

# De rebus divinis et humanis

Essays in honour of Jan Hallebeek





**unipress**



Harry Dondorp / Martin Schermaier /  
Boudewijn Sirks (eds.)

# **De rebus divinis et humanis**

Essays in honour of Jan Hallebeek

With 4 figures

V&R unipress

Bibliographic information published by the Deutsche Nationalbibliothek  
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie;  
detailed bibliographic data are available online: <http://dnb.d-nb.de>.

This publication was made possible by financial support of the Van Coeverden Adriani Stichting  
and the Vrije Universiteit Amsterdam, Afdeling Rechtstheorie en Rechtsgeschiedenis.

© 2019, V&R unipress GmbH, Robert-Bosch-Breite 6, 37079 Göttingen, Germany  
All rights reserved. No part of this work may be reproduced or utilized in any form or by any means,  
electronic or mechanical, including photocopying, recording, or any information storage and  
retrieval system, without prior written permission from the publisher.

Cover image: © Basel, Universitätsbibliothek, A I 14: Thomas von Aquin, *Summa theologiae*  
(prima pars) (<http://www.e-codices.unifr.ch/de/list/one/ubb/A-I-0014>).  
Printed and bound by CPI books GmbH, Birkstraße 10, 25917 Leck, Germany  
Printed in the EU.

**Vandenhoeck & Ruprecht Verlage | [www.vandenhoeck-ruprecht-verlage.com](http://www.vandenhoeck-ruprecht-verlage.com)**

ISBN 978-3-8470-0731-9



*[Handwritten signature]*



## Contents

Laudatio . . . . .	11
John W. Cairns	
The legal education of Alexander Mylne, first president of the College of Justice . . . . .	15
Orazio Condorelli	
Primacy of the Bishop of Rome and dialogue between the churches of east and west. Brief historical notes . . . . .	25
Emanuele Conte	
The order and the <i>Volk</i> . Romantic roots and enduring fascination of the German constitutional history . . . . .	37
Niels de Bruijn	
Das Wissen des Verkäufers im frühneuzeitlichen kastilischen Recht der Sachmängelhaftung . . . . .	55
Hylkje de Jong	
Two interpretations of D. 17,1,27,1 in early Byzantine law: Obligation to <i>reddere</i> and unjust enrichment . . . . .	77
Wim Decock	
De beroepsaansprakelijkheid van de advocaat in Lenaert Leys' <i>Over rechtvaardigheid en recht</i> . . . . .	91
Harry Dondorp	
Restitution for wrongs in the civilian tradition . . . . .	105



Jacques du Plessis	
Reception, the law of unjustified enrichment in mixed legal systems, and a curious case of the compelled payment of another's debt . . . . .	123
Sjoerd Faber	
J.P. Hooykaas en de afdeling Wetgeving van het Ministerie van Justitie in Den Haag (1939–1946) . . . . .	135
Atsuko Fukuoka	
A Path between Scylla and Charybdis: Ulrik Huber (1636–1694) and the theologico-juridical paradigm of Constantine the Great . . . . .	151
Dirk Heirbaut	
Codification in Belgium from Napoleon to Geens . . . . .	167
Viola Heutger	
Lieferte die Bibliothek in Konstantinopel einen Beitrag zum Codex Theodosianus? . . . . .	179
David Ibbetson	
Unjust enrichment and Lord Mansfield . . . . .	193
Aniceto Masferrer	
Human dignity in the early sixteenth century Spanish scholasticism. Francisco de Vitoria and Fray Bartolomé de las Casas . . . . .	203
Ton Meijers	
Liturgischer Frauengesang? Eine historische Analyse aus kirchenrechtlicher Sicht . . . . .	215
Janwillem Oosterhuis	
A staunch Protestant on an irenic Remonstrant: Matthaeus's references to Grotius in <i>De criminibus</i> . . . . .	225
Martin J. Schermaier	
<i>Habebant omnia communia</i> . Überlegungen zum Gemeineigentum in Philosophie, Theologie und Recht . . . . .	241

Dirk Jan Schoon

Truth and obedience. The states of Holland and West Frisia's 6 August 1702 *plakkaat* and its repercussions in Rome for the proceedings against Petrus Codde . . . . . 265

E.J.H. Schrage

In testamentis plenius testatoris intentionem scrutamur . . . . . 279

Louis Sicking / Remco van Rhee

Prize law, procedure and politics. The settlement of a prize case before the Admiralty Court and the Great Council of the Netherlands (1554–1555) . . . . . 303

Boudewijn Sirks

What did *in bonis* in the *actio Serviana* include? . . . . . 323

Peter-Ben Smit

A non-political stance as an ecclesial *via media* in war time? The correspondence between archbishop Andreas Rinkel of Utrecht and bishop Erwin Kreuzer of the German Old Catholic Church from 1937 until the invasion of the Netherlands . . . . . 335

Konstantin Tanev

Observations on the value of *naturalis ratio* from early Humanism to the Antiquity . . . . . 357

Philip Thomas

Critique of the rational agent model: reinventing Roman law? . . . . . 365

Leon van den Broeke

Setting the right example? Good governance, exemplary law and reformed church polity . . . . . 375

Tymen J. van der Ploeg

De prejudiciële beslissing van de Hoge Raad van 21 april 2017 over omzetting van en in een kerkgenootschap, nader beschouwd . . . . . 389

E.G.D. van Dongen

Nullus videtur dolo facere, qui suo iure utitur . . . . . 403

Gustaaf van Nifterik	
Remarks on a reference of Grotius to Vitoria. A scholastic reading . . . .	417
Maurice van Stiphout	
On the role of the laws of the state and Canon Law in the 19 <sup>th</sup> and early 20 <sup>th</sup> centuries . . . . .	427
Daniel Visser	
Gerard Noodt and seventeenth-century attitudes to charging interest on money . . . . .	441
Laurent Waelkens	
Heidenen in de Codex Theodosianus? . . . . .	457
Tammo Wallinga	
Creative solutions for enrichment situations among the early Glossators .	471
Bart Wauters	
Lessius and Grotius on property . . . . .	483
Alain Wijffels	
<i>Audiuntur theologi</i> . Legal scholarship's claim on the "Second Table" in Alberico Gentili's <i>De Nuptiis</i> (1601) . . . . .	497
Laurens Winkel	
Nine remarks on the distinction between <i>mala in se</i> and <i>mala prohibita</i> .	513
Jan Hallebeek – Bibliography . . . . .	519
Index of sources . . . . .	535

## Laudatio

Every year, at the end of his summer month spent at the Max Planck-Institute for European Legal History in Frankfurt – something he has consistently done for almost thirty years now – Jan Hallebeek visits me at Friedrichsdorf. There, sitting comfortably in the afternoon sun on the balcony, with a glass of red wine in his hand, he recounts, after some chatting, what he had originally planned to do in Frankfurt and what he had eventually achieved: preparing seminars and lectures; writing papers, contributions and reviews; and of course, visiting the various Eppelwoi-pubs. And every time, he finishes with a satisfied expression on his face: all done; ready for a most enjoyable evening of talking and dining. Jan is a man who knows to manage his time most efficiently and over the years he has accomplished quite a lot in his fields of expertise.

Jan was born on 5 March 1954 in the city of Utrecht from an Old Catholic family. His father, a hydraulic engineer, worked as senior official for the municipality, his mother, a certified occupational therapist, was active in community-centre work and teaching courses. After having attended schools in Utrecht and passed his final examinations, Jan began to study law in 1972 at the University of Utrecht. He finished his degree at the end of 1977, with specialisations in Legal Theory, Legal Philosophy, Legal Methodology and Legal History. Having, by then, embarked upon a DPhil thesis, an appointment during the years 1980–1985 at the Catholic University of Nijmegen, where he taught Roman law as assistant of Prof. Paul Nève, enabled him to finish and submit his dissertation in 1986 at the University of Utrecht: *Quia natura nichil privatum: Aspecten van de eigendomsvraag in het werk van Thomas van Aquino (1225–1274)*. Prof Govaert van den Bergh was his main supervisor. This work combined several of his specialisations, as would also transpire in his later work.

At the beginning of 1986, he moved from Nijmegen to the Vrije Universiteit Amsterdam, where a research fellowship of the Royal Netherlands Academy of Arts and Sciences enabled him for some years to investigate the historical development of unjust enrichment as a source of obligation. In 1988, he also began lecturing in ecclesiastical law at the Seminary of the Old Catholic Church, con-

nected to the Faculty of Theology of Utrecht University; an activity he continued until 2015, alongside his work in Amsterdam. In 1997, he was appointed extraordinary professor of ‘Ancient Structures of the Catholic Church’ at the Faculty of Theology in Utrecht on behalf of the Old Catholic Seminary and resigned from this teaching commitment in 2006. In 1998, Jan was called to the chair of European Legal History at the Vrije Universiteit as successor to Prof. Eltjo Schrage. In this function he not only taught the legal historical courses, but also developed for the Faculty the compulsory Moot Court for the Bachelor (*pleitoeefening*) and participated in various other courses, such as ‘Science and Religion’ and ‘Religious communities and law’, and in the Summer School ‘Laws in Antiquity’.

Jan’s scholarly accomplishments centred around his specialisations on medieval Roman law, the later *ius commune* and ecclesiastical law, but he did not restrict himself to these areas, which were in themselves rather wide. Moreover, he never approached medieval legal doctrine from a mere contemporary or 19<sup>th</sup> century perspective, but always studied the texts in their own context, particularly in connection with theology. His studies on unjustified enrichment and other legal concepts show that medieval legal discourse chiefly struggles with the question to what extent the *Corpus iuris civilis* was acceptable in view of existing standards and the theological teaching of the time. Likewise, his studies on the just price-doctrine show how much reciprocity there was between theology and legal doctrine in the Middle Ages and the Early-Modern Period. The *res humanae* and the *res divinae* are inseparably intertwined, both for the Middle Ages as in Jan’s research and life. His studies accomplish Ulpian’s vision (D. 1,1,10,2) of jurisprudence as *divinarum atque humanarum rerum notitia*.

Jan also discovered unknown manuscripts. They enriched our knowledge of the activities of the famous criminal law professor of Utrecht, Antonius Matthaeus II (1601–1645), and of legal proceedings before the Court of Holland in the seventeenth century. Moreover, he found in medieval manuscripts sound proof for the conjecture that the Greek text of the constitution *Alearum lus* (C. 3,43,1) was translated into Latin by Pedro de Cardona († 1183). In addition to papers on these subjects and on his central fields of research, Jan published on Early Modern Scholasticism and on the colonial legal history of Sri Lanka. Currently, he is engaged in research into Old Frisian Law, more specifically, into the Latin glosses on the Frisian Land Law and the *Jurisprudentia Frisica*.

Furthermore, his teachings managed to bear fruits. Whereas most professors of Legal History do not publish textbooks, Jan produced two: *Fons et origo iuris* of 2006 and *Lijf ende goedt* (in collaboration with Dr Harry Dondorp and Dr Hylkje de Jong) of 2014. These books present in an exemplary way the dogmatical development of West-European private law.

On top of this, the position at the Seminary and at Utrecht University also yielded well. Besides articles on Church history, ecclesiastical Jansenism, and a

handbook on Canon Law, Jan collaborated in editing two important manuscripts of the parish priest Ignatius Walvis (1653–1714) from Gouda, which revealed much about how the Catholic Church under the Dutch Republic was afflicted by internal disputes.

Jan did not do all of this in splendid isolation, on the contrary. He was guest-lecturer in South Africa in 1992, 2002 and 2007; visiting-professor in Bern in 2011; gave guest-lectures in Lüneburg (2003) and Valencia (2013); besides guest lecturing elsewhere. In the case of Sri Lanka, he became involved in the digitalisation-project of the VOC-archives in Colombo. Further, he participated in establishing new national and international fora of scholarly collaboration: in 1998, the “Internationaler Arbeitskreis Altkatholizismusforschung”; in 2001, the “Centre for Religion and Law”; in 2009, the “European Society for Comparative Legal History”; and in 2014, the “Stevin Centre for History of Science and Humanities”. He organised conferences concerning the law during the period the Netherlands were the Kingdom of Holland (1806–1810); part of the French Empire (1810–1813); and in 2012 the second biennial conference of the “European Society for Comparative Legal History”.

These scholarly pursuits Jan combined with activities, which placed – and still place – him in the middle of what Non-Academia calls ‘the real life’. He not only belongs to the Old Catholic Church of the Netherlands, but is also committed and active within this small religious community. In numerous memberships of ecclesiastical committees and bodies he bestowed time, energy and knowledge, especially in the field of Canon Law, liturgical music and dialogue with the Roman Catholic Church. Liturgy and church music indeed, because Jan is an experienced organist and has been playing Sunday after Sunday for more than 45 years now. Having studied some music theory in his younger years, he also composed liturgical music, such as settings of chants and responses, and hymn tunes. In addition to such *opera spiritualia* Jan dedicated time to *opera temporalia*, i.e. as deputy judge in the District Court of Utrecht (1996–2014) and as a deputy justice in the Court of Appeal of ’s-Hertogenbosch (2003 till present).

In short: Jan is a present-day *uomo universale*, who enjoys good company, a good meal, good entertainment, and who is above all a good friend, in and outside Academia. This *Festschrift* is dedicated to him by all contributors in profound recognition and warm friendship, in the hope that we may share many more years of his companionship.

Deus te servet per multos annos, carissime Johanne!

On behalf of the editors<sup>1</sup>,  
Boudewijn Sirks

<sup>1</sup> The editors thank Ms Frances Gilligan for correcting the laudatio.



John W. Cairns\*

## The legal education of Alexander Mylne, first president of the College of Justice

In this short chapter in honour of Jan Hallebeek I shall briefly examine some aspects of the life of the first president of the College of Justice in Edinburgh, Alexander Mylne (alternatively Milne or Myln) (c. 1470–1548)<sup>1</sup>. I shall explore in particular the issue of where he acquired his training in law, which was primarily as a canon lawyer. The topic is in line with Professor Hallebeek's interests in the Middle Ages and the Catholic Church, while also throwing light on the *ius commune* in Scotland – it is thus a topic not unworthy of our distinguished honorand.

The central court that had developed in Scotland by the later fifteenth century out of judicial sessions of the king's council was reconstituted in 1532 as the College of Justice<sup>2</sup>. Mylne had already frequently sat on these judicial sessions, along with other ecclesiastical lawyers<sup>3</sup>. That he was selected as the first president of the new College was undoubtedly significant as a judgment of his ability as a lawyer and administrator<sup>4</sup>.

In legal historians' minds, Mylne is nowadays commonly associated with the Abbey of Cambuskenneth (the Abbey of St Mary of Stirling), the ruins of which, with an extraordinary free-standing bell tower of around 1300 – an amazing statement of power and authority – lie in a bend in the Forth just below Stirling

---

\* The author is grateful to Hector MacQueen for his comments.

1 J.A. GOULD, Mylne, Alexander (c. 1470–1548), Abbot of Cambuskenneth and Historian, in: C. MATHEW et al. (eds.), *Oxford Dictionary of National Biography*, Oxford 2004, date of access 8 Apr. 2018, <http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-19693>.

2 A.M. GODFREY, Scotland: The Court of Session from its Foundation to 1800, in: A.A. WIJFFELS/C.H. VAN RHEE (eds.), *European Supreme Courts: A Portrait Through History*, London 2013, 190–97; A.M. GODFREY, Civil Justice in Renaissance Scotland: The Origins of a Central Court, Leiden 2009, 40–160; J.W. CAIRNS, Revisiting the Foundation of the College of Justice, in: H.L. MACQUEEN (ed.), *Miscellany Five*, Stair Society, Edinburgh 2006, 27–50.

3 R.K. HANNAY (ed.), *Acts of the Lords of Council in Public Affairs, 1501–1554*, Edinburgh 1932, 210–11, 238, 256, 292, 349, 368.

4 HANNAY (ed.), *Acts 1501–1554* (note 3) 373–74.



Castle<sup>5</sup>. Mylne acquired the abbacy in 1517, after its resignation into the pope's hands by Patrick Paniter (alternatively Painter or Panter) (with whom Mylne was already associated), on the request of the Duke of Albany, Regent of Scotland<sup>6</sup>. The strong association of Mylne with Cambuskenneth in the mind of modern scholars is no doubt because he possessed this abbacy when appointed by James V as first president of the College of Justice, and he is almost invariably designed "Abbot of Cambuskenneth" in any relevant primary source. But supposing Mylne was born around 1470, much of his youth to early middle age was passed attached to another major ecclesiastical foundation, Dunkeld Cathedral, where, not long after finishing his university studies in arts, he held various offices and became a member of the chapter.

Dunkeld Cathedral has a beautiful and picturesque setting among trees close to the river Tay. Leading up to it is what has the appearance of a cathedral close of former prebendaries' manses, built in the Scottish vernacular style; none of the houses dates back to Mylne's era, however, as the town was burned in a Jacobite attack in 1689<sup>7</sup>. The cathedral church consists of a roofless nave, rebuilt in stages through the fifteenth century, and a roofed choir, remodelled in the early fourteenth century, which serves as the local parish church of the Church of Scotland. It has a square chapter house of the mid-fifteenth century attached to the choir, and linked to the nave, on its northwest corner, is an impressive bell tower<sup>8</sup>. This is the setting in which Mylne spent the first part of his adult life.

John Gifford has described the tower of 1470–ca. 1500 as "an overpowering statement of ecclesiastical might dwarfing the rest of the church"<sup>9</sup>. Its ground floor consists of a large vaulted room, with its own door, that has the remains of painted decoration below the vault on two of its walls. One painting depicts the judgment of Solomon, the other the woman taken in adultery. The decor reflects the use of this space as the consistorial courtroom of the diocese<sup>10</sup>. The setting is now rather bucolic, due to the creation of a designed landscape in the eighteenth century by the Athol family round their now demolished seat at Dunkeld; but in Mylne's time litigants and those accused of sin were forcefully reminded of the

5 J. GIFFORD/FA. WALKER, *The Buildings of Scotland: Stirling and Central Scotland*, New Haven 2002, 303–305.

6 R.K. HANNAY/D. HAY (eds.), *The Letters of James V*, Edinburgh 1954, 32; J.A. GOULD, Panter, Patrick (c. 1470–1519), Ecclesiastic and Administrator, in: C. MATHEW et al. (eds.), *Oxford Dictionary of National Biography*, Oxford 2004, date of access 8 Apr. 2018, <http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-212-34>.

7 J. GIFFORD, *The Buildings of Scotland: Perth and Kinross*, New Haven 2007, 332.

8 GIFFORD, *Perth and Kinross* (note 7) 334–39.

9 GIFFORD, *Perth and Kinross* (note 7) 336.

10 GIFFORD, *Perth and Kinross* (note 7) 340.

worldly and spiritual power of the bishop and the chapter to judge, to punish, and to forgive.

Alexander Mylne was born in Angus, and, according to his biographer, may have been the son of the royal master mason<sup>11</sup>. He studied at the University of St Andrews, being a determinant in 1494, that is, taking his bachelor's degree, but he is described as a *pauper, non licentiatus*, in 1496<sup>12</sup>. We know that Mylne was clerk and notary to the court of the official of Dunkeld for three years during the period that Walter Brown was official. Brown served in this office between 1493/1495–1505<sup>13</sup>. Mylne was an apostolic notary public by 1500, and in the same year became clerk to the bishop and chapter of Dunkeld<sup>14</sup>. In 1513 Mylne was the official of Dunkeld<sup>15</sup>.

Mylne described himself as "*agrestis et incultus scriptor*", which has a certain truth, even if intended as an elegant self-deprecation. His Latin is "loose" and, according to R. K. Hannay, gives no indication of any acquaintance with Latin literature<sup>16</sup>. It is the language of administration, and, of course, like many of the higher clergy, his function was indeed to be, above all other duties, an administrator.

Administration involved the law, and it is possible that Mylne may have pursued some legal study prior to his first positions in Dunkeld, perhaps at St Andrews, which had a Faculty of Canon Law<sup>17</sup>; there is, however, no evidence of his having done so, and he is never described as possessing any degree in law<sup>18</sup>. But he was clearly a man learned in law, *jurisperitus*, even without possessing a university degree in the discipline. From an *ex libris* inscription, we know that he acquired an *Infortiatum*, printed at Lyons in 1514, when he was serving as official of Dunkeld<sup>19</sup>. He can certainly be associated with a large collection of the major

11 GOULD, Mylne (note 1).

12 J.M. ANDERSON (ed.), *Early Records of the University of St. Andrews: The Graduation Roll, 1413–1579 and The Matriculation Roll, 1473–1579*, Edinburgh 1926, 82 and 85. This always supposes it is the same person.

13 R.K. HANNAY (ed.), *Rentale Dunkeldense: Being Accounts of the Bishopric (A.D. 1505–1517) with Myln's "Lives of the Bishops" (A.D. 1483–1517)*, Edinburgh 1915, 326; D.E.R. WATT/A.L. MURRAY (eds.), *Fasti Ecclesiae Scoticanæ Medii Aevi ad Annum 1638*, Edinburgh 2003, 163.

14 HANNAY (ed.), *Rentale Dunkeldense* (n. 13) xv; GOULD, Mylne (n. 1).

15 WATT/MURRAY (eds.), *Fasti* (n. 13) 163.

16 HANNAY (ed.), *Rentale Dunkeldense* (note 13) x; the quotation is from ALEXANDER MYLNE, *Vitae Dunkeldensis Ecclesiae Episcoporum, a prima sedis fundatione ad annum M.D.XV.*, Edinburgh 1831, 3.

17 A.I. DUNLOP (ed.), *Acta Facultatis Artium Universitatis Sanctiandree, 1413–1588*, 2 vols. Edinburgh 1964, I, cxlix–clv.

18 HANNAY (ed.), *Rentale Dunkeldense* (note 13) xv.

19 Advocates Library Edinburgh: shelfmark A.79.2. The inscription reads: "*Liber Alexandri myln canonici et officialis Dounkelden[is] anno 1516*".

texts of the *ius commune*<sup>20</sup>. He was evidently a competent canon lawyer also interested in the *ius civile*. It is possible to make a suggestion as to where he learned – or at least refined – his knowledge of the *utrumque ius*.

Mylne wrote a history of the bishops of Dunkeld, his *Vitae Dunkeldensis Ecclesiae Episcoporum*<sup>21</sup>. In this, almost as a digression, he provided an account of the cathedral clergy under Bishop George Brown, a man to whom he was evidently close and whom he admired. This account, basically of the chapter and the vicars choral, has understandably already been the subject of comment, as it is an important historical source for a topic about which we know little. Hannay translated it into English<sup>22</sup>. Because of its insights, it has been the subject of two relatively recent discussions, one of which, by John MacQueen, has convincingly argued that Mylne's *Vitae Dunkeldensis Ecclesiae Episcoporum* was written in a number of stages<sup>23</sup>. Thus, at the beginning of the book, Mylne greets his contemporary colleagues, mentioning many members of the chapter; not all of these men appear in the later account of the chapter and vicars choral, with some holding different offices, differently described, or simply not mentioned<sup>24</sup>.

I shall start with some observations on some of the men mentioned in the greetings to his colleagues with which Mylne prefaced the history. There he noted that David Abercromby, the sub-dean, was *jurisconsultissimus*, that the prebendary David Wauchope was *in utroque jure licenciatus*, that another prebendary, Alexander Moncrief, was *jurisconsultus multum expertus*, and that Walter Leslie was *in jure canonico tam literis quam praxi perdoctus et illuminatus*. He also observed that the Chancellor, Patrick Paniter, was both royal secretary and *orator lepidissimus*<sup>25</sup>. Paniter was educated at Paris and Leuven, and also associated with ownership of standard texts of the *ius commune*. As already noted, he was also Mylne's predecessor as Abbot of Cambuskenneth<sup>26</sup>.

Mylne's later, more detailed, account of the Cathedral clergy of his own day, in

20 J.W. CAIRNS, English Looters and Scottish Lawyers: The Ius Commune and the College of Justice, in: J.W. CAIRNS (ed.), Law, Lawyers, and Humanism: Selected Essays on the History of Scots Law, Volume 1, Edinburgh 2015, 22–33.

21 MYLNE, *Vitae* (note 16).

22 In HANNAY (ed.), *Rentale Dunkeldense* (note 13) 320–34.

23 J. MACQUEEN, Alexander Myln, Bishop George Brown, and the Chapter of Dunkeld, in: J. KIRK (ed.), *Humanism and Reform: The Church in Europe, England, and Scotland, 1400–1643: Essays in Honour of James K. Cameron*, Oxford 1991, 349–60; I.B. COWAN/M.J. YELLOWLEES, The Cathedral Clergy of Dunkeld in the Early Sixteenth Century, in: A.A. MACDONALD/M. LYNCH/I.B. COWAN (eds.), *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture offered to John Durkan*, Leiden 1994, 136–43.

24 MYLNE, *Vitae* (note 16) 1–2; MACQUEEN, Alexander Myln (note 23) 349–52.

25 MYLNE, *Vitae* (note 16) 1–2.

26 CAIRNS, English Looters (note 20) 25–26. An *ex libris* inscription on Paniter's books describes him as "lepidissimus", as here, suggesting that whoever wrote the inscription was familiar with this text, or was perhaps even Mylne himself. But further examination is needed.

which he discussed the chapter and the vicars choral, also paid attention to skills in law, an interest perhaps unsurprising in one who was the official of the diocese<sup>27</sup>. Mylne noted that David Abercromby, the sub-Dean, earlier mentioned as *jurisconsultissimus*, had now been appointed as rural dean and commissary general by Bishop George Brown<sup>28</sup>. This time he described Wauchope, as “licentiate in decrees”<sup>29</sup>. The prebendary John Young was “...commissary general of the official principal” and “...licentiate in canon law, exceedingly learned and an excellent textualist”<sup>30</sup>. Walter Leslie was now described as “...commissary general of the see of Dunkeld”<sup>31</sup>. Walter Brown, the official under whom Mylne had served as clerk of the consistorial court, and of whom he had clearly been fond, was a bachelor of theology, and had a “remarkable knowledge of canon law and a strong sense of justice”; after mass, Brown “devoted the rest of the day to judicial work, study, and reading in the law and theology”. At his table, “there was always reading”<sup>32</sup>. Another prebendary, William Ireland, was “specially versed in the canon law”, and later became commissary general of the diocese. He was a relative, Mylne stated, of Robert Ireland, doctor of the laws, and a teacher at Poitiers<sup>33</sup>. He also commented that a former chancellor of the diocese, John Donaldson, had been a “licentiate in decrees”<sup>34</sup>. Two of the vicars choral, Stephen Young and James Lauder, acted as advocates in the consistorial court; another, Finlay Simpson, was clerk of the consistorial court, presumably to Mylne; another, Alexander Fairfoule, was a notary, while a fifth, John Penicuik, had studied, among other subjects, canon law<sup>35</sup>.

The young Mylne when he came to Dunkeld accordingly found himself in a society in which there were many men skilled in the *utrumque ius*, particularly in the canon law. There was an active consistorial court with a fine new courtroom.

27 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 320–30; MYLNE, *Vitae* (note 16) 54–70.

28 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 324; MYLNE, *Vitae* (note 16) 60; WATT/MURRAY (eds.), *Fasti* (note 13) 152, 161, 163.

29 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 325; MYLNE, *Vitae* (note 16) 62.

30 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 325; MYLNE, *Vitae* (note 16) 62; not listed in WATT/MURRAY (eds.), *Fasti* (note 13).

31 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 326; MYLNE, *Vitae* (note 16) 63.

32 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 326–27; MYLNE, *Vitae* (note 16) 64–65; WATT/MURRAY (eds.), *Fasti* (note 13) 161 and 163.

33 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 327–28; MYLNE, *Vitae* (note 16) 66. He later became commissary general: WATT/MURRAY (eds.), *Fasti* (note 13) 164. On Robert Ireland, see, e.g., J. DURKAN, Ireland [Ireland], Robert (d. 1561), Jurist, in: C. MATHEWS et al. (eds.), *Oxford Dictionary of National Biography*, Oxford 2004, date of access 8 Apr. 2018, <http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-14457>.

34 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 328; MYLNE, *Vitae* (note 16) 66–67; WATT/MURRAY (eds.), *Fasti* (note 13) 145.

35 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 324–30; MYLNE, *Vitae* (note 16) 68–70.

In his account he creates the impression that there was a busy and active chapter. Whatever his prior legal knowledge (if any) might have been, he was certainly in a position at Dunkeld to develop and to improve his understanding of law. It is worth noting that Robert Leslie, who had an outstanding career as an advocate in sixteenth-century Scotland, is also linked to this milieu. A secular man who possibly studied at St Andrews, Leslie was probably the son of Walter Leslie, described by Mylne as learned in canon law, and commissary general of the diocese of Dunkeld<sup>36</sup>.

Mylne seems to have been especially close to Walter Brown, the official under whom he served and who died in 1505. His account of Brown has a strong personal, even intimate, feel. He recounted Walter Brown's deathbed in such detail that it seems likely that he was both present and powerfully affected. He described Brown as having been his *dominus* and emphasized that he had served as clerk (*scriba*) and notary public (*tabellionatus*) in his court and in his presence. He set out Brown's daily routine of mass, judicial work, study, and reading in law and theology, with readings at his meals. No other member of the cathedral chapter was described so closely or at such length; only Bishop George Brown gets fuller treatment. Brown had been a long time in Dunkeld, having been precentor (1490) and rural dean (?-1505) before becoming official in 1493/1495<sup>37</sup>. Both Mylne's closeness to Brown and knowledge of his quotidian habits suggest he was a member of his household, probably because he had not yet acquired a benefice that brought with it a manse by the Cathedral. Brundage points out that, under the constitution *Quoniam contra* of the Fourth Lateran Council, ecclesiastical judges, whenever possible, had to use notaries to record proceedings<sup>38</sup>. As clerk, Mylne certainly would have worked very closely with Brown and taken responsibility for the efficient running of the court, recording its procedures, while also issuing and recording documents and collecting fines and charges<sup>39</sup>. It was no doubt this practical experience of the court, linked with his academic learning, that later helped qualify him for the office of official, an office whose possessors, Ollivant notes, had "... a high degree of both learning and professionalism", many of whom "... had acquired experience of the working of the courts"<sup>40</sup>.

It is important to focus on Mylne's comment that Brown devoted part of his day to reading in the laws and in theology. This cannot mean private study, as that

36 JOHN FINLAY, *Men of Law in Pre-Reformation Scotland*, East Linton 2000, 123–46.

37 WATT/MURRAY (eds.), *Fasti* (note 13) 141, 161, 163.

38 J.A. BRUNDAGE, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, Chicago 2008, 396.

39 S. OLLIVANT, *The Court of the Official in Pre-Reformation Scotland: Based on the Surviving Records of the Officials of St. Andrews and Edinburgh*, Stair Society, Edinburgh 1982, 62–63.

40 OLLIVANT, *Court of the Official* (note 39) 50.

is covered by the gerund *studendum*. This suggests that when Mylne mentioned Brown's practice of *jura ac theologiam legendum*, he meant "reading" in the sense of giving public readings or lessons in the laws, just as a *lectio* had been given at Brown's meals. In writing the plural *jura*, Mylne also suggested Brown gave lessons in both the laws, though this may be to read too much into the wording<sup>41</sup>. If Mylne studied law with Brown, it may further explain the intimate nature of his account; Brown was his *dominus*, not just in employing him as clerk and notary, but also as his teacher.

It is worth noting that a Walter Brown had determined in arts in St Andrews in 1475, gaining his licence in 1477, before he became a regent in the College in 1478. He was elected as *quodlibetarius* in 1482, and as an examiner in 1483. He is not mentioned thereafter<sup>42</sup>. Given the chapter of Dunkeld's obvious links with the University of St Andrews, it is very probable that this is the future official and *dominus* of Mylne, especially given that he first appears as *precentor* of Dunkeld in 1490. From a university position he had made the transition to being a member of the cathedral clergy.

It is difficult to judge how typical Mylne's experience of Dunkeld was of other Scottish cathedral chapters and clergy in his era. More research and rethinking of existing research may throw more light on this. For example, it is worth noting that Mylne's successor as president of the College of Justice, Robert Reid, Bishop of Orkney, had given a new constitution to his chapter, under which the chancellor of the diocese had to be a *doctor utriusque iuris*, or at least a bachelor of canon law trained in a "flourishing university", who each week was to lecture publicly to the chapter on canon law<sup>43</sup>. There may have been more men who had received systematic instruction in the *utrumque ius* than is at present evident in the record, men who had attended formal lectures in law in ecclesiastical corporations other than universities. The dominance of canon lawyers among the ecclesiastical senators of the College of Justice may be even greater than is currently obvious.

Mylne's work in Dunkeld included keeping a record of the diocese's accounts, published under the name *Rentale Dunkeldense*. This reminds us of the important general administration of the diocese in which he had been involved, and the way in which his work touched, not only on canon law, but also on the administration of the extensive secular landholdings of the diocese<sup>44</sup>. His strong practical and organizational skills are shown by his acting as clerk of works in the

41 MYLNE, *Vitae* (note 16) 64.

42 DUNLOP (ed.), *Acta* (note 17) II, 195, 198, 203, 214, 215.

43 J. KIRK, Clement Little's Edinburgh, in: J.R. GUILD/A. LAW (eds.), *Edinburgh University Library, 1580–1980: A Collection of Historical Essays*, Edinburgh 1982, 1–42 at 8.

44 GOULD, *Mylne* (note 1).

building of a bridge over the Tay at Dunkeld<sup>45</sup>. It was these skills, legal, administrative, and practical, that led to his promotion to the abbacy of Cambuskenneth, where he carried out extensive renovation of the buildings, and into royal service, where he is found acting as an ambassador to England, as well as later scrupulously managing the church property settled on the king's illegitimate sons<sup>46</sup>. Further testimony to his qualities is provided by Cardinal Beaton's appointment of him, with Robert Reid of Orkney, as one of his vicars-general<sup>47</sup>.

It is evident that Mylne's career at Dunkeld will have led him to develop a good understanding of Scots law and legal practice. The late Archie Duncan's study of early Scottish formularies shows that they were sometimes owned by ecclesiastical lawyers, probably including, in the case of the important Bute MS, an official of Dunkeld<sup>48</sup>. This is far from surprising. Lawyers attached to cathedrals, priories, and abbeys would have to deal with baronial rights, baronial courts, and tenants, as well as the issues that came before the consistorial courts. The Abbey of Dunfermline, for example, was not alone among Scottish ecclesiastical corporations in possessing land in the extensive franchise jurisdiction of a regality<sup>49</sup>. Knowledge of the royal law and its practice would be invaluable for any ecclesiastical administrator, which was no doubt why ecclesiastical lawyers, such as Abraham Crichton and Martin Balfour, both linked to the diocese and university of St Andrews, are found acting as procurators and pleading in royal courts. Both became officials in the diocese of St Andrews, while Crichton later became a senator of the College of Justice<sup>50</sup>.

Men such as Mylne played a crucial role in the development of Scots law. Skilled in legal practice before the church courts, learned in the *utrumque ius*, knowledgeable in the practice of the secular courts, used to managing property, and involved in the business of government, it is easy to see why such higher clergy dominated the law, operating in the royal courts as well as the consistorial. Gero Dolezalek has described the College of Justice (or Court of Session, as it later became known) as a "*ius commune* court", by which he meant that it was a court that followed a version of the romano-canonical procedure of the church courts, and in which the primary and secondary sources of the *utrumque ius*, or

45 HANNAY (ed.), *Rentale Dunkeldense* (note 13) 279–301.

46 W. FRASER (ed.), *Registrum Monasterii de S. Marii de Cambuskenneth A.D. 1147–1535*, Edinburgh 1872, xcii; HANNAY, *Acts* (note 3), 213–15; HANNAY/HAY (eds.), *Letters* (note 6) 399–400.

47 M.H.B. SANDERSON, *Cardinal of Scotland: David Beaton c. 1494–1546*, Edinburgh 2001, 101–103.

48 A.A.M. DUNCAN (ed.), *Scottish Formularies*, Stair Society, Edinburgh 2011, 115.

49 J.M. WEBSTER/A.A.M. DUNCAN (eds.), *Regality of Dunfermline Court Book, 1531–1538*, Dunfermline 1953.

50 OLLIVANT, *Court of the Official* (note 39) 173–74; SANDERSON, *Cardinal of Scotland* (note 47) 99.

*ius commune*, dominated practice<sup>51</sup>. There can be no doubt about this and of its significance in the reception of the civil and canon laws in Scotland.

As the research of Jim Brundage reminds us, the development of an early modern legal profession out of that of canon lawyer is hardly unique to Scotland<sup>52</sup>; but this exploration of the training of Mylne indicates that more research is both necessary and possible on the personnel of the College of Justice in Scotland, not just on the ecclesiastical lawyers, but also on the “graduate lairds”, as, through the fifteenth century, Scottish secular men started to attend university and acquire degrees<sup>53</sup>. In this it is particularly interesting to reflect on the career of Robert Leslie, a secular man with links to the Dunkeld chapter.

I shall conclude with a further reflection on Dunkeld. It is now a sleepy place, dominated by the remains of the Cathedral, a pretty tourist stop on the road to Pitlochry and ultimately to Inverness, if now bypassed by the main modern road north. But it is necessary to remember that it was not always so. We have to consider that in Mylne’s time it was a hive of activity, the centre for the administration of a large ecclesiastical corporation, a place dominated by bureaucrats and their work, overseeing the collection and dispensing of the revenue of the diocese, and organizing the suppression of sin and the care of souls. It was a place of power and administration, with a cathedral chapter helping govern a large part of Scotland, both highland and lowland, not just through its ecclesiastical authority, but also using its power as a landowner. It is not surprising that the chapter contained so many lawyers, nor that it nourished the first president of the College of Justice.

51 G. DOLEZALEK, The Court of Session as a *Ius Commune* Court – Witnessed by “Sinclair’s Practicks”, 1540–1549, in: H.L. MACQUEEN (ed.), *Miscellany Four*, Stair Society, Edinburgh 2002, 51–84.

52 BRUNDAGE, *Medieval Origins* (note 38) 488–92.

53 A. BORTHWICK/H. MACQUEEN, “Rare Creatures for their Age”: Alexander and David Guthrie, Graduate Lairds and Royal Servants, in: B.E. CRAWFORD (ed.), *Church Chronicle and Learning in Medieval and Early Renaissance Scotland*, Edinburgh 1999, 227–39.





Orazio Condorelli

## Primacy of the Bishop of Rome and dialogue between the churches of east and west. Brief historical notes<sup>\*</sup>

1. A well-known statement made by Joseph Ratzinger has had an enormous echo in the ecumenical reflection of the Catholic Church. I am referring to the idea, expressed in 1976, that “with regard to the doctrine of primacy, Rome must not demand from the East more than it was formulated and lived in the first millennium”<sup>1</sup>. The resonance that this topic holds within the Catholic reflection is due not only to the authority of the theologian who later became Prefect of the Congregation for the Doctrine of the Faith and then the Roman Pontiff, but is supported by the teaching of the Second Vatican Council, which represented an implicit point of reference to Ratzinger’s assertion. In the decree *Unitatis redintegratio* we read, in fact, that “for the restoration or the maintenance of unity and communion it is necessary ‘to impose no burden beyond what is necessary’

---

\* This is a brief account of more extensive researches, which I presented at the 23rd International Congress of the Society for the Law of the Eastern Churches, Debrecen (Hungary) September 3–8, 2017.

1 J. RATZINGER, *Prognosen für die Zukunft des Ökumenismus* (1976), in: TH. PIFFL-PERČEVIĆ/A. STIRNEMAN (eds.), *Ökumene, Konzil, Unfehlbarkeit (= Pro oriente 4)*, Innsbruck/Wien/München 1979, 208–215, now in: J. RATZINGER, *Kirche - Zeichen unter den Völkern. Schriften zur Ekklesiologie und Ökumene*, Freiburg in Breisgau 2010, 717–730 (I quote from this edition, 724; the English translation is mine): “Rom muss vom Osten nicht mehr an Primatslehre fordern, als auch im ersten Jahrtausend formuliert und gelebt wurde. Wenn Patriarch Athenagoras am 25. Juli 1967 beim Besuch des Papstes im Phanar diesen als Nachfolger Petri, als den ersten an Ehre unter uns, den Vorsitz der Liebe, benannte, findet sich im Mund dieses grossen Kirchenführers der wesentliche Gehalt der Primatsaussagen des ersten Jahrtausends und mehr muss Rom nicht verlangen”. Ratzinger intervened on this topic again in 1991 (when he was Prefect of the Congregation of the Doctrine of the Faith), stating that the doctrine and practice of the primacy of the first millennium implicitly contained the whole doctrine of primacy developed in the second millennium and solemnly proclaimed in 1870. The statement of 1976 is now represented as an “ecumenical concession”, which consists in allowing the Orthodox to remain at a level of minor doctrinal development, on the assumption of an identity of doctrine (J. RATZINGER, *The Tablet*, 26 October 1991, 1310).