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"FULL FAITH AND CREDIT" IN MERRIE OLDE ENGLAND: NEW INSIGHT FOR MARRIAGE CONFLICTS LAW FROM THE THIRTEENTH CENTURY

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INTRODUCTION

"Marriage has a legal ubiquity of obligation."[1] This traditional and fundamental premise is considered so beyond dispute that it is seldom even expressed. The new Restatement of Conflicts, for example, nowhere explicitly articulates this premise; yet, its whole treatment of marriage[2] and judgments pertaining thereto[3] assumes it. The notion of the "universality" of marriage, the view that marriage is everywhere (at least in Christendom[4]) the same despite variations between local laws, is the foundation of traditional marriage conflicts law. It is because this premise is first assumed that the problem of recognition of foreign marriages involves the questions of choice of law, and that the full faith and credit problem concerning judgments affecting marriage reduces primarily to a test of the rendering courts' jurisdiction.

Other articles have demonstrated when and how this principle of universality intruded upon the English law and what the implications of its demise might be for choice of law regarding marriage.[5] In a typical

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1. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 113 (8th ed. 1883).

2. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 283-86 (Proposed Official Draft, 1969).

3. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 69-79, 92-121 (Proposed Official Draft, 1967).

4. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 113-14 (8th ed. 1883).

> But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status* from Turkish or other marriages among infidel nations.

Warrender v. Warrender, 2 Cl. & Fin. 488, 532, 6 Eng. Rep. 1239, 1255 (H.L. 1835).

5. See Engdahl, *English Marriage Conflicts Law Before the Time of Bracton*, 15 AM. J. COMP. L. 109 (1967) [hereinafter cited as ENGDAHL, 15 AM. J. COMP. L. 109]; Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law*, 55 IOWA L. REV. 56 (1969) [hereinafter cited as ENGDAHL, 55 IOWA L. REV. 56]; Engdahl, *Medieval Metaphysics and English Marriage Law*, 8 J. FAM. L. 381 (1968) [hereinafter cited as ENGDAHL, 8 J. FAM. L. 381]. See also Engdahl, *The Secularization of English Marriage Law*, 16 KAN. L. REV. 505 (1968) [hereinafter cited as ENGDAHL, 16 KAN. L. REV. 505]; Engdahl, *The Canonical and Metaphysical Background of the Classic Dutch Marriage Conflicts Rule*, 15 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 42 (1968) [hereinafter cited as ENGDAHL, 15 NEDERLANDS 42].

case, a right might be claimed which is predicated upon "marriage." A woman might make a claim to the benefits provided a widow under a workmen's compensation act or a servicemen's insurance law. The normal tendency of the courts has been to determine all such rights by determining whether the claimant was validly married. Presumptions, doctrines of estoppel or other exceptions may sometimes operate, but the basic proposition is that whenever a law speaks of "marriage," "wife," or "widow," etc., it contemplates the marriage law of the state or, in a conflicts situation, of some other appropriate place. The effect of this approach is that entitlement to workmen's compensation benefits, for example, is determined not pursuant to the social policy of the workmen's compensation act, but pursuant to the different local or foreign policy reflected in the rules governing the contracting of marriages. Those rules, for their part, are grounded not on policies concerning the alleviation of losses resulting from industrial injuries, but rather on policies concerning the conditions under which persons should be permitted to cohabit.

Rejection of the notion of universality and application of the ancient English insight would permit courts to recognize that various statutes and rules use the word "marriage" and other words relating thereto with different meanings. These terms as they are used, for example, in a workmen's compensation act could be interpreted so as to assure an award to a person dependent as a wife, even though her marriage was technically defective according to the law of the forum (or in a conflicts case, the law of the appropriate foreign place) regulating the contracting of marriages. Under the native English conflicts principle, when a foreign marriage was asserted to premise a forum claim, the English courts inquired not whether the marriage was "valid" by the "applicable" law, but rather whether the relationship presented by the facts was contemplated by the term "marriage" as it was used in the forum's statute or rule on which the claim was based.[6]

Here the subject is full faith and credit and the implications which the exposure of the myth of universality might carry for the recognition of judgments concerning marriage. As with the choice of law problem, so with the recognition of judgments, there is discovered in the antiquities of English law a perception and comprehension exceeding our own.

THE CONTEXT OF THE MEDIEVAL FAITH AND CREDIT PRACTICE

English Courts and Roman Canon Law

6. *See* ENGDAHL, 15 AM. J. COMP. L. 109.

At the outset it is necessary to retrace the picture of English marriage law in the twelfth and thirteenth centuries. In Anglo-Saxon England marriage had been an empirical conception. There was no conception of "validity." Certain relationships might be unlawful and punishable by Church or King, but this was not considered anything less than marriage if in fact the parties lived as husband and wife.[7] Shortly after the Norman Conquest, the new metaphysics of the medieval theologians introduced the notion of validity into marriage law in England. Marriages before held unlawful came to be viewed as invalid—not really marriages at all, however indistinguishable they might appear from other relationships.[8] But while metaphysical conceptions thus prevailed, the requisites of a valid marriage in England retained the traditional English forms. While continental canonists were developing the classic canonical doctrines such as the *de praesenti* rule,[9] their counterparts in England simply transformed their own traditional standards of lawfulness into prerequisites for the validity of marriages.[10] It was not until about the turn of the thirteenth century that the efforts of the Roman Church to displace the traditional provincial rules in England began to have effect.[11]

Although the English prelates surrendered their independence, the victory of Rome was not complete. While the churchmen accepted the displacement of their traditions by the new Roman canons, the secular leaders of the kingdom declined to accede to the innovations.[12] By the traditional English canons a valid marriage could be made only by public ceremonials—by marriage *in facie ecclesiae* or, as sometimes expressed, at the church door.[13] The Roman doctrine, on the other hand, as it distilled about the middle of the twelfth century, countenanced even clandestine and unwitnessed consents contemplating the present time—mutual consents *de praesenti*.[14] Approximately in 1200, the English

7. *See* ENGDAHL, 8 J. FAM. L. 381, 382-89.
8. *Id.* at 393-96.
9. *See* 1 W. BLACKSTONE, COMMENTARIES *439; note 14 *infra* and accompanying text.
10. *See* ENGDAHL, 15 AM. J. COMP. L. 109, 118-21.
11. Professor Maitland erroneously believed that the papal innovations were received in England during the time of Henry II. Maitland, *Glanvill Revised*, 6 HARV. L. REV. 1 (1892). *See* ENGDAHL, 15 AM. J. COMP. L. 109, 118-21.
12. For a more comprehensive explanation of this adherence to English tradition, see ENGDAHL, 15 AM. J. COMP. L. 109.
13. *Id.* at 118-21. *See* H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE ff. 92, 302b-303 (G. Woodbine ed. 1942) [hereinafter cited as BRACTON].
14. *See* J. DAUVILLIER, LE MARIAGE DANS LE DROIT CLASSIQUE DE L'EGLISE 12-13 (1933); 1 A. ESMEIN, LE MARIAGE EN DROIT CANONIQUE 131-36 (2d ed. 1929); Maitland, *Magistri Vacarii Summa de Matrimonio*, 13 L.Q. REV. 133, 136-37 (1897).

Church accepted the Roman doctrine in lieu of its traditional rule,[15] but the secular law, which traditionally had conformed its law of dower to the English Church's rules determining the validity of marriages, countinued to insist upon public ceremonials as a condition sine qua non for dower.[16] Similarly, by the traditional English canons a child was forever a bastard if born outside of marriage whether his parents subsequently married or not. The Roman canonists, on the other hand, during the twelfth century adopted the old Roman civil law principle of *legitimatio per subsequens matrimonium,* that a child born out of marriage is made legitimate if his parents afterwards marry. Although the English law of succession had developed theretofore in conformity with the English Church's rules on legitimacy, when the English Church in 1236 accepted the *per subsequens* rule the secular law continued to insist upon birth *after* valid marriage as the condition for succession to land.[17]

The resulting diversity between the secular and ecclesiastical law in force in England was of major significance because of the practice of the secular courts of referring issues of legitimacy and marriage, when they arose in certain actions, to the ecclesiastical courts for trial. Rights of dower and succession were enforced by the secular courts but these rights traditionally had depended upon the facts of valid marriage and legitimacy—subjects beyond the competence of the secular courts. The secular courts, therefore, would send a writ to the appropriate bishop asking his decision on the issue of marriage or legitimacy and would take his certificate as determinative for purposes of the secular case. But once the new doctrines of marriage and legitimacy had been accepted by the English Church, if the secular law was still to follow the traditional English rules, this practice of referring such issues to ecclesiastical courts for trial could hardly continue unchanged. In a dower dispute the secular courts needed to know not merely whether the marriage was lawful, but whether it had been performed publicly or *in facie ecclesiae.* In the determination of heirship, the secular courts needed to know specifically whether the asserted heir was born after the marriage of his parents. Since the church courts were applying the classic Roman canon law principles of consent *de praesenti* and legitimation *per subsequens matrimonium,* they no longer inquired into the precise questions which the secular courts needed answered. The issue of concern to

15. *See* note 11 *supra.*
16. ENGDAHL, 15 AM. J. COMP. L. 109, 128-30. *See* Y.B. Pasch. 10 H. 3, f.— (1226), A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT *Dower* 201 (Tottelli ed. 1577).
17. *See* ENGDAHL, 15 AM. J. COMP. L. 109, 128-30.

the secular law and the issue resolvable by the church were no longer the same.

Technicalities of Pleading and the Bishop's Certificate

The thirteenth century jurists of England were perceptive enough to note this distinction, and it accounts for two peculiarities of pleading and procedure in the ancient Common Law. If, in an action concerning heirship to land, a plea of general bastardy was made, that issue would be sent to an ecclesiastical court for trial; but if the plea was that X is a bastard because born before the marriage of his parents—the plea of special bastardy—that issue would be tried by the country.[18] If in an action for dower *unde nihil habet*[19] one intended to impeach the validity of the claimant's marriage to decedent, he would plead *"ne unques accouple en loyal matrimony"*—never joined in lawful marriage[20]—and that issue would be sent to an ecclesiastical court for trial; but if one intended instead to question not the validity of the marriage but its celebration in the face of the church he would plead simply "never married"[21] and that issue would be tried *per pais.*[22]

The distinction between pleas of general and special bastardy was inaugurated after the Parliament at Merton in 1236.[23] The distinction between the pleas "never married" and "never joined in lawful marriage" appears to have originated at the very beginning of the thirteenth century. In November of the year 1200, Edith brought an action for dower against Hugh before the King's Justices.[24] William, vouched to warranty by Hugh, answered that Edith "was never married."[25] Edith replied that decedent had married her,[26] and the Justices issued a writ to

18. BRACTON f. 416.

19. The term refers to the writ of a widow who had received no part of her dower. *See* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 20-21 (3d ed. 1923) [hereinafter cited as HOLDSWORTH].

20. Y.B. Mich. 10 Rich. 2 f.— (1387), A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT *Trial* No. 100, reprinted at *Trailles* No. 6, Bel. 326, 72 Eng. Rep. 144 (1585); BRACTON f. 302. *See also* Ilderton v. Ilderton, 2 H. Bl. 145, 126 Eng. Rep. 476 (C.P. 1793); Allen v. Grey, 1 Show. K.B. 50, 89 Eng. Rep. 441 (K.B. 1688), also reported at 2 Salk. 437, 91 Eng. Rep. 380, and Comb. 131, 90 Eng. Rep. 387.

21. One might also plead "she was never his wife." BRACTON f. 302.

22. *Id. See also* Mich. 9 & 10 Edw. 1, *coram rege Rot. 24 Ebor.* (1282), E. FRIEDBERG, DAS RECHT DER EHESCHLIESSUNG IN SEINER GESCHICHTLICHEN ENTWICKLUNG 52 (1865), 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND f. 33a n.10 (18th ed. 1823). *See also* Betsworth and Betsworth, Sty. 10, 82 Eng. Rep. 490 (K.B. 1648). *Per pais* means by the country, *i.e.,* by jury in the secular court.

23. *See* ENGDAHL, 15 AM. J. COMP. L. 109, 126-27.

24. Mich. 2 John 1, 3 SELDEN SOCIETY PUBL., SELECT CIVIL PLEAS 6, pl. 15 (1200).

25. *"Nunquam fuit desponsavat . . . ." Id.*

26. *"Ric[hard] eam desponsavat . . . ." Id.*

the Bishop of Lincoln to inquire "whether she was married or not."[27] A year later, however, Agnes brought a similar suit against Philip.[28] When Philip answered she "was not married,"[29] Agnes replied she "was *lawfully* married,"[30] and the question referred by the Justices to the Bishop of Lincoln was, "whether she was *lawfully* married or not."[31] In the same term, Cecilia brought her dower claim before the Justices.[32] In her case, on the objection that Cecilia "was not the wife"[33] of decedent, the issue was sent to the Archbishop of York, who certified that she "*was lawfully married.*"[34] The certificate evoked a discussion of the novelty of the Bishop's law which is some evidence of the English clergy's acceptance of the *de praesenti* principle around the year 1200.[35] The reports do not disclose whether or not the judges in this case decided to credit the ecclesiastical judgment to premise Cecilia's secular right although based on novel canon law; a day was given for judgment but the judgment does not appear. The cry had been raised, however, that to judge one who, like Cecilia, had been espoused not at the church door but on a sickbed, was "contrary to right and ecclesiastical custom."[36] Soon after, if not at that time, the secular courts began to decide for themselves the issue of public celebration when that issue, rather than canonical lawfulness, was raised.[37] Thereafter the distinction between those issues which were triable by the Bishop and those which were triable *per pais* was vital, and the distinction in pleading between the pleas "never married" and "never joined in lawful marriage" was its mark.

The procedure of referring issues of marriage and legitimacy to ecclesiastical courts for trial was employed only in proceedings in the royal courts, never in the feudal courts,[38] and it was employed there only in certain proprietary actions, never in possessory actions. The assize *mort d'ancestor*[39] tried only claims to seisin and not claims of

27. *"Utrum desponsata fuit vel non . . . ."* *Id.*
28. 3 John 1, 3 SELDEN SOCIETY PUBL., SELECT CIVIL PLEAS 39, pl. 92 (1201).
29. *"Non fuit desponsata . . . ."* *Id.* at 40.
30. *"Legitime desponsata fuit."* *Id.*
31. *"Utrum legitime desponsata fuit neene."* *Id.*
32. 3 John 1, 3 SELDEN SOCIETY PUBL., SELECT CIVIL PLEAS 45, pl. 109 (1201).
33. *"Non fuit sponsa . . . ."* *Id.*
34. *"Legitime fuit desponsata."* *Id.*
35. ENGDAHL, 15 AM. J. COMP. L. 109, 121.
36. *"Contra jus et consuetudinem ecclesiasticam: . . . si eam desponsavit eam desponsavit in lecto suo egitudinis."* Y.B. 3 John 1, 3 SELDEN SOCIETY PUBL., SELECT CIVIL PLEAS 45, pl. 109 (1201).
37. *See* ENGDAHL, 15 AM. J. COMP. L. 109, 129-30.
38. No one but the King could demand that the bishop determine the issue. *See* BRACTON ff. 106, 296.
39. An assize of *mort d'ancestor* was a writ which lay for one whose ancestor died seised of land in fee simple and after his death a stranger abated. *See* 3 HOLDSWORTH 23.

right. Glanvill records that in an assize *mort d'ancestor* the tenant could stop the assize by asserting and proving the bastardy of the demandant,[40] but there is no suggestion that in this possessory action the issue of bastardy was transferred to an ecclesiastical court for trial. Some manuscripts of Bracton report an assize *mort d'ancestor* in 1227 in which it was the jury that found the claimants to have been born in adultery before marriage.[41] Also, in other actions, issues of marriage and legitimacy were decided without reference to ecclesiastical courts. In some actions, the secular court required only proof of repute of legitimacy or marriage.[42] In other actions proof of actual performance of the traditional public ceremonials *in facie ecclesiae* seems to have been required, and just as in the case of dower, even proof of espousals *de praesenti* was insufficient if not in the face of the church.[43]

From the thirteenth and throughout the fourteenth and fifteenth centuries, in all but proprietary actions, marriage in fact or in possession or by reputation, all triable *per pais,* was sufficient to be proved; chal-

40. R. GLANVILL, TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE f. 47.

41. Henry Pamsore's or Panforer's Case, BRACTON f. 417. The fact that this case is not given in the best manuscripts of Bracton has raised the inference that it is a later interpolation. In commenting on this case in his edition of BRACTON, Sir Travers Twiss overlooked the distinction in practice between bastardy issues in possessory and proprietary actions. 6 H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS 293 n.1 (T. Twiss ed. 1878). Regrettably, this writer followed him in this error in an earlier publication. ENGDAHL, 15 AM. J. COMP. L. 109, 123.

42. *E.g.,* Y.B. 22 Edw. 1 f.—(1294), 3 RERUM BRITANNICARUM MEDII AEVI SCRIPTORES 426-29 (Horwood ed. reprint 1964) [hereinafter cited as HORWOOD], noting that when a woman confronted by her deed to bar an action of right pleads that she was covert when she sealed the deed, it is sufficient if the defendant can aver that no one knew the man was her husband and that he was not acknowledged as her husband.

A 1302 case indicated that reputation might sometimes be sufficient proof in ecclesiastical courts to determine legitimacy when that issue was referred there by the secular court. In proceedings on a writ of right *de rationabili parte* (see 3 HOLDSWORTH 22) the rights of adverse claimants to a fee depended on the legitimacy of a person then deceased. The *"inquisitio super bastardiam"* was taken on the point whether decedent had been regarded as a bastard during his lifetime. Y.B. 30 Edw. 1, f.—, 3 HORWOOD 286-91 (1302). Pollock and Maitland cited this case as an example of a secular court putting to its own *jurors* a question of repute of bastardy. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 383 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND]. But since the case arose on a writ of right and pertained to proprietary rights, the issue of bastardy should have been decided by the ecclesiastical, not by the secular court. Since Bracton uses the word *"inquisitio"* to designate the procedure of reference to the bishop for trial, Pollock and Maitland's interpretation of *"inquisitio"* as if referring to secular jurors in the 1302 case seems unsupportable.

43. *See* Del Heith's Case, De Banco Roll, Trin. 34 Edw. 1, f.— (1306) (assize of novel disseisin), and Foxcote's Case, De Banco Roll, Pasch. 10 Edw. 1, f.—(1282) (action of cosinage), both discussed in 2 POLLOCK & MAITLAND 383-84 and A. FRIEDBERG, DAS RECHT DER EHESCHLIESSUNG IN SEINER GESCHICHTLICHEN ENTWICKLUNG 53-54 (1865). Pollock and Maitland somewhat miss the significance of these cases, viewing them against their misapprehension of the early English requisites of a valid marriage. *See* ENGDAHL, 15 AM. J. COMP. L. 109, 114-21.

lenges to the lawfullness of a marriage, a question for ecclesiastical decision, were out of place.[44] At the same time, the issue of the lawfulness of marriage continued to be raised in proprietary actions and was referred to ecclesiastical courts for trial.[45]

Characteristics of the Medieval Faith and Credit Practice

The Hallmark of Thirteenth Century Conflicts Analysis

As the foregoing paragraphs demonstrate, there was a doctrine of "full faith and credit" in English law not long after William the Conqueror separated the lay and ecclesiastical courts when the secular courts began the practice of referring questions of marriage and legitimacy to ecclesiastical courts for trial. While at first the secular court's countenance might possibly have been confined to English ecclesiastical pronouncements specifically requested by the justices, by the middle of the thirteenth century it is clear that even collateral prior decrees of English ecclesiastical courts would be credited in secular proceedings trying the right to land.[46] English *ecclesiastical* courts, for their part, did not hesitate to

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44. *E.g.*, in 1338 plaintiff brought a writ of trespass against a woman and others, and defendants moved to abate the writ on the ground that the woman defendant was plaintiff's wife. Plaintiff sought to answer by pleading "never joined in lawful matrimony." This plea was not permitted, however, since the fact of the marriage, even if not lawful, was deemed sufficient to abate the writ. Plaintiff was forced to plead instead that she was not his wife, but since the proof showed he had married her, albeit under duress and therefore unlawfully, the writ was abated. Y.B. Hil. 12 Edw. 3, f.—, 1 Horwood 360-63 (1338). *Cf.* Y.B. Hil. 12 Edw. 3, f.—, Horwood 390-93 (1338). Similarly, in the assizes and in proceedings on writs of entry, see Y.B. Pasch. 49 Edw. 3, f. 18, pl. 11 (1376), and, when a marriage was contested in an appeal of felony for the rape of one's wife, see Y.B. Mich. 11 Hen. 4, f. 13b, pl. 30 (1410). *See generally* Leigh and Hanmer's Case, 1 Leo. 52, 74 Eng. Rep. 48 (C.P. 1587).

45. *See* Case LXXXIV, Jenk. 44, 145 Eng. Rep. 33 (Ex. 1366); Corbet's Case, Y.B. Hil. 22 Edw. 4, f. 20, pl. 46 (1483), A. Fitzherbert, La Graunde Abridgement *Consultacion*, f. 194, No. 5 (Tottelli ed. 1577), summarized at 7 Co. Rep. 44a-44b, 77 Eng. Rep. 477-78.

46. *See* William de Cardunville's Case, reported at 2 Pollock & Maitland 379-80. Pollock and Maitland date the case "in or about 1254." Some short time previously William had been divorced from Alice by church court decree because of his precontract (pre-existing *de praesenti* marriage) with Joan who was still living. Both Joan and Alice had borne sons to William, and at William's death Joan's son, age 24, and Alice's son, age 4, both claimed as William's heir. The secular court proclaimed Joan's son heir. Pollock and Maitland viewed this case as corroborating their view that

> at this time our temporal courts were at one with our spiritual courts about legitimacy and the capacity to inherit; that if the church said, 'This child is legitimate,' the state said, 'It is capable of inheriting'; and that if the church said, 'This child is illegitimate,' the state said, 'It is incapable of inheriting.'

Id. at 377. This writer has shown that view to be significantly mistaken. See Engdahl, 15 Am. J. Comp. L. 109, 114-25. What *William de Cardunville's Case* rather shows is that the secular courts, in proprietary proceedings wherein the procedure of reference to the bishop would ordinarily be employed, would credit a prior collateral ecclesiastical determination of the same issue (whether or not the parties to both proceedings were the same) and so avoid the need to bother the bishop over the same issue a second time.

credit decrees of sister *ecclesiastical* courts and even of *ecclesiastical* courts abroad. Bracton cites as relevant, in an ecclesiastical court action to determine which claimant was the lawful wife, a divorce celebrated "in the same kingdom or the same province or another."[47] Far more surprising, however, is the fact that the English *secular* courts, at least three and a half centuries before they finally came to credit the judgments of any foreign secular courts,[48] gave decrees of the *church courts abroad* as much credit as was given to the church courts in England. In one fourteenth century case, the court explained that "all the courts Christian are one court."[49]

The unquestioned certainity with which the court stated the rule in that fourteenth century case suggests that it had been followed long before. Indeed, alertness to it seems to have conditioned some of the secular law's responses to the changes in canon law in the thirteenth century. Bracton would not allow appeals from ecclesiastical proceedings on an issue of bastardy referred from the secular courts to affect the sufficiency of the original ecclesiastical decree for purposes of the secular claim; to have regard for such appeals to higher ecclesiastical judges outside the kingdom and ultimately to the pope would not only protract the cause to infinity, he said, but would result in those foreigners taking cognizance, if only indirectly, of an English lay fee.[50] It was none of the pope's business, in particular, Bracton argued, to dispose of temporal matters.[51] It must have been a consciousness that without such a rule the already evident fact that the courts Christian were a single, integrated judicial system would logically entail such a consequence which caused Bracton to enunciate this rule. But however faithfully Bracton's rule ignoring, for secular purposes, decisions on appeal from ecclesiastical

47. BRACTON f. 94.

48. *See* note 33 *supra* and accompanying text.

49. A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT *Trial* 1 No. 54, reprinted at *Trailles* No. 1, Bel. 325, 72 Eng. Rep. 144 (1382). Thus if the ecclesiastical court of Arches in England were to enter a judgment of privation and that judgment were to be confirmed on appeal to the church tribunals at Rome, the Roman judgment would be provable in the English secular court. *Id.* The rule was different with respect to a papal bull of privation, as distinguished from a judgment on appeal. *See* the 1398 case reported at *Id. Depriuation* at Bel. 133, 72 Eng. Rep. 56; *Id. Pape* No. 2, at Bel. 257-58, 72 Eng. Rep. 112; *Id. Quare impedit* No 9, at Bel 283, 72 Eng. Rep. 124.

50. BRACTON ff. 307, 420.

51. *Id.* at f. 417b. R. GLANVILL, TRACTIBUS DE LEGIBUS ET CONSUETUNIBUS REGNI ANGLIE f. 29 admitted ecclesiastical court jurisdiction over lay fees in the single case of a *maritagium,* the power of a lord of disposing of his infant ward in marriage. This exception has its roots in the period before the development of the ecclesiastical courts into an independent and foreign-oriented system was complete.

proceedings on questions referred from the secular courts might have been applied in his own or later generations, papal or other foreign ecclesiastical judgments must have determined rights in English land when they had been previously rendered and were introduced for recognition in the English secular courts.[52]

In the thirteenth century, however, the practice of crediting ecclesiastical decrees differed notably from the modern doctrine of full faith and credit. For example, it was not necessary that the ecclesiastical decree be "final"[53] in order to receive credit. In the canon law, *"non transit sententia in rem judicatam contra matrimonium;"*[54] but this inherent non-finality of decrees affecting marriage did not deter the secular courts from crediting such decrees. As Bracton's passage just discussed indicates, the original Bishop's certificate, or in other cases the most recent collateral decree, was conclusive for the secular purpose without regard to subsequent church judgments, collateral or on appeal. The thirteenth century practice also differed in that it pertained only to secular recognition of ecclesiastical decrees concerning legitimacy and marriage. The secular courts did not credit foreign secular decrees, and there is no indication that ecclesiastical courts credited secular decrees. English secular courts did recognize foreign ecclesiastical decrees because they viewed the Church in England and abroad as one.[55]

There is an even more significant difference, however, between that ancient practice and modern doctrine. The most notable feature of thirteenth century faith and credit practice reflected the distinction, already mentioned above, which the jurists of that century drew between the issues concerning legitimacy and marriage determinative of secular proprietary rights and the issues determined by ecclesiastical courts under the same name but according to new and different rules. As a result of the conflicts which had emerged between the traditional English law and the new law that the church courts in England now applied, English secular courts had determined not to refer certain particular issues in proprietary actions to the church courts for trial.[56] Consistent

52. *See* note 49 *supra.*

53. *Cf.* Barber v. Barber, 323 U.S. 77 (1944); Lynde v. Lynde, 181 U.S. 183 (1901).

54. X. 2, 27, 7. *"Sententia contra matrimon' nunquam transit in rem judicat'."* Kenn's Case, 7 Co. Rep. 42b, 43b, 77 Eng. Rep. 474, 476 (Ct. Wards 1607). The phrase means that a judgment against the validity of a marriage never becomes res judicata.

55. *See* note 49 *supra.* Recognition of foreign ecclesiastical decrees by English ecclesiastical courts was based on different principles since all those courts were part of the same judicial system. As to judgments concerning marriage, of course, there was no res judicata effect. *See* note 54 *supra* and accompanying text.

56. *See* notes 18-22 *supra* and accompanying text.

with this determination, during the thirteenth century the secular courts would refuse to accept a prior and collateral ecclesiastical adjudication as determinative of one of those issues concerning which there was such a conflict of laws.

This is illustrated by a case decided in the year 1282.[57] B claimed dower in lands which A, her deceased husband, had transferred to D. The marraige between A and B had been held valid by the ecclesiastical court in earlier proceedings brought there by B; however, this ecclesiastical decree confirming the marriage was not accepted as conclusive of the dower right. While B was married in the eyes of the church, there had been only a clandestine, *de praesenti* pact and that was insufficient to entitle B to dower. The church court had found that B was "married," but the "marriage" required for dower involved an additional element which the church court had not found. The secular court, therefore, asked the further question, "was she duly endowed?" and found that she was not because there was no formal celebration of the marriage until after the land in question had been transferred.[58]

Loss of the Thirteenth Century Analysis

The ability to distinguish between crediting an ecclesiastical judgment for what it had held and taking it for deciding more, a reflection of the thirteenth century recognition that church and secular courts expressed different notions of the same words, "legitimacy" and "marriage," was not to endure. Even in the 1282 case cited above, the court of first instance had awarded B her dower, and it was only on recourse to the King's Court and Council that the distinction between the two issues was made.[59] At the Common Pleas in 1305 the judges' loss of this important distinction was manifest.[60] Alice brought an action for dower against R who defended by saying the decedent grantor had never married Alice. Alice's attorneys replied that this amounted to saying she

57. Mich. 9 & 10 Edw. 1, *coram rege Rot. 24 Ebor.* (1282), 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 33a n.10 (18th ed. 1823), E. FRIEDBERG, DAS RECHT DER EHESCHLIESSUNG IN SEINER GESCHICHTLICHEN ENTWICKLUNG 52 (1865). As Coke states the case:

> A. contracts per verba de praesenti with B. and had issue by her; and afterwards marries C. in facie ecclesiae. B. recovers A. for her husband by sentence of the Ordinary, and for not performing the sentence he is excommunicated, and then marries B. in facie ecclesiae and dies. She brings dower against D. and recovers because the feoffment was per fraudem between the sentence and the sollemn marriage, sed reversatur coram rege et concilio, quia praedictus A. non fuit seisitus during the espousals between him and B.

Id.

58. *Id.*
59. *Id.*
60. Y.B. Mich. 33 Edw. 1, f.—, 5 HORWOOD 64 (1305).

was never joined to him in lawful matrimony and that this claim could not be raised because in a previous dower action by Alice against one William, he had pleaded to the lawfulness of the marriage and the issue had been sent to the Bishop. The Bishop's disposition of the issue in that proceeding, it was argued, must be credited in the present action since one "ought not send twice to the Bishop." R's attorneys, however, explained that they did not deny the canonical lawfulness of the marriage, but only denied that she had been married in the face of the church.

> We are not pleading as William pleaded; we do not speak of not being joined &c; but we say that he never married her; of which the country may well have cognisance and it may be tried in this Court.[61]

If there had been no prior ecclesiastical decree, certainly the distinction pleading *"ne unques accouple en loyal matrimony"* and pleading "never married" would have been crucial, for only the former would invoke the procedure of reference to the ecclesiastical court for trial.[62] In the 1282 case,[63] even a prior ecclesiastical decree was disregarded when the issue involved in the secular action was that raised by the plea of "never married." In 1305, however, the court failed to understand the distinction. To the claim that the plea "never married" (*i.e.,* not espoused *in facie ecclesiae*) could be tried in the secular court notwithstanding the prior ecclesiastical adjudication of a *different* question (whether lawfully married by canonical standards) Judge Hengham replied, "Certainly it can not; any more than that she was joined &c." On the strength of the prior church judgment, Alice won the case.[64]

It was this less perceptive principle of credit to ecclesiastical judgments which became established in the fourteenth century. In 1366, a plea of general bastardy was entered in a proprietary real action.[65] In accordance with the traditional practice, this issue was sent to the Bishop. When the Bishop made his return he not only certified the claimant to be a bastard, but also revealed the basis of his finding—that the claimant had been begotten during his mother's elopement with an adulterer. This was sufficient to make him a bastard by the Roman canon law but not by the traditional English law. Nevertheless, the

61. *Id.* at 64-66.
62. *See* notes 19-22 *supra* and accompanying text.
63. *See* note 57 *supra* and accompanying text.
64. Y.B. Mich. 33 Edw. 1, f.—, 5 HORWOOD 64 (1305).
65. Case LXXXIV, Jenk. 44, 145 Eng. Rep. 33 (Ex. 1366). *See also* Corbet's Case, Y.B. Hil. 22 Edw. 4, f. 20, pl. 46 (1483), A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT *Consultacion,* f. 194, No. 5 (Tottelli ed. 1577), summarized in 7 Co. Rep. 44a-44b, 77 Eng. Rep. 477-78.

secular court resolved upon the bishop's certificate that the claimant was a bastard, and the report declares:

> Where the Cognizance of a Cause belongs to the Spiritual Courts, and they give Sentence in it, and express the Cause *of their Sentence,* although this Cause *of their Sentence* be null *and void* in our Law; yet our Law approves the Sentence.[66]

The hallmark of the thirteenth century conflicts analysis had been the ability of the English jurists to penetrate the form of words to discover conflicting meanings, with the result that an ecclesiastical finding of "marriage" or "bastardy" would not necessarily determine a dower or succession right.[67] Had it employed this analysis, the court in this 1366 case could have penetrated the term "bastard" and concluded that while they both went under the same name, what was found by the ecclesiastical court and what was contemplated by the secular law of succession were not actually the same. Accordingly, even assuming full loyalty to the tradition of according faith and credit, the ecclesiastical decree would not have been controlling because the question raised in the secular proceeding was not actually the same as that which had been answered by the bishop. The courts, however, had forgotten this technique of analysis. As a result, *more than full* faith and credit was given to the ecclesiastical decree. All the bishop could determine was that the claimant was a bastard by the canon law. Secular rights of property, however, depended upon legitimacy under the traditional English rules. By default in analysis, by heeding only the form and disregarding the meaning of the word, the ecclesiastical decree was given quite a *different* effect in the secular court than it had in the court where rendered.

The thirteenth century conflicts analysis had been lost to memory. Eventually, the requirement of endowment in the presence of the church died away, and "dower *in facie ecclesiae*" became merely a matter of historical importance,[68] and even then without recall of its original significance. The distinction between general and special bastardy remained in use somewhat longer but with no greater understanding of its origins or original significance. While procedural distinctions between issues to be tried by the bishop and those to be tried *per pais* (if not previously adjudicated) persisted, the reasons for these distinctions (and the implications those reasons entailed) were lost. Substantial differences in meaning were left hidden behind the identity of mere words.

66. Jenk. at 44, 145 Eng. Rep. at 33 (emphasis in original).
67. *See* ENGDAHL, 15 AM. J. COMP. L. 109, 125-30.
68. *See* [Anonymous], TREATISE ON FEME COVERTS 62-63 (1732).

FAITH AND CREDIT PRACTICE IN THE SIXTEENTH CENTURY

Through the sixteenth and the first half of the seventeenth century the practice of referring issues of lawful marriage arising in proprietary actions to ecclesiastical courts continued,[69] although with some exceptions.[70] As for centuries before, in all other proceedings the lawfulness of a marriage was of no concern; only marriage in fact, marriage in possession or marriage in reputation was required.[71] However, as has already been noted, during the fourteenth century English secular courts began to accept ecclesiastical judgments on issues of legitimacy and marriage as dispositive of those issues in the secular courts even in circumstances where their thirteenth century predecessors would have recognized that the issues raised in the secular courts differed from those decided by the church courts.[72] This continued to be true.[73] Moreover, prior ecclesiastical decrees came to be taken as dispositive of issues concerning marriage even in *non*-proprietary actions, where, but for the accident of prior litigation, the church's view of the issue would have been irrelevant. While the procedure of reference to the Bishop still was not used in such cases[74] because the lawfulness of marriage was not the issue, the secular courts began to credit a prior ecclesiastical decree to settle issues of marriage and legitimacy in such non-proprietary actions.

Evidence of this development does not appear until the sixteenth century. The thirteenth and fourteenth century cases discussed above which show the loss of the thirteenth century distinction between the

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69. *See* Wickham v. Enfield, Cro. Car. 351, 79 Eng. Rep. 908 (K.B. 1633); Kenn's Case, Jenk. 289, 145 Eng. Rep. 209 (Ex. 1610). The court in *Betsworth and Betsworth*, Sty. 10, 82 Eng. Rep. 490 (K.B. 1648), asserted that "wife or not wife is triable at the common law; but whether lawfully married or not, is triable in the Spiritual Court." *Id.*

70. *E.g.*, in 1566 the Judges of Common Pleas advised that where the alleged bastard was not a party to the action, the bastardy would be tried *per pais*. Simond's Case, 3 Leo. 11, 74 Eng. Rep. 508 (C.P. 1566). *Simond's Case*, however, was an action of *formedon*, originally a possessory action in which the procedure of reference to the church courts would not have been employed in any event. *See* notes 35-40 *supra* and accompanying text. Holdsworth notes, however, that

> [t]he writ of Formedon (*forma doni*), though originally regarded as being possessory in character, came to be regarded as so distinctly proprietary that it was called the writ of right for the tenant in tail.

3 HOLDSWORTH 17. It may be, therefore, that by the mid-sixteenth century the referral procedure was being employed in *formedon* as in the older proprietary actions.

71. Leigh and Hanmer's Case, 1 Leo. 52, 74 Eng. Rep. 48 (C.P. 1587); Fletcher v. Pynfett, Cro. Jac. 102, 79 Eng. Rep. 88 (K.B. 1605); Fulwood's Case, Cro. Car. 488, 493, 79 Eng. Rep. 1021, 1026 (K.B. 1638). *Cf.* Ambrosia Gorge's Case, 6 Co. Rep. 22a, 77 Eng. Rep. 286 (Ct. Wards 1599); Porter's Case, Cro. Car. 461, 79 Eng. Rep. 1000 (K.B. 1637); Williams' Case, March N.R. 101, 82 Eng. Rep. 430 (K.B. 1642); Middleton's Case, Kel. J. 27, 84 Eng. Rep. 1066 (K.B. 1662).

72. *See* note 65 *supra* and accompanying text.

73. *See, e.g.*, Wickham v. Enfield, Cro. Car. 351, 79 Eng. Rep. 908 (K.B. 1633).

74. *But see* note 70 *supra*.

issues decided in ecclesiastical courts and those raised in secular courts all involved claims of proprietary right to land.[75] In a 1483 decision, the court observed that if the parents of claiming heirs had been unjustly divorced, the heirs should sue to avoid the divorce in the ecclesiastical court, "for so long as the divorce stood in force (the common law gives so great credit to it) the issue could not have remedy by the common law."[76] This dictum was offered in connection with a hypothetical which supposed the heirs to be interested in protecting their proprietary right. In the sixteenth century, however, the secular courts began to credit ecclesiastical judgments even when they were introduced in actions not concerning proprietary rights in land.

In 1537 the Common Pleas faced the question whether, when a woman brings certain goods with her to a marriage and is afterwards divorced, she should have those goods back.[77] It was suggested that the divorce might have been procured by perjured testimony in the ecclesiastical court. Shelley replied:

> Yet if they of the spiritual court give judgment in any case, be it true or false, until it be reversed and defeated, it shall bind all the world; as in our law a recovery upon a false oath binds until it be defeated by attaint.[78]

About 1560 the Common Pleas, over the protests of the Chancellor, credited an ecclesiastical decree of divorce in another sort of action.[79] Wilmott had married Henry and then procured a divorce on the ground of his impotence. She soon after married Cary, and, desirous of securing her lands to him, they levied a fine on her lands as husband and wife. But Henry had also remarried and, it was alleged, had begotten a child. It was argued that the fine should not be engrossed to Cary and Wilmott as husband and wife because the prior divorce was avoided and they were not married. The doctors of the civil law consulted by the court declared that Henry's demonstrated virility showed the divorce to have been procured by fraud, and "because the holy church was deceived in its former judgment,"[80] that judgment should be treated as of no effect. But regarding the church decree as still in force and determinative, the

75. *See* notes 59-68 *supra* and accompanying text.

76. Corbet's Case, Y.B. Hil. 22 Edw. 4, f. 20, pl. 46 (1483), A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT *Consultacion*, f. 194, No. 5 (Tottelli ed. 1577), summarized in 7 Co. Rep. 44a-44b, 77 Eng. Rep. 477-78.

77. Reported at 1 Dy. 13a, 73 Eng. Rep. 28 (C.P. 1538).

78. *Id.*, 73 Eng. Rep. at 29.

79. Bury's Case, 2 Dy. 179a, 73 Eng. Rep. 394 (C.P. 1560). The case is discussed by counsel in *Morris & Webber's Case*, 2 Leo. 169, 74 Eng. Rep. 449 (C.P. 1587).

80. 2 Dy. at 179a, 73 Eng. Rep. at 394.

court ordered the fine to be engrossed.

Twenty-five years or so later, the same decree of divorce between Henry and Wilmott came into dispute again.[81] Henry was seised and made a feoffment to a friend to the use of himself for life, remainder for life to the use of such woman as he should marry, remainder in tail to the first-born of his body lawfully begotten by such woman, remainder in fee to his own lawful heirs.[82] Then having been divorced from Wilmott as already discussed, Henry married Phillippa. During this marriage, Phillippa gave birth to Humphrey. After Henry and Phillippa died Humphrey entered and gave a lease to Morris for a term of years. Webber, claiming under the brother of Henry (the brother apparently claimed as Henry's heir) ejected Morris. Morris in 1587 brought an action *ejectione firmae* against Webber. Morris' claim depended, under the terms of the feoffment, upon the legitimacy of his lessor, Humphrey, which depended upon his parents' marriage, which in turn depended upon Henry's divorce from his first wife, Wilmott. The case was argued, adjourned and argued again repeatedly until finally at Michaelmas term judgment was entered for Morris, the plaintiff.[83] Defendant had urged that if Henry were in fact impotent, Humphrey must be a bastard, and that if Henry were not in fact impotent, his divorce from Wilmott was null, his marriage to Phillippa thus void and poor Humphrey a bastard still. The court, however, would not relitigate the ground of the divorce but would give it effect until repealed by the ecclesiastical court.[84] The marriage to Phillippa then was not impeached, and the

81. Morris v. Webber, Moo. K.B. 225, 72 Eng. Rep. 545 (C.P. 1587), also reported at 2 Leo. 169, 74 Eng. Rep. 449. Less complete reports appear at 1 And. 185, 123 Eng. Rep. 421, and *sub nom.* Bury's Case, 5 Co. Rep. 98b, 77 Eng. Rep. 207.

82. John [Henry] Bury fist feofment . . . al use luy mulier pur vie, remainder pur vie al use de tiel feme quel is apres mariera, remainder en tail al primer fits de son corps sur tiel feme loyalment engenders, remainder en fee a ses droit heirs demesne.

Moo. K.B. at 225, 72 Eng. Rep. at 545. (Whom we have called Henry, this report calls John.) The account of the feoffment given in 2 Leo. at 169, 74 Eng. Rep. at 449-50, is different and seems to make no sense: "Hen. Bury was seised . . . . Humphry made a feoffment in fee unto the use of himself for life, and after to the use of the first, or eldest son of the body of the said Henry in tail."

83. 2 Leo. at 173, 74 Eng. Rep. at 453; Moo. K.B. at 228, 72 Eng. Rep. at 547.

84. The report says:

Term. Mich. Anno 30 & 31 Eliz. fuit adjudge que les issues ne fuerant bastards, quia le divorce ne fuit adnul per sentence declaratory del Eglise en les vies les parties. . . . Et n notre ley ne fuit de inquirer le cause del divorce, mes de ponder le sentence pur bone tanq repeal.

Moo. K.B. at 228, 72 Eng. Rep. at 547. Counsel for Morris had conceded in argument that in some cases such credit would not be given the ecclesiastical decree:

[A]s if a man bringeth an action, de muliere abducta cum bonis viri, where after the trespass committed, the husband and wife are divorced, yet the action lieth, for this action is not in the right, but in possession onely, and in such action, never accoupled in legal matrimony, is not any plea, but the defendant ought to

common law presumption of the legitimacy of children born during coverture applied. In 1597 or 1598 the same case, or another involving the same land (which is not clear[85]), was taken up on a writ of error, and the judgment based on crediting the divorce was affirmed.[86]

Another example from the same period is the case of *Bunting v. Lepingwell,*[87] decided in the King's Bench in 1585. John Bunting had entered into a *de praesenti* marriage with Agnes, but later Agnes married Twede and cohabited with him. John then sued Agnes in an ecclesiastical court and proved his *de praesenti* contract. The ecclesiastical court did not pronounce a divorce between Agnes and Twede; Twede was not even a party. Rather, it simply decreed that John and Agnes were married by the prior *de praesenti* pact and should therefore solemnize their union and live together. John and Agnes obeyed this decree, and afterwards Charles Bunting was born to them. Charles' legitimacy was put in question as affecting his claim to copyhold lands—a possessory, not a proprietary claim. Charles' legitimacy, of course, depended upon the marriage of his parents while Twede remained still living and undivorced. The Court held the issue determined by the ecclesiastical decree:

> [F]orasmuch as the conusance of the right of marriage belongs to the Ecclesiastical Court, and the same Court has given sentence in this case, the Judges of our law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences . . . .[88]

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answer to the possession, not his wife; for although they are divorced, yet the action lieth . . . .

2 Leo. at 170, 74 Eng. Rep. at 450. This argument might indicate what had been true many decades before; however, "never accoupled in legal matrimony" had never been a fit plea in actions concerning the goods of a divorced wife, 1 Dy. 13a, 73 Eng. Rep. 28 (C.P. 1538); nor in proceedings to engross a fine, Bury's Case, 2 Dy. 179a, 73 Eng. Rep. 394 (C.P. 1560); nor in actions *ejectione firmae,* Morris v. Webber, 2 Leo. 169, 74 Eng. Rep. 449 (C.P. 1587); nor in copyhold cases, Bunting v. Lepingwell, 4 Co. Rep. 29a, 76 Eng. Rep. 950 (K.B. 1585), and yet in all of these pleas, ecclesiastical decrees were now receiving credit.

85. Moore reports this as an *ejectione firmae* by Webber against one Berry, perhaps Bury. Moo. K.B. at 228, 72 Eng. Rep. at 547. This could have been Humphrey Bury who might have ejected Webber if the latter entered on the expiration of Morris' term. But the other reports either treat the writ of error as being taken in *Morris & Webber's Case* (2 Leo. at 173, 74 Eng. Rep. at 453; 5 Co. Rep. 98b, 77 Eng. Rep. at 208) or else say nothing to settle the point (Jenk. 268, 145 Eng. Rep. 193).

86. Bury's Case, Jenk. at 268, 145 Eng. Rep. at 193; Moo. K.B. at 228, 72 Eng. Rep. at 547; 2 Leo. at 173, 74 Eng. Rep. at 453; 5 Co. Rep. at 98b, 77 Eng. Rep. at 208.

87. 4 Co. Rep. 29a, 76 Eng. Rep. 950 (K.B. 1585).

88. *Id.,* 76 Eng. Rep. at 952. The justices had asked for and received the opinion of one Goldingham, Doctor of the Civil Law, on the question of Charles' legitimacy in view of the prior proceedings. Goldingham's opinion is reported at Moo. K.B. 169, 72 Eng. Rep. 510.

In 1607 Martha exhibited a bill in the Court of Wards against Sir N. Stallenge to traverse his office as custodian of a ward claimed as heir to a certain manor.[89] Simplified, the facts showed that Christopher Kenn was seised of a manor in knights service *in capite* (of the King) and in 1546 married Elizabeth Stowell by whom he begat Martha. Several years later Christopher and Elizabeth were divorced by ecclesiastical decree and Christopher married Elizabeth Beckwith. In 1562 the second wife, Elizabeth, brought proceedings in an ecclesiastical court to which both Christopher and his first wife Elizabeth were made parties. This ecclesiastical proceeding terminated with a decree confirming that Christopher had never lawfully married the first wife and was lawfully married to the second, Elizabeth Beckwith.[90] Elizabeth Beckwith died and Christopher married Florence and had a daughter, whom the report calls simply "E." Christopher died while E was still an infant, and Queen Elizabeth granted her wardship and custody to Stallenge. Martha, claiming to be heir of Christopher, brought this action to traverse the office of Stallenge. Martha's case was that the divorce between Christopher and her mother, Elizabeth Stowell, was based on their supposed nonage but that she could prove they in fact were of age. The age of consent, Martha argued, was triable at the common law, and since her claim (though not formally raised in a proprietary real action) concerned the true descent of a manor, and particularly since sentences against marriage never become res judicata,[91] she should be permitted to impeach the divorce decree in this secular proceeding. But, after some delays occasioned by the deaths of parties and revivals of the action, the court refused to permit her attack:

> [W]e will never examine the cause, whether it be true or not; for of things (the cognizance whereof belongs to the Ecclesiastical Court), we ought to give credit to their sentences, as they give to the judgments in our Courts.[92]

Displacement of the Indigenous Faith and Credit Doctrine

English Acceptance of the International Law Rules

The tradition of faith and credit to ecclesiastical decrees as it developed in English secular courts into the sixteenth century was of native English stock. So far as it respected judgments of English

89. Kenn's Case, 7 Co. Rep. 42b, 77 Eng. Rep. 474 (Ct. Wards 1607), *aff'd*, Jenk. 289, 145 Eng. Rep. 209 (Ex. 1610).
90. *Id.* at 43a, 77 Eng. Rep. at 475.
91. *See* note 54 *supra*.
92. 7 Co. Rep. at 43b, 77 Eng. Rep. at 476.

ecclesiastical courts, its roots extended as far as the eleventh century when the Conqueror separated the lay and ecclesiastical courts after which the practice of referring issues of marriage and legitimacy arising in proprietary proceedings to ecclesiastical courts for trial arose.[93] So far as it respected judgments of ecclesiastical courts abroad, it rested on the recognition that all the courts of the Catholic Church were part of the same unified judiciary so that no distinction should be drawn between ecclesiastical courts in England and abroad.[94] Although to this point the English faith and credit doctrine was indigenous, the doctrine of faith and credit as it developed in succeeding generations had other and foreign sources.

After the Reformation of the sixteenth century the unity of all the courts Christian was manifestly destroyed. England's church courts in particular were no longer a part of the Catholic judicial system.[95] The courts in England recognized that the old justification for crediting the judgments of foreign ecclesiastical courts was thus removed. In a case at Common Pleas in 1585[96] Justice Rodes raised the old point of the unity of ecclesiastical courts, citing fourteenth century precedent.[97] Rejecting that principle, however, the court held that letters of administration granted by a bishop in Ireland would not be credited in England.[98]

The old justification for crediting foreign ecclesiastical judgments has scarcely disappeared, however, when new principles requiring credit to foreign judgments, secular as well as ecclesiastical, were received. The international situation of the sixteenth and seventeenth centuries made it necessary for the English and for English law to take account of happenings abroad to a degree much greater than before.[99] Because of the very insularity on which the English traditionally had prided themselves, their Common Law was ill-suited to serve them in matters of international scale. The government itself recognized the necessity for men trained in the civil law to do the king's service not only because other states' internal systems must to some degree be understood, but also because England herself in dealing internationally must live by the civilian's rules.[100] As England opened its legal mind to the rules of the

93. ENGDAHL, 15 AM. J. COMP. L. 109, 111.
94. *See* note 49 *supra* and accompanying text.
95. *See* ENGDAHL, 16 KAN. L. REV. 505, 511.
96. Carter & Crost's Case, Godb. 33, 78 Eng. Rep. 21 (C.P. 1585).
97. *See* note 49 *supra* and accompanying text.
98. Godb. at 33, 78 Eng. Rep. at 21.
99. *See* 4 HOLDSWORTH 228-39.
100. *Id.* at 232-33. The English referred to the civilians for the law of treaties, martial causes and diplomatic protocol. *See* 1 T. RIDLEY, A VIEW OF THE CIVILE AND ECCLESIASTICALL LAW 6-12 (3d ed. 1639).

civilians, the recognition of foreign judgments came to be admitted as an obligation under international law. These new principles seem to have been admitted at about the turn of the seventeenth century. The first reported case explicitly referring to crediting a foreign secular decree was decided in 1607.[101] While the native English faith and credit principles pertained to secular recognition of ecclesiastical decrees, these new principles were sufficiently general to oblige the ecclesiastical courts likewise to credit secular decrees.[102] The same principles were used to urge the English ecclesiastical courts (though no longer a part of the Catholic judicial system) to credit the judgments of ecclesiastical courts abroad.[103] Of course, the English secular courts continued, under the new principles, to credit English ecclesiastical decrees;[104] in fact, while the older cases which this writer has discovered deal only with ecclesiastical decrees respecting legitimacy and marriage, in the seventeenth century credit began to be given to church court judgments on other matters as well.[105] This new faith and credit practice began early to exhibit some of the characteristics typical of modern faith and credit practices.[106]

The International Law Rules and the Universality of Marriage

The international law rules of faith and credit, insofar as they

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101. Wier's Case, 1 H. ROLLE, ABRIDGMENT 530 (1668) and 2 K. D'ANVER, ABRIDGMENT 265 (2d ed. 1722). It was there stated that foreign judgments should be enforced in the admiralty courts because their recognition was enjoined by international law, a branch of the civil law, and the admiralty court alone "hath the execution of the Civil Law within the realm." *Id. See* Sack, *Conflicts of Laws in the History of the English Law*, in 3 LAW, A CENTURY OF PROGRESS 342, 382 (1937).

102. *Webb v. Cook*, Cro. Jac. 535, 626, 79 Eng. Rep. 459, 538 (K.B. 1622, 1624), is the first instance the author has found of *enforcement* of a requirement of faith and credit upon the ecclesiastical courts. But in *Kenn's Case*, 7 Co. Rep. 42b, 77 Eng. Rep. 474 (Ct. Wards 1607), the Common Pleas *assumed* that ecclesiastical courts would credit secular court judgments just as the secular courts credited ecclesiastical judgments.

103. *See* Cottington's Case, 2 Swans. 326, 36 Eng. Rep. 640 (Ch. 1678).

104. *E.g.*, Dacosta v. Villa Real, 2 Str. 961, 93 Eng. Rep. 968 (K.B. 1734).

105. *E.g.*, Needham's Case, 8 Co. Rep. 135a, 77 Eng. Rep. 678 (C.P. 1611); Caudrey's Case, 5 Co. Rep. la, 77 Eng. Rep. 1 (K.B. 1595).

106. The indigenous English practice did not require a judgment to be final in order to receive faith and credit. *See* note 54 *supra* and accompanying text. In contrast, *Jurado v. Gregory*, 2 Keb. 511, 84 Eng. Rep. 320 (K.B. 1669), denied faith and credit to a Spanish judgment which was interlocutory and therefore as yet "imperfect."

In *Hughes v. Cornelius*, 2 Show. K.B. 232, 89 Eng. Rep. 907 (1692), an action of trover for a ship and goods, defendant pleaded a judgment in his favor in the admiralty court of France. The court

> adjudged, that as we are to take notice of a sentence in the Admiralty here, so ought we of those abroad in other nations . . . . It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars.

Id., 89 Eng. Rep. at 908. *See also* Beak v. Tyrell, Carth. 31, 90 Eng. Rep. 623 (Adm. 1688); Grove's Case, 2 Vent. 41, 86 Eng. Rep. 296 (C.P. 1682).

relate to marriage, developed in a context notably different from thirteenth century England. Consequently, the distinction between the issue concerning marriage which is at stake in the forum and that which might have been resolved by the court of another system[107] has never been recognized by those rules. The old English distinction grew out of the conflict between the rules of two competing systems—the traditional English and the novel Roman canon laws—regarding legitimacy and marriage.[108] The international law rules, on the other hand, developed on the Continent after the Church had consolidated its power and the laws concerning legitimacy and marriage were uniform and everywhere received.[109] Marriage in that era *was* everywhere in Western Christendom the same. Moreover, this notion of universality was reinforced by the metaphysical reification of marriage;[110] if a marriage did in fact exist, how could any court deny it? The ecclesiastical courts were to determine the existence of the *res,* and until years after the start of the Reformation, no European secular court would presume to contest their decision.

It was not until well into the seventeenth century that the principal secular powers on the Continent began to legislate on the validity of marriage,[111] putting an end to the uniformity of European marriage law which had prevailed with few, late and relatively minor exceptions,[112] for more than four hundred years. From that time on, the requisites of a valid marriage in France or in the Empire were different from the requisites in Holland or in England, and any or all might vary from the requisites of the canon law. Once the forces loosed by the Reformation had thus shattered the Catholic uniformity of marriage law, it was no longer accurate to say that marriage was everywhere, even in western Christendom, the same.

While today, with a telescoped view of history, one might view the medieval uniformity of marriage law as shattered, to contemporaries the changes were gradual and very subtle. Established habits of thinking were not easily overcome. Europe still retained a common social or

107. *See* notes 13-37 *supra* and accompanying text.
108. *Id.*
109. *E.g.*, if the laws of the Empire or the customs in France conditioned secular rights upon marriage, what they conceived of as marriage was exactly the same—a marriage according to the classic Roman canon law. *See* ENGDAHL, 15 NEDERLANDS 42.
110. *See* note 8 *supra* and accompanying text. For a more detailed account, see ENGDAHL, 8 J. FAM. L. 381.
111. ENGDAHL, 15 NEDERLANDS 42, 45-46, 64-65.
112. The exceptions included England during the reign of Henry VIII, Geneva under the influence of Calvin and the rebelling protestant United Provinces of the Netherlands. *See* ENGDAHL, 15 NEDERLANDS 42, 53-55; ENGDAHL, 16 KAN. L. REV. 505, 508-18.

cultural concept of marriage, and the new legal diversity was easily overlooked. The choice of law rules which French and German secular jurists developed for marriage preserved the principle of universality inherent in their canonical models;[113] likewise, the rules governing recognition of foreign judgments concerning marriage failed to recognize the new legal diversity between marriage in different systems. The question was never asked whether the "marriage" proved by the foreign judgment was such a "marriage" as was required by the forum law being applied. In the Netherlands, Ulrich Huber propounded a different conflicts doctrine which did mark the difference between forum and foreign "marriage,"[114] but even though the English derived much of their conflicts doctrine from the Dutch, they either could not understand or else could not accept such a Balkanization of marriage. Failing to recognize, as their thirteenth century ancestors had, that the one term "marriage" can mean different things, they established the modern practice regarding recognition of judgments concerning marriage.

The Significance of the Indigenous English Faith and Credit Practice

Historical Research and Conceptual Analysis

Until now, scholars have believed that the English were not concerned with the conflict of laws until the start of the seventeenth century. The research discussed in the foregoing pages, however, discloses an indigenous faith and credit practice which flourished in England for centuries before that time. An indigenous choice of law practice can also be identified, even before the time of Bracton.[115] The objective of this writer's research, however, is not merely historical enlightenment; it is the improvement of conflict of laws doctrine.

Because the international law rules of faith and credit as they apply to marriage, and the modern practice based upon those rules, presume the universality of marriage, they are clearly inept for dealing with cases where "marriage" is used with a different meaning in each of the systems concerned. While apologists for the traditional rules are prone to disparage the fact, marriage as a legal concept, as distinguished from a social concept, has not been universal for well over two hundred years.

113. After the Council of Trent's reforms, confirmed by the Pope in January, 1564, uniformity was broken by the Church's own marriage rules. The Church, however, developed choice of law rules to reconcile its own divergent marriage rules. *See* Engdahl, 15 Nederlands 42, 48-53. These were the prototypes of the conflicts rules later to be developed by secular conflicts jurists.

114. *Id.* at 60-63.

115. *See* Engdahl, 15 Am. J. Comp. L. 109.

The native English faith and credit practice offers the prototype for an appropriate faith and credit analysis for today. That ancient practice, long ago forgotten by judges and lawyers and overlooked even by legal historians, flourished in an era when jurists were acutely aware of the different meanings attached to identical words by separate but interrelating systems of law. The same divergence in the meaning of common terms exists on a far greater scale today—although, amazingly, this seemingly obvious fact has escaped the notice of all the notables of jurisprudence who have wrestled with the concept of "status" over the course of the last century and more.[116]

A modern doctrine of full faith and credit can be built upon this ancient foundation. This can be done consistently with the American full faith and credit clause, and, at least in America and England, it can be done by courts themselves without legislative action.[117] Such a "new" faith and credit doctrine would facilitate the effectuation of deeply felt policies which courts otherwise, hamstrung by traditional conceptual errors, must strain to effectuate by compromise doctrines or fail to effectuate at all.[118] To those who incline toward an easy jurisprudence, blundering down the path pointed out by any handy precedent, the foregoing discussion and this writer's other efforts might seem tedious, superfluous and obscure. Conceptual errors sanctified by the endorsement of generations are not easily dislodged. Still the effort must be made, for however tedious the pathway might seem, it is the path that juristic opinion must travel if it is to escape its conceptualist entrapment and respond, as law ought to respond, to the social and humane factors at stake in marriage conflicts and faith and credit cases.

A Proposal Applying the Indigenous English Practice to Modern Marriage Conflicts Law

Such a faith and credit doctrine can be summarily sketched here.[119]

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116. *E.g.*, John Austin, Sir Thomas Holland, A. V. Dicey and Carleton Kemp Allen. The writer has reviewed and criticized their concepts of status. *See* ENGDAHL, 55 IOWA L. REV. 56, 57-72. The principle error is the failure to recognize the fact that the "universality" of marriage is a chimera. *Id.* at 106-08.

117. The United States Constitution provides that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

118. A typical question facing the courts is whether to award workmen's compensation benefits to a woman with whom the deceased had been living for many years but without being "lawfully" married.

119. The proposed faith and credit doctrine was originally included in more detailed form in another law review article. See ENGDAHL, 55 IOWA L. REV. 56, 111-14. The proposal is outlined in the present article at the request of this *Review* to insure a more integrated manuscript.

The insight which the ancient practice provides is the recognition that the "status" which is conferred by the law of one jurisdiction and the "status" upon which certain rights are conferred by the law of another jurisdiction may not be the same though both are designated by the same verbal label. Specifically, to use the thirteenth century example, fulfilling certain requisites may make a woman a "wife" by canon law, and by the Common Law a "wife" is entitled to dower; but what the church courts had in mind when they adjudged someone a "wife" was very different from what the Common Law had in mind as a "wife" who was entitled to dower. The principle is applicable to modern conflicts questions, and indeed even to questions involving only the laws of a single state. It is simply erroneous to collect all the rights attributed to "marriage" and regard them as a single status because the classes of persons upon which these several rights are conferred are not the same. Consequently, a divorce in State A does not determine that the parties are *not married,* but only that the parties are *not married for certain purposes.* Moreover, unless it is to be pretended that State A has power to give its judgments by their own force extraterritorial effect, all the State A judgment really says is that the parties are *not married for certain purposes in A.* Thus, the judgment *in A* says nothing of the marriage for any purpose *outside* of A.

The basic principle of recognition of foreign judgments imposed on American state courts by the full faith and credit clause is said to be that the judgment of one state must be given the same effect in another state as it has in the state where it was rendered.[120] On this analysis, however, the judgment of State A affects only rights in A; indeed, A would have no jurisdiction to adjudicate rights in State B. For B to give the A judgment any effect for any purpose in B is to give it greater effect than the judgment has in A. It is apparent, therefore, that what the full faith and credit clause actually is taken to mean is not that the A judgment must be given in B the *same* effect which it has in A; rather, B must afford rights in B *equivalent* to those that the A judgment affords in A. Moreover, "the full faith and credit clause is not an inexorable and unqualified command."[121] There is some room left for B's local policy to interpose and refuse to afford rights equivalent to those afforded by the A judgment in A.

To make the illustration more concrete, suppose that a judgment in State A had determined that X was entitled to payments of support from Y as Y's wife. That judgment could not be taken under the full faith

120. 28 U.S.C. § 1738 (1964).
121. Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210 (1941).

and credit clause to determine the eligilibity of X to inherit Y's intestate estate in State B because the question decided in the A judgment and that involved in the B proceeding are not the same. Both entitlement to support and entitlement to an intestate's estate are said to hinge upon "marriage," but the real meaning of the term "marriage" is not necessarily the same. Even if the question in B had been X's entitlement to support in B, the A support judgment would not have been determinative. The A judgment by its own strength could only affect rights between X and Y in A, and the contest in B concerns equivalent rights in B. For B to take the A judgment as determining rights in B would be to give the judgment a different effect in B than it had in A. Even under the full faith and credit clause's requirement of "equivalent" effect, since this requirement is not "inexorable and unqualified," there is room for B to inquire whether the relationship which premised the judgment in A is the kind of relationship which would entitle X to support according to the policy of B.

There are complexities in the application of this faith and credit analysis to twentieth century problems which this article cannot explore. It is hoped, however, that this brief discussion will illustrate the possible modern application of the thirteenth century English faith and credit analysis, or at the very least, assist in understanding more clearly by contrast, the faith and credit principles which are currently applied.[122]

122. *See* ENGDAHL, 55 IOWA L. REV. 56, 111-14.