal jurisdiction.⁵² Some of these actions concerned testamentary debt.

The Statute itself was not new.⁵³ It dated from the fourteenth century. There has been scholarly uncertainty about the original moti-

49. Comparing Act book I/4 with Act book I/6; the figure for testamentary causes in 1520, however, is 20 (Act book I/5).

50. Dr. R. A. Houlbrooke's forthcoming study (Oxford U. Press) of the courts of Norfolk and Winchester indicates that claims over testamentary debt were not heard in the 1520's.

51. Again it is impossible to speak with certainty, but 14 causes involving probate were introduced in the court at Lichfield in 1529. Two years later there were only four, three of which were brought for "subtraction" of a legacy (taken from Act book B/C/2/3).

52. See generally 2 *Reports of Sir John Spelman* 66-8 (94 Selden Soc., J. Baker ed. 1978); Michael Kelly, "Canterbury Jurisdiction and Influence during the Episcopate of William Warham, 1503-1532," 100-10 (unpublished Cambridge Univ. thesis, 1964).

53. 16 Ric. II, c. 5 (1392-3); other earlier similar statutes, also occasionally used in plea rolls entries, are 27 Edw. III, st. 1, c. 1 (1353); 38 Edw. III, st. 2, cc. 1, 2 (1364).

vation of the Statute, but its professed aim was to deter the hearing of litigation which touched the King's regality in the papal court.⁵⁴ The Statute laid heavy penalties on anyone who sued process in a matter belonging to the King's jurisdiction "in the Roman court or elsewhere." During the fifteenth century the phrase "or elsewhere" was interpreted to include pleas within as well as outside the realm of England,⁵⁵ and hence it became possible to invoke the stringent procedures and penalties of the Statute of *Praemunire* to punish litigants in the Church courts in a way which had not been feasible with a writ of prohibition.⁵⁶ That is, a person sued in a Church court could bring an action based on the Statute, alleging that his opponent had incurred its penalties and must answer for his offense before the King's Bench.

Thus, to take an example involving testamentary debt, the plea roll for Easter term 1506 contains an action brought by John Sackville against the three executors of the testament of William Rosse.⁵⁷ The plea begins by setting out the terms of the Statute and by stating the principle that pleas of lay debt belong to the court of the lord King and not to the ecclesiastical forum. It continues by alleging that the defendants, heedless of the Statute and scheming to deprive the king of his rights, had sued Sackville for 53s. 4d. allegedly owed to Rosse before the Archbishop of Canterbury's Court of Audience and had caused various kinds of process and sentences to be "fulminated" against him in that court. It ends by asking that he be warned by the sheriff to appear to answer for these actions. It is a typical example of many entries on the plea rolls. Its availability provided litigants with a weapon for use in hindering the claims of executors. Its use brought new pressure to bear on the ecclesiastical courts to conform to the rules of secular law.

54. See E. B. Graves, "The Legal Significance of the Statute of Praemunire of 1353," in *Anniversary Essays in Mediaeval History by Students of Charles Homer Haskins* 57 (C. Taylor ed. 1929); W. T. Waugh, "The Great Statute of Praemunire," 37 *English Historical Rev.* 173 (1922).

55. Y.B. Mich. 5 Edw. 4, f. 6, pl. 7 (1465). An earlier attempt to use a Statute of *Praemunire* to cover actions within England had been met with a demurrer: "Dicit quod per eadem non supponitur ipsum Willelmum aliquam sectam seu prosecutionem extra regnum Anglie fecisse nec aliquid in aliena curia extra idem regnum in prejudicium domini Regis attemptasse . . ." Rex. v. Corby, P.R.O. C.P. 40/479, m. 511 (1380). No result is recorded, however. A similar attempt, again without result is Mercer v. Nasserton, C.P. 40/598, m. 441 (1410).

56. See notes 19-21, *supra*.

57. P.R.O. K.B. 27/979, m. 23; the case also appears at K.B. 27/978, m. 26. See generally R. Brooke, *Grande Abridgement, Praemunire* *144b (1573).

Actions of *praemunire* were not unknown on the plea rolls of the King's Bench from before the last years of the fifteenth century.⁵⁸ However, it was only in the years around the turn of the sixteenth century that they began to appear in considerable numbers.⁵⁹ Their appearance did not signal the immediate collapse of the Church's jurisdiction. The same Church courts which had had their actions subjected to *praemunire* actions heard cases apparently violating the secular rules afterwards.⁶⁰ But, as noted above, the Church's jurisdiction gradually shriveled. And although the process by which the Church courts lost their jurisdiction is not yet fully understood, it is likely that the actions brought on the Statute of *Praemunire* played a role in it. Litigants may simply have felt that the risks of incurring the penalties of the Statute were too great to make it worth resorting to the ecclesiastical forum.

III. CONCLUSION

Several conclusions can be drawn from this brief history of the Church's jurisdiction over testamentary debt. First, and most certain, the principles of the secular law do not tell the whole story, or even the correct story, about the extent of the probate jurisdiction of the medieval Church courts. Writs of prohibition would stop a single testamentary cause.⁶¹ They did not determine the scope of ecclesiastical jurisdiction. The effective separation of probate jurisdiction from jurisdiction over disputed claims for and against a decedent's estate must therefore be moved forward from the reign of Edward I to sometime around the turn of the sixteenth century.

58. The plea rolls from 1468 (K.B. 27/827-30), produce one action of *praemunire*, Sharp v. Tempyn, K.B. 27/830, m. 128. The same rolls from 1481 (K.B. 27/877-80) again produce only one such action, which was not pleaded to issue; Prior of Wenlock v. Prior of Dudley, K. B. 27/879, m. 7d. See also *Calendar of Patent Rolls*, 1408-13, at 27; *Calendar of Patent Rolls*, 1422-29, at 400; Waugh, *supra* note 54, at 199.

59. See generally 2 *Reports of Sir John Spelman*, *supra* note 52, at 66-8.

60. Compare Newman c. Executor of Fawcett, York CP.G.85 (1517), a suit for £5 6s. 10d. allegedly owed for grain delivered to the decedent, with Constable v. Holme, K.B. 27/931, m. 41d and K.B. 27/934, m. 26 (1494), an earlier royal court case in which the plaintiff had been sued before the court at York as executrix of her husband's testament for 7 marks allegedly owed by the husband. The record of the ecclesiastical court for this case has coincidentally survived, and it shows that (according to the royal court rules) the complaint was well justified. Holme c. Constable, CP.F.304 (1492), was a suit before the court at York for the 7 marks. For some reason this particular suit in the royal court was brought on a writ of prohibition.

61. The evidence for this is set out in R. H. Helmholz, "Writs of Prohibition," *supra* note 3, at 1019-21.

Second, the disappearance from the Church courts of testamentary debt left a gap in remedies available to litigants with legitimate claims. It particularly hurt the decedent's creditor who had no written obligation, for as noted above, without it he could not sue the executor at all in debt.⁶² Occurring prior to the time assumpsit for money came into common use, this disappearance of the ecclesiastical remedy left him with no recourse outside Chancery.⁶³ The executor with a claim against a debtor was better off, since he could bring debt; however debt could be met by wager of law on the defendant's part, and the executor with witnesses to the contract may well have been better off in the Church courts, where he could prove it by witnesses.⁶⁴

This dilemma was ended, as legal historians have often noted, by the expansion of assumpsit during the course of the sixteenth century. Assumpsit allowed the creditor to sue the debtor's executor. It allowed the creditor's executor to sue the debtor and have the issue tried by jury.⁶⁵ In light of the evidence from the Church court records, perhaps it was no accident that the expansion of assumpsit to include promises to pay money occurred when it did. The expansion was the work of men, not a matter of any inherent necessity, and the practical problems facing litigants with valid claims but no satisfactory remedy outside Chancery may have provided some impetus for attempts to stretch assumpsit to cover the situation.⁶⁶ As long as the Church courts provided adequate recourse, common law rules like the one which kept debt on an oral contract from being brought against an executor were tolerable rules. Once the Church had lost its jurisdiction, they were harder to live with. The resources inherent in the secular law had to be exploited to fashion a remedy.

Third, the decline in ecclesiastical jurisdiction must be tied to the fundamental religious changes of the sixteenth century. It is particularly noteworthy that the decline occurred gradually, and that it happened mostly prior to the Henrician Reformation. In the broadest sense, the decline therefore reflects a basic shift in attitude towards

62. See notes 36 and 37 *supra*.

63. The Chancellor's jurisdiction over contract is studied in W. Barbour, *The History of Contract in Early English Equity* (1914).

64. See note 26 *supra*.

65. See J. H. Baker, "New Light on Slade's Case: Pt. II," 1971 *Cambridge L. J.* 213, 228-30; McGovern, *supra* note 36, at 48-57.

66. This suggestion is also made by S. F. C. Milsom, "Sale of Goods in the Fifteenth Century," 77 *Law Q. Rev.* 257, 265 (1961). The generally accepted explanation for the rise of assumpsit in the common law courts has been the fear of competition from Chancery. See, for example, A. W. B. Simpson, *supra* note 4, at 561. The explanation suggested above is, of course, a different one, but it is not intended wholly to exclude the influence of Chancery. Both may have been at work.

the proper role of the Church in men's lives. It points to a gradual change of mind about what things belonged to the spiritual side of life and what things to the secular. The medieval Church could not have maintained its testamentary jurisdiction over debt without some kind of consensus that it was proper. When that consensus disappeared, so did the jurisdiction.

Even if the decline occurred partly in response to actions of *praemunire*, as suggested above, that does not fundamentally alter this conclusion. The Statute had been available for more than 100 years when it began regularly to be exploited in the King's Bench to restrict ecclesiastical jurisdiction. No technical improvements in its coverage under Henry VII have been discovered. The legal expansion to include pleas heard within England had occurred decades previously. The Statute may therefore have furnished part of the means for the change. But we ought not to confuse the means with the cause. The cause must be seen more broadly; it is as much a matter of social and religious change as of a political or legal innovation.

One of today's leading Reformation historians has characterized the most important development in the thought of the period as a "change of viewpoint concerning the nature and functions of religion."⁶⁷ Exactly that change of viewpoint is evident in the end of the enforcement of debt claims within the English Church courts. In historical perspective, the effective separation of debt claims from probate jurisdiction is at bottom a product of this secularizing change.

67. A. G. Dickens, *The English Reformation* 325 (1964).