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Illegitimacy in Late Medieval England

Laws, Dispensation and Practice

Human society has traditionally distinguished between the rights of the child born of a union of parents it considers acceptable and the rights of the child born under less favourable circumstance. This is one of the ways in which society has sought to impose restrictions on the use of sexual powers, setting off those relationships that are acceptable from those that are not.¹ During the course of the twelfth century when it elaborated its doctrine on sexual activity as it touched those living in the matrimonial state and those dedicated to chastity², the Church enunciated a doctrine on illegitimacy, defined the conditions of birth that brought it about, reflected on its consequences within society both secular and religious, and began to develop procedures to ascertain whether or not the condition existed.

The main point was a simple one: a legitimate child was one born of a couple who had capacity for marriage and had indeed established the bond in a proper manner. Canonists, theologians, papal decretals, councils and synods all worked during the twelfth and thirteenth centuries to elaborate the requirements for capacity and for establishing the bond. With regard to the latter, the establishment of the bond, there was one area that was not without difficulty. The thrust of legal thinking was to insist on marriage under conditions of publicity and formality that made it clear that consent had been freely given by husband and wife: marriage was to be *coram facie ecclesie*. If the union were brought about in any of those modes that might be considered *clandestine*³, it was presumed that the bond was invalid and, as a consequence, that the child born of that union was illegitimate. This point of view is made abundantly clear in canon 51 of the fourth Lateran Council (1215) and in the legislation of local councils and episcopal synods throughout thirteenth-century Europe. Yet it was grudgingly admitted that it was possible to establish a valid marriage bond privately, and that the fact of the marriage could be demonstrated to the satisfaction

¹ See the discussion of the social impact of the notion of illegitimacy in *Peter Laslett, Family Life and Illicit Love in Earlier Generations. Essays in Historical Sociology* (Cambridge 1972) 102–105.

² On the use of the same sanction to enforce the rules of clerical celibacy see *Bernhard Schimmelpfennig, „Ex fornicatione nati“*. Studies on the Position of Priests' Sons from the Twelfth to the Fourteenth Century, in: *Stud. in Medieval and Renaissance Hist.* 2 (1980) 3–50; cited as follows: *Schimmelpfennig, Priests' Sons*.

³ On the many forms of clandestine marriage see *Michael M. Sheehan, The Formation and Stability of Marriage in Fourteenth-Century England*, in: *MedSt* 33 (1971) 244–251.

of the ecclesiastical courts. In these cases – and they were very numerous – the child born of the union was legitimate.

Furthermore, as doctrine touching marriage and legitimacy was elaborated, adjustments and refinements were made. By the last quarter of the twelfth century it was agreed that the subsequent valid union of a couple who had been free to marry at the time their child was born rendered that child legitimate.⁴ Finally, in those cases where by error or deceit an apparent marriage was invalid, provision was made for innocent parties: in some cases it was found possible by way of dispensation to make the marriage valid and the child legitimate; in others, where the marriage could not be salvaged, legitimate status of the children was a possibility.

During the course of the twelfth century, English society adopted many of these rules.⁵ In the case of illegitimacy the purposes of the Church with regard to marriage and the purposes of families with regard to inheritance came together in mutual support. This is clear in the first discussion of the matter in the constitutions of Bishop Richard Poore of Salisbury (1217–1219). There, in a context where the importance and seriousness of marriage is presented, it is pointed out that, where proper rules are not followed, the children that might result would suffer disabilities both in the ecclesiastical and the civil orders.⁶

In what follows, we propose to examine these matters in England during the later Middle Ages. However, since the essential direction in the English law of bastardy was determined in the late twelfth and the first half of the thirteenth century, we must first briefly review the relevant events of those years.

Conflict and Cooperation of the English Legal Jurisdictions

Written about 1190, the treatise known as Glanvill dealt with the mutual support of the civil and ecclesiastical orders in respect to the widows dower: her right was established if it could be demonstrated that she had been endowed at the door of the church at the time of her marriage. This regulation reinforced the pressure coming from the church to make marriage a public ceremony, at least among the landed classes.⁷ Glanvill also treated the exclusion of the illegitimate child from inheritance.⁸ In this case, however, it does not

⁴ See *Robert Génestal*, *Histoire de la légitimation des enfants naturels en droit canonique* (Bibliothèque de l'Ecole des Hautes Etudes. Sciences religieuses 18, Paris 1931f.) passim.

⁵ On the position of the bastard within Norman society, one not unlike that in the years after the Conquest of England, see *Eleanor Searle*, *Predatory Kinship and the Creation of Norman Power 840–1066* (Berkeley 1988) passim.

⁶ C. 82: *Nam sola proles ex matrimonio legitimo suscepta a dingnitatibus [sic] tam ecclesiasticis quam civilibus non est exclusa, cum tamen aliter geniti repellantur tamquam spurii.* *F.M. Powicke, C.R. Cheney* (Ed.), *Councils and Synods with Other Documents Relating to the English Church*, 2 vols. (Oxford 1964), vol. 1 86f.; cited as follows: *Powicke, Cheney*, *Councils*. This text was repeated in later synodal constitutions: *ibid.*, vol. 1 198, 201, 418, nr. 3; vol. 2 1273.

⁷ Bk. 6, chs. 1, 11: *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur.* Ed. by G.D.G. Hall (Oxford 1965) 59, 64f.: *ad hostium ecclesie tempore desponsationis sue.*

⁸ 7. 13, 87: *heres non possit eo quod ex legitimo matrimonio non sit natus.*

mention the observance of those public ceremonies required for dower. Perhaps the royal courts of that time were open to the possibility of the valid marriage privately concluded or resulting where sexual union followed betrothal. Glanvill presumed that decision about the validity of a union pertained to the bishop. But it also insisted that, whatever the usage of canon and civil law, legitimization by subsequent marriage did not obtain in the common law of England.⁹

At the Council of Merton in 1236 there was a concerted effort made by the bishops, led by Robert Grosseteste, bishop of Lincoln, to change the law so that legitimization by subsequent marriage would be possible. The barons refused. In their turn, the bishops withdrew from part of the legal process touching bastardy, refusing to answer the question whether a child was born after the marriage of the parents. Much has been made of this episcopal decision, but such studies have concentrated on the bishops' efforts to have the Church's law on legitimization recognized in England. The matter was more complex, however. In his correspondence with William de Raleigh, chief justice, Grosseteste pointed out that the bishops were expected to answer whether or not the child in question *natum esset ante matrimonium solemniter contractum*¹⁰. Grosseteste objected to this position because it ignored many marriages that in the order of conscience and in objective terms were valid. It is possible that this second reason was the fundamental cause of the bishops' decision to change their position, though it is yet too soon to conclude on the matter. Thus, as the procedure for establishing whether or not a disputant were heir, the decision was assigned to the bishops if it were question of legitimacy or illegitimacy. If the question were whether birth occurred before marriage, jurisdiction fell to a civil jury.

Between the Council of Merton and the third quarter of the fourteenth century, a division of labour in cases touching bastardy was worked out between the royal and ecclesiastical courts.¹¹ The former saw their role as defending the traditional English law of inheritance and, where their understanding of illegitimacy differed from that of the canonists, saw to it that decisions as to legitimacy fell to a jury rather than to the bishop. Thus when there was question of bastardy in general, the bishop was asked to decide; where it was question whether the child was born before the marriage of the parents then it went to a lay jury. Furthermore, since the common-law presumption that a child born of a married woman was the offspring of her husband was much stronger than that of

⁹ Bk. 7, ch. 11 (p. 88).

¹⁰ Ep. 23: Letters of Robert Grosseteste. Illustrative of the Social Conditions of his Time. Ed. by H.R. Luard (Rolls Series 25, London 1961) 89f, 104. In a discussion of dower, Bracton seems to imply that the formalities of marriage were not necessary for succession to inheritance and thus for a child to be legitimate; *et ita poterit esse matrimonium legitimum quoad hereditatis successionem ubicumque contractum fuerit* (f. 304): Bracton de legibus et consuetudinibus Angliae. Ed. by George E. Woodbine, Samuel E. Thorne, 4 vols. (Cambridge Mass./London 1977), vol. 3, 377. Other evidence indicates, however, that Grosseteste's apprehension was vindicated. See Frederick Pollock, Frederick W. Maitland, The History of English Law before the Time of Edward I (Cambridge 2. Ed. 1968) vol. 2 378f.; cited as follows: Pollock, Maitland, English Law.

¹¹ The fundamental modern studies are Richard H. Helmholz, Bastardy Litigation in Medieval Europe, in: American Journ. of Legal Hist. 13 (1969) 360–383; cited as follows: Helmholz, Bastardy; John L. Barton, Nullity of Marriage and Illegitimacy in the England of the Middle Ages, in: Legal Hist. Stud. (1972); Ed. by Dafydd Jenkins (Cardiff 1975) 28–49.

canon law, cases touching the alleged adulterine child pertained to the royal court. With regard to children of parents divorced because of the impediments of consanguinity or affinity, the civil courts did not make the distinction between cases where one or both the partners were ignorant of the impediment and those where they sought to deceive. The courts simply declared all such children to be legitimate.¹² On the other hand they agreed that the children of parents divorced because of a precontract were illegitimate. Where there was question of the bastardy of the dead, even though a given case would probably have led to the same judgment in either jurisdiction, the matter was reserved to the royal court.¹³ With those limitations the bishops continued to exercise jurisdiction until the nineteenth century, when all aspects of cases touching bastardy and inheritance were removed to the civil courts. The common law opposition to legitimation which occasioned the development in the first place was finally removed by the Legitimation Act of 1920.¹⁴

The procedures by which the legitimacy of a child was decided having been set out, it remains to be seen what societal supports for that child were available and what limitations it would suffer within society as it grew to maturity.

Support of the Illegitimate Child

Care of the bastard as of any child, especially in the early years of its life, devolved primarily on the mother. In the normal family situation she was supported financially and socially by her husband, the child's father. In the case of male children, at least, the father usually played an increasing role in socialization as sons grew older. More extended kin likewise took part in this process. In the case of the illegitimate child, the father was often absent or, were that not the case, his obligation and that of his family were not necessarily admitted or acted upon. Various societal pressures probably helped to cajole those related to the child in one way or another to contribute to its support. But where the right of the bastard child to support was not honoured the Church provided enforcement.¹⁵

Richard Helmholtz opened the way on this matter in an article published in 1977.¹⁶ He shows the sources, development, and originality of the canon law on the support of the bastard child.¹⁷ Care of neglected children is not a subject that looms large in the conciliar and synodal documents of the English Church.¹⁸ It is rather in the records of the ecclesiastical courts that one can observe the process whereby the reluctant father was identified and his support of his child ordered. Professor Helmholtz found examples in

¹² On the later history of this question see *Helmholtz*, Bastardy (see note 11), 371 nr. 34.

¹³ On the distinction between proprietary and possessive actions and the formalism that developed and was eventually abandoned, see *ibid.*, 378–381.

¹⁴ 16–17 George V, c. 60.

¹⁵ Cf. *Schimmelpfennig*, Priests' Sons (see note 2), 30f.

¹⁶ *R.H. Helmholtz*, Support Orders, Church Courts, and the Rule of Filius Nullius. A Reassessment of the Common Law, in: *Virginia Law Rev.* 63.3 (1977) 431–448.

¹⁷ *Ibid.*, 433–436.

¹⁸ See *Powicke, Cheney*, Councils (see note 6), Index „Children“ vol. 2 1411.

virtually every English diocese of which significant court records survive. The usual procedures were followed. In instance cases, a mother or other person, having named the father, could petition the support of a child; in *ex officio* cases where individuals were prosecuted for adultery or fornication – and there had been a child – the court proceeded in the same fashion. As a general rule, where the father was named, if the court were satisfied that he had had access to the mother at the time suitable for her conception of the child in question, the court ordered him to provide for its support pending examination of the more difficult question of paternity. Where it was impossible to prove paternity, or where the father was too poor to help the child, the court sometimes sought assistance from other members of the families involved.¹⁹ This system continued through the years of the Reformation in England and it was only in Queen Elizabeth's reign, by the Poor Law of 1576, that civil authority provided an alternative way to assure support.²⁰

Civil Disabilities of the Illegitimate

By common law, the bastard was excluded from inheritance. This was the principal legal consequence of illegitimate birth. Furthermore, since from a legal point of view, the bastard was *filius nullius*, beyond descendants, he had no recognized relatives who could inherit from him were he to die without an heir of his body or intestate; and his property thus passed by escheat to his lord. Yet, as Maitland pointed out, bastardy was not a status or condition in English law.²¹ Aside from the impossibility of inheriting within the civil structure, the bastard had full legal rights in accord with his status as free or servile. In the high Middle Ages, a child received the status of its mother; but, during the fourteenth century, with the growing notion that the status of the father should prevail, a strange result occurred: the principle that the bastard was *filius nullius* was pressed to the limit, and it was concluded that, since the father could not be known, all bastards enjoyed or could enjoy the status of the free.²²

In fact, the civil consequences of illegitimacy among the peasantry remains an unsatisfactory area of research. This lacuna is an important one, for serfs constituted the majority of the population of England during the Middle Ages. Most aspects of their lives were regulated by manorial custom. On matters touching family property these customs varied among themselves and often differed to a considerable extent from the usages of common law; although, as the Middle Ages came to an end, custom often drew closer to the law of

¹⁹ Thus in 1367 at Rochester, neither father nor mother could support their child, but the mother's sister and her husband agreed to support the child from their own resources. In 1374, again at Rochester, Geoffrey Steyn, father of a child by Agnes Jays, claimed that he possessed nothing except by the grace and will of his father. Leonard Cohen, the local judge, asked and induced (*rogavit et induxit*) Geoffrey's father to provide for the child until some better arrangement was possible (*ibid.*, 444).

²⁰ 18 Eliz. I, c. 3.

²¹ Pollock, Maitland, *English Law* (see note 10), vol. 2 396f.

²² *Ibid.*, vol. 1 422f.; vol. 2 397. E.g., a writ from the king to the bishop of Norwich, 13 Feb. 1503, requesting inquiry as to the bastardy of William Nerdy. It had been objected to William's claim to land that he was a villein. William countered, claiming that he was a bastard and therefore could not be a villein (London. B.L. Add. Ch. 54536).

the royal courts. Manorial custom was administered by manorial courts. Many thousands of rolls record the activity of these courts from the middle of the thirteenth century to the end of the Middle Ages. Land transfer, both intergenerational or by sale or grant *inter vivos*, whether disputatious or merely administrative, was recorded in these rolls. Yet this voluminous record contains very little information about bastardy and inheritance.²³ George Homans, the Harvard sociologist, whose study of the thirteenth-century English villager led the way during the past generation in major advances in our knowledge of peasant life, discovered a few references to illegitimacy. Thus in a court roll of the second quarter of the fourteenth century from Chertsey, a Benedictine abbey in Surrey, he found the statement that illegitimacy was by custom a bar to inheritance.²⁴ Professor Homans also pointed out a few cases in Hertfordshire and Yorkshire where a son born before the formal marriage of his parents but, after they had become engaged, was awarded the inheritance. In other words, the manorial court followed the procedure advocated by Bishop Grosseteste that would allow the validity of those unions established privately or which were mere engagements that became marriages following sexual union. In a dispute before the court of the Yorkshire manor of Wakefield, the custom was questioned; but an inquest concluded that such was in fact the custom. In this case, then, there seems to have been a knowing divergence from the common law which recognized children of unions that did not comply with the common law regulation of marriage at the church door.

But excepting a few cases such as these, there is silence on the matter. Many court rolls have been searched and several scholars working on other records from different parts of England queried on the matter, but the result is the same. The illegitimate and any limitations that he or she might suffer seem by and large to have been ignored.²⁵ Does it mean that in the rather intimate society of the village it was generally known which children had a suitable claim to inherit, so that the lord simply decided the matter by accepting the entry fine of the proper heir? Or was the matter simply ignored?²⁶

Ecclesiastical Disabilities of the Illegitimate

The illegitimate condition of the serf as well as of the free was of major importance in the eyes of the Church. All illegitimates were bound by the limitations of canon law that forbade promotion to orders and, in the case of religious, to positions of authority.²⁷ On the other hand, the flexibility of canon law provided some relief from these harsh rules. First,

²³ The principal discussion of the subject is in *George C. Homans, English Villagers of the Thirteenth Century* (Cambridge Mass. 1941) 164–166, 438f.; cited as follows: *Homans, Villagers*; supplemented recently by *Barbara A. Hanawalt, The Ties that Bound. Peasant Families in Medieval England* (Oxford/New York 1986) 72f.; cited as follows: *Hanawalt, Ties*.

²⁴ *Homans, Villagers* (see note 23), 438 nr. 14.

²⁵ On the other hand the mother of the illegitimate might be subject to fine for her crime and on some occasions would be denied inheritance, see *Homans, Villagers* (see note 23), 165, 438 nr. 14, 20.

²⁶ See *Hanawalt, Ties* (see note 23), 72f.

²⁷ For a brief description of the canonical developments that ascribed this irregularity to the sons of priests and then to all born of irregular unions, see *Schimmelpfennig, Priests' Sons* (see note 2), 20.

as was mentioned above, subsequent marriage of parents could, under certain conditions, result in the legitimization of the child and the removal of the limitations which had obtained until that time. Furthermore, the bastard who became a religious and lived a life becoming to that state was also freed from some of the limitations of his illegitimacy should he choose to seek orders. Finally, there was the possibility of dispensation, a possibility unique to the canonical system, one that provided a degree of relief from its harsher aspects. Thus dispensation from impediments to a *de facto* marriage usually involved a declaration that the children of the marriage were deemed legitimate, and where no legitimizing marriage was possible a dispensation could remove the irregularity that prevented the reception of orders. In the high Middle Ages bishops granted a variety of dispensations, but during the thirteenth century the papacy restricted their powers and extended its own by decreeing that no illegitimate might receive major orders or receive a benefice with *cura animarum* without a papal dispensation.²⁸ There is much evidence on all these matters in the records that are at our disposition.

The English royal courts recorded only those cases in which a bastard claimed to be heir or in which inheritance passed through him to a third party. Such pleas were not common. For all their legal interest, they can at best provide a very limited view of the frequency of bastardy and its consequences in society. On the other hand, the documentation which records at least some of the dispensing activity of popes, their delegates, and of bishops during the last two hundred years of the Middle Ages, harbours a wealth of information on the impact of the law of illegitimacy on the lives of individuals and, more generally, on the Church and civil society in England. The registers of various papal offices allow us to take some measure of the impact of the law of illegitimacy on those living in the married and the celibate states and of the composition of the clergy and religious orders at different times and in different places. (Professor Schmutge has already made data collected for his present project available to me, and even a preliminary examination makes it clear that it can be exploited in several promising ways.) In addition, many registers of English bishops from the fourteenth and fifteenth centuries are extant. Unfortunately, like all records of this kind, the surviving parts are not always the ones that would be most useful for the present purpose. But, with all their limitations, the episcopal registers provide a complement to and, in some ways, a control of the data provided by the papal archives.²⁹

²⁸ Ibid., 28f.

²⁹ Note: Michael Sheehan had originally ended his paper with the following statement: „In the expanded form of this lecture that I hope to be able to publish among the acts of this colloquium, some of these data will be exploited.“ As the microfilms and printed editions of registers and court rolls on his desk attested, he was indeed working on these data but had not yet arrived at a synthetic appraisal of them at the time of his tragic death on 23 August 1992 in Toronto.