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Their Litigious Society

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THE WHILTON DISPUTE, 1264-1380: A SOCIAL-LEGAL STUDY OF DISPUTE SETTLEMENT IN MEDIEVAL ENGLAND. By *Robert C. Palmer*. Princeton, N.J.: Princeton University Press. 1984. Pp. xxii, 295. $28.50.

This is an unusual essay in mediaeval legal history; so far as I am aware no other scholar has attempted anything quite like it. Between the 1260's and the 1380's, and perhaps for a longer period, a series of interconnected disputes arose over property rights in the Manor of Whilton, located in the Midlands of England in the county of Northamptonshire. In the late fourteenth century a lawyer transcribed seven documents connected with these disputes into a manuscript volume, which is now in the British Library. Who he was is not known, but presumably he was professionally involved in some way in the matter, and these texts were needed for the purpose of litigation, or giving legal counsel. Mr. Palmer came across this collection, which excited his curiosity; he decided to write a history of the controversies involved and the legal procedures and forms through which the conflicting claims and interests of the parties were expressed and mediated. The story is the more fascinating because at bottom this was one single continuous dispute, transmitted down through the generations in the families on either side, and becoming more complex as time passed.

The trouble all began in about 1264. One William de Whelton (*i.e.*, Whilton) had four manors, and four sons. For some reason or other he wanted his second son, Nicholas, to succeed to his principal manor of Whilton, which he held in fee by knight service. Given primogeniture, and a world in which wills could only dispose of goods and chattels, not land, the manor would pass on his death to his eldest son, Roger, unless he did something in his lifetime to prevent this. So he granted the manor in fee to Nicholas, making an arrangement whereby Nicholas gave him back a life estate.[1] Unhappily this trans-

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1. Professor Palmer recounts that this transaction took place in four stages. First, William delivered seisin by putting Nicholas' hand to the door hasp of the chief dwelling of the manor, and by giving Nicholas the branch of a cherry tree, signifying his son's possession of the dwelling and of the fruits of the land. Second, Nicholas attempted to establish seisin by using the manor as his own in various ways — fishing, burning wood, taking fealty from the tenants — while his

action (which could have been seen by some as a dirty trick on Roger or as a tax dodge harmful to William's feudal lord) was, at least arguably, imperfectly executed,[2] with the consequence that there was doubt as to whether, the conveyance having failed entirely, William still held the property in fee, or, the conveyance being valid, Nicholas held the fee subject to his father's life estate. Worse was to follow, for William and his son supported the rising of Simon de Montfort, ending up on the losing side at the battle of Northampton; they were captured. The manor became forfeit to King Henry III, who gave it to his loyal supporter, Thomas de Turberville. Not long after, however, the King came to a compromise with the former supporters of de Montfort, who was now dead. This compromise was embodied in the Dictum of Kenilworth.[3] The miscreants were to be allowed to buy back their lands at substantial prices, but at less than market value.

But whose lands were now involved? Nicholas had died before his father, leaving a widow, Joyce, and an heir, Felicia. Joyce was the daughter of one William de Zouche. Then William de Whelton also died; his heir was Roger. Depending upon the view taken of the transaction in 1264, either brother's family might have the best claim. If the transaction of 1264 was valid, the fee passed through Nicholas, if not it remained in William and now passed to Roger. And so the stage was set for a complex legal dispute. Roger de Whelton won the first match, his claim being vindicated by a jury in preference to that derived through Nicholas.[4] A sort of uneasy peace was temporarily established in 1270 by a compromise transaction between Roger and Joyce's father, William de Zouche. But this transaction, though favourable to mother Joyce, was at least potentially bad news for her daughter, Felicia, Nicholas' only child and heir. She was still a minor, but her value on the marriage market was at issue, and so the dispute became more complex; a rift was established between mother and daughter. Those familiar with family life, which in some respects has changed little,[5]

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father stayed away for fifteen days. Third, William returned and Nicholas granted him a life tenure. And lastly Roger, Nicholas' elder brother, consented to the grant to Nicholas by writing out a quitclaim. Pp. 31-32.

2. The most serious alleged defect in the transaction was that Nicholas' "actualization" of seisin had been inadequate. While Nicholas spent a sufficient amount of time in sole possession of the land, there was no evidence that he had the land plowed, that he received rent from the tenants, or that he discharged his father's bailiff and replaced him with his own man. These were all customary ways of showing that one had title. P. 32.

3. An edited version of the Dictum of Kenilworth appears at pp. 35-36.

4. The limited jurisdiction of the court to decide questions arising under the Dictum of Kenilworth meant that the jury verdict here did not truly settle Roger's dispute with his brother's heir. Probably all that was decided by the jury's verdict was that Roger de Whelton was the person privileged to redeem the estate under the provisions of the compromise. Pp. 49, 51.

5. In other respects, the potential for serious discord between mother and daughter may have been even greater at this time. In accord with feudal custom (and the lord's financial advantage), Felicia was taken from her natural mother on the death of Nicholas and placed with her guardian, one Joan de Stuteville, from whom William had held his estate. Thereafter, Joyce had noth-

will know what that means. Mother Joyce remarried one Robert de Mortimer in about 1273, so the rift was now between daughter and step-father. The conflict was expressed in two actions of novel disseisin. The first was inconclusive, but Felicia won the second, only to be deprived of the fruits of victory late in 1275 when Robert succeeded in attainting the assize jury[6] which had favoured her claim. Game and set to the Mortimers, but not the match. For Felicia reopened the claim by suing out a writ of entry. She won in 1285, the decision in the earlier attaint proceedings not being thought in any way to conclude the question of title. The Mortimers replied by challenging the judicial ruling on this point by writ of *certiorari*. By now Felicia had married and thus involved one Philip de Montgomery, so the battle was now between the Mortimers and the Montgomerys. The former won this set. Felicia and Philip doggedly returned to the attack with a writ of entry, which they won. And at this point Joyce and Robert gave up the struggle; Robert died in 1287, and Joyce in 1290.

A temporary but only partial peace descended on the Manor of Whilton, partial because Felicia and her husband set about the business of establishing themselves as effective holders of the manor. This brought further law suits. Some, such as an action of replevin against the Prior of Daventry, were not directly connected with the main dispute. Some were, as when Felicia and Philip de Montgomery attacked the title of Nicholas and Alice Lee, who had entered the manor as tenants of their enemies. Failing in the courts, they apparently simply threw the Lees out. The latter replied by assize of novel disseisin, and what became of them in the end Mr. Palmer has not been able to discover. Violence and litigation did not exhaust the means employed by Felicia and Philip to consolidate their position. They now established an alliance with no less important and powerful an individual than Robert Burnel, Edward I's Chancellor, and the mastermind behind his programme of legislation. By grant and regrant they changed their estate in the manor into what would soon be conceived of as an estate in fee tail special, with a remainder in tail general and a reversion in fee in Robert Burnel. So Burnel now had an interest in defending this title. Robert Burnel died in 1292, and in 1295 Hugh de Mortimer, who was Robert and Joyce's son and heir, reasserted the Mortimer claim in two actions, one being a writ of entry relating to one third of the property, the other a writ of right claiming the rest. The writ of entry was not pursued with any vigor; the writ of right was pursued until proceedings were stayed, by Royal intervention, and ordered not to be

ing more to do with Felicia. As Professor Palmer observes, "[t]he legal rules surrounding military tenure did little to foster the growth of a strong relationship between a widowed mother and her heiress daughter." P. 39.

6. For a description of this rather cumbersome, quasi-appellate procedure, and a reproduction of the attaint in *Mortimer v. Whelton*, see pp. 77-83.

resumed until 1307 at the earliest.[7] Thus was Felicia given at least a temporary respite from the dispute, and she also improved the shining hour by marrying again in 1298, her new husband being Richard de Nevill; the Nevill family were now included. Felicia died in about 1311, secure in the Manor of Whilton.

It was some years before the dispute revived again. By her first husband, Philip de Montgomery, Felicia left a daughter, Anne, and in 1305 or so Anne had married an unpleasant character, John de Swynnerton, a rapist, thereby involving his family in the story. By her second marriage, Felicia left a son, James de Nevill, also of course interested. Meanwhile members of the opposing faction had not been idle. Hugh de Mortimer had been prudently poisoned by his wife Matilda; she was shortly afterwards pardoned by the King, who presumably thought for some reason or other that Hugh had it coming to him. Hugh left three children, the eldest of whom, Joan, reopened the dispute in 1321 by suing out yet another writ of entry. An uneasy peace was established, however, in 1330, by a compromise involving an elaborate re-adjustment of claims and by a marriage between James de Nevill and a lady from the Mortimer faction who was, to confuse matters further, called Joan Cornwall. She was Hugh's granddaughter. The newlyweds were given an entailed interest jointly in the Manor of Whilton, over which their families had been feuding for sixty years. The serious business of marriage was not of course at this period confused with romance.

In spite of this marriage and compromise the dispute rumbled on, for the compromise had not catered to the interests of the rapist John de Swynnerton. His son, also John, commenced litigation in 1376, and his grandson, yet another John, pursued the claim of the Swynnertons again in 1379 by writ of formedon in the descender.[8] By then Joan de Nevill, who had survived her husband (but not by using the drastic technique employed by Matilda) had sold the property, and the marriage had left no surviving children. The purchasers were John Holt, a pleader, and John, the parson of Whilton. They put the property in the hands of feoffees to uses or trustees as we would now call them. The Swynnerton claim was settled, John de Swynnerton, III, being bought off with a reversion in fee simple. But unhappily John Holt, who had become a Justice of the Court of Common Pleas, was condemned to death by the Merciless Parliament in 1388, ending up spared but in exile in Ireland. His property became forfeit to the Crown. He was in the end fully pardoned, and the parson must have died sometime before Holt's own death in 1418. It was the Swyn-

7. This was to allow certain of the parties who were deemed to have a present interest in the estate to attain the age of majority before the case would be resumed. Pp. 160-61.

8. A hypothetical form of this writ, which was specially designed for those claiming a fee tail, can be found at p. 195.

nertons, then, the descendants of a fourteenth-century rapist, who at last acquired the Manor of Whilton, which they held until the mid-seventeenth century. Whether the dispute was continued in some form or another in the fifteenth century Professor Palmer has not been able to discover. It would be surprising if it was not.

It will be seen from all this that life in mediaeval England was not dull, and Mr. Palmer tells the elaborate story, in my account much simplified, with great clarity, explaining as he goes the precise significance and effects of the various legal procedures and forms employed. The format of the book was dictated by the desire that it should be usable as a teaching book. This has imposed simplicity on the style, and led the author to disperse throughout the text the relevant documents and records as they feature in the story, the texts all being translated. Some of these texts are original, but where originals have not been found or do not exist, appropriate forms have been constructed from other surviving examples. Mr. Palmer has also included numerous other documents (for example extracts from statutes) in appendices, and provides a useful glossary of "legal" terms. This technique goes back to Bishop Stubbs' well known *Select Charters and Other Illustrations of English Constitutional History,*[9] and its legal historical twin, K.E. Digby's *An Introduction to the History of the Law of Real Property with Original Authorities.*[10] What is new, however, is the application of this method to the story of a prolonged property dispute. A student who works his way through this book will learn a considerable amount about the mediaeval land law, for Mr. Palmer seems to have a real flair for clear explanation, but will still find the going easier if he also uses one of the standard elementary introductions to the subject.

Mr. Palmer has not, however, simply been concerned to tell and explain a story. He has other aims, which surface in his Preface, his Introduction and Conclusion. In particular he is concerned, first, to write social history, and to discuss the workings of the law in its social context, and, second, to relate legal history to the growth of the state as an institution.[11]

So far as the first aim is concerned the mediaeval legal historian confronts severe problems. In the main he is necessarily confined to using written texts as sources, although as to the Manor of Whilton it might be that some historical information could be derived from archaeology, from field and place names, and so forth; I do not know.

9. W. STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST (8th ed. 1900).

10. K. DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY WITH ORIGINAL AUTHORITIES (5th ed. 1897).

11. *See generally* pp. 3-5, 210-20.

In all events Mr. Palmer's evidence is purely textual, and it is a sad fact that in earlier stages of society writing is principally employed for administrative or bureaucratic purposes. When deciphered the Minoan script known as Linear B produced not epic poetry, but boring stock inventories, and the earliest English text consists of the laws of Ethelbert, not his diary or love letters. In any event only clerks, that is clerics, could then write, Christianity and high technology being intimately associated. So too, mechanisms existed to ensure the preservation of legal and administrative records; they did not exist for other types of written material. Only in later periods, for example in the nineteenth century, are there many sources of historical information which can be used to place formal legal records into a social context, to explain the ways in which law and life interacted, and to make sense of legal transactions and events which otherwise would be scarcely comprehensible. Indeed, much work of this type has been published, and it is surprising that Mr. Palmer claims, in relation to his subject, that there is "nothing that discusses the law of property in a properly social instead of a doctrinal framework" (p. xiii), unless he is simply saying that those who concentrate solely on doctrinal explication do what they set out to do. For the mediaeval period it is only too frequently the case that little or nothing exists that can be used by way of source materials to supplement the legal texts; they are all we have. The very fascination of legal history for some, such as the late Professor Plucknett, lay in this fact.[12]

Of course it is possible, as Mr. Palmer's book shows, to try to explain why the law was used in this or that way, and to make sense of records which in their very nature must give a distorted vision of mediaeval life. But his book also illustrates how difficult it is to understand what is going on when the only direct evidence consists of a record of a formal legal transaction. Thus, the Whilton dispute is presented as starting with a transaction in about 1264, its precise date being unknown, in which William de Whelton attempted to transfer the inheritance in the manor to his second son, himself retaining a life estate. Mr. Palmer is on sure ground when he explains what would have happened if William had simply let the law take its course — all his landed property would pass by primogeniture to his eldest son and heir. That was the law. But beyond that everything becomes much more speculative. It may well be that Mr. Palmer is right in suggesting that the reason for the transaction was a projected marriage with Joyce la Zouche, which would be easier to negotiate beneficially if Nicholas had assured prospects. But it is quite impossible to be sure, and the same point may be made as to many other of the events set out in the story. Why Matilda murdered her husband, if indeed she did,

12. *See, e.g.*, T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY (1922).

or why she was pardoned, appears to be quite unknown. Or, to take another example, how did it come about that the parson of Whilton joined with a prominent lawyer in purchasing the manor in about 1375? Why did Joan de Nevill sell it, and for how much? What became of the parson anyway? Was he some relative? Assuming, as I think we must, that Mr. Palmer has, in this careful study, used all the more readily available evidence (human life being much too short to search comprehensively), these and many other questions must either remain unanswered, or be handled with intelligent, informed speculation. The problems at one level are problems of detail; individual incidents remain to some degree baffling. But one of the particular merits of Mr. Palmer's case study of this prolonged dispute is that it succeeds in advancing understanding of certain equally puzzling general features of the legal history of the period. One such problem is the scope of litigation and its relationship to crude violence, on which Mr. Palmer comments interestingly in his Introduction, though the figures he publishes show weird disparities between the scale of litigation in different counties, and raise further problems. Another is the function of litigation, and its relationship to other mechanisms for the resolution of disputes and the pursuit of family power; it will be recalled that one technique employed to resolve the dispute, which would I think hardly arise in modern corporate litigation, was a marriage between the families concerned. Here there may be room for comparative work and for the use of anthropological material. It is not a demerit, but rather the contrary, that Mr. Palmer's book raises perhaps more questions than it solves, and provokes a reader to consider how some of the issues raised might perhaps be profitably taken further.

Mr. Palmer's ideas on the relevance of this kind of study to the evolution of the state seem to me to be less well developed, and to give rise to analytical problems about the conception of the state. Perhaps some of the difficulty here lies in the relatively brief exposition which those ideas receive, and the lack of any real attempt to relate them to the story the book is primarily concerned to tell. Mr. Palmer argues that "[t]he growth of the state . . . was not primarily a constitutional, administrative, or intellectual phenomenon: it was a social development" (p. 3). He goes on to make the point that legal institutions profoundly modified social behaviour, in that individuals adapted their behaviour to secure desired ends. The law was not simply observed, but used.[13] In the language of modern jurisprudence, law is facilitative, and what it facilitates may be manipulation to secure a variety of ends.

Mr. Palmer relates this point to a second thesis, according to which law became progressively divorced from its social origins. Put shortly, law and life, originally in some sort of harmony, became di-

13. *See* pp. 4-5.

vorced, so that the relationship of one to the other became distorting.[14] I suppose a modern example of the sort of phenomenon to which Mr. Palmer is referring is the bizarre behaviour which individuals pursue in order to minimize their tax liability; I recall a conversation once with a wealthy individual who explained to me his deep sorrow at having to move to a tax haven to live.

The first of these points, that law was "used" as often as it was "observed," is no doubt well taken, though the same point could surely be made of law at any time in any society; social institutions can always be manipulated. The second, presented by Mr. Palmer with some hints of a golden age in the past, merits a much fuller discussion than it can receive here. The idea is in some degree related to the contrast some make between "imposed" law and "grass roots" law, the latter being a rather romantic notion, and one which is difficult to apply to a society which has developed any degree of centralised hierarchical power. But whether there is anything in that idea or not, the story of the Whilton dispute, as told here, does not at all obviously illustrate any transition in the nature of the common law; we begin and end with legal manipulation, and anyone who follows the tortuous course of litigation in modern America may be forgiven for thinking that nothing much has changed since.

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14. *See* pp. 15-17.