ECCLESIASTICAL LAWYERS AND THE ENGLISH REFORMATION

R. H. HELMHOLZ
Professor of Law in the University of Chicago

1. INTRODUCTION

Too little is known about the history of the profession of ecclesiastical law. It is a good subject for research. The Prefect of the Vatican Library once described the medieval English ecclesiastical lawyers as a 'much-maligned class' that has commonly been held responsible for a great many of the ills that afflicted the English Church.[1] He was restating a not uncommon judgment among historians who have been obliged by their subject to say *something* about ecclesiastical lawyers.[2] But it is a statement about public perception rather than actual conditions among these lawyers.[3] There needs to be somewhat more of the latter. We do know something about the top of the profession, the advocates and judges of Doctors' Commons.[4] The rest of the landscape is almost wholly *terra incognita*.[5] About the diocesan registrar, the backbone of the profession, there is only one article – a good article to be sure – but only one: that published in 1976 by Rosemary O'Day.[6] There is much more to be done.

This paper takes up one part of the history: ecclesiastical lawyers and the English Reformation. What were their reactions to the break with Rome? How did it change their lives and affect their careers? What variations and upsets occurred in the courts they served? To deal with these questions it is necessary to describe some of the historical background and also to take in more than simply the years of the breach in relations between the English Church and the Papacy. It is artificial to speak only about the Henrician Reformation of the 1530s in assessing and describing the impact of the Protestant Reformation upon English law, religion, and society.[7]

1. Leonard Boyle, 'The Summa summarum and some other English Works of Canon Law', in *Pastoral Care, Clerical Education and Canon Law, 1200-1400* (1981) XV, pp.415-16.
2. E.g., C. Davies, 'A Reformation Dilemma', *Journal of Ecclesiastical History* 39 (1988) p.63: 'rusty and it was held in general disrepute'.
3. See also the pioneering article about the income of the clergy more generally: Beat Kümin, 'Parish finance and the early Tudor clergy', in *The Reformation of the Parishes,* Andrew Pettegree ed. (1993) p.44.
4. G. D. Squibb, *Doctors' Commons: a History of the College of Advocates and Doctors of Law* (1977) is the principal study. Also valuable are: Daniel R. Coquilette, *The Civilian Writers of Doctors' Commons, London* (1988); Brian P. Levack, *The Civil Lawyers in England 1603-1641* (1973); W. Senior, *Doctors' Commons and the Old Court of Admiralty* (1922); F. Donald Logan, 'Doctors' Commons in the Early Sixteenth Century: a Society of Many Talents', *Historical Research* 61 (1988) pp.151-65.
5. This can be appreciated by reading a valuable review essay, which is almost totally devoid of treatment of legal practice: C. T. Allmand, 'The Civil Lawyers', in *Profession, Vocation, and Culture in Later Medieval England,* Cecil H. Clough ed. (1982) pp.155-80. James A. Brundage has recently made a start; see his 'The Bar of the Ely Consistory Court in the Fourteenth Century: Advocates, Proctors, and Others', *Journal of Ecclesiastical History* 49 (1992) pp.541-60. He reached the conclusion that in the late fourteenth century at least, 'the lawyers and judges of the Ely consistory court constituted a well-defined and relatively prosperous upwardly mobile professional elite'.
6. 'The role of the registrar in diocesan administration', in *Continuity and Change: Personnel and Administration of the Church in England 1500-1642* (1976) pp.77-94. There is also useful information to be found, albeit for a later period and for one court only, in G. I. O. Duncan, *The High Court of Delegates* (1971) pp.190-96.
7. I agree entirely with the view on this point expressed in Diarmaid MacCulloch, *The Later Reformation in England 1547-1603* (1990) pp.6-7.

The principal conclusions of the paper come from record evidence, specifically the act books and other court records now found in county archives and diocesan registries throughout England. These books contain records of the men who acted as lawyers in the spiritual courts, and it is upon their evidence that descriptions of the lower part of the profession must be based. This paper concludes with a brief attempt to relate the evidence presented to the 'revisionist' history of the Reformation that is the subject of so much writing and controversy today, and then with a somewhat more personal reflection about the relevance of this story to the modern situation.

2. THE YEARS BEFORE THE REFORMATION

The fifty years before the start of the English Reformation were years of diminishing fortunes for the English ecclesiastical lawyers. Beginning in the 1480s, actions brought at common law, based largely on the medieval Statute of Praemunire and begun in the Court of King's Bench, gradually removed significant parts of the jurisdiction on which their livelihood depended. By the 1520s this attack was complete. And successful. Breach of faith or perjury, significant parts of probate administration, and defamation involving imputations of temporal crimes were all taken, incrementally but surely, from the effective jurisdiction of the Church's tribunals. Loss of the first was particularly serious. Breach of faith had permitted suits for specific performance of ordinary contracts to be brought within the ecclesiastical courts whenever those contracts had been undertaken by an oath. It had provided a large percentage of the litigation in the courts and its loss was one reason these must have been difficult years for the profession. In financial terms, they were hard times.

The only truly positive development amid the gloom of these years was the organisation of Doctors' Commons in London, and perhaps also the endowment of All Soul's College in Oxford. The greater cohesion and ease in consulting learned literature among the ecclesiastical lawyers practising in the capital that the first development made possible was certainly an advance. On the other hand, this learning did little for the lawyers in the provinces, where the bulk of litigation occurred. There, books mattered less. The loss of effective jurisdiction is what counted.[8] In most dioceses, low levels of litigation and consequently of income continued throughout the first two-thirds of the sixteenth century. So far as one can tell from the court records, its was unaffected by the shifts and turns of political and religious change at the top of the pyramid. The reign of Queen Mary signalled no rise in the fortunes of the Church's tribunals.

3. RECOVERY OF FORTUNES

A rise did at length come, however. It came under Mary's successor. Beginning in about the second decade of Elizabeth's reign, the spiritual courts began to reassert themselves. Levels of litigation rose, and professional income seems to have kept pace with the rise.[9] Admissions to practice in the Court of Arches grew substantially.[10] An increase in the number of proctors admitted to

8. The story is well worked out by Ralph Houlbrooke, 'The Decline of Ecclesiastical Jurisdiction under the Tudors', in *Continuity & Change: Personnel and Administration of the Church in England 1500-1642*, Rosemary O'Day & Felicity Heal eds. (1976) pp.239-57.
9. E.g., Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640* (1987) pp.12-15; Carson I. A. Ritchie, *The Ecclesiastical Courts of York* (1956) pp.62-64.
10. Brian P. Levack, 'The English Civilians, 1500-1750,' in *Lawyers in Early Modern Europe and America*, Wilfrid Prest ed. (1981) p.109.

practice,[11] and a rise in the number of graduates in civil law at the universities seems also to have occurred. Articulate spokesmen for ecclesiastical jurisdiction and writers on ecclesiastical law emerged to state and defend the Church's legal claims. The 'down-turn' that had begun a century before thus turned out not to be a steady-state decline.

Indeed, although the fifteenth century subject matter jurisdiction was not recovered, no source of jurisdiction of any moment was lost to the Church during the Reformation period. There were proposals aplenty to do so. But they failed. In fact new initiatives in the assertion of expanded spiritual jurisdiction were undertaken. Though it may have seemed unlikely to the ecclesiastical lawyers during the gloomy years of the 1540s and 1550s, in fact a revival of fortunes took place in their profession. During Elizabeth's reign increasing levels of litigation and something like a recovery of nerve encouraged the English civilians.

A part of this was a product of simple stability. Once a storm is over, it is comforting to known one has survived. But not all the gain was a matter merely of survival. A part of the recovery came from the initiatives of the ecclesiastical lawyers themselves. One illustrative example is the rise of the suit for jactitation (or boasting). This cause of action (if the phrase be permissible in a canonical context) is familiar from the rather quaint legal action known as 'jactitation of marriage'.[12] This action could be brought when one person boasted of being married to another, to the detriment of that other person. It might, for example, impede a woman's chance of marrying advantageously if someone else was openly boasting of having contracted marriage with her. Thus she could bring suit in an ecclesiastical court to silence the boaster.

The earliest suits for 'jactitation of marriage' come from before the sixteenth century. However, it was during Elizabeth's reign that concerted efforts were made to expand the scope of this remedy. If boasting of a marriage could give rise to a cause of action, why not apply the same reasoning to other sorts of boasting? Thus, boasting of the ownership of a tithe, the power to appoint to a benefice, or even the right to an inheritance arose as possible subjects of jurisdiction in the ecclesiastical courts. There is at least one instance in which 'jactitation of jurisdiction' was made available as a way of trying a disputed question of jurisdictional competence.[13] The *gravamen* was as much the public boasting as it was the underlying right, and the apparent justification for the extension was that the Church had jurisdiction over 'verbal acts'.

From the perspective of the English common lawyer, this development might well have been seen as a threat, at least a potential threat. Almost any legal claim can be the subject of a boast. This is particularly true if in order to be actionable a boast needs to amount to little more than open assertion, as was true in jactitation of marriage. If it requires no more than such an assertion by one's opponent to render him subject to suit in the spiritual forum, then truly a *via latissima* was being opened up to the expansion of ecclesiastical jurisdiction. At the end of the day, of course, this did not occur. The 'cause of action' came

11. See Ralph Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* (1979) p.28.
12. Henry Conset, *The Practice of the Spiritual or Ecclesiastical Courts* (1685) Part VI §§3-6.
13. 'William Colman's Precedent Book', in Suffolk Record Office, Bury St. Edmund's, MS.E 14/11/2, no. 129 (early 17th century).

to be confined to marriage. But the actors would not have known this at the time. At the time, it must have looked as though a considerable step towards expansion of the scope of the ecclesiastical law was being made.

4. RELIGIOUS CHANGES AND LEGAL CAREERS

This part of the story must be only background, however. At least some of it has been told before. A related subject that has not been explored concerns the lawyers themselves. What happened to individual members of the profession during those years when so many religious changes within the Church were taking place? How did they react? To answer these questions, one must turn to the act books and other manuscript records of the ecclesiastical courts. The civilians have left so few descriptions of their attitudes and so little non-professional literature, that such an indirect approach is probably the best one can hope for. But the officials records, if not wholly continuous for the sixteenth century and if not satisfactory for every one of the English dioceses, at least are full enough to inspire confidence in their representative character. They record who the judges, advocates and proctors were pretty well throughout the century of the years covered by the English Reformation. From the actions of the civilians, it is possible to describe their public reactions to the changes of these years, although their private reactions remain largely impossible to penetrate. And from these records, several conclusions emerge.

(a) *The Henrician Reformation*

The Henrician Reformation, properly speaking, made little discernible difference in the careers of the civilians. The early years of the Reformation did produce a few spectacular deprivations among the episcopate, John Fisher of Rochester being the most famous example. But such men were famous in part because they were exceptional. Their example did not reach down to the courts of the Church. Except for death or promotion, the same men acted throughout as judges, advocates, registrars and proctors in the diocesan courts throughout the Henrician period. For example, Dr Roland Lee served as judge of the consistory court at Lichfield and continued to do so until he became bishop of Coventry and Lichfield in 1533. He died in office in 1543.[14] Nicholas Harpsfield, judge of the consistory court at Winchester in the late 1520s, served there thoughout Henry's reign. Apparently he continued to do so until he was made archdeacon of Canterbury during Queen Mary's reign.[15] Among the lesser civilians, the proctors and advocates, the same pattern is readily discernible. They remained in place. At Winchester, for example, Nicholas Hocker and John Lichfield, the two proctors there who lived through the period, continued to exercise their office from the 1520s into the 1540s.[16]

In this respect, it is important to recall the maintenance of the Church's judicial institutions during this period.[17] Except for appeals to Rome, the Henrician legislation made no appreciable changes in the organisation of the

14. Taken from Act book B/C/2/1, Jt. Record Office, Lichfield, and John Le Neve, *Fasti Ecclesiae Anglicanae 1300-1541, Coventry & Lichfield Diocese,* B. Jones comp. (1964) p.3.
15. Hampshire Record Office, Winchester, Act books C 2/2 (1526-30) and C 2/3/1 (1541-49). He was not the sole judge, however. Edmund Steward also acted as official principal.
16. Ibid. The other proctor, John Southwood, seems to drop out in the Act book during the course of the 1520s.
17. See, e.g., Christopher Kitching, 'The Prerogative Court of Canterbury from Warham to Whitgift', above note 8, pp.191-213.

legal system of the Church. Indeed one can only regret that some much needed reforms, such as the consolidation of many of the peculiar courts, were not tackled at the time.[18] Very few of the outstanding problems were taken up, much less resolved. There were indeed attacks on the Church's jurisdiction during these years. One need cite only Christopher St. German's *Doctor and Student,* the Common's Supplication against the Ordinaries, or the aftermath of Hunne's case. There were others. But for all the sound and fury, very little happened on the inside of the Church's legal system – either in a positive or a negative direction. What large-scale attack on the jurisdiction of the consistory courts *would* occur, had *already* occurred by the time of the break with the papacy. Otherwise, although some of the changes in the 1530s and 1540s raised important religious or constitutional issues by implication, most were minor in their actual effect. They were matters like varying the degrees of affinity and consanguinity that rendered a marriage unlawful.[19] Little in the way of drastic change occurred to upset the lives of the practising civilians.

This result may well be considered an accident. The 1532 Act for the Submission of the Clergy called for the appointment of a Commission to reform the ecclesiastical law so that it would not be 'repugnant to the King's prerogative royall or the customs and statutes of the Realm'.[20] The Commission eventually appointed to reform the canon law did produce a document that would materially have changed the law administered in the ecclesiastical courts.[21] Perhaps it would even have been an improvement. However, the commission's draft was never enacted, and over the course of the sixteenth century its failure to achieve statutory force proved to be more important than the existence of the *Reformatio legum.* The statute that authorised the Commission's appointment also contained a saving clause for existing canonical rules, provided that they did not contravene existing English law, and the English civilians took the view that this saving clause authorised virtually *everything* they were already doing.[22] The men who worked within the system of ecclesiastical law were thus touched only at the margins by the hand of Parliament. This may explain something of the regularity of the act books. The same men administered pretty much the same law.

(b) *The Reigns of Edward VI and Mary*

More surprising, at least at first sight, is the finding that this pattern of stability continued through the reigns of Henry's two immediate successors. Although the reigns of Edward VI and Mary stood at opposite ends of the religious spectrum, one discerns little sign of change and none of disruption by looking at the act books and personnel of the spiritual courts. The absence of change is surprising – indeed it is a little disconcerting to one who professes to believe in the premisses of the Law and Society movement. At the archiepiscopal court at York, for example, the two men serving as officials who had taken office under Henry VIII and lived through the period were still there and serving

18. See, e.g., Sandra Brown, *The Medieval Courts of the York Minster Peculiar* (York 1984) 29 and, more generally, the discussion in Paul Barber, 'What is a Peculiar' (1995) 3 *Ecc.L.J.* pp.299-312.
19. Precontracts and Degrees of Consanguinity 1540, 32 Hen. 8 c.38; Restoration of Jurisdiction to the Crown 1558-59, 1 Eliz. 1 c. 1 § 3.
20. 25 Hen. 8 c. 19.
21. The standard edition is *The Reformation of the Ecclesiastical Laws,* E. Cardwell ed. (1850); it has recently been translated in James C. Spalding, *The Reformation of the Ecclesiastical Laws of England, 1552* (1992).
22. E.g., 23 Hen. 8 c. 9, enacting that no person should be cited out of the diocese where he lived at the time of citation was interpreted by the civilians to authorise appointment of someone within a diocese to receive process in the name of the person cited, despite the person's absence from the diocese.

when Mary died in late 1558.[23] At Canterbury, Robert Colyns, the commissary general who had first appeared in the act books of the 1520s, was still in his judicial place in 1559.[24] Some of the judges died or were promoted, of course. Hugh Curen, official principal at Hereford during the 1530s, became Archbishop of Dublin in 1555. But such men must be counted among the survivors. In fact, Curen is a good example; he survived to become bishop of Oxford in 1567.

Again, what holds true of the judges is also true of the lawyers practising in the courts. The three advocates at York whose names are found in the Henrician act books and who had not died by the close of Mary's reign were still there and apparently in harness at that time.[25] The same pattern is found among the York proctors, five of whom practised in three reigns.[26] This proves to be typical. In the diocese of Hereford, the two proctors practising there in the 1530s who survived remained in place under Queen Mary.[27] At Winchester, of the five proctors practising in the Consistory court during the latter years of Henry's reign, three died before his reign was over and three remained in place into Marian times.[28] In other words, the comings and goings of the ecclesiastical lawyers do not coincide with the changes in official religious policy that occurred under the Tudors. The Henrician Reformation, Edwardian Protestantism, and the Marian restoration of papal supremacy and the Mass had no apparent impact on the careers of the practising ecclesiastical lawyers.

(c) *The Elizabethan Settlement*

At the accession of Elizabeth, there was a change that is discernible in the contemporary act books. At that point, a division can be made between the ordinary ecclesiastical lawyers and those who served in the higher positions, particularly those who had achieved dignities in the Church and were no longer active in the day-to-day running of the spiritual courts, that is the men who had attained the offices of bishop, archdeacon or cathedral dean. Something like half of this second group refused to take the oath of Supremacy and were deprived. The other half did take the oath of Supremacy and were deprived. The other half did take the oath and continued in possession of the ecclesiastical offices they had attained.[29]

Hugh Curen, the onetime official principal at Hereford who became successively archbishop of Dublin and bishop of Oxford until his death in 1568,

23. They were John Rokebye and George Palmer. Taken from the headings of consistories in act books, Borthwick Institute of Historical Research, York, Cons.AB.14, Cons.AB.18, Cons.AB.21, and Cons.AB.22.
24. He acted initially as official to the archdeacon of Canterbury; see Brian Woodcock, *Medieval Ecclesiastical Courts in the diocese of Canterbury* (1952) p.120. For appearances in the commissary courts, see Canterbury Cathedral Library, Act book Y.2.16, f.72 (1547) and Act book Y.2.19, f. 105 (1559).
25. They were Richard Farley, Reginard Beysley and William Turnbull.
26. They were Thomas Standevin, John Todde, Christopher Beisley, John Wright and John Shellito.
27. They were John Dornell and Roger Lewes. Taken from Hereford County Record Office, Hereford, Act books I/6 and I/7; there is a lacuna for the years 1538-52.
28. Taken from Hampshire Record Office, Winchester, Act books C2/3/1, C2/4 and C2/5.
29. Besides the examples given below, see Ralph Houlbrooke, *Church Courts and the People,* above note 12, p.26, with references to 'long serving chancellors at York, Chester, Chichester, and Gloucester', to which he adds Miles Spencer, also archdeacon of Sudbury, who served as official at Norwich from 1531 to 1570.

is one of the best examples of a survivor – a successful survivor. There are others. At York, William Rokeby and John Rokeby, both judges in the consistory court from the 1540s, both achieved dignities, the first as precentor of the cathedral, the second as archdeacon of the East Riding, and died in office in 1568 and 1573 respectively. By contrast, George Palmes, also a York judge in the 1540s, became archdeacon of York in 1544, but he was deprived when he refused to subscribe to the Act of Supremacy during the royal visitation of 1559.[30] The most dramatic example of discontinuity I have found so far comes from Winchester. Three of the four men who acted as judges under Henry VIII and survived into Elizabeth's reign were deprived of the dignities each of them had achieved after leaving the confines of the consistory court: Nicholas Harpsfield, who had become archdeacon of Canterbury,[31] Edmund Steward who had become dean of Winchester,[32] and John Lawrence who had become archdeacon of Wiltshire.[33] Only Robert Reynolds, who was given a canonry at Winchester in 1558, remained active in the Church.[34] He died in office in 1595.

The same division did not occur, however, among the ordinary lawyers who staffed the consistory courts. Although there were a few exceptions, by and large the proctors and advocates, including the diocesan registrars, remained in their places under Elizabeth. The example of Winchester is again instructive. The Act books allow us to identify six proctors who were active in Henry's reign. Of these three were dead by 1547, two continued to be active throughout the religious changes and were still active in the 1560s, and one, who had in the meantime become a judge and a dignitary, was deprived on the accession of Elizabeth.[35] In the consistory court at Exeter, the two proctors active in the 1530s who survived were still practising in the 1560s.[36] At Lichfield, the picture among the proctors was one of virtually complete continuity. Five men were serving as proctors in the consistory court during the 1540s. Three of them continued under Elizabeth, one of them, Edmund Stretchey, died in 1547, and one, a Richard Martyn, cannot be traced except to say that his disappearance did not coincide with the accession of Elizabeth.[37]

5. ECCLESIASTICAL LAW AND 'REVISIONIST' HISTORY

More such detailed examples could be given, but they would only reiterate what these examples demonstrate: despite the winding up of the canon law faculty at the English Universities and the vicissitudes of Tudor religious policy, little change in the careers of practising ecclesiastical lawyers occurred during the Henrician Reformation or even during the confused times of his first two children. The pattern of stability continued among the civilians under

30. See *Fasti 1541-1857, York Diocese*, p.13.
31. *Fasti 1541-1857, Canterbury, Rochester and Winchester Dioceses*, p.15.
32. ibid. p.84.
33. *Fasti 1541-1857, Salisbury Diocese* p.18, stating merely that he had been deprived by 1564.
34. *Fasti 1541-1857, Canterbury, Rochester and Winchester Dioceses*, p.104.
35. The two continuing were John Pottinger and Gilbert Mather; the three who had died were Nicholas Hooker (or Hocker), Robert Raynold and John Lichfield; the deprived cleric was Nicholas Harpsfield, who had become archdeacon of Canterbury in 1554. Taken from act books listed above in note 28. For Harpsfield, see *Fasti 1541-1857, Canterbury, Rochester and Winchester Dioceses*, p.15.
36. They were Michael Brown and Simon Beare. Taken from Devon County Record Office, Exeter, Act books, Chanter MSS. 778 and 779. The disappearance of the act books from the twenty-five year period before 1560 prevents description of what happened to the other four men.
37. Taken from Joint Record Office, Lichfield, Act books B/C/2/4 and B/C/2/5.

Elizabeth with the exception of something like half the men who had begun their careers as proctors, advocates or judges but had subsequently been promoted to higher office in the Church and were no longer actively involved in the practice of ecclesiastical law.

What does this pattern of relative stability mean for our understanding of the Reformation as a whole, and in particular how does it bear upon the recent 'revisionist' writing about the English Reformation? It is tempting to answer the question posed by the Conference title: 'Consequence of the Break with Rome' very simply. With respect to the careers of the English ecclesiastical lawyers, there were no consequences. Obviously, this cannot be a wholly satisfactory answer. However, the question is how much further one can go on the basis of record evidence. In some particulars, the historian must admit defeat. In particular, little progress can be made on the crucial question of motivation. Were these ecclesiastical lawyers simply time servers, putting income over religious principle? Or did the stability of their professional careers grow from a sincere and ingrained habit of respect for established order?[38] There is little hope of answering this question, at least without relying simply upon our own assumptions (and prejudices) about lawyers and about religion.

In some respects, however, it is possible to say more by taking the perspective of the ecclesiastical lawyers. Such additions should be welcome, at least if not too much is claimed for them. They will not supply a definitive statement about the nature or the effects of the English Reformation; but they do provide valuable information about the times. This is particularly so because most recent historical writing about the Reformation, whether 'revisionist' or not, has paid little attention to the legal side of the Church's life. If we ask what additions to understanding come from taking the perspective of an ecclesiastical lawyer, four points come immediately to mind.

(a) *Legal Continuity*

First, the ecclesiastical lawyer would have regarded the 'revisionist' literature as overstating by far the extent of the actual break with the past that the Reformation brought, at least in the field of law. J. J. Scarisbrick, for example, holds that the Reformation 'took a shoulder to [what the reformers regarded as the filthy canon law] and heaved it over'.[39] Such a description of the fate of the canon law in English practice would have astounded the contemporary English civilians. Some men did desire to 'heave it over' no doubt. But many more did not, and no such 'heaving' occurred in fact. The *ius commune* remained the touchstone of practice in the courts ofthe English Church. The continuity in personnel, substantive law and legal literature in the English spiritual courts suggest a quite different assessment ofthe specifically legal effects of the Reformation than that found in the Scarisbrick's description. At the very least, it should be said that the evidence of continuity from the records of the ecclesiastical courts shows that the history of the ecclesiastical law does not fit the pattern of religious change found in the revisionist writing.

38. See the judicious comments in Lacey Baldwin Smith, *Tudor Prelates and Politics 1536-1558* (1953) pp.44-47.
39. *The Reformation and the English People* (1984) p.162.

(b) *Popular Opinion and the Canon Law*

Second, the ecclesiastical lawyer's viewpoint would have disputed the underlying premise of much of the recent writing on the subject. That is the assumption that the desires of the English people would, and should, have made a crucial difference in determining whether of not the Reformation would succeed in England. No principle was more firmly established in the canon law than that 'the people are to be led, not to be followed'. It was expressly stated at several places in Gratian's *Decretum*.[40] The canonists made the same point often and forcefully, drawing legal conclusions from it in many areas of the law.[41] It would therefore have turned established canonical principles on their head to have asserted that the rightness or the wrongness of a particular regime was to be determined by its acceptability to the people. Exactly this assumption underlies the revisionist literature. The question of the Reformation's 'inevitability' is approached from the standpoint of whether or not the English people were sympathetic to Protestantism. Perhaps the English ecclesiastical lawyers would have even have found it amusing to hear modern apologists for medieval religion making this assumption, for it was one that medieval religion (at least in its canonical manifestations) most emphatically rejected.

(c) *The Ecclesiastical Courts in European Perspective*

Third, the English civilians would certainly have supposed that the subject should be looked at from a European perspective. The English civilians were fully abreast of developments across the Channel. They read, and regularly made used of, the commentaries from the *ius commune* that poured from the Continental printing press during the sixteenth and seventeenth centuries. One of the features of some of the recent writing on the Reformation – and perhaps not only of this writing – is that it focuses attention on England alone. When one looks at what was happening on the Continent, however, a large and fuller perspective opens up. There, canonical jurisdiction as stated in the *Corpus iuris canonici* had been under a broad-scale attack, an attack that had begun during the fourteenth century and had continued without resolution down to the time of the Reformation. The Reformation wrote a further and more decisive chapter in a long-standing struggle between the courts of Church and State.[42]

Moreover, this attack had occurred in Catholic lands as well as in Protestant lands.[43] In Spain, Germany, and France, the degree to which the secular courts had taken over the jurisdiction of the spiritual courts and the

40. E.g., *Decretum Gratiani* Dist. 63 c. 12; Dist. 62 c. 2.
41. E.g., Panormitanus, *Commentaria in libros decretalium* (1617) ad X 1.6.2 *(Osius)*, no. 4, dealing with episcopal elections and stating the standard canonical rule against lay participation; Joannes Bertachinus, *Repertorium* (1590) tit. *Blasphemia*, dealing with the definition of blasphemy and rejecting the argument that custom among the people could legitimize otherwise blasphemous language; Josephus Mascardus, *Conclusiones omnium probationum* (1593), Lib. II. Concl. 749, detailing the safeguards against allowing public opinion to constitute proof in the *ius commune*.
42. For what follows, see Emil Friedberg, *De finium inter ecclesiam et civitatem regundorum judicio* (1861) pp. 87-154; Eduard Eichmann, *Der recursus ab abusu nach deutschem Recht* (1903); Jean-François Poudret, 'Un concordat entre Amédée et le clergé Savoie au sujet des compétences des cours d'Église et des censures ecclésiastiques,' in *Mélanges offertes à Jean Dauvillier* (1979) pp.655-75; Antonio Martínez Blanco, *Introducción al derecho canónico* (1991) pp.139-46.
43. For a contemporary example, see Francisco Salgado de Somoza (d. 1664), *Tractatus de regia potestate* (Lyons 1647), Pt. 1, c. 1, prae. 1, no. 56.

degree to which they were exercising an intrusive supervisory jurisdiction was much greater than in England. From the perspective of the English ecclesiastical lawyer, therefore, the Continental example would have shown the unlikeliness that the law of the Decretals *could have* been kept fully intact. It did not happen anywhere. This would put English events into perspective, and it might have given him some cause for satisfaction. In terms of jurisdictional competence, his courts fared better than did their counterparts, Protestant and Catholic, in most places on the Continent.

(d) *Advances in English Ecclesiastical Law*

Fourth, the ecclesiastical lawyer could have reminded observers of the positive substantive developments in English ecclesiastical law that were taking place during these years. The creation of a body of English legal literature relating to the canon law, something that occurred beginning under Elizabeth, was one sign of progress.[44] The creation, or at least the expansion, of existing causes of action such as that based on a defendant's 'boasting' of one's possession of a right mentioned earlier, or the *duplex querela,* the improved way of framing disputes over advowsons in that arena of jurisdiction the Church exercised, one that expedited and improved the hearing of patronage disputes in the Church's courts,[45] provide examples of the progress that characterized these years. The growth and regularization of *ex officio* jurisdiction is a third such sign. More offences were heard, and they were more competently handled as a result of a tightening up that occurred during Elizabeth's reign.[46] At least from the civilian's point of view, these were good developments. They opened up new possibilities for the profession of ecclesiastical law. Most recent writing about the English Reformation has missed them entirely.

6. CONCLUSION

What does this history mean for the present? Do conclusions drawn from the history of the profession of ecclesiastical law during the Reformation have any continuing meaning or relevance? Certainly they do not in the sense of providing clear answers to pressing contemporary problems. Still, the evidence is not without value, even apart from its utility in filling in a gap in history of the legal profession in England. Ecclesiastical lawyers today may, if they wish, take some pride, and perhaps also some comfort, from the history of their profession during the hard years I have been describing. It is a story worth knowing and thinking about.

The hundred year period between about 1475 and 1575 was indeed a hard time for the courts of the Church and the men who served in them. But through the upsets and the turbulence, the civilians seem overall to have stuck to their immediate tasks. They preserved the heritage of the *ius commune* in England. They administered the law of the Church without a pause. They seem not to have let theological differences affect their professional lives very much.

44. I have tried to describe the various forms of this literature in *Roman Canon Law in Reformation England* (1990) pp.121-57.
45. The origins and a full description of this development remain to be worked out; for a general description see Francis Clarke, *Praxis in foro ecclesicastico* (Dublin 1666) tits. 92-93.
46. Ronald A. Marchant, *The Church under the Law: Justice Administration and Discipline in the Diocese of York 1560-1640* (1969) pp.229-30; *Roman Canon Law in Reformation England,* above note 44, pp.104-17.

We cannot, of course, look into their minds. It may be that many of them were nostalgic for the fifteenth century. Indeed that seems likely. But we cannot see their anxieties or appreciate their hopes. We can see only their outward behaviour.

But for this steadfastness in outward behaviour the English ecclesiastical lawyers were in a palpable sense rewarded. The years after 1575 were years of recovery and relative prosperity for them. Levels of litigation advanced and professional incomes with them. Able men rose up within their profession to assert the Church's jurisdictional claims and to state its law. There came Henry Swinburne, Thomas Ridley, Francis Clerke, Richard Cosin, John Cowell, and others – some of them men whose names are lost to us and some whose names are just now being recovered. Taking a longer look at the place of the ecclesiastical law during the troubled years of the Reformation may provide some reason for hope about the future for members of this Society. Such a look shows that the profession of ecclesiastical law was not easily swept away. It shows that the canon law could suffer and nevertheless survive to hold its place in the life of the Church.