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The first history of ecclesiastical jurisdiction in England covers the period up to the removal of principal subjects inherited from the Middle Ages. Probate, marriage and divorce, tithes, defamation, and disciplinary prosecutions involving the laity are all covered. These all disappeared from the church's courts during the mid-nineteenth century and were taken over by the royal courts. The book traces the steps and reasons – large and small – by which this occurred.

R. B. Outhwaite is a late fellow of Gonville and Caius College, Cambridge. He devoted much of his scholarship to the history of ecclesiastical jurisdiction of England.

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FOREWORD

R. H. Helmholz

This account of the jurisdiction of the English ecclesiastical courts was the last work written by R. B. Outhwaite before his early death from cancer in the spring of 2005. It completed one part of his scholarly career. The book also fills a gap in knowledge. Many treatises on the law of the Church of England contain a historical dimension and general treatments of English law sometimes have a little to say about the ecclesiastical courts. But most of these works approach the subject from the outside, using evidence from the common law to describe what happened in the spiritual forum. That is necessarily second-hand evidence. And despite some forays into the history of the courts of the church after their restoration in the 1660s, such as the two excellent books written by Professor Stephen Waddams of the University of Toronto, there has been no overall account of the history of ecclesiastical jurisdiction itself. Little has been written from the perspective of the general historian, that is, the historian who seeks to trace the fate of the courts as they found their way forwards after the Elizabethan Settlement and then, later on, as they approached the demise of their jurisdiction over the laity in the mid-nineteenth century. Brian was that historian, and this is the gap his work fills.

My part in the production of this book has not been significant. I did both enjoy and benefit from a friendship with Brian, having had the good fortune to be elected to a fellowship at his college, Gonville and Caius, during the year I served as Goodhart Professor in Cambridge. I also

knew something about the ecclesiastical courts from my own work on their history prior to the 1640s. For these reasons it fell to me to read through and undertake some editing of the typescript he left at his death. I have corrected a few mistakes, occasionally amended the author's prose in the interest of clarity and added a few details, bibliographic and factual. However, this remains Brian's book and accomplishment throughout. I have done nothing – at least nothing consciously – to alter his conclusions or approach. The only real change of which I am conscious is to have made his language slightly more 'legal' in tone and substance.

I am sure that Brian himself would have made additions and changes had he been spared time to do so. Indeed, he left notes for a final chapter, in which he intended to sum up and clarify his conclusions. He particularly wished, for example, to stress the relative importance of the instance side of ecclesiastical jurisdiction. Even before the end of the seventeenth century, it was jurisdiction in contests between private parties about tithes, testaments and defamation that provided the great bulk of the work (and income) for the English civilians, or ecclesiastical lawyers. The *ex officio* side, prosecutions relating to immorality or religious dissent, actually played a smaller role in the maintenance of the church's place in the history of English law than some histories of the so-called bawdy courts suggest. Of course, it is true that court officials also profited from *ex officio* prosecutions. Those prosecuted had to pay what we would call 'court costs'. But Brian thought that too much attention had been paid to the 'bawdy' side of ecclesiastical jurisdiction, and he wished to stress this corrective point.

Brian's notes show that he would also have added to his conclusions about the several ways in which the jurisdiction of the courts was effectively diminished. Prior to the nineteenth century, little was lost as a direct consequence of parliamentary legislation. Such restrictive measures as were introduced usually removed jurisdiction that had largely disappeared anyway. Nor did he think that emphasis

could rightly be laid on efforts from common lawyers to restrict the scope of ecclesiastical jurisdiction. Instead, he wished to stress change in attitudes among those affected by the system. Perhaps he left something out by not taking up the legal mechanisms by which ecclesiastical jurisdiction was curbed, but what he wrote is nonetheless helpful – as for example in his discussion of the unwillingness of churchwardens to present men and women for discipline even though they were required to do so in the official sources of the day.

The process by which Parliament eventually did dismantle the church's existing jurisdiction in the mid-1800s is also a theme to which his notes show he would have returned in concluding. Cases involving scandals among the clergy and long-repeated complaints against the fees exacted by the courts obviously played a part. But these were not new. They can be found in virtually every period since the courts were established in the second half of the thirteenth century. However, the pressure for reform was building in the first half of the nineteenth. The church no longer maintain its claim to the allegiance of virtually the entire populace. Change was 'in the air' in any event. The process of parliamentary manoeuvring by which it came is a subject on which Brian had valuable things to say. Most of them are in fact mentioned in the final chapters of this book. The initial strategy – wholesale reform – proved less effective than piecemeal changes. He shows the gradual process by which this lesson became clear to participants. Still, it would have been better to have had Brian's more general reflections on this topic.

No one – least of all Brian Outhwaite – would claim that this book is the final word on the subject. It has little to say, for example, about the careers and works of the English civilians, some of whom are well worth fuller study. It has even less to say about many of the legal technicalities attending, say, the law of last wills and testaments or the working of Lord Hardwicke's Marriage Act. But what it does, it does very well. It presents a clear picture of what

happened to the several heads of jurisdiction exercised by the courts of the church from time immemorial as they passed into modern times. Brian's fair-minded examination, found in the first half of the book, of the work by other scholars who have drawn conclusions from the court records is itself a useful advance in scholarship. He brought to his assessment a sophisticated understanding of the economic forces that affected the exercise of eccesiastical jurisdiction. His notes suggest that he meant to go further with the evidence presented in this book, discussing the wider question of whether eighteenth-century England can accurately be described as an *ancien regime*. He thought the history of ecclesiastical jurisdiction in England had a bearing on it. This would have been a worthwhile discussion, I have no doubt. We can now only lament that he did not have time enough to complete it. But we can also be glad that this book exists. It has been an honour for me to have had a hand in securing its completion.

PREFACE

As executor for this book, I wish, on behalf of the Outhwaite family, and on my own account, to express gratitude to Professor Richard Helmholz, Ruth Wyatt Rosensen Distinguished Service Professor of Law at the University of Chicago, for taking editorial charge of Brian Outhwaite's manuscript, and to Cambridge University Press for expediting its publication. My only contribution has been the index.

Brian and I were professional colleagues, relations by marriage, and close friends and travel companions – going back over forty years. I read his splendid *Scandal in the Church* shortly after it came out in 1998, Brian presenting it to me as 'a diversion'. I later heard from him about his more general work on the English ecclesiastical courts. When he was diagnosed with prostate cancer, his labours on the volume, unsurprisingly, faltered; and, with a view to gaining some external encouragement in the new circumstances, he sent the incomplete manuscript to CUP in July 2004. The Press's reaction, based on two readers' reports, was broadly positive, but not conclusive. When Brian received a further, now terminal, prognosis in January 2005, I asked him whether he still had plans for the book. His reaction was entirely dismissive: partly through an urgent reordering of priorities, partly through a genuine modesty concerning the worth of his contribution. It was only in late March that, unprompted, he passed the typescript, with attendant correspondence, into my care. I read it, with a decidedly non-expert eye, and a week or so later discussed with him

how we might proceed. He was able, with his wife Christine's help, to convey clear agreement and disagreement with the proposals offered. Brian died the following day.

I communicated immediately with Professor Helmholz in Chicago, as Brian had suggested that he would be the best person to carry the project forward. He replied at once to express, without proviso, his willingness to take charge. It was a fine example of a warm-spirited international academic community at work. Learning that Professor Helmholz would, specifically, be undertaking corrections and elucidations, as well as writing a foreword, CUP – in the persons of Professor Sir John Baker, the Legal History Series Editor, and Finola O'Sullivan, Publisher, Law – declared a ready willingness to proceed.

Brian loved Cambridge and his college, Gonville & Caius. He would have been delighted to know that CUP would be presenting the book to the public. He would also have been gratified to learn of Professor Helmholz's high valuation of his final work and unconditional commitment to its completion.

W. M. Mathew
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TABLE OF PARLIAMENTARY STATUTES

ABBREVIATIONS

AJLH	*American Journal of Legal History*
CJ	*The House of Commons Journals*
DRO	Derbyshire Record Office, Matlock
EHR	*English Historical Review*
JEH	*Journal of Ecclesiastical History*
LHR	*Law and History Review*
LJ	*The House of Lords Journals*
LPL	Lambeth Palace Library, London
LRO	Lichfield Record Office, Lichfield
PD	W. Cobbett, *Parliamentary Debates, 1812–20*
PP	*Parliamentary Papers*
SCH	*Studies in Church History*
TRHS	*Transactions of the Royal Historical Society*

CONTENTS

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THE ECCLESIASTICAL COURTS: STRUCTURES AND PROCEDURES

People's lives are regulated by custom and by law, enlivened by flashes of wilfulness that might well get them into trouble. Men and women in the three-and-a-half centuries examined here functioned within various social units – households, kinship groups, manors, parishes, villages, towns, gilds – all of which had formal and informal rules governing behaviour and imposing sanctions on those who had misbehaved. This book is not concerned, however, with informal rules and informal sanctions, important though these are, but with those formal rules and formal sanctions that were dispensed by courts of justice, operating in acknowledged systems of law.

There were two overarching systems of law operating in the early modern period, one secular or temporal and the other spiritual. Temporal law was dispensed in manorial, hundred and borough courts, in petty and quarter sessions, in assizes and in the royal courts situated in London – the Court of Common Pleas, the Court of Requests, the King's Bench and so on. Spiritual law – our concern – was dispensed through hundreds of ecclesiastical courts scattered the length and breadth of the country. How many there were is difficult to establish. Hill, reviewing their operations in the sixteenth and early seventeenth centuries, put their number at over 250.[1] A parliamentary report of 1832 stated that there were 372 courts, of which 285 were 'peculiars' in ecclesiastical districts that were exempt from the oversight of the bishops in whose dioceses they were geographically situated.[2] The principal courts

[1] Christopher Hill, *Society and Puritanism in Pre-Revolutionary England* (1966), 299.

[2] *PP*, 1831–2, xxiv, 552. Peculiars were monastic, royal, episcopal or cathedral properties claiming exemption from the jurisdiction of the bishop in whose

were both ubiquitous and active in the sixteenth and early seventeenth centuries. Their activities touched the lives of many people. Sharpe notes that only 71 of the 400–600 people who dwelt in the Essex village of Kelvedon in the first half of the seventeenth century fell foul of quarter sessions, but there were 756 presentments made of the village's inhabitants in the local archdeacon's court.[3] Macfarlane has shown that in the period 1570–1640, the inhabitants of the large Essex village of Earls Colne were involved in about twenty ecclesiastical court cases a year. Most inhabitants could expect to be summoned to appear in one of these tribunals at some point in their lives.[4] 'They formed', writes Marsh, 'a vast web of justice covering the entire country, and extending into a great many spheres of local behaviour'.[5]

The system in which the ecclesiastical courts operated is best envisaged as a graded hierarchy with overlapping functions. At its base were the peculiar courts and the courts of the archdeacons. The latter were officials appointed by a bishop to supervise the clergy within a specified geographical area of jurisdiction – the archdeaconry – and to deal with the complaints of those parishioners who dwelt there. In its simplest form the archdeaconry coincided more or less with the county. This was the case, for example, in Huntingdonshire, Leicestershire, Staffordshire and Surrey. One has to say 'more or less' because most counties contained peculiars, many of which claimed the right of operating their own courts, and some counties, such as Staffordshire, were riddled with them.[6] Many counties, and not just the larger ones, contained several archdeaconries, and not all of them belonged to the same diocese. Cambridgeshire, for example, was subjected to the control of at least four archdeacons – those of Ely, Sudbury, Norfolk and Huntingdon – who were in turn controlled by three bishops – those of Ely, Norwich and Lincoln. At least nine different ecclesiastical courts were at work in Sussex at the end of the

diocese they lay. See *The Oxford Dictionary of the Christian Church*, ed. F. L. Cross and E. A. Livingstone (1983), 1057.

[3] J. A. Sharpe, 'Crime and delinquency in an Essex parish 1600–1640', in *Crime in England 1550–1800*, ed. J. S. Cockburn (1977), 109.

[4] A. Macfarlane, *Reconstructing Historical Communities* (1977), 44, 60, 132.

[5] C. Marsh, *Popular Religion in Sixteenth-Century England* (1998), 108.

[6] See the helpful county maps published in C. Humphery-Smith, *The Phillimore Atlas and Index of Parish Registers* (1984).