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Ronald A. Marchant
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INTRODUCTION

'The records of the Ecclesiastical Courts, particularly in the post-Reformation period, form one of the most intractable and forbidding of historical sources. Much labour is apt to produce little save material for an historical gossip column.'[1] This stricture, by an accomplished historian, is enough to deter any reader from even considering a book produced almost wholly from such material to be worth his while to peruse. Yet the church courts were never busier, nor ecclesiastical discipline more intense, than in the post-Reformation decades. The machinery of administration, discipline and litigation bequeathed to the Reformed Church of England by the Middle Ages, was taken over by Tudor and Stuart lawyers who tried to breathe into it the efficiency of Tudor and Caroline bureaucrats.

It is the object of the present work to describe how this machinery functioned, with special reference to a single diocese, that of York. The courts in their civil and disciplinary aspects were so much intertwined that no attempt has been made to separate them. The church historian will therefore find here much that is new to him, but he has to accept it as part of church life of the time. The same men were concerned with proving of a will, adjudicating a dispute over tithes, disciplining a person who led an immoral life, allocating a seat in church, divorcing a couple whose matrimonial life had become unbearable or enforcing the maintenance of a churchyard wall. For good or ill, all these activities came under the aegis of the Church, and her life and reputation were bound up with them. Theological disputes have captured the historian's attention during this period, and the life of the average person has been left to the chattier type of antiquary. It is hoped to show in this book that the systematic study of court records does bring its own rewards, and introduces a new dimension into the picture of church life at the time.

The developed medieval Church was as much a legal institution as it was a society preparing for a heavenly existence, and its lawyers and administrators were often better rewarded in this life than its theologians. The medieval legal scene was, to a modern observer, very complicated. In western Europe there were basically three systems of law operating at the same time—local customary law, Roman or civil law and canon law. There was cross-fertiliza-

[1] Canon Eric Kemp, in a review in the *Journal of Ecclesiastical History*, XIV, 266.

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tion of ideas between them which served for mutual enrichment. During the sixteenth century there was a renewed interest in, and assimilation of, civil law, with a consequent supersession of local law. Throughout Europe this Reception of the civil law typified the gradual dying of medieval ideas and their replacement by the ideas of the Renaissance. Amid rising nationalism, the Renaissance supplied a common cultural background for the peoples of the new self-conscious states of western Europe. When, for instance, John Calvin's father took his son away from the study of theology at Paris in 1528 and sent him to Orleans to read law under one of the greatest expositors of the Reception in France, Pierre l'Estoile, he was only acting as a wise and far-seeing father should have done. Calvin later graduated as a doctor of law at that university, and although his own interests developed in other ways, his legal studies became part of his intellectual equipment, as they did of educated Europeans generally, whether Catholic or Protestant. In the British Isles, only Scotland shared in the Reception.

In medieval Europe, the different systems of law gave much scope for rivalry. The field of conflict was even wider because church and secular courts both existed and often disputed their respective jurisdictions. The rivalry was particularly evident between the canon and the civil law. Similar in many respects, with a common inheritance from the Roman Empire, they had each developed their own particular theories, assumptions, ideals and ethos. Their political differences, leading to the exaltation of the Pope and the Emperor respectively, are well known, but such differences were only one variety among many.

The scene in medieval England was similar to that on the continent of Europe. There were three systems of law practised—canon, civil and the common law, the latter being the customary law of England. Again there was both rivalry and cross-fertilization of ideas. Common law had its own peculiar ways of criminal investigation and procedure, but in non-criminal matters it was particularly concerned with land and non-moveable property (real estate). In these subjects it learned little from other sources , but it was from canon law that the developing court of equity, the Chancery Court, received some of its basic principles and also its method of procedure—not unnaturally as many of the medieval lord chancellors were clerics. Common law had no maritime law, so that when the court of the Lord High Admiral acquired the jurisdiction of cases concerning ships and the sea, it was natural that it should use civil law and civil lawyers. Church courts came to have jurisdiction in matters of probate of wills and administration of intestate estates (except for real estate subject to common law), and they likewise used civil law. These courts also were originally the only courts dealing with

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matrimonial, slander and tithe suits, using canon law together with customary law in matters of tithe.

It is necessary to emphasize that canon law was not simply an administrative code made up of individual canons, but was a system with its own principles, rules and methods, studied at the universities as a distinct discipline. It was unfortunate that the doctrine of papal monarcy explicit in canon law led Henry VIII to abolish its study in the universities. Obviously such a principle could not be taught when the king was Supreme Head of the Church, but it meant that the future of canon law was in the hands of men whose principles were those of civil law. Canon law became subjected not so much to internal development within the Reformed Church as to development by the body of civil lawyers whose inspiration was to be found in the political theories of the later Roman Empire. The sources of canon law were studied, but its application was influenced by civil law.

The use of Latin in teaching enabled the English universities to study the whole range of literature produced on civil law in Europe, and also allowed them to appoint noted jurists, such as Gentili, to the Regius Professorships which Henry VIII had founded. In this way, civil lawyers kept English legal studies abreast of developments elsewhere, which was particularly important in Admiralty work where litigants were often foreigners, and in negotiating trade and other agreements with foreign countries. Civil lawyers had already become sufficiently important for the advocates who practised in the courts in and around London to form themselves into an organized body about 1508, and to acquire permanent premises in 1565. This was the corporation known as Doctors' Commons (for the advocates at London had to be doctors of the civil law). In 1600 there were twenty-four practising advocates, but a list of members in 1639[1] has fifty-two names on it, for it included those in full-time employment elsewhere and also the judges of the London courts themselves. It was this body which in effect ruled the profession, and served the same purpose which the Inns of Court performed for the common law.

The Reformation in England was therefore of considerable benefit to the civil lawyers, for they took over all the work of the church courts, at a time when their business was beginning to expand. Besides increasing Admiralty work, civil lawyers were also appointed to influential posts as Masters in Chancery, where they assisted the Lord Chancellor in his judicial duties, they secured places as Masters (or judges) in the developing Court of Requests and in the Star Chamber Court. Civil law not only magnified the prerogatives of the monarch, but it had also been evolved to suit the need of a highly bureaucratized administrative system. As such, it fitted admirably

[1] R.VII.P.R.108, 109.

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the needs of the developing monarchies of Europe, and helped to produce what is known as 'administrative law'. Something similar happened in England through the work of the Star Chamber, the Privy Council and its offshoots—the Councils in the North and of the Marches (for Wales). How far this English development can be ascribed to the influence of civil law is a moot point, for all these bodies had common law members also, but it cannot all be said to have developed by accident.

In the sphere of church administration, the combined influence of civil lawyer and practical administrator is best seen in the Court of High Commission, established by statute at the beginning of Elizabeth's reign. Being a statutory body it was not a court Christian but a secular court dealing with church discipline. It took over and adapted the procedure of the church courts, as it likewise used the civil lawyers practising in those courts, but its primary purpose was to see that the will of the government in religious affairs was enforced. To this end, it had its own machinery for arresting suspects, fining and imprisoning them. Students of the period will be familiar with the propaganda of the Puritans against the court's use of the *ex officio* oath.[1] This oath had a long and respected history behind it as used in the church courts, but the essential feature of canonical discipline was that it was intended not so much to punish as to reform the offender. If something stronger than admonition was needed, he was made to perform public penance. This was a punishment, and was so described, but it did not hurt his person, restrict his liberty, nor touch his wealth. Its primary purpose was to extract a public confession of guilt, an expression of contrition, a profession of reformation and, incidentally, to serve as a warning to others. The purpose of the High Commission was as much to punish as to reform; it was therefore right that exception should be taken to its use of an oath intended to extract from the accused an admission of his own guilt, based on his answers to charges of which he had no previous knowledge until his examination.

The ability of an accused person to testify under oath in his own defence was one of the advantages of the church court procedure (copied by Chancery) over that of the common law, and it was only in official prosecutions (not in civil causes or prosecutions by a private person) that the *ex officio* oath was used. In the church courts it does not often seem to have extracted much information which the accused would not have otherwise provided voluntarily, when pleading guilty. Cases where the accused was proved guilty after having denied the charge on oath do not seem to have been followed by a

[1] For the origins and use of this oath, and the attacks on it, see the essay by M. H. Maguire in *Essays in History and Political Theory in Honor of C. H. McIlwain* (Cambridge, Mass., 1936). The most substantial complaint was that the accused had no knowledge of the charges against him before his examination.

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prosecution for perjury, to which technically they were liable. The limitations of the church court, despite the *ex officio* oath, are exemplified in the examination of a Puritan clergyman, John Birchall.[1] The court had power to order a re-examination for fuller and clearer answers, if not satisfied with the original ones. Birchall was strongly suspected of having given the Holy Communion to Puritan non-parishioners. Here are his two answers:

Original answer	*Fuller answer*
This Respondent hath ordinarily within the space of fouer, five or six or seven weeks or thereabouts had Communions upon Sundayes at the Church articulate, And he denieth that he hath given the Sacrament usually to divers persons which he hath knowne at that tyme to have absented themselves from prayers at their owne parrishe Church, or which he hath knowne not to receive at their owne parish Church, unles Mrs. Scott with her daughters.	Ever since this respondent came to be Parson of the parish Church of St. Martins in Micklegate articulate, which is for the space of three yeares ended at Easter next, there hath beene Communions att the sayd parish Church of St. Martins some time at the end of the moneth some time within the compasse of five, six, seaven, eight, nine, tenn or eleaven weeks for and during the time that he hath beene Parson before confessed but not alwaies monethly as is articulate [i.e. as stated in this article of the libel against him] yet this respondent denieth that he hath given the sacrament usually to divers persons which he hath knowne att that tyme to have absented themselves from prayers att their owne parish Church or which he hath knowne not to receive att their owne parish Church, unles Mrs. Scott with her daughters.

The second answer was certainly 'fuller' but it contained no extra relevant information, and the case was later transferred to the High Commission. What action was taken by the Commissioners in this case is not known owing to loss of records, but they had it in their power to bring pressure to bear on an accused person by remanding him in custody as long as they thought fit. It was probably this power which brought such violent opposition to the use of the *ex officio* oath by that court.

The detection and prosecution of a criminal always pose great problems if fairness to the accused (who may be innocent) is to be balanced against efficiency of investigation and the conviction of the guilty. It would be hard

[1] See my *Puritans and the Church Courts in the Diocese of York 1560–1642* (1959), pp. 74–92, and R.VII.H.2123.

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to claim that the balance has been achieved even today, and it certainly did not exist in the sixteenth and seventeenth centuries in the secular courts. At that time torture was still used (as on Guy Fawkes) to extract confessions in important cases. In lesser matters the examining magistrates questioned the accused and the witnesses separately and in private, and made available the resulting depositions only to the prosecution. Thus the accused had no notice of the case against him until his trial began, and, as he was not allowed counsel, he had to undertake cross-examination of the prosecution's witnesses himself. He was further handicapped because he could not compel witnesses to attend on his behalf, and there were no 'rules of evidence' or 'Judges rules' as we know them. The division between detective and judge was not as clear as today. A High Court judge could still both supervise the preparation of the case against an accused and sit in judgement upon him.

Within its historical context, the church courts' procedure was not as out of line with contemporary standards of justice as is sometimes made to appear. The defendant in a church court enjoyed certain substantial advantages not enjoyed by a person accused in the secular courts of the time:

(1) He did not know the contents of the libel against him until he was examined, but he could only be examined on the specific charges itemized in the different articles of the libel. There was no equivalent of the general investigation carried out by Justices of the Peace where they could try to discover anything of which the accused might be guilty.

(2) After his examination he was allowed full legal representation in court.

(3) He could compel the attendance of witnesses on his behalf.

(4) He could secure copies of his own and all the witnesses' depositions, and of any documents exhibited in the case.

(5) Examination and cross-examination of the accused and all witnesses was undertaken by an officer of the court, usually the registrar, who was impartial. He read the articles, any later articles or questions submitted by either side, and then framed questions to elicit the required information which he wrote down. These depositions were then read over in the presence of the judge and each person had an opportunity of making any changes he deemed necessary. Each deposition was signed by the person making it and endorsed by the judge.

This method of examination was of considerable importance to the accused because of the standards of contemporary examination in secular courts. From Elizabethan times, the successful prosecution counsel was one who could most terrify his witnesses, reduce them to pulp, appear to make them contradict themselves, and only when they were suitably abject begin

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the process of extracting the evidence he really wanted.[1] The rooted objection, which still lingers in places, to giving evidence in court is a justifiable hang-over from this unfortunate period in English legal history.

The only real lowering of standards in the York courts came during the few years of the Laudian regime before the Civil War. The standards which are observed by professional men are usually unwritten, and therefore are difficult to unearth from purely manuscript sources. This is particularly true of the detection and prosecution of crime, yet these standards can make the difference between a just and an unjust system. The church system, where the chancellor or archdeacon's Official was responsible both for the detection and bringing of offenders to trial, and also for trying them, was one particularly open to abuse if the standards were not maintained. Up to the time of the Laudian administration no real abuse of this system has been discovered. The Laudian lawyers, however, had a tendency to arraign a Puritan and charge him with certain specified nonconformist practices. These would be denied and no further proceedings would be taken. Evidently the evidence in the possession of the chancellor was insufficient to obtain a conviction, and it was hoped to secure what was needed from the accused himself. This was apparently as far as the York lawyers were prepared to go.

Lord Devlin has observed that the standards of the police in England are today maintained in part by the standards of the lawyers they have to employ. Few solicitors and even fewer barristers are engaged solely on the work of criminal prosecution. Most of those concerned with such cases also appear often for the defence and in civil suits and so do not become 'prosecution-minded'. The same was generally true of the ordinary church courts. At London there was a king's advocate and king's proctor (whose functions await examination), but at York and other courts official prosecutions were shared among the ordinary lawyers. A king's advocate was appointed at York by the Laudians, but he prosecuted only in the High Commission, he still had to allocate his cases among the proctors, and he carried on a normal legal practice as well. The effect must have been similar to that noted by Lord Devlin in contemporary England.[2]

[1] C. P. Harvey, *The Advocate's Devil* (1958), pp. 130–48. Sir James Stephen, *History of the Criminal Law*, I, 350, quoted by T. F. T. Plucknett, *Concise History of the Common Law* (5th ed. 1956), p. 434. The prisoner was allowed counsel to argue points of law, but he was not fully represented in treason trials until 1696 and in felonies until 1837. From 1702 he was allowed (in these cases) to produce his own witnesses and have them sworn, but not until 1898 was he allowed to give evidence on oath himself. In Elizabethan and Stuart times the judges issued warrants and conducted examinations in important cases (*W. S. Holdsworth, A History of English Law*, 7th ed. 1956, I, 296).

[2] P. Devlin, *The Criminal Prosecution in England* (1960), pp. 21–2. Because the advocates at York could practise throughout that province, even the king's advocate in the North could find himself defending clients before the Durham High Commission Court (*Acts of the High Commission Court within the Diocese of Durham*, Surtees Soc. vol. 34, pp. 181, 188 (Mottershed)).

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It was in the small court at Nottingham, served only by three or four local lawyers, that standards really slipped. The king's advocate at York secured one lawyer (Hatfield Reckles) who would co-operate, and who thus obtained most of the work of official prosecution. The practice evolved here was to make a general accusation of evasion of duty (e.g. in the case of churchwardens, of not presenting the offenders, or of a private person for disturbing a service in an unspecified manner), in the hope that the accused would themselves supply the details, without which a conviction could not be obtained. Even so, among the many prosecutions begun at Nottingham at this time in the interests of ecclesiastical discipline, the great majority were quite properly conducted according to normal practice.[1] The fact that the king's advocate could use a doubtful legal expedient at Nottingham, but not at York, is a strong indication that the church officials did have to observe the standards of the lawyers of their courts where these were strongly established. They were not entirely free to do as they pleased. The protection which the traditional church court system gave to an incumbent, added to his common law freehold, secured the Puritan clergyman in his benefice provided that he was an outward conformist. Even notorious Puritans (such as Birchall) survived because of the inability of the church officials to secure enough evidence or an admission of guilt by the normal methods. One wonders how long these men would have survived examination by a seventeenth-century barrister under common law methods. Some credit for the protection of such men must be given to the church court procedures, for without them the principle of *cuius regio eius religio* must have applied in England as well as in the Holy Roman Empire.

The stress under which the church authorities operated as a result of Puritan attacks from within and without must be appreciated. They were as conscientious in their stand for the Church as were the Puritans for their different brands of Protestantism. They took what action was needed in a desperate situation, and their opponents naturally squealed. Today, in order to secure more convictions of those whom the police regard as guilty, the rule of unanimity of juries has been abolished (what would Lord Chief Justice Coke have said about that?). One result of the *ex officio* oath controversy was the principle enshrined in English law that 'no man may be compelled to give evidence against himself'. Yet the reluctance of twentieth-century magistrates and juries to deal adequately with driving while under the influence of drink, has caused the executive to compel a motorist to undergo tests which might incriminate him as effectively as oral evidence.[2] At the time

[1] For particulars of such cases, see my *Puritans and the Church Courts*, pp. 192–3.

[2] The compulsory samples legislation also has the feature of fixed penalties. Some ecclesiastical offences, e.g. illegal marriages and violence on consecrated ground, also carried the fixed penalty

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nonconformity with the established religion was seen as a disruption of society, and needed the severest penalties. Likewise sexual immorality was thought to produce the same result, and was punished with equal or greater severity. There is always a tendency in society to turn currently fashionable sins (by which is meant sins which it is fashionable to denounce) into crimes. Today, immorality between consenting adults is officially considered to be their own concern, but the sin of discrimination against a person because of his race (long permitted when 'only' Jews suffered) has been turned into a crime.

The general history of the law during this period is one of rivalry between the courts. For many centuries the limitations of common law prevented its courts from encroaching on other courts' preserves, but already by the end of the Middle Ages it was seeking to extend its sphere of operations. Common law originally had no law of slander, but from the end of the fifteenth century its courts gradually appropriated much of the litigation in this field. They adopted the principle that the church courts had jurisdiction only where the defamation was of a crime cognizable in the church courts. The conflict between the common and civil law courts reached its peak during this period. To the modern observer, the morality of the common law attack seems to leave much to be desired. A highly righteous attitude towards the *ex officio* oath went hand-in-hand with an attack on the Admiralty Court. Common law courts had no law merchant themselves, but nevertheless tried to prevent the suitor taking his lawful remedy at the Admiralty. The result was to leave the suitor powerless to achieve justice. It was only gradually that the common lawyers absorbed the law merchant and remedied the wrong which they had created.

The method by which the common law judges attacked other courts was through the writ of prohibition. The litigant in a civil law court who could discover a pretext for suggesting that the court had exceeded its jurisdiction could sue out this writ and stay proceedings. He would go to a judge of one of the High Courts at Westminster in his chambers, and if the judge thought that there was any plausibility in the litigant's suggestion, he would grant a prohibition. The litigant had a statutory period of six months in which to prove his allegation, and the common law judges helped him by interpreting this period as exclusive of legal vacations. Some litigants of the period waged what can only be described as legal campaigns, going from court to court with their cases. Clever litigants managed to play off the old common law courts against the rising equitable royal Chancery Court. Similarly, they had

of excommunication. Judges mitigated this rigour by granting almost immediate absolution for technical irregularities or minor offences, but fees still had to be paid for sentence and absolution. The result was to add fuel to the criticism that church courts acted only for fees.

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much success from the end of the sixteenth century in pitting these courts against those of the civil law. Especially when Sir Edward Coke sat on the bench (1606–16), the common law judges were only too ready to allow their suspicions of the other courts to over-ride the real demands of justice in each case. By the time James I came to the throne the church authorities had become seriously worried by the growing number of prohibitions, although they did not admit that the growing number of causes inevitably produced a rise in complaints to the common law judges. The departure of Coke from the bench removed the influence which had stiffened the other judges, and prohibitions were not granted quite so readily, but the result had been the erection of certain rules which limited the jurisdiction of the civil law courts and so made them less attractive to litigants.

The procedure in courts of civil and canon law was so different from our own legal processes that it is necessary to summarize it. Most disciplinary prosecutions resulted from presentments made by churchwardens at episcopal or archidiaconal visitations. Those presented were tried summarily. In consistory courts both civil and disciplinary causes were conducted by lawyers acting for the parties, and each cause progressed by a series of well-defined stages. Each stage was taken on one day in a formal session, and there was a delay of a fortnight or three weeks between stages while citations were issued, evidence was taken or documents exchanged. Later, when the facts had been established as far as possible, counsel argued the merits of the cause before the judge at 'informations' which were in public, but were not regarded as formal court sessions and were not entered in the acts of court. The judge prepared his verdict (which did not normally contain his reasons but only his decisions) and delivered it at a formal session. The acts for a court day therefore recorded the causes in progress and which stage was taken in each; only rarely did some interesting legal material get entered.

The method of promotion to the bench also differed from common law courts. In the latter the judges were, and are, restricted to able counsel who have proved themselves in arguing cases and handling points of law. Advocates who practised before the church courts were sometimes appointed to be chancellors of dioceses, but very often these ecclesiastical judges were drawn from men whose training had been almost entirely academic. For instance, at the beginning of the sixteenth century Archbishop Warham appointed Cuthbert Tunstal, afterwards Bishop of Durham, to be his chancellor, only three years after the completion of his university studies. But Tunstal's university education lasted for fourteen years, including six at Padua where he had taken his doctorate.[1] Nevertheless university training was not devoid

[1] C. Sturge, *Cuthbert Tunstal* (1938), pp. 8–17.

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