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978-0-521-86938-6 - The Rise and Fall of the English Ecclesiastical Courts, 1500-1860

R. B. Outhwaite

Excerpt

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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, guilds – 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 'peculiar' 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. Peculiarities were monastic, royal, episcopal or cathedral properties claiming exemption from the jurisdiction of the bishop in whose

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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).

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fifteenth century.⁷ At the county level, therefore, structures could be very complex.

Above this bottom layer there existed various superior diocesan courts. How many there were, what functions they performed and what relationships prevailed with the archdeaconry courts seems to have been dictated primarily, but by no means solely, by the size of the diocese. Episcopal sees varied widely in size. The see of Canterbury was one of the smaller ones. Here, apart from some exempt areas, there were only two ecclesiastical courts: the commissary court and an archdeacon's court.⁸ Whereas the diocese of Canterbury covered little more than half of Kent, that of pre-Reformation Lincoln extended over eight and a half counties. It was the largest diocese in the country. As Owen has written, 'The size of the diocese made it difficult, and indeed virtually impossible, for one man to be responsible in one consistory court for all the legal business likely to arise.' By the early sixteenth century, the bishop of Lincoln appears to have had two courts: a court of audience that he presided over personally, which convened wherever he happened to be residing, and a consistory court presided over, principally in Lincoln itself, by his official principal. In addition, the bishop exercised jurisdiction through appointed commissaries in each of the many archdeaconries that made up this huge diocese. Problems of competition with the archdeacons appear to have been solved by agreed compositions defining their respective jurisdictions and by the practice of appointing the archdeacon's official to the post of commissary. In smaller dioceses such arrangements might be unnecessary because the consistory court could be near enough for litigants and others to reach it without great difficulty.⁹

In pre-Reformation England the richest see appears to have been Winchester, and although it stretched over most of Hampshire

⁷ S. Lander, 'Church courts and the Reformation in the diocese of Chichester, 1500–58', in *Continuity and Change: Personnel and Administration of the Church in England 1500–1642*, ed. R. O'Day and F. Heal (1976), 216.

⁸ B. L. Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952), 4.

⁹ K. Major, 'The Lincoln diocesan records', *TRHS*, 4th series 22 (1940), 39; M. Bowker, *An Episcopal Court Book for the Diocese of Lincoln 1514–1520* (1967), xvi; M. Bowker, *The Secular Clergy in the Diocese of Lincoln 1495–1520* (1968), 7, 19, 26; D. Owen, *The Records of the Established Church in England* (1970), 47; D. Owen, *Church and Society in Medieval Lincolnshire* (1971), 31–2.

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and Surrey, it was one of the smaller dioceses in the kingdom. There, after 1528, the bishop does not seem to have operated a court of audience, though before this there is evidence of the periodic functioning of such a court. Instead there was a consistory court presided over by the bishop's official principal, a man who held this position conjointly with that of vicar general, and who, confusingly, was often referred to as the chancellor.¹⁰ The consistory court sat mainly in the cathedral at Winchester, though occasionally it convened in other places. Consistory courts could, therefore, be peripatetic.¹¹ It was more usual, however, for the peripatetic courts to be commissary ones. In the larger dioceses much consistory business was handled in these commissary courts, which shifted from one archdeaconry to another in the course of the year.¹²

Appeals generally lay from lower to higher courts. Thus most appeals from the archdeacon's court proceeded to the consistory court. But those stemming from cases in the commissary and consistory courts would be decided in one of the provincial courts, depending on whether the initiating courts were situated in the province of Canterbury or that of York. The appellate court for the northern province was the archbishop's Court of court at York; that for the southern province was the court of arches, which sat not in Canterbury but in the church of St Mary de Arcubus in London.¹³ The court of arches not only heard appeals, but could also try causes sent to it from lower courts by means of letters of request. Appeals from the two provincial courts before the Reformation went to Rome whereas after the Reformation they went to the high court of delegates, which was an *ad hoc* tribunal of ecclesiastical and temporal lawyers.¹⁴

¹⁰ R. Houlbrooke, *Church Courts and the People during the English Reformation 1520–1570* (1979), 22–4; F. Heal, *Of Prelates and Princes* (1980), 54.

¹¹ The Canterbury consistory court also operated a circuit that included Dover, Hythe and Romney in addition to the cathedral city: Woodcock, *Medieval Ecclesiastical Courts*, 33.

¹² Houlbrooke, *Church Courts and the People*, 32–3.

¹³ 'Until the Great Fire of London, the court sat in the church of St Mary de Arcubus or Bow Church; after the Great Fire until April 1672 in Exeter House in the Strand; and afterwards in the great hall of the rebuilt Doctors' Commons': M. D. Slatter, 'The records of the Court of Arches', *JEH*, 4 (1953), 142.

¹⁴ G. I. O. Duncan, *The High Court of Delegates* (1971).

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Although structures varied widely, almost defying generalisation, these courts performed a range of functions, though not all courts offered a complete range. They varied in the powers that they had and in the functions they performed, depending in part on the agreements that had been hammered out between them in the three centuries before 1500. It should also be remembered that court officers conducted some business not only in formal court sittings but also out of session, sometimes even in their own homes. The ecclesiastical courts and their officials had at least four important functions, namely, a corrective function, an adjudicative function, a function of acting as courts of verification and record, and a licensing function. All of these activities were shaped by the requirements of canon law.

The corrective powers of the church naturally embraced purely spiritual matters. They had power to seek out and to punish spiritual nonconformity and religious misbehaviour among both clerics and laymen. The scope of such jurisdiction is well illustrated by visitation articles – those lists of questions drawn up by the higher clergy to be put to clerics and laymen in parish after parish when particular jurisdictions were visited by archdeacons, bishops or archbishops. The visitation articles drawn up by Archbishop Cranmer in 1547 asked of the clergy whether they had preached against the ‘pretensed authority’ of the pope and for the power and authority of the king; whether they had taken away and destroyed ‘all images, all shrines, coverings of shrines, all tables, trundles, or rolls of wax, pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry and superstition’; whether the Bible, in English, was publicly available in the church; whether they were keeping a register of weddings, christenings and burials; whether they had provided a poor men’s box in which parishioners could bestow what they had formerly spent on ‘pardons, pilgrimages, trentals, masses satisfactory, decking of images’ and so on. The church’s jurisdiction, however, was not confined to matters of doctrine, faith and practice, for it embraced also a wide range of moral offences. In addition to being called on to present any layman performing popish rituals, and any who ‘commune, jangle and talk in the church in the time of common prayer’, parishes were also to present ‘common drunkards, swearers or blasphemers’, any who have ‘committed adultery, fornication or incest, or be common bawds’, any ‘that

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use charms, sorcery, enchantments, witchcraft, soothsaying, or any like craft invented by the devil', any 'who have made privy contracts of matrimony' and much else besides. This was 1547, and here we have the Edwardian Reformation in full flow.¹⁵ Other, and later, visitation articles would have different obsessions. Most prosecutions derived from presentments made by parish churchwardens at or after such visitations, though offences, or the 'fame' that offences may have been committed, could be reported to the ecclesiastical authorities at any time.

The corrective powers of the church extended, therefore, over a wide range of human behaviour, taking in not only spiritual concerns but also communal discord, marital arrangements and sexual misbehaviour. As canon 109 of the ecclesiastical canons of 1604 put it:

If any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, and any other uncleanness, and wickedness of life, the churchwardens, or questmen, and sidemen, in their next presentments to their ordinaries, shall faithfully present all and every of the said offenders to the intent that they, and every of them, may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed.¹⁶

The courts had, as listed earlier, important adjudicating functions. They were institutions in which private litigants could pursue grievances. The sort of misbehaviour that led people to be punished by these courts could also lead them into personal legal actions against each other, hoping for sentences in their favour or some sort of compromise settlement. So people went to court to prove that they were, or were not, married to some other person. Husbands sought separations from their wives on the grounds of the wife's adultery. Wives sought separations from their husbands on the grounds of the husband's cruelty. People sought to clear themselves of imputations of misbehaviour, contesting an alleged remark made by some individual that they were fornicators, adulterers, usurers or whatever. These defamation suits comprised a large portion of business in the courts that handled such litigation. Other common actions included pew disputes and

¹⁵ E. Cardwell, *Documentary Annals of the Reformed Church of England* (1844), i, 49–59.

¹⁶ G. Bray, *The Anglican Canons 1529–1947* (1998), 409.

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quarrels over tithes and wills. It is hardly surprising that disputes about church seating should be handled in the ecclesiastical courts, but the other two categories of business are quite surprising and merit a brief explanation.

As tithes were originally grants made by laymen to support the church, jurisdiction relating to tithes lay generally with the church courts, even though by the later sixteenth century many tithe-receivers were laymen. One reason laymen held tithes was that after the dissolution of the monasteries between 1536 and 1540 a great deal of spiritual property passed into lay hands. The monks had earlier been given many rights over parish churches, and laymen eventually succeeded to them.

Disputes between the church and the crown in the early Middle Ages over their respective powers of jurisdiction in relation to wills were usually resolved through compromise. Issues relating to the inheritance of real property – land – fell to the royal courts; those revolving around the disposal at death of personal property – goods and chattels – fell to the church courts. Typical testamentary disputes were those concerned with the non-payment of legacies by executors. But the probate of wills and the administration of the estates of intestates – those who died without making a will – also came into the ecclesiastical courts. This brings us to the third important function of these institutions: they were courts of verification and record.

Wills were ‘proved’ or authenticated by church court officials and subsequently lodged in their archives for safe keeping. So also were the inventories of goods and chattels compiled by or for executors and the accounts of those called on to administer the estates of intestates. Most wills were proved in local archdeaconry courts, but the will of a person with property in more than one archdeaconry was supposed to go to a diocesan court, whilst the wills of those with assets in more than one diocese were legally subjected to probate in one of the two provincial courts. That for the southern province was the prerogative court of Canterbury, situated in London, whilst that for the northern province was the exchequer court at York. These rules were not strictly adhered to, however; sometimes executors went to the courts that were geographically most convenient for them.

The fourth, and final, function of these courts and their officials is that they were licensing bodies. This naturally embraced the

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licensing of the clergy themselves, from whom fees were extracted at their ordination and during the periodic visitations when their credentials were inspected. Schoolteachers also were supposed to obtain licences from the ecclesiastical authorities, though the majority of those who taught in schools were probably unlicensed. The same applies to midwives, who were theoretically required to be godly women, if only because they might periodically have to baptise babies on the point of death. They were required to swear oaths in order to obtain their licence to practise, such as this example from 1726:

You shall swear that you will faithfully and truly execute the office of Midwife in those places where you shall be licenced and authorized, you shall afford your help as well to the Poor as to the Rich for reward, you shall not deliver any privately or clandestinely to conceal the Birth of the Child. If you help to deliver any whom you suspect to be unmarried you shall acquaint the Ecclesiastical Court of the Jurisdiction therewith and before you yield your assistance or helpe you shall perswade and by all lawful means labour with them to declare who is the father of the said Child ...¹⁷

There are reminders here not only of how intrusive the powers of the church courts actually were but also of how their various functions interlocked and fed each other. Midwives were obliged to attempt to force an unmarried mother to reveal the name of the father of her child. The mother, and less often the father, might subsequently be prosecuted for fornication. Married women might be cited for prenuptial fornication if the midwife reported that the child was born within nine months of the church ceremony and was not visibly premature. Such prosecutions were all too common in the later sixteenth and early seventeenth centuries. One party might attempt to thwart such a prosecution by beginning an action against a partner to prove a prior clandestine marriage, but this in turn might precipitate a prosecution for irregular marriage.

Court officials derived income from the issue of licences, and after the Reformation a major source of income under this head came to be that derived from the issue of marriage licences. These dispensations avoided the calling of banns in parishes where the couple normally resided, and also avoided the prohibitions on marrying in any one of the closed seasons for matrimony inherited

¹⁷ Hair, *Before the Bawdy Court* (1972), 58.

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from the medieval liturgical calendar. They became in time an important source of revenue to all the higher clergy and officials who had a hand in their issue.

These courts had, therefore, at least four important functions. In addition to their corrective, adjudicative, licensing functions, they also served as courts of record and verification. The first two functions require further discussion, if only because they involved different court procedures.

Corrective prosecutions – the so-called office causes – were either initiated by complaints about a particular individual's activities made by churchwardens and clerics, often in the course of routine ecclesiastical visitations, or arose from the 'common fame' of an individual's misbehaviour, brought in other ways to the court's attention, perhaps by the activities of apparitors or summoners. If, after being so alerted, the judge decided to take action, the defendant would be served notice by an apparitor to attend the court at a particular place and time. If the person attended, he or she would be charged either *ex officio mero*, that is, with the judge acting as the prosecuting agent, or *ex officio promotio*, where the cause was promoted by some individual other than the judge. The defendant would then be compelled on oath to make a true answer to the accusations levelled against him or her. If the party admitted the offence, the judge could proceed straight to sentence. If he or she denied it, then two courses of action usually presented themselves. The judge could take evidence to help determine the outcome of the case. Such evidence was usually presented orally, leaving little or no record in the court's registers, though it was possible for the case to proceed via the submission of written 'articles', 'interrogatories' and 'responses'. The alternative was that the defendant could be purged of the charge. 'Compurgation' meant mustering on some future court day a stipulated quota of trustworthy people who would swear to their belief in the defendant's oath. If the compurgators duly appeared to so swear, the charge against the defendant would be dismissed.¹⁸

¹⁸ D. Owen, 'Ecclesiastical jurisdiction in England, 1300–1550: the records and their interpretation', in *Materials, Sources and Methods of Ecclesiastical History*, ed. D. Baker (1975), 206; Houlbrooke, *Church Courts and the People*, 38–40.

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These office causes are to be distinguished from instance causes, where the judge adjudicated private disputes between litigants. The procedures involved were different in several ways. Proof in instance causes was made by witnesses and documents, rarely by oaths. Such causes began with a complaint and the consequent summons by an apparitor for the litigants to appear at a specified court. At their first appearance, they would appoint proctors – officials who would conduct the case on their behalf in an elaborate sequence of written complaints – and then articles containing questions which were put to the witnesses and answered by them. Each procedural stage was presented at separate court sessions. Every document drawn up and presented had to be paid for by the parties, and cases could stretch on for months, and sometimes years.¹⁹ Most, however, did not. Indeed only a minority of these instance suits seems to have culminated in a judicial sentence. In the consistory court of Wells in the fifteenth century, only about 10 per cent seemed to have reached this point.²⁰ Most of them petered out through exhaustion or through compromise, as the litigants began to appreciate the financial implications of continuing the case.

If an instance cause came to sentence, the judge – and the judge alone since there were no juries in these ecclesiastical courts – would find for one party or the other, allocating the payment of costs to be imposed on the loser. In office cases, however, the defendant would be declared guilty of the charges that were levelled or dismissed if he succeeded at compurgation. If guilty, what then happened depended largely on the seriousness of the charge. Lesser offences might simply receive a ‘monition’ – a judicial warning; greater offences would merit sentences of penance, varying in the severity of their demands. Before the Reformation a penitent might be forced to process around his church, bearing a candle that was subsequently placed before the high altar or on some shrine. The most usual post-Reformation

¹⁹ Woodcock, *Medieval Ecclesiastical Courts*, 53, implies that a contested case could not be terminated in less than three months. R. W. Dunning, ‘The Wells consistory court in the fifteenth century’, *Proceedings of the Somersetshire Archaeological and Natural History Society* 106 (1962), 54–5, agrees with this, if the case was simple; the average duration of a contested instance suit in Wells at this time was six months, ‘which amounted to fairly speedy justice’.

²⁰ Dunning, ‘Wells consistory court’, 55.