

**Comparative Studies
in Continental and Anglo-American Legal History**

**Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte**

Band 6

The Records of the Medieval Ecclesiastical Courts

**Part I:
The Continent**

Reports of the Working Group on Church Court Records

**Edited by
Prof. Charles Donahue, Jr.**



Duncker & Humblot · Berlin

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I

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und anglo-amerikanischen Rechtsgeschichte**

Herausgegeben von

Prof. Dr. Dr. h. c. mult. Helmut Coing

und

Prof. Dr. Knut Wolfgang Nörr

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Preface

This is the first of two volumes that will contain the reports to date of the Working Group on Church Court Records. The second will deal with England. The Working Group is part of a larger effort: the Research Project on Continental and Anglo-American Legal History. We would like to take this opportunity to thank the Gerda Henkel Stiftung for its generous support for the Project and, in particular, for its support for this Group, which operated quite differently from other Groups associated with the Project.

Many individuals assisted us, too many to name here. We cannot pass over, however, those connected with the Project who did much to get us going in the beginning and who encouraged us along the way, in particular, Professors Helmut Coing, Robert Feenstra, Stephan Kuttner, Domenico Maffei, and Raoul Van Caenegem. Professor Knut Nörr, to whom fell the task of communicating with the Group on behalf of the Project, moved us along with consummate tact. Professor R.H. Helmholz not only wrote the reports on Spain, but he also supported the general editor in his darkest moments. Ms. Kathleen Curley put up with innumerable drafts of the book, making entries and corrections in the computer in strange languages, with a fidelity that is not given to many. Finally, we would like to acknowledge the assistance of the archivists and their staffs in the numerous archives which we visited or with which we corresponded. Theirs is frequently a frustrating task, and their work too often goes unappreciated. Without them these reports could not have been written.

It is in the nature of work like this to be incomplete and to contain mistakes. The *Kanonistische Abteilung* of the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* has offered its pages for supplements and corrections to these reports. The Group hopes that these volumes will be but a start on a complete and accurate inventory of the surviving records of the medieval ecclesiastical courts.

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General Abbreviations

Archive Abbreviations:

Abbreviations for individual archives are frequently given in the second section of each report. They are repeated in the Index of Archives.

Abkürzungen für Archive werden oft in der zweiten Abteilung des jeweiligen Berichtes sowie im Index der Archive angegeben.

Abréviations des archives individuelles sont données souvent dans la deuxième section de chaque rapport et dans l'Index des Archives.

Cross-references:

I/01/3/1, usw. = Erstes Kapitel (Österreich) (fehlt bei Verweisen innerhalb des Kapitels), Bericht Nr. 01 (Salzburg, Offizialat des Erzbischofs) (00 = Einleitung, Vorwort), Abteilung Nr. 3 (Bestände), erster Abschnitt (KAS—Offizialatsprotokolle), usw.

II/01/3/1, etc = Chapter II (Belgium) (omitted when the cross-reference is internal to the chapter), report no. 01 (Tournai) (00 = introduction, preface), third section (contents of archives), first subsection (Accounts of the bishop's courts), etc.

III/01/3/1, etc = Chapitre numéro trois (France) (manque si la référence est dans le chapitre), rapport numéro 01, section numéro 3, sous-section, etc., c.-à-d. le rapport sur l'officialité de l'archevêque d'Aix, troisième section, contenu des ADBRA, etc.

Date Abbreviations:

s14/1, s14/2, s14/in, s14/m, s14/ex, etc = first half, second half, beginning, middle, end of the fourteenth century, etc.

s15/1, s15/2, s15/in, s15/m, s15/ex, usw. = erste Hälfte, zweite Hälfte, Anfang, Mitte, Ende des 15. Jhs., usw.

s16/1 s16/2, s16/in, s16/m, s16/ex, etc = première moitié, deuxième moitié, commencement, milieu, fin du seizième siècle, etc.

Other General Abbreviations:

* = An archive that the author of the report has visited or a doc that s/he has examined personally (see further, General Introduction).

[] (in diocese lists) = The see in question is not located within the modern territorial limits of the country covered by the chapter.

abp = archbishop, archevêque

AD = Archives départementales. For shortened forms of the *inventaires* and *répertoires* of the AD see III/00.

AN = Archives nationales (voir III/56/2).

art(s). = Article(s).

BM = Bibliothèque municipale.

BN = Bibliothèque nationale (voir III/18/2; III/40/2).

c (with dates or numbers) = circa (avec dates ou chiffres), um (bei Daten oder Nummern).

cr. (in diocese lists) = creation of the see in question.

dact = manuscrit dactylographié (se trouvant aux archives nommées).

doc(s) = document(s).

Dok. = Dokument(e).

fol(s) = feuillet(s), Folio(s).

MOL = Magyar Országos Levéltár (siehe: V/01/2).

ms = manuscrit (avec un inventaire ou répertoire indique une liste se trouvant aux archives nommées).

nal = nouvelles acquisitions latines de la BN.

no(s) = numéro(s).

Nr. = Nummer.

p(p) = page(s), Seite(n).

sd = undated, sans date.

X (entre dates) = "bracketing dates," i.e., pas avant la première date et pas après la deuxième date.

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Adams/Donahue, *Select Canterbury Cases* = N. Adams and C. Donahue, *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200 - 1301*, Selden Soc'y 95 (London, 1981).

AKKR = Archiv für katholisches Kirchenrecht.

Aubenas, *Recueil* = Roger Aubenas, *Recueil de lettres des officialités de Marseille et d'Aix*, 2 vols. (Paris 1937-8).

Balázs, *Magyarország levéltárai* = P. Balázs (ed.), *Magyarország levéltárai* (Budapest 1983).

Bándi, *Csehszlovákiai levéltári anyagról* = Zs. Bándi, *Csehszlovákiai levéltári anyagról készült mikrofilmek (1973. január 1-én)* Levéltári leltárak 62 (Budapest: Magyar Országos Levéltár, 1974).

Bautier/Sornay, *Sources* [ou] *Bautier/Sornay* = Robert-Henri Bautier et Janine Sornay, *Les sources de l'histoire économique et sociale du moyen âge: Provence-Comtat, Venaissin, Dauphiné, États de la maison Savoie*, 3 vols. (Paris 1968-74).

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Borsa, *Csehszlovákiai levéltári* = I. Borsa, *Csehszlovákiai levéltári anyagról készült mikrofilmek az Országos Levéltár filmtárában (1963. január 1-én)* Levéltári leltárak 19 (Budapest: Levéltárak Országos Központja, 1963).

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Fournier, *Origine* = Édouard Fournier, *L'origine du vicaire général et des autres membres de la curie diocésaine* (Paris 1940).

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Koller, *Historia Quinqueecclesiarum* = J. Koller, *Historia Episcopatus Quinqueecclesiarum*, 7 Bde. (Posonii/Pesthini 1782-1812).

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Kumorovitz, *Veszprémi regeszták* = B.L. Kumorovitz, *Veszprémi regeszták 1301-1387*, Magyar Országos Levéltár kiadványai 2, Forráskiadványok 2 (Budapest 1953).

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MHDB = Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands.

MDSR [2.8] = Mémoires et documents publiés par la Société de la Suisse romande [2^e série, volume 8].

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NRHD = Nouvelle revue historique de droit.

Ollivant, *The Court of the Official* = S. Ollivant, *The Court of the Official in Pre-Reformation Scotland*, Stair Soc'y 34 (Edinburgh 1982).

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RHD = Revue historique de droit, 4^e série.

SMÆH = *Scriptoria medii aevi Helvetica. Denkmäler schweizerischer Schreibe-kunst des Mittelalters*.

Szentirmai, 'Ungarische Diözesankurie' = A. Szentirmai, 'Die ungarische Diözesankurie im Spätmittelalter', *ZRG KA* 48 (1962) 164-221.

SZG = Schweizerische Zeitschrift für Geschichte.

Tabulae codicum = Academia Caesarea Vindobonensis (ed.), *Tabulae codicum manu scriptorum praeter graecos et orientales in Bibliotheca Palatina Vindobonensi asservatorum*, 10 Bde. (Vindobonae 1864-1899).

Tangl = M. Tangl (ed.), *Die päpstlichen Kanzleiordnungen von 1200 bis 1500* (Innsbruck 1894, repr. Aalen 1959) (*Provinciale* = pp 1-32).

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TRG = Tijdschrift voor Rechtsgeschiedenis.

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Vleeschouwers-Van Melkebeek, *Officialiteit van Doornik* = Monique Vleeschouwers-Van Melkebeek, *De officialiteit van Doornik. Oorsprong en vroege ontwikkeling (1192-1300)*, Verhandelingen van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België, Klasse der Letteren 47.117 (Brussel 1987).

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Zimmermann, *Urkundenbuch* = F. Zimmermann, K. Werner, G. Müller, G. Gündisch, *Urkundenbuch zur Geschichte der Deutschen in Siebenbürgen*, 5 Bde. (Hermannstadt/Bucuresti 1892-1975).

ZRG KA = Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung.

ZSKG = Zeitschrift für schweizerische Kirchengeschichte.

General Introduction

01. The Problem

In the large effort of examining and editing unpublished sources that has characterized the historiography of medieval canon law in the past generation, case material (with the exception of papal decretals), as opposed to legislative and doctrinal material, and archival, as opposed to manuscript material, have tended to be neglected. The reasons for this relative neglect are complicated and probably not very important. So much needs to be done in so many areas that one should hardly criticize scholars for focusing on one thing that ought to be done rather than another thing that ought to be done. What needs asserting is that the history of medieval canon law as a legal system is not going to be written until we have a better idea than we do now of how law and practice fitted together, how the various doctrines of the academic law shaped and were shaped by the societies within which they were applied, what role canon law, as opposed to other bodies of law, played in the lives of different people across the Latin West during the Middle Ages and beyond. Some progress has been made in these areas in the various studies of the interrelationship of canon law and politics, and some attention is now being paid to the *concilia* of later medieval canonists, another important source of the history of the relationship between the academic law and practical reality. There remains, however, one source of that history, the records of the medieval ecclesiastical courts, that until quite recently had hardly been touched.

Recently, a small body of research has been published on the workings of the medieval ecclesiastical courts of the Latin Church both in England and on the Continent. Citing only book-length studies and editions, one might mention:

Adams/Donahue, *Select Canterbury Cases*; Dolezalek, *Imbreviaturbuch*; Hageneder, *Geistliche Gerichtsbarkeit*; R.H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge (Eng.) 1974); Lefebvre-Teillard, *Officialités*; Ollivant, *The Court of the Official*; Dorothy M. Owen (ed.) *John Lydford's Book* Historical Manuscripts Commission JP 22 (London 1974); Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury, 1198-1254*, Oxford Historical Monographs (London 1971); Vleeschouwers/Van Melkebeek, *Liber sententiarum*; Richard Wunderli, *London Church Courts and Society on the Eve of the Reformation*, Speculum Anniversary Monographs 7 (Cambridge (Mass.) 1981).

No complete picture of the medieval officialities has yet emerged, but enough has been done that we can discern striking patterns both of unity and of divergence.

The unity seems to reflect the transnational character both of the academic canon law and of the Church as an institution. We rarely find a sentence of an ecclesiastical court that violates a basic rule of law found in the academic writers; we rarely find a court that does not seem to be applying one or another form of Romano-canonic procedure; and the patterns of geographical jurisdiction almost always reflect the familiar ideal type of the hierarchical church (pope, archbishop (metropolitan), bishop, archdeacon (frequently but not always), with room for occasional courts of rural or urban deans, below the level of the archdeacon, and for 'peculiar', jurisdictions exempt from one or more elements in the hierarchy).

At the same time there are some remarkable divergences. The subject-matter and personal jurisdiction of the church courts varied markedly from time to time and place to place. Sometimes these divergences seem to reflect open or tacit understandings reached between the ecclesiastical and the secular authorities; sometimes they may reflect differences in the underlying societies. An example of the former might be the differing treatment of criminous clerks in England and in France in the later Middle Ages.

Compare, e.g., L. Gabel, *Benefit of Clergy in the Later Middle Ages* Smith College Studies in History 14 (Northampton (Mass.) 1929) and C.R. Cheney, 'The Punishment of Felonious Clerks', *English Historical Review* 51 (1936) 215, with R. Génestal, *Le privilegium fori en France* (Paris, 1929) and O. Martin, *L'assemblée de Vincennes de 1329 et ses conséquences* (Paris 1909).

An example of the latter might be the large number of cases concerning informal, *de presenti* marriages in England and the relative absence of such cases from the French records. (See Donahue, 'Canon Law and Social Practice'.)

The problem is complicated by the fact that jurisdiction in law and jurisdiction in fact frequently differed; knowledge of a court's legal jurisdiction does not always tell the researcher what he will find there. For example, by the s14 the English church courts' jurisdiction over cases concerning lay debts (other than those pertaining to marriage or testaments) was not recognized by the secular courts and was hardly defended as a matter of law even by churchmen; yet the English church courts in fact heard thousands of such cases.

See R. Helmholz, 'Assumpsit and *fidei laesio*', *Law Quarterly Review* 91 (1975) 406-32.

On the other hand, the French church courts' jurisdiction to hear *de presenti* marriage cases seems never to have been disputed, but in fact they heard relatively few such cases.

Not only does jurisdiction in fact differ widely from time to time and place to place, but there are also wide differences in the procedures employed. A great variety of procedures are encompassed under the broad heading 'Romano-canonic procedure'. Some courts seem to have heard practically no civil cases; some courts practically no criminal. There are, for example, no surviving records of

civil cases from the diocesan officiality of Châlons-sur-Marne and virtually no records of criminal cases from the consistory court of York (Donahue, 'Canon Law and Social Practice', p 154 n40; Donahue, 'Stubbs vs. Maitland', pp 703-4).

Some courts regularly employed recognizable variants of "long form" procedure; others made use of summary procedures, and there are a bewildering variety of the latter, ranging from the occasional consolidation of terms in a procedure that otherwise follows the long-form *ordo* quite strictly to the one- or two-session hearings typical of criminal cases in the English archdeacons' courts and the northern French diocesan courts. (See Adams/Donahue, *Select Canterbury Cases*, pp 57-9, 68-71; Lefebvre-Teillard, *Officialités*, pp 71-83.)

Given the state of our knowledge of what was actually happening in the wide variety of English and Continental church courts in the Middle Ages, it would be rash to attempt any definitive explanation of these similarities and differences in jurisdiction and procedure. Before we can even begin to explain the differences, we must get a better comparative sense of what was happening in the church courts in England and on the Continent. To do this we must know where the records are and what is in them. Even when they are available, most archival descriptions are not adequate for our purposes. For example, someone who is examining the question whether there was a shift in the proportion of marriage cases and other kinds of cases in the church courts in the late fifteenth century would not be advised to examine the 1480 register of the provincial court at Sens. The register meticulously records each step in the procedure of the cases but rarely tells us what the case is about. (See III/53/3/2).

This last point leads to another reason why the content of the records must be described: What looks at first glance like differences among the courts may only be differences among the types of records kept or the types of records that have survived. A register may record only criminal cases, but that does not mean that the court heard no civil cases. There may have been a civil register, now lost, or it may have been the practice to keep records of the civil cases in files of documents (libels, depositions, etc.) with the *acta* written on the back, as was done in some periods for the consistory court at York. (See Donahue, 'Stubbs vs. Maitland', p 657 & nn 56, 58.)

The Church Courts Records Working Group, then, undertook a preliminary survey of the surviving records of the courts of the Latin Church in the British Isles and on the Continent prior to 1563. (The date was chosen somewhat arbitrarily to coincide with last session of the Council of Trent. In some cases we stopped short of that. Where we did, the fact is indicated in the editor's preface or introduction that precedes each chapter.) On the basis of this survey we hoped that it might be possible to outline some answers, or possible answers, to the questions just posed. Even if that did not prove possible, the survey would still be valuable, since it would show others where the material that may contain the answers lies.