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## Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian

R.H. Helmholz\*

In medieval England the writ of prohibition, ancestor of the modern writ used to restrain an inferior court from exceeding its jurisdiction,<sup>1</sup> was most commonly used to restrain the courts of the Church, which administered the great body of canon law and stood independent of the jurisdiction of the King.<sup>2</sup> Prohibitions, normally issued on application to Chancery or the King's Bench, lay where the subject matter of the suit belonged to the "crown and dignity" of the King rather than to the jurisdiction of the spiritual courts.<sup>3</sup>

The writ was necessary because the medieval Church held a wider view of its sphere of subject matter jurisdiction than the King's government would allow. For example, the right to enforce contracts formalized by means of an oath was claimed by the English Church courts.<sup>4</sup> The English common law lawyers denied the claim.<sup>5</sup> They contended that unless the contract re-

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1. See generally F. FERRIS, *THE LAW OF EXTRAORDINARY LEGAL REMEDIES* §§ 303-41 (1926); J. HIGH, *A TREATISE ON EXTRAORDINARY LEGAL REMEDIES* §§ 762-804 (2d ed. 1884); J. SHORTT, *INFORMATIONS (CRIMINAL AND QUO WARRANTO) MANDAMUS AND PROHIBITION* \*426-98; Hughes & Brown, *The Writ of Prohibition*, 26 *Geo. L.J.* 831 (1938); Smith, *The Prerogative Writs*, 11 *CAMB. L.J.* 40 (1951). There are also several recent and useful articles on the writ in particular American jurisdictions. Boone, *Prohibition: Use of the Writ of Restraint in California*, 15 *HASTINGS L.J.* 161 (1963); Bosson & Sanders, *The Writ of Prohibition in New Mexico*, 5 *N.M.L. REV.* 91 (1974); Simko, *Mandamus and Prohibition in Idaho*, 4 *IDAHO L. REV.* 5 (1967); Note, *The Writ of Prohibition in Missouri*, 1972 *WASH. U.L.Q.* 511.

2. The most recent writer on English ecclesiastical law takes the position that the modern Church courts retain their independence and are "neither inferior nor superior" to the secular royal courts. E. MOORE, *AN INTRODUCTION TO ENGLISH CANON LAW* 125-26 (1967).

3. "[A]d coronam et dignitatem nostram." See, e.g., H. BRACTON, *DE LEGIBUS ET CONSUECUDINIBUS ANGLIAE*, f. 402 (G. Woodbine ed. 1915-42) [hereinafter cited as H. BRACTON].

4. See Esmein, *Le serment promissoire dans le droit canonique*, 12 *REVUE HISTORIQUE DE DROIT FRANCAIS ET ETRANGER*, 3d ser. 248 (1888); Helmholz, *Assumpsit and Fidei Laesio*, 91 *L.Q. REV.* 406 (1975).

5. See Constitutions of Clarendon, chs. 1, 15, in STUBBS' *SELECT*

lated to marriage or testaments, the ecclesiastical courts were without jurisdiction. They further insisted that those courts must not deal with lay contracts indirectly, by considering what amounted to a secular cause of action under a spiritual name.<sup>6</sup> Thus, while they admitted that the canon law could punish a man for perjury, they maintained that it had no jurisdiction to compel a man to comply with a simple contract he had sworn to fulfil. If the ecclesiastical court judges heard such suits, they and the party suing could be prohibited from continuing the suit, on complaint of the party aggrieved. And those who violated the writ of prohibition would suffer for it; they would be liable to imprisonment, fine, and (though this seems not to have been available in the earliest days) to damages in favor of the injured party.<sup>7</sup> The writ of prohibition was thus used to determine, and to enforce, the royal view of the proper boundary between the jurisdiction of royal and ecclesiastical courts.

Forty years ago, Professor Norma Adams published an article in this Review, entitled *The Writ of Prohibition to Court Christian*.<sup>8</sup> Professor Adams's article has stood up well in the intervening years, and its conclusions have been widely accepted. It has continued to be used and cited,<sup>9</sup> together with Flahiff's subse-

CHARTERS 164, 167 (9th ed. H. Davis 1921); Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272, 276 (1936) [hereinafter cited as Adams].

6. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 201 (2d ed., reissued 1968). English canonists, on the other hand, suggest that such a purely formal variation in the remedy demanded was effective in practice to give the ecclesiastical courts jurisdiction. See William of Drogheda, *Summa Aurea*, in 2 QUELLEN ZUR GESCHICHTE DES ROMISCH-KANONISCHEN PROZESSES IM MITTELALTER 65, 67 (L. Wahrmond ed. 1913, reprint 1962); W. LYNDWOOD, *PROVINCIALE (SEU CONSTITUTIONES ANGLIAE)* 315 s.v. *perjurio* (1679). See also 3 ROTULI PARLIAMENTORUM 645-46 (no. 72 1410) [hereinafter cited as W. LYNDWOOD].

7. Adams, *supra* note 6, at 286.

8. Adams, *supra* note 6.

9. E.g., S. Chrimes, *Introductory Essay*, in 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 66 n.8 (1966); F. LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND* 88 n.93 (1968) [hereinafter cited as F. LOGAN]; S.F.C. Milsom, *Legal Introduction*, in *NOVAE NARRATIONES cxcviii* (80 Seldon Society 1963) [hereinafter cited as Milsom]; T.F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 395 n.1 (5th ed. 1956); J. SAYERS, *PAPAL JUDGES DELEGATE IN THE PROVINCE OF CANTERBURY* 1198-254, 165 n.3 (1971) [hereinafter cited as J. SAYERS]; Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C.L. REV. 49, 51 n.9 (1961); Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Reexamined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 660 n.64 (1974) [hereinafter cited as Donahue].

quent and more extensive treatment.<sup>10</sup> However, an important aspect of the topic was not covered by Professor Adams's article, nor have other commentators dealt with it. This aspect is the receipt of the writ by the courts Christian and their treatment of cases involving conflicting claims to jurisdiction. We know, it is true, that the bishops complained bitterly about the hardships caused to their courts by what they claimed was excessive use of prohibitions. Their petitions for change in the system were frequent.<sup>11</sup> But medieval petitions lent themselves to exaggeration. Their object was redress of a grievance, not balanced presentation of fact. A better, though not infallible, guide is provided by regularly compiled court records. And here Professor Adams's article, like virtually all treatments of the subject, was based exclusively on royal records.<sup>12</sup> Hence we know much more about the procedure for issuing writs of prohibition than we know about how the ecclesiastical courts reacted to them. Our knowledge of the working and effectiveness of prohibitions is based on the records of the side that issued them, not on those of the side that received them. For understanding the realities of legal relations between Church and State in pre-Reformation England, the testimony of both royal and ecclesiastical courts is equally important.<sup>13</sup>

The present article therefore treats writs of prohibition from the perspective of the reactions of the ecclesiastical courts. It is based on examination of most of the surviving records of England's ecclesiastical courts for the period prior to the Reformation.<sup>14</sup> Unfortunately, only a small portion of these records

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10. Flahiff, *The Writ of Prohibition to Court Christian in the Thirteenth Century* (pts. 1 & 2), 6 *MEDIEVAL STUDIES* 261 (1944) and 7 *MEDIEVAL STUDIES* 229 (1945) [hereinafter cited as Flahiff].

11. A comprehensive review is provided by Jones, *Bishops, Politics, and the Two Laws: The Gravamina of the English Clergy, 1237-1399*, 41 *SPECULUM* 209 (1966). See also D. DOUIE, *ARCHBISHOP PECHAM* 113-22 (1952).

12. The two exceptions known to me are B. WOODCOCK, *MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* 108 (1952) [hereinafter cited as B. WOODCOCK] and Donahue, *supra* note 9, at 665.

13. This point is made clearly and at greater length in G. ELTON, *ENGLAND, 1200-1640*, at 114-15 (1969). For a general survey of the current state of knowledge, see Jones, *Relations of the Two Jurisdictions: Conflict and Cooperation in England During the Thirteenth and Fourteenth Centuries*, 7 *STUDIES IN MEDIEVAL AND RENAISSANCE HISTORY* 79 (W. Bowsky ed. 1970).

14. For a summary description of the records and a description of the various types of courts, see D. OWEN, *THE RECORDS OF THE ESTABLISHED CHURCH IN ENGLAND EXCLUDING PAROCHIAL RECORDS* (1970). A good example and a description of the records kept by the courts is found

has survived, much fewer than the number of the royal courts' records. There are enough, however, to yield a significant sample. There are enough examples of prohibitions received and of cases in which the Church dealt with questions of conflicting jurisdiction to give some confidence in their representativeness, even if they constitute only a statistically small part of the total number of instances which must actually have occurred. Their study fills out the history of the writ of prohibition and sheds some new light on the history of legal relations between Church and State.

### I. RECEIPT OF ROYAL WRITS

For purposes of studying receipt of the writ, only cases in which the Church court records show a prohibition introduced into actual litigation are included. I have excluded second-hand sources. For example, records of attachment on prohibitions from the plea rolls of the royal courts are not used. They invariably suggest disobedience to the royal writ.<sup>15</sup> This, however, was a necessary part of the allegations, without which the plaintiff could not have brought the action at all. It does not prove actual disobedience. Also excluded are depositions from the Church court records<sup>16</sup> and royal writs copied into formu-

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in Donahue & Gordus, *A Case from Archbishop Stratford's Audience Act Book and Some Comments on the Book and Its Value*, 2 BULL. MEDIEVAL CANON L. 45 (1972). Citations to manuscript Church court records are given hereinafter by diocese, rather than by present record repository. The diocesan court records used, with corresponding repositories, are as follows:

<i>Canterbury</i>	Library of the Dean and Chapter, Canterbury, and Lambeth Palace Library, London [Act book MS. 244].
<i>Chichester</i>	West Sussex Record Office, Chichester.
<i>Ely</i>	Cambridge University Library.
<i>Exeter</i>	Devon Record Office, Exeter.
<i>Hereford</i>	Hereford County Record Office, Hereford.
<i>Lichfield</i>	Joint Record Office, Lichfield.
<i>London</i>	Guildhall Library, London [MS. 9064 records] and Greater London Council Record Office [DL/C records].
<i>Norwich</i>	Norfolk Record Office, Norwich.
<i>Rochester</i>	Kent County Record Office, Maidstone.
<i>York</i>	Borthwick Institute of Historical Research [Cause Papers and A B Act Books] and York Minster Library [M 2 (1) Act Books].

15. In an attachment on a writ of prohibition, it was normally alleged that one party delivered the prohibition, but that the other, "spreta regia prohibicione predicta nichilominus placitum illud ulterius secutus fuit." *E.g.*, Public Record Office, London [hereinafter cited as P.R.O.] C.P. 40/330, m. 275d (1342).

16. In a case heard in the Archbishop of Canterbury's Court of

laries or bishops' registers.<sup>17</sup> Some examples found among this excluded evidence have the ring of truth about them.<sup>18</sup> But too many are mere ex parte statements that we cannot verify. Rather than attempt, after centuries have passed, to sort out the reliable from the exaggerated, it seems safer to deal only with receipts of a writ in cases recorded in the regular course of Church court business. The scribe who compiled the court records had no reason to distort the truth. The canon law required that he make a true record.<sup>19</sup> He had nothing to gain by distortion or concealment of the facts.

Under this criterion, Church court records produce 52 cases of royal prohibitions received. They range in date from 1293 to 1501. The largest number come from the courts of two archiepiscopal sees, Canterbury and York. There are 23 cases from the former,<sup>20</sup> 14 from the latter.<sup>21</sup> Six other dioceses are also represented, however: Lichfield with seven;<sup>22</sup> Hereford with three;<sup>23</sup>

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Audience and recorded in Canterbury Act book *Chartae Antiquae A 36 IV*, f. 15v (1340), for example, a witness testified that in a previous case in the same court, the archbishop had delayed the hearing after receipt of a prohibition until he could obtain a writ of consultation allowing the original case to proceed. Since I have been unable to trace the case referred to, I have not counted this instance.

17. Most bishop's registers contain one or more writs of prohibition, but not as a part of records of litigation. See I I. CHURCHILL, *CANTERBURY ADMINISTRATION* 528-34 (1933).

18. E.g., 3 BRACON'S NOTE BOOK, no. 1388 (1220) (F. Maitland ed. 1887), a case in which the defendant admitted continuing the case after receipt of a writ of prohibition, acting on the advice of the papal legate.

19. *Decretales Gregorii IX*, c. *Quonian contra falsam* (X 2.19.11), found in 2 *CORPUS JURIS CANONICI*, col. 313 (A. Friedberg ed. 1879). For a comment by a medieval canonist on the notary's duty, see, for example, *HOSTIENSIS, LECTURA IN LIBROS DECRETALIU*, lib. 3, tit. *ne cler. vel. mon.*, ch. 8 (*Sicut te accepimus*) no. 4 (Venice 1581, f. 181A): "Primo, quod de his quae videbit et audiet et requisitus fuerit sine diminutione veritatis et commixtione falsitatis conficiet instrumentum."

20. Ecclesiastical Suit no. 54 (1293); Act book Lambeth Palace MS. 244, f. 4 (1304); f. 21r (1304); f. 25r (1304); f. 62r (1305); f. 68v (1305); f. 79r (1306); f. 93v (1308); f. 95r (1309); f. 96r (1309); f. 101r (1309); Canterbury Act books *Chartae Antiquae II*, f. 31r (1329); *Chartae Antiquae IV*, f. 34r (1340); Y.1.1, f. 40r (1373), f. 73v (1374), f. 75v (1374); Y.1.2, f. 27v (1397), f. 31r (1397), f. 117r (1398); Y.1.3, f. 42r (1418); Y.1.7, f. 156r (1463); Y.1.6, f. 205v (1467); Y.1.13, f. 378v (1483).

21. C[ause] P[apers] E 39 (1339), E 72 (1356), E 172 (1365); Act books M 2(1) b, f. 7r (1371), f. 9v (1371); M 2(1) c, f. 2v (1371), f. 3v (1371), f. 25v (1374); C.P. E 250 (1383), E 141 (1385), E 217 (1395); Reg. Bowet I, f. 307r (1411); Act books Cons. A B 1, f. 65r (1418); A B 2, f. 56r (1425).

22. Act book B/C/1/1, f. 60v (1465), f. 161v (1467), f. 222v (1468); f. 252v (1469); B/C/1/2, f. 185r (1475), f. 259v (1476), f. 290r (1477).

23. Act books I/1, 204 (1495), I/2, 17 (1497), 54 (1498).

Rochester with two;<sup>24</sup> and London,<sup>25</sup> Ely,<sup>26</sup> and Bath and Wells<sup>27</sup> with one apiece. These ecclesiastical cases can be broken down by subject matter as follows:

Testamentary	16
Breach of Faith	6
Ecclesiastical Dues	6
Tithe	4
Defamation	4
Annual Pension	4
Spoilation of Benefice	1
Usury	1
Uncertain or Not Stated	10

The number of recorded cases is too small to be conclusive evidence concerning the areas actually in dispute. But, even admitting this, the relatively large number of testamentary causes is noteworthy. It is not surprising. The right of the executor to collect debts owed to the decedent and the right of the decedent's creditors to enforce their claims against the estate were, in the ecclesiastical view, a proper part of probate administration.<sup>28</sup> The Church courts were, therefore, open to suits between executors and debtors and between creditors and executors. Efficient administration required it. The royal courts viewed this as ecclesiastical encroachment on their jurisdiction. The executor should be no better off than the testator would have been himself. The testator, for most obligations, could only have sued at common law.<sup>29</sup> Therefore a prohibition lay to restrain the

24. *REGISTRUM HAMONIS HETHE, DIOCESIS ROFFENSIS, A.D. 1319-1353*, at 943 (1347) (C. Johnson ed. 48 & 49 Canterbury and York Society 1948) [hereinafter cited as *REGISTRUM HAMONIS HETHE*]; Act book DRb Pa 1, f. 133r (1440).

25. Act book DL/C/1, f. 994 (1501).

26. Act book EDR D/2/1, f. 86v (1378).

27. Act book D/D/C A1, 228, 230 (1461).

28. See, e.g., *COUNCILS AND SYNODS WITH OTHER DOCUMENTS RELATING TO THE ENGLISH CHURCH II, A.D. 1205-1313*, at 958, 961 (F. Powicke & C. Cheney eds. 1964) [hereinafter cited as *COUNCILS AND SYNODS*]; Flahiff (pt. 1), *supra* note 10, at 277-79; Jones, *supra* note 13, 169-78. An example from the Church court records of suit brought by an executor is found in Chichester Act book Ep I/10/1, f. 43v (1508): the executor William Coklyn sued Thomas Gylly for 20 measures of barley, "quos debuit dicto defuncto."

29. *COUNCILS AND SYNODS*, *supra* note 28, at 875-77; *ST. GERMAN'S DOCTOR AND STUDENT 232* (T. Plucknett & J. Barton eds. 91 Selden Society 1974). The remedies available at common law and the position taken as to the scope of the writ of prohibition in testamentary cases are slightly more complicated. For fuller accounts, see J. BARTON, *ROMAN LAW IN ENGLAND 80-93* (*Ius Romanum Medii Aevi V*, 13a, 1971); R. GOFFIN, *THE TESTAMENTARY EXECUTOR IN ENGLAND AND ELSEWHERE 37-57* (1901); McGovern, *Contract in Medieval England: Wager of Law and the Effect of Death*, 54 *IOWA L. REV.* 19, 38-48 (1968).

Church courts from giving the executor (or the creditor of the testator) a right that would not have existed had the testator been alive, namely the right to sue in a Church court. The persistence of the Church courts in maintaining their claim throughout the fourteenth and fifteenth centuries, together with the substantial amounts of money which must have been at issue in these cases, helps to explain the preponderance of prohibited testamentary causes.<sup>30</sup> We can only wonder that there were not more.

Equally noteworthy, but in the opposite way, is the small number of cases relating to ecclesiastical patronage. The right to present a cleric to the bishop for induction into a benefice was a valuable right in the Middle Ages.<sup>31</sup> Both canon law and royal law claimed the right to try disputes over it. To the Church it was a spiritual matter, heard under the heading of *jus patronatus*. To the King's court, on the other hand, the advowson, or right to present, was a lay possession. In no area of the law was the theoretical conflict between claims of the canon law and English law clearer,<sup>32</sup> but the number of cases relating to ecclesiastical benefices is very small in the remaining Church court records. Most of those did not encroach directly on the royal right to try all claims relating to advowsons.<sup>33</sup> Historians have generally concluded that the Church tacitly acquiesced in the royal claims to try questions of patronage in later medieval England.<sup>34</sup> The court records involving prohibitions do not contradict this conclusion.

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30. Note, however, that the Church claimed jurisdiction by English custom, not because the subject matter was inherently spiritual; see W. LYNDWOOD, *supra* note 6, at 170 s.v. *insinuationem*. The English Act books also contain occasional testamentary causes remitted to secular tribunals by the Church court judges themselves; e.g., Hereford Act book I/4, 122 (1511): "In causa testamentaria, . . . , iudex licenciavit eosdem ire ad consilium principis et sic partes dimisse [sunt];" Rochester Act book DRb Pa 1, f. 87v (1438): "Remittitur iuri communi;" 4 REGISTERS OF ROGER MARTIVAL, BISHOP OF SALISBURY 1315-1330, at 66-67 (K. Edwards & D. Owen eds. 141 Canterbury & York Society 1973-4).

31. 2 F. POLLOCK & F. MATTLAND, *supra* note 6, at 136-40.

32. Gray, *The ius praesentandi in England from the Constitutions of Clarendon to Bracton*, 67 ENG. HISTORICAL REV. 481 (1952).

33. See Donahue, *supra* note 9, at 661-63; O'Day, *The Law of Patronage in Early Modern England*, 26 J. ECCLESIASTICAL HISTORY 274 (1975); Plucknett, *Execrabilis in the Common Pleas: Further Studies*, 1 CAMB. L.J. 60 (1921).

34. See, e.g., W. PANTIN, *THE ENGLISH CHURCH IN THE FOURTEENTH CENTURY* 86 (1962). The statistics supplied by Flahiff (pt. 1), *supra* note 10, at 310, are also illuminating. An excellent example of the attitude of an English bishop caught between royal and papal claims in matters



The writ of prohibition was introduced at various stages of the proceedings in the Church courts, from immediately after the first appearance by the parties,<sup>35</sup> to after definitive sentence by the judge.<sup>36</sup> When it came seems to have made no difference. This is what English common law would lead one to expect. Since a writ of prohibition was meant to protect the King's interest in his jurisdiction, the claim could not be waived by private parties.<sup>37</sup> They could not validly renounce their right to use the writ. They could not acquiesce in ecclesiastical jurisdiction if the subject matter of the quarrel belonged to royal jurisdiction. Therefore it would have made no difference at what stage of the suit in the Church court the prohibition was produced, and this is what one finds in the Church court records. In fact, we may say that the point of introduction seems dictated by the convenience of the party producing it, and that it had no apparent effect on the way the prohibition was received in the Church courts.

Two other general and useful conclusions can be drawn from this evidence by the legal historian. The first and most evident is the infrequency with which proceedings in the English courts Christian were interrupted by writs of prohibition. The Church courts apparently enforced the canon law unfettered by more than a very occasional prohibition. No precise figure for the total number of cases examined in all diocesan courts can be given. But it runs into several thousands. A total of 52 prohibited cases is a minute percentage of the total. To take a specific example, of the 102 cases heard in the diocesan court at Lichfield in 1476 only one was prohibited.<sup>38</sup> Of the slightly fewer than 300 cases recorded in the first court book from Bath and Wells, only one was subject to a recorded writ of prohibition.<sup>39</sup> Many, in fact most, of the remaining court Act books contain no recorded prohibitions at all.<sup>40</sup> The great legal historian F.W. Maitland described writs of prohibition as "always buzzing about the ears

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of the patronage of ecclesiastical benefices is found in 10 REGISTRUM ROBERTI WINCHELSEY 1044-46 (R. Graham ed. 114 Canterbury & York Society 1942).

35. *E.g.*, Canterbury Act Book, Y.1.1, f. 31r (1397).

36. *E.g.*, York, C.P. E 72 (1356).

37. H. BRACON, *supra* note 3, at f. 401b. *See also* Adams, *supra* note 5, at 283. *But cf.* Dobbs, *supra* note 9.

38. Act book B/C/1/1; the prohibited case is at f. 259v.

39. *See* Dunning, *The Wells Consistory Court in the Fifteenth Century*, in 106 PROCEEDINGS OF THE SOMERSETSHIRE ARCHAEOLOGICAL & NATURAL HISTORY SOCIETY 46, 55 (1962); note 27 *supra*.

40. *See generally* B. WOODCOCK, *supra* note 12, at 108.

of the ecclesiastical judges."<sup>41</sup> This description seems exaggerated.

It is certainly true, however, that not all writs of prohibition that were issued would find their way into the Church court records surveyed here. The writ did not have to be delivered in court to be effective.<sup>42</sup> It might be handed over to the judge and the opposing litigant out of court. And even if it were delivered in open court, we cannot be sure that the prohibition would have been mentioned specifically in the records. We may have, therefore, only a small sample of the total number of prohibitions actually used. On the other hand, there was no good reason for the scribe in the Church court to have omitted notation of the receipt of a prohibition. The fact that sometimes the introduction of the writ was recorded, coupled with the sheer volume of cases which were subject to being prohibited but which were in fact heard in the Church courts, does suggest strongly that writs of prohibition to the ecclesiastical courts were not frequently used. If this is so, the importance of prohibitions in daily practice was less than has been assumed.

The second conclusion to be drawn from the cases of receipt of prohibitions, to some extent inconsistent with the first, is that although there may not have been many prohibitions received and recorded, they were effective when used. When the writs were introduced, they were obeyed. Of the 52 cases noted above, not one was continued in the Act book after receipt of the prohibition. The case thereafter disappeared from the records. The court scribe made no entry in the case after introduction of the writ. Sometimes he made a marginal note—*prohibitum est*<sup>43</sup> or *prohibitio*<sup>44</sup>—to indicate the receipt of the writ. Other times he indicated the fact by a similar note in his record of the substance of the case.<sup>45</sup> In either situation, the following sessions of the court did not take up the prohibited case. It was dropped.

In a few of these 52 cases, the scribe made more than a summary record of the action taken by the judge in response to the prohibition. That action was never disobedience to the royal

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41. 2 F. POLLOCK & F. MATTLAND, *supra* note 6, at 200.

42. At least in the thirteenth and early fourteenth centuries, however, it had in fact to be delivered somewhere. See Milsom, *supra* note 9, at cc. For a printed case in which the place of delivery was different from the ecclesiastical consistory, see *Clerbek v. Lincoln*, 26 Selden Society 98 (1301).

43. *E.g.*, Lichfield Act book B/C/1/1, f. 60v (1465).

44. *E.g.*, Canterbury Act book Lambeth MS. 244, f. 21r (1304).

45. See, *e.g.*, Donahue, *supra* note 9, at 669-70.

writ. For example, at Hereford in 1498, the scribe noted in one such instance that "the judge, having read the prohibition, desisted in the cause."<sup>46</sup> In a tithe case heard at Canterbury in 1373, when the judge received a writ of prohibition, he "declared that he was unwilling to proceed in the cause."<sup>47</sup> The judge of the diocesan court of Bath and Wells received a royal prohibition in a suit heard in 1461; the court scribe noted that the judge "was willing to comply with it in every particular."<sup>48</sup>

The ecclesiastical attitude towards the royal writs is particularly revealed by a case heard in 1306 before the Archbishop of Canterbury's Court of Audience. There were several defendants in the case. Some, but not all, of them delivered a writ of prohibition to the judge. He desisted as to those in whose name the prohibition ran. He proceeded as to the rest.<sup>49</sup> The judge would not extend the coverage of the writ of prohibition to all the defendants. But he would not violate it. The closest any of the 52 cases comes to suggesting disobedience to the royal writ is one from 1418 in which the record notes that one party delivered the writ. The court took no formal action against the defendant after he had delivered the writ, but the scribe noted that "nevertheless before his departure a compromise was reached."<sup>50</sup> Other than this, all the recorded writs were apparently effective.

One of the possible reasons that the writs of prohibition were so uniformly obeyed is that there was an avenue of redress for their misuse under English common law. If the prohibition had been wrongly obtained, the plaintiff in the court Christian could

46. Act book I/2, 54: "*Dicta pars rea inhiuit iudici et exhibit quandam prohibitionem impetratam a skaccario domini regis. Et iudex lecta prohibitionem cessavit in causa.*" A similar entry in a prohibited case heard after the Act of Supremacy in 1535 is slightly, but not greatly, different. Act book I/6, 67 (1536): ". . . breve regium nobis prius exhibitum et transmissum, ob cuius reverenciam dicto breve prius perlecto iudex distulit et supersedebat."

47. Act book Y.1.1, f. 40r: the defendant, "porrexit unam regiam prohibitionem propter quam commissarius predictus protestabatur se nolle ulterius procedere in causa."

48. Act book D/D/C A1, 228: "Quo die adveniente prefatus dominus officialis recepit regiam prohibitionem pro eadem causa cui parere in omnibus voluit ut asseruit."

49. Act book Lambeth MS. 244, f. 79r: "Et demum quadam prohibitionem pro Waltero Kough et Johanne filio et executore Walteri Kough in iudicio porrecto, unde decretum est quod supersedeatur in negocio memorato quo ad personas prenominatas et prefigimus aliis partibus terminum ad faciendum super excepcione proposita quod erit iustum."

50. Act book Y.1.3, f. 42r: "Ricardus Leek de parochia de Petham porrexit domino commissario unam prohibitionem in quadam causa

obtain a writ of consultation.<sup>51</sup> Upon application to the royal courts, and upon a showing that the true nature of the dispute was within ecclesiastical cognizance, the aggrieved party could obtain an order permitting the ecclesiastical judge to take up the case again and the suit would proceed despite the prohibition. Six of the 52 cases contain some kind of a reference to the procurement of a writ of consultation. The records in three of these cases demonstrate actual introduction of the writ.<sup>52</sup> The records in the other three merely indicate that one would probably be sought, as in a case heard at Ely in 1378 in which the court scribe recorded, "therefore we decree that the [cause] is to be suspended until we can obtain a consultation."<sup>53</sup> These six cases show, as does the aggregate of the 52, apparent obedience to the royal writs and a willingness to accept the common law rules rather than to attack them. To apply for a writ of consultation was to work within the system of royal law. If it is true, as suggested above, that writs of prohibition were infrequently introduced, it is not because they were disregarded by the Church courts.

## II. ECCLESIASTICAL SANCTIONS

The impression of ecclesiastical acquiescence in the claims of the royal courts conveyed by the Church courts' reactions to royal prohibitions is not, however, a complete picture. It is not wholly accurate to say that the prelates were reduced to supplication of the King for redress of their complaints about lay incursions on ecclesiastical jurisdiction.<sup>54</sup> The records of the Church courts show that they had weapons of their own in the disputed areas of jurisdiction. Those weapons, although "purely spiritual" in character, continued to be useful in the centuries prior to the

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*fidei lesionis et perjurii inter dominum Hugonem Mavys et ipsum; tamen ante recessum eius a consistorio concordatum est cum parte et pars rea est absoluta et dimissa."*

51. See Stat. Consultation, 18 Edw. I in 1 STATUTES OF THE REALM 108; 1 W. HOLDSWORTH, *supra* note 9, at 229.

52. Canterbury Act book Y.1.13, f. 378v (1483); York C.P. E 141 (1385); York Reg. Bowet I, f. 307r (1411). Another instance, taken from an actual case, is found in JOHN LYDFORD'S BOOK 69 (D. Owen ed. 1974).

53. Act book EDR D/2/1, f. 86v: "Porrecta est regia prohibitio ideo decernimus fore suspendendum quousque consultationem poterimus optinere." The other two instances are found in Canterbury Ecclesiastical Suit Roll, no. 54 (1293) and Act book Y.1.1, f. 40r (1373).

54. See, e.g., Jones, *supra* note 11, at 239. For the somewhat parallel situation in France, see O. MARTIN, L'ASSEMBLEE DE VINCENNES DE 1329 ET SES CONSEQUENCES 172-74 (1909).

Reformation. There was, in other words, a positive defense of ecclesiastical claims to jurisdiction. The defense was not made by a direct attack on royal prohibitions. No spiritual sanctions were invoked against the King's government or the justices of the royal courts. But spiritual sanctions were invoked against those who *used* the machinery made available by royal courts. They were applied against litigants rather than against the Crown. It is doubtful, admittedly, that the existence of these sanctions can completely explain the infrequency of prohibited cases in the Church court records. But at least we are in a better position to assess the place of the writ in Church-State relations if we examine them.

It has long been recognized that the canon law contained penal sanctions against those who used secular power to hinder the Church from exercising its jurisdiction. Most notably in England, Archbishop Boniface's Council of Lambeth in 1261 promulgated a series of constitutions against lay encroachment on spiritual jurisdiction.<sup>55</sup> Not much attention has been paid to the effect of these measures in practice. It is true that the Pope, acting at the urgent request of Henry III, refused to confirm them.<sup>56</sup> Moreover, the English canonist William Lyndwood (d. 1446) later commented that they "were but little observed."<sup>57</sup> These facts, together with exclusive reliance on royal court records, have led some modern writers to disregard the penal sanctions.

However, as Professor Cheney has pointed out, the English constitutions defending the ecclesiastical jurisdiction did not need papal approval to be valid.<sup>58</sup> It is even possible that Lyndwood's remark meant only that the penalties actually used in practice were taken not from Archbishop Boniface's constitutions, but from the similar statutes of Archbishop John Stratford (d. 1348)<sup>59</sup> and from the law of the entire Western Church found

55. COUNCILS AND SYNODS, *supra* note 28, at 659-84.

56. *Id.* at 686. See generally O. PONTAL, LES STATUTS SYNODAUX 50 (Typologie des Sources du Moyen Age Occidental A-III.1 1975); Cheney, *Legislation of the Medieval English Church* (pt. 2) 50 ENG. HISTORICAL REV. 385, 402-06 (1935); Jones, *supra* note 13, at 215.

57. W. LYNDWOOD, *supra* note 6, at 92 s.v. *contingit*. Maitland went too far, I believe, in suggesting that these were "useless canons," and that "the battle had been decided." See F. Maitland, *Church, State and Decretals*, in ROMAN CANON LAW IN THE CHURCH OF ENGLAND 61 (1898, reprint 1968).

58. See COUNCILS AND SYNODS, *supra* note 28, at 662.

59. 2 D. WILKINS, CONCILIA MAGNAE BRITANNIAE AT HIBERNIAE 702-09 (1737).

in the *Corpus Juris Canonici*.<sup>60</sup> The Church court records suggest this possibility. Whenever they contain explicit reference to the source of the penalty it is to one of Stratford's statutes, called *Accidit novitate perversa*,<sup>61</sup> or to a canon found in Gratian's *Decretum* called *Si quis suadente*.<sup>62</sup> Lyndwood included the former in his collection with no qualification on its usage. Thus, although the constitutions of Archbishop Boniface may not have been used in practice, their purpose was served by the use of other similar sanctions. The Church courts were willing to take positive steps to enforce at least part of the canonical view of the jurisdictional boundary. Evidence of effectiveness is difficult to assess. But it would not be accurate to treat the disciplinary rules of the Church as a dead letter. The court records suggest a continuing, sophisticated, and serviceable series of actions available to defend the ecclesiastical position.

The sanctions as enforced in the Church courts can be divided into two classes: first, disciplinary proceedings against parties who used the machinery of the secular courts, including writs of prohibition, to impede an ecclesiastical cause or judgment, and second, prosecution of persons who brought suits in the secular courts which belonged, because of their subject matter, to the Church courts. The surviving records reveal a greater number of examples of the first practice than of the second. Most were brought *ex officio*. That is, the ecclesiastical court itself prosecuted the suit. They were sometimes brought specifically under the provincial constitution *Accidit novitate perversa* referred to above,<sup>63</sup> sometimes under the general rubric of con-

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60. For brief descriptions of the standard corpus of the canon law, see R. MORTIMER, *WESTERN CANON LAW* 40-55 (1953); Donahue, *supra* note 9, at 648-49, nn. 10-14.

61. *E.g.*, Hereford Act book I/4, 104 (1510), in which Llewellyn ap Rees admitted to having caused the arrest of William Watkyns in a secular court because Watkyns had cited him before an ecclesiastical tribunal. The official of the diocesan court at Hereford then declared officially that Rees had incurred the "penam constitutionis que sic incipit *accidit novitate perversa*." Rees asked to be absolved and swore to obey the dictates of the canon law. The constitution referred to is given by W. LYNDWOOD, *supra* note 7, at 260 and D. WILKINS, *supra* note 59, at 707.

62. *E.g.*, Exeter Act book Chanter MS. 776 s.d. 22 June 1518, in which William Blakmore was cited, "ad dicendam causam quare non debeat declarari pro excommunicato pro eo quod incidit in canonem *si quis suadente* etc." He submitted to the court. The canon excommunicated those who "laid violent hands" on a cleric and was therefore appropriately used only in cases where the complainant was a cleric and there had been force. It is found in the *Decretum Gratiani* (C. 17 q. 4 c. 29) 1 *CORPUS JURIS CANONICI*, *supra* note 19, at col. 822.

63. See note 61 *supra* and accompanying text.

tempt,<sup>64</sup> sometimes without any special designation.<sup>65</sup> All were aimed at disciplining the party who had made use of the secular legal process. All were aimed at undoing its effects. For example, at Rochester in 1321, Henry de Elham was cited for having laid violent hands on a cleric and for having made use of a royal prohibition in the dispute with him. Elham submitted to the judgment of the court, swore never to use a prohibition in an ecclesiastical cause again, and agreed to pay the aggrieved cleric four marks for the expenses he had incurred in the matter.<sup>66</sup> In 1443 at York, Cecelia Jackson appeared before the auditor of the Dean and Chapter to answer for having "impeded the ecclesiastical jurisdiction by arresting and unduly vexing by the temporal law" a certain Robert Clyse. Jackson "submitted herself to penance to be awarded and to the grace" of the court.<sup>67</sup> At Canterbury in 1399, Thomas Felton was summoned before the Church court and charged with interfering with its jurisdiction by using the secular courts to trouble the vicar of Eastchurch. Felton confessed and abjured further interference under penalty of 20 shillings.<sup>68</sup>

It is unfortunate that good statistics cannot be given for the number of these cases. The incomplete contemporary records of the Church's ex officio jurisdiction make it impossible to give any reliable figures. Most entries in the Act books state merely that a person was disciplined for wrongfully interfering with the jurisdiction of the ecclesiastical courts. Such entries sometimes mean no more than that the person involved had forcibly prevented the court's summons from being delivered.<sup>69</sup> We simply

64. London Deposition book DL/C/206, ff. 171r-173r, called *negotium contemptus*.

65. *E.g.*, Canterbury Act book Y.1.4, f. 98 (1422) in which John Odle was cited "super eo quod arrestavit sive arrestari procuravit rectorem de Hamme pro eo quod ipse rector prosequeretur dictum Johannem in curia christianitatis." Compare an entry in the same Act book, at f. 93r (1422), in which John Ashelsted was summoned to show cause why he should be declared to have incurred "penam illius constitutionis accidit novitate perversa pro eo quod fecit Thomam Ketyng arrestari." The Act book does not indicate why reference was made to the constitution in one instance but not in the other.

66. REGISTRUM HAMONIS HETHE, *supra* note 24, at 214-15.

67. Act book D/C A B 1, f. 104r. There is a printed example in W. HALE, A SERIES OF PRECEDENTS AND PROCEEDINGS IN CRIMINAL CAUSES, 1475-1640, at 32 (1973).

68. Act book Y.1.2, f. 131v.

69. York Act book D/C A B 1, f. 42r (1408), in which the accusation was that the defendant "insultum fecit Ricardo Lychefeld mandatorio venerabilis capituli pro eo quod idem Ricardus ipsum dominum Willelmum (the defendant) citavit, ipsumque Ricardum insequeretur cum arco

do not know, in many cases, if the interference involved the use of secular legal process. Sometimes we can be sure. Some of the entries specifically mention that there had been attachment or arrest by royal officials,<sup>70</sup> or that a writ of *capias* or prohibition had been used,<sup>71</sup> or that chattels claimed in an ecclesiastical suit had been seized by royal officers.<sup>72</sup> More often, however, we cannot tell.

It is also difficult to ascertain the way in which the disciplinary cases came to the attention of the judges in the ecclesiastical courts. Most prosecutions probably depended on a complaint, perhaps no more than an informal notice, given by the party against whom secular process had been invoked. In form and in theory the ecclesiastical proceedings were carried out *ex officio*, that is, at the suit of the judge.<sup>73</sup> No private party sued, but there must have been some way of bringing the matter before the judge. It is natural to think that it was done by one of the litigants, and that is what the records from the royal courts suggest. Occasionally the Church court records are full enough to suggest the same thing, as in a London prosecution from 1471 in which the case was dismissed when the parties involved reached an agreement.<sup>74</sup> Most of the records, however,

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tenso et sagittis ac ad ipsum sagittavit." William confessed the attack, but alleged that he had mistaken Richard for someone else.

70. *E.g.*, Hereford Act book I/1, 75 (1493): "[P]rocuravit ipsum attachiari;" Canterbury Act book Y.1.3, f. 41v (1417): "[P]rocuravit dictum rectorem arestari." In the margin beside one such case, found in Canterbury Act book Y.1.5, f. 65r (1454), is a large hand pointing to the case. It was drawn by Francis Aldrich, registrar of the court in the late sixteenth century, evidently to support the post-Reformation court's claims to authority. I owe the identification of the scribe to Dr. William Urry, Reader in Paleography at the University of Oxford.

71. Canterbury Act book Chartae Antiquae A 36 IV, f. 90v (1347): "[I]mpetravit unum breve vocatum *capias* nomine vicarii;" Rochester, REGISTRUM HAMONIS HETHE, *supra* note 24, at 943 (1347): "[I]ncidisse in sententiam excommunicationis majoris a jure latam, eo quod quandam regiam prohibitionem ad impediendum jurisdictionem ecclesiasticam . . . impetrasti."

72. Rochester Act book DRb Pa 2, f. 108r (1439), in which the defendant was cited for causing the seizure of the horse of Richard Frowde because of a cause under litigation in the consistory court. In Canterbury Sede Vacante Scrapbook II, 71 (1294), the chattels at issue were alleged to be part of a legacy, and thus subject to the Church's jurisdiction. The defendant was alleged to have "caused them to be distrained by a lay court."

73. See A. LEFEBVRE-TEILLARD, *LES OFFICIALITES A LA VEILLE DU CONCILE DE TRENTE* 79-81 (1973); 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2250 (McNaughton rev. ed. 1961); B. WOODCOCK, *supra* note 12, at 93-102.

74. Act book MS. 9064/1, f. 58v.



tell us nothing. The source and the factual details behind these prosecutions are too often obscure. What is clear is their existence. Their use in practice as a means of defending the Church's view of its jurisdiction is not open to doubt.

The principal remedy available under these *ex officio* proceedings was to require the person summoned to desist from impeding the suit pending in the ecclesiastical court. That meant, in a normal case, stopping the secular law suit. An order, we may even say an injunction, "not to vex"<sup>75</sup> or "not to prosecute"<sup>76</sup> in the secular forum was therefore issued by the ecclesiastical judge. The offending litigant often took an express oath to obey the injunction or to renounce further use of the secular courts.<sup>77</sup> In appropriate cases the litigant was also obliged to pay the expenses incurred by the person injured by the suit in the royal courts.<sup>78</sup> Or he might have to undergo public penance. That meant a public whipping, or marching barefoot and dressed in penitential clothes in the parish procession before high Mass.<sup>79</sup> Assessment of the appropriate penalty lay in the discretion of the judge, and practice seems to have varied.<sup>80</sup> The essential element, however, was to force the guilty party, under penalty

75. *E.g.*, Canterbury Act book Y.1.10, f. 314r (1477): "Deinde iudex monuit dictum Thomam sub pena excommunicationis quod non vexeret ipsam in curia temporalis."

76. *E.g.*, Norwich Act book ACT/1 s.d. 12 November 1509: "Dominus iniunxit Thome Balle de Bettler quod non prosequatur aliquam actionem in curia seculari contra Gregorium Burnell . . . sub pena excommunicationis."

77. *E.g.*, Hereford Act book I/4, 104 (1510): "Et prestitit iuramentum de parendo iuri." See also J. SAYERS, *supra* note 9, at 255-57; Adams, *supra* note 5, at 283 n.43.

78. Canterbury Act book Y.1.1, f. 105r (1375) (one mark expenses); REGISTRUM HAMONIS HETHE, *supra* note 24, at 215 (four marks, reduced from the eight claimed).

79. *E.g.*, York Act book D/C A B 1, f. 104r (1443): "Quo sic facto dominus auditor iniunxit eidem quod tansiet coram processione in ecclesia cathedrali Ebor' per duos dies dominicales nudis tibiis et pedibus tunicaque sua singulari induta more penitentiali, necnon cotidie in eadem forma circa ecclesiam parochialem de Cave predicta." This penance was, however, remitted *ex gratia*.

80. See, e.g., JOANNES ANDREAE, NOVELLA COMMENTARIA IN LIBROS DECRETALIU, lib. 5, tit. *de poen. et remis.*, c. 3 (*Significavit*) (Venice 1581, f. 123): "Consideratis circumstantiis arbitraria poenitentia imponetur." With the penance mentioned in the text accompanying note 67 *supra*, compare a case recorded in Canterbury Act book Chartae Antiquae A 36 II, f. 5r (1329); the offender was obliged to approach the shrine of St. Thomas of Canterbury six times and make an offering of a candle of a certain value. See also AN EPISCOPAL COURT BOOK FOR THE DIOCESE OF LINCOLN, 1514-1520, at xv (M. Bowker ed. 61 Lincoln Record Society 1967).

of major excommunication, to undo the effects of his invocation of the secular jurisdiction to thwart proceedings in the ecclesiastical court.

The existence of these ecclesiastical sanctions and the use which the Church court records show was made of them in pre-Reformation England help to explain an apparent inconsistency in the record evidence. That is the disparity between the way writs of prohibition were actually treated in the Church courts and the way one finds them *described* as being treated in the plea rolls of the royal courts. No allegation appears more regularly on the plea rolls in cases involving prohibitions than disobedience to the writ.<sup>81</sup> The canon law judges were said to have spurned it. They "made light of" the royal writ. They "tore it up." They "threw it to the ground." They "fulminated" sentences of excommunication against the party introducing the writ.<sup>82</sup> The Church court records say just the opposite. They show that officials of the ecclesiastical courts obeyed writs of prohibition. This apparent inconsistency may be explained in some cases by the "two-stage" nature of the ecclesiastical reaction to the writs; that is, compliance with the writ, coupled with giving the party harmed the opportunity, in a separate hearing, to seek discipline in personam against the person who sued out the secular process. In the plea rolls, the two parts were alleged together. The "two-stage" ecclesiastical reaction was treated as a single transaction. Indeed its ultimate effect was single. If the evidence of the Church court records is considered in its entirety, the secular plea rolls may give an accurate picture of the reality.

The second situation in which the ecclesiastical courts acted affirmatively to defend their jurisdiction involved prosecutions brought against litigants who initiated in secular courts suits which belonged (according to the canonical view) to spiritual ju-

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81. *E.g.*, P.R.O. C.P. 40/346, m. 73 (1346): "[E]t ipsum Ricardum causa liberationis brevium predictorum excommunicavit;" C.P. 40/150, m. 25d (1304): "[D]ictum breve regium postquam illud admiserat a se contemptabiliter proiecit et illud inspicere vel a prosecutione sua in placito predicto . . . desistere penitus recusavit in Regis contemptum manifestum."

82. *E.g.*, P.R.O. C.P. 40/149, m. 195 (1304): "[C]um idem Henricus breve regium de prohibitionis ex parte domini Regis eidem Rogero porrexit . . . idem Rogerus mandatum Regis perinpendens in hac parte breve illud fregit et dilasteravit et ad terram proiecit et in ipsum Henricum ratione brevis Regis sibi porrecti sententiam excommunicationis sepius fulminavit et nichilominus placitum illud tenuit in curia Christianitatis."

risdiction. The offense alleged was not interference with an existing cause in the Church courts. It was suing in the wrong court. These prosecutions represent a rough ecclesiastical equivalent of royal writs of prohibition. For example, at Canterbury in 1456 Thomas Gylnot was summoned before the diocesan court "because he initiated and prosecuted a certain testamentary cause which belongs to the ecclesiastical forum in a secular court."<sup>83</sup> At York a prosecution was brought against a defendant because he had "impleaded [a cleric] in a secular court about a covenant breached [concerning] tithes."<sup>84</sup> In 1342 William Orable was prosecuted for withholding tithes and also for threatening to sue for the chattels involved in a secular forum.<sup>85</sup>

The result of such a prosecution was basically no different from that which followed most *ex officio* prosecutions for using the secular courts to impede ecclesiastical jurisdiction. In the 1456 case from Canterbury, for instance, Gylnot was ordered to withdraw the suit from the secular court under pain of excommunication and was directed to pay the other party's expenses.<sup>86</sup> Again it is impossible to tell how most of the cases came to the attention of the ecclesiastical court, except to suppose that many were initiated by a private complaint. In one case in 1471 the record specifically noted that the suit was prosecuted at the promotion of the monks of St. Augustine's Abbey, who were probably originally sued in the secular forum.<sup>87</sup>

It is worth pointing out that these *ex officio* prosecutions were far more efficient than royal writs of prohibition. The ef-

83. Act book Y.1.5, f. 109v: "Thomas Gylnot de parochia de Faversham ad dicendam causam quare puniri et excommunicari non debeat pro eo quod ipse Thomas Gylnot quandam causam testamentariam et ecclesiasticam que ad forum ecclesiasticum pertinet in foro seculari agite et prosequitur."

84. York Act book D/C A B 1, f. 13v (c. 1400): "[I]mplacitavit dictum dominum Johannem in curia seculari super convencione huiusmodi per ipsum dominum Johannem violata pro eo quod certas oves ad decimam quadragesimalem pertinencias . . . in curia seculari predicta obtinuit et recuperavit."

85. Canterbury Act book Chartae Antiquae A 36 IV, f. 57r: "Wilhelmus Orable parochianus dicte ecclesie de Cranebrok denegat solvere decimam silve sue cedue . . . asserens se velle fatigare abducentes huiusmodi decimas in foro seculari." He submitted and swore not to "fatigare" the vicar and to pay arrearages.

86. Note 83 *supra*: "Fatetur quod prosequitur et habet ad subtrahendum causam a curia seculari sub pena excommunicationis et satisfaciendum expensis." These expenses were taxed at 2s.

87. Canterbury Act book Y.1.11, f. 123v: "Johannes Pocul de Chartham notatur quod violavit libertates ecclesiasticas in tantum quod initiavit accionem spiritualem in temporalem; citat' per Nedam ad promocionem abbatis et conventus sancti Augustini."

fectiveness of the royal courts was considerably hindered by the procedure used there. Professor Adams' Article details the difficulties. For example, if the writ prohibited a plea of debt, whereas the real cause of action involved theft of chattels, a different but equally secular plea, the writ availed nothing.<sup>88</sup> There were many other such difficulties.<sup>89</sup> The ecclesiastical prosecution did not labor under them. It did not require delivery of a writ correctly describing the prohibited action. Its outcome did not depend on the vagaries of wager of law or jury trial. Rather, it was brought under a procedure which allowed the judge to interrogate the accused under oath to discover what he had done. If it turned out that the accused had brought a suit belonging to ecclesiastical jurisdiction in the royal courts, he had to withdraw it or suffer excommunication.

Even with these procedural advantages, however, the evidence of the court records suggests that this second sort of ecclesiastical sanction was not used as frequently as the first. There are fewer cases of ecclesiastical prosecution for bringing a spiritual plea in the secular court than there are prosecutions for using secular process to impede a case pending in the Church courts. There are more receipts of royal prohibitions recorded than there are instances of its spiritual counterpart. Those in which the subject matter is recorded cover only the tithe and testamentary causes. This suggests that if a litigant chose to bring a case involving a benefice or contract in the royal court, the ecclesiastical courts would not excommunicate him for doing so.<sup>90</sup> The Church courts might entertain such actions. They would not, in practice, interfere if a litigant went to the royal court instead.<sup>91</sup> Compared to the immediate problems raised by

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88. See Adams, *supra* note 5, at 283 n.49.

89. *Id.* at 277-85; Flahiff (pt. 2), *supra* note 10, at 249-74. *But cf.* Milsom, *supra* note 9, at cc.

90. A preliminary sample of cases on the late medieval royal court plea rolls also suggests that where any interference by canon law courts with royal court jurisdiction over advowsons was alleged, the interference was usually alleged to have taken place at the Roman court, not in England. *E.g.*, P.R.O. K.B. 27/342, Rex m. 29 (1345), in which the prebend of Hovedon was at issue, and in which it was alleged that James Multon, "machinans iudicium predictum in curia Regis predicta rite redditum et eius executionem enervare, . . . traxit in placitum extra regnum Regis Anglie et adhuc trahit in Regis contemptum ac iuris corone Regis Anglie preiudicium." See generally HEMINGBY'S REGISTER 14-36 (H. Chew ed. 18 Wiltshire Archaeological and Natural History Society, Records Branch 1962).

91. See F. MAITLAND, *supra* note 57, at 64-65. The position taken

interference with suits already in ecclesiastical hands, this may have seemed a lesser problem. It was more theoretical, a matter of ideology, while interference with pending suits kept justice from being done. We can say only that there was a possibility of prosecution of litigants who brought in a secular court cases thought to belong in the ecclesiastical forum. How effective that possibility was in deterring litigants from doing so is a matter of speculation.

### III. CONCLUSION

A summary of the evidence taken from the records of the Church courts relating to conflicts of jurisdiction is easily made. The canon law did not oppose the commands of royal justice directly. The Church courts obeyed a writ of prohibition when they received one. They did not excommunicate the King or his judges for hearing cases which belonged, according to the canon law, to spiritual jurisdiction. They did not impose interdicts on the lands of the King.<sup>92</sup> They did, on the other hand, make available remedies operating in personam against litigants who used the secular courts to interfere with the exercise of canonical jurisdiction.

We might analogize the situation to Chancery procedure where common law and equity conflicted. That is, Chancery made no attack on the common law rules. The Chancellor would not attempt to keep the common law judges from enforcing the restrictive rules of that law. He would, however, enforce a supplementary system which imposed a duty on one who sought to take advantage of a common law rule in order to work injustice.<sup>93</sup> Something like the same thing happened in the Church courts. A litigant might make use of the royal courts, but if he did so to frustrate justice as administered in the ecclesiastical courts, he could be proceeded against independently. He faced the added burden of excommunication. The effect of imposing this

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by the French *Parlement* was analogous; see O. MARTIN, *supra* note 54, at 237-40.

92. An interdict was an order suspending participation in the sacraments by all Christians in a given area. It was subject, however, to a number of special rules and exceptions. See generally Gloss to Clem. 2.2.1, in *CORPUS JURIS CANONICI* (Rome 1582, cols. 90-91); Jombart, *Interdit*, in 5 *DICIONNAIRE DE DROIT CANONIQUE*, col. 1464. The interdict was apparently used, at least occasionally, in France as part of ordinary canonical procedure. See O. MARTIN, *supra* note 54, at 243-47.

93. See J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 42 (1971); Barton, *Equity in the Medieval Common Law*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS* 139, 150 (R. Newman ed. 1973).

on the litigant who used the secular courts was to blunt the force of writs of prohibition and other process of the royal courts.

But a hard question remains. Did the injunctions of the ecclesiastical courts have any force? The Chancery had considerable powers of enforcement behind it. The Church courts had only excommunication. Was this spiritual weapon effective? Unless it was, the sanctions described above were next to worthless. The court records supply no trustworthy answer to this hard question of effectiveness. Many of the entries in the Act books break off before conclusion of the suit. And even where the accused confessed and submitted to the court, we cannot be sure that he ultimately obeyed the court's injunctions. Perhaps he later had recourse to the royal courts to impede enforcement of the ecclesiastical sentence. There is no way to be certain.

At a distance of several centuries, it is difficult, perhaps impossible, to grasp the contemporary attitude towards excommunication. About its efficacy in medieval England opinions differ.<sup>94</sup> But there are two clear facts which suggest the utility of the ecclesiastical sanctions. One is that, even if the excommunicate did not fear the spiritual loss the sentence entailed, he was subject to a number of secular incapacities because of it. He was excluded from pleading in secular courts.<sup>95</sup> His company was to be shunned by all Christians.<sup>96</sup> In England he could be arrested and imprisoned if the bishop "signified" to the King that he had remained unrepentantly excommunicate for 40 days or more.<sup>97</sup> Excommunication was, in short, an unhappy position from which an ordinary man would seek to be released. The second fact is the real vitality of the Church courts in the late medieval period. Plaintiffs continued to use them to enforce their claims. The Church courts continued to exercise jurisdiction even in areas where prohibitions lay. The evidence from the Act books and several recent studies testify to this vitality.<sup>98</sup> This

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94. Compare, e.g., Hill, *The Theory and Practice of Excommunication in Medieval England*, 42 *HISTORY* 1 (1957) with Kelly, *The Submission of the Clergy*, 15 *TRANSACTIONS ROYAL HISTORICAL SOCIETY*, 5th ser. 97, 108 (1965).

95. H. BRACON, *supra* note 3, at f. 426b.

96. See, e.g., HOSTIENSIS, *SUMMA AUREA*, tit. *de sent. excom.*, no. 11 (Venice 1574, col. 1902): "Effectus autem maioris excommunicationis est, ut nullus Christianus cum tali participet."

97. See generally F. LOGAN, *supra* note 9.

98. See, e.g., Bowker, *Some Archdeacons' Court Books and the Commons' Supplication against the Ordinaries of 1532*, in *THE STUDY OF MEDIEVAL RECORDS* 282 (D. Bullough & R. Storey eds. 1971); Donahue, *supra* note 9; Helmholz, *Canonical Defamation in Medieval England*, 15

must be taken as a sign of the effectiveness of the ecclesiastical sanctions. There is evidence to the contrary, but the evidence of the effectiveness of the Church courts should not be easily or completely disregarded.

In sum, the evidence suggests that the Church courts placed a real weapon in the hands of litigants whose interests coincided with the defense of the ecclesiastical jurisdiction. They were not helpless. The use made of the weapon must have varied considerably from case to case, according to the resources of the litigants and even according to the sentiment of the community. It may be that, in practice, customary rights of jurisdiction, dependent on what Professor Arnold has called "shared societal assumptions," had more to do with determining the boundary line between jurisdiction of Church and State than did the apparently preemptory commands of the writ of prohibition.<sup>99</sup> Of course, it is important to remember that there were many areas of harmony and cooperation between the two court systems. But even in terms of actual cases of conflict, writs of prohibition ought to be viewed as only one weapon used to determine particular disputes. They had a real force in the Church courts. That is evident. But the testimony of the court records indicates that the courts Christian had weapons of their own. They show how much room the resources provided by the two court systems left for harrassment, bargaining, and compromise.

The conclusions drawn from the record evidence do not diminish the value of Professor Adams' Article. They do supplement it. They fill out our knowledge of how writs of prohibition were treated in the Church courts themselves. And they suggest that it would be a mistake to draw too simple a picture of legal relations between Church and State in medieval England. All the advantage was not on one side. It is wrong to pretend that the writ of prohibition alone determined the jurisdictional boundary. A great deal depended on what use individual litigants chose to make of the resources provided by Church and King. If the resulting picture is confused, it accurately represents the reality. That the two court systems could have existed

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AM. J. LEGAL HISTORY 255 (1971); Morris, *A Consistory Court in the Middle Ages*, 14 J. ECCLESIASTICAL HISTORY 150 (1973); Schoeck, *Canon Law in England on the Eve of the Reformation*, 25 MEDIAEVAL STUDIES 125 (1963).

99. See Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, out of Mind*, 18 AM. J. LEGAL HISTORY 267, 279 (1974).

together for so long without greater friction and without reaching a final resolution of the question of jurisdictional competence is a tribute both to the weakness of all government in the Middle Ages and to the unwillingness on the part of either side to push theoretical claims to their logical conclusions.