

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

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

Band 34

**Central Courts
in Early Modern Europe
and the Americas**

Edited by

A. M. Godfrey and C. H. van Rhee



Duncker & Humblot · Berlin

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Herausgegeben von

Richard Helmholz, Knut Wolfgang Nörr
und Reinhard Zimmermann

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Printed with the support of
the Gerda Henkel Stiftung, Düsseldorf

Bibliografische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in
der Deutschen Nationalbibliografie; detaillierte bibliografische Daten
sind im Internet über <http://dnb.d-nb.de> abrufbar.

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© 2020 Duncker & Humblot GmbH, Berlin
Fremddatenübernahme: L101 Mediengestaltung, Fürstenwalde
Druck: CPI buchbücher.de gmbh, Birkach
Printed in Germany

ISSN 0935-1167
ISBN 978-3-428-18033-2 (Print)
ISBN 978-3-428-58033-0 (E-Book)

Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706 ☼

Internet: <http://www.duncker-humblot.de>

Preface

This book is dedicated to the memory of W. David H. Sellar (1941–2019), the most distinguished Scottish legal historian of his generation. Both editors of this volume were his students, and were first introduced to each other by him during their doctoral research. He did much to inspire their interest in the history of central courts, and his analysis of the foundation of the College of Justice in Scotland has influenced subsequent interpretations through its stress on a comparative European perspective, and its focus on jurisdiction. He was delighted to meet the Working Group for this volume on the occasion of its meeting in Edinburgh in June 2014, and he followed the progress of the project with interest.

David Sellar was the founding Director of the Centre for Legal History at Edinburgh University, established in 1991. His distinguished contribution to legal history was marked by the award of an honorary doctorate of laws by the University of Glasgow in 2016. Born in Glasgow, educated at the universities of Oxford and Edinburgh, he spent his academic career at the Faculty of Law of Edinburgh University, where he taught Scottish and European legal history and Scots private law from 1969 until his retirement, and thereafter as an honorary research fellow. After retirement from the university, he served from 2008–2014 as Lord Lyon King of Arms, one of Scotland's most ancient offices of state. He was known internationally as a historian of Scots law, was a regular participant in the British Legal History Conference, and participated in several projects of the Société Jean Bodin pour L'Histoire Comparative des Institutions: on *actes à cause de mort*, on *l'assistance dans la résolution des conflits*, and on *la coutume*. He was also an invited member of four research projects sponsored by the Gerda Henkel Stiftung which have published volumes in the *Comparative Studies in Continental and Anglo-American Legal History* series – on unjust enrichment, negligence, third party rights and presumptions (1995, 2001, 2008, 2009). In collaboration with Professor R. H. Helmholz, in 2009 he co-edited one of the books in this series, *The Law of Presumptions: Essays in Comparative Legal History*. The editors of the present volume owe him a debt of gratitude beyond measure, and dedicate this volume to his memory with affection and respect.

The editors also wish to record their gratitude to the late Professor K. W. Nörr, without whose encouragement and support the Working Group for this volume would never have been established, and to the Gerda Henkel Stiftung

for its patient support of what has been a long-running project. Thanks are also due to the University of Maastricht, and the Signet Library, Edinburgh, for hosting the two meetings of the Working Group. Special thanks are owed to the former Dean of the Faculty of Advocates, James Wolffe, Q. C., currently Lord Advocate of Scotland, who kindly met with the Working Group and permitted it to make a conducted tour of the Advocates Library to complement its tour of Parliament Hall and the Signet Library during its Edinburgh meeting. It was an inspiration for the Working Group to meet in these surroundings, within the very precincts of the Scottish College of Justice, both a subject of historical enquiry for the project, and the contemporary site of a busy working court.

Glasgow/Maastricht, November 2020

Mark Godfrey
Remco van Rhee

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A. M. GODFREY AND C. H. VAN RHEE

Introduction

1. Central courts

This volume is intended as a contribution to the comparative history of central courts focused principally on their development in early modern Europe, but including aspects of their development relating to European settlement in America. We focus in particular on the formative period in the development of such courts (between roughly the fifteenth and eighteenth centuries), tracing their origins and especially their jurisdiction, and how this became accepted and embedded within the existing structures of jurisdiction and arrangements of courts in individual states (or empires). The book thereby hopes to illuminate the development of the state through examining the changing institutional framework of jurisdiction within which the adjudication of legal disputes developed in the early modern period. This also involves enquiring into the wider role of legal institutions in the development of governance and more particularly in the administration of justice, and the ways in which the legal concept of jurisdiction informed these developments.

The concept of a central court provides a focus for each contribution to this book. It relates to courts which were in some sense part of the structure of central governance in a given territory, *central* governance typically embracing institutions with authority over the whole of a state or otherwise politically connected territory, and associated with government by a ruler with authority over the whole of such territory. The jurisdiction of such courts would therefore be potentially co-extensive with that territory, rather than restricted to a particular locality (though in practice particular localities might nevertheless be exempted from the wider general jurisdiction of a central court or lie beyond it for other reasons). It might usually (though not necessarily) possess a general superior jurisdiction, which might enable it to exercise an appellate jurisdiction over other courts within the territory, as well as some form of first instance jurisdiction. Some of the central courts under discussion were new creations, whilst others developed more organically from existing institutions – the Dutch High Council or *Hoge Raad*, for example, as well as the *Reichskammergericht* and the early fifteenth century Scottish ‘Session’ were new creations (in 1582, 1495 and 1426 respectively), whilst the Great Council of Malines (from its reinstatement in 1504), the

Reichshofrat and the Scottish College of Justice (founded in 1532 but reconstituting the existing judicial Session of the King's Council) were institutions with a long pre-history. Many of the contributions to this book discuss the way that royal councils could give rise to new central courts, when the judicial role of such royal councils evolved from a peripheral or restricted role into a form of superior regular jurisdiction, existing alongside the more general role such councils continued to play in politics and government. Sometimes this evolution might introduce a central court with general competence into a territory for the first time, as with the sixteenth-century Scottish 'Session', though sometimes it might involve the development of a new but supplementary generation of central courts into a system of courts already structured around central jurisdiction, as with the development of Chancery and Star Chamber in sixteenth-century England alongside the earlier generation of central courts of King's Bench, Common Pleas and Exchequer established in the thirteenth century.

A particular focus of the book is on the relationship between such new courts and the more political, governmental privy councils (including in some contexts parliaments or other forms of central political assembly) which were often in some senses their parent bodies, or at least from whom they may have separated institutionally as part of what R. K. Hannay termed a 'differentiating process'.¹ Hannay's analysis was made in relation to the Scottish King's Council, whose adjudicative functions were gradually organised separately within council business by the end of the fifteenth century (sitting as 'the Session'), and finally transferred to a distinctive judicial body in the sixteenth century (the College of Justice). Such differentiation of function was itself a wider feature of governmental development, visible, for example, within the complex Spanish governmental system of 'polysynody', in the way the group of councillors on the Council of Castile who heard matters concerning the Indies, meeting as a *Consejo de Indias*, became autonomous by 1524 as the Royal and Supreme Council of the Indies.²

The more political councils with a general competence in matters of government not only continued to play an essential role in governance after ceding judicial competences to new judicial institutions, but often retained an important residual jurisdiction and judicial role which continued to interact with the new courts. Sometimes, as in the case of the Dutch Republic, new political bodies like the Estates General of the Dutch Republic assumed a

¹ R. K. Hannay, On the Antecedents of the College of Justice, in: R. K. Hannay, *The College of Justice*, Stair Society, Supplementary vol. 1, 1990, ed. H. L. MacQueen, pp.179–215 at 109. For comment see A. M. Godfrey, *Civil Justice in Renaissance Scotland. The Origins of a Central Court*, Leiden, 2009, pp. 80 and 4, 27, 31.

² *López Valencia* in this volume, p. 471.

judicial role from the time of their creation, replicating models from the territories from which they had seceded. The new courts influenced the development of the early modern state through the exercise of superior forms of jurisdiction over other courts, and enhancing their own judicial autonomy from forms of political control. However, this newly focused jurisdiction also had to accommodate itself to other parts of central governance such as privy councils, precisely because they also retained a judicial competence of their own, though not necessarily one which was clearly defined at the outset. In some countries such as England and Scotland there was a need to articulate the jurisdictional relationship not only with privy councils but also with established parliaments which retained their own judicial competence. Indeed, both the English and Scottish parliaments saw a resurgence in judicial activity in the seventeenth century, alongside their competence as legislative bodies.

An important wider theme to be explored alongside the charting of institutional developments is the role of jurisdictional change – how and why the jurisdiction of both existing and new institutions changed or developed. This can shed light on the relationship between the development of central courts and the role played by law and the administration of justice in governance. Instances or patterns of contested jurisdiction can provide crucial insights into this theme. Where it has proved feasible, therefore, some individual contributions have been based methodologically upon research in the litigation records of such courts in the late medieval and early modern periods, together with ordinances and statutes affecting their constitution.³

The chronological scope of the book is focused on the early modern period. As touched on already, some countries such as England developed central courts as early as the thirteenth century, but this was the exception. Others, such as Scotland, had no such distinct and separate central court in the medieval period but did rely on the general institution of a parliament to provide a judicial forum exercising central jurisdiction. In this sense Scotland possessed a kind of central court, in that parliament conducted judicial business and was technically constituted as a court of law. But a new pattern emerged between the fifteenth and the seventeenth centuries, as European states tended to develop a new generation of central law courts, distinct from political bodies with a judicial competence. This followed a variety of path-

³ *J. H. Baker* (ed.), *Judicial Records, Law Reports, and the Growth of Case Law, Comparative Studies in Continental and Anglo-American Legal History*, vol. 5, Berlin, 1989, and *A. Wijffels* (ed.), *Case Law in the Making. The Techniques and Methods of Judicial Records and Law Reports, Comparative Studies in Continental and Anglo-American Legal History*, vol. 17, Berlin, 1997 are valuable guides to the archival sources of the superior courts of law.