8 The Imperial Chamber Court and the Development of the Law in the Holy Roman Empire

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A. INTRODUCTION

In 1643, Hermann Conring, the well-known professor of the University of Helmstedt, published a book entitled *De origine iuris Germanici – On the origins of the German law*.[1] The volume became very famous because Conring refuted the so-called "Lotharian legend"[2] of the validity of the Roman law. Instead, he introduced a new term and said that the Roman law was received by the court practice. Conring's book gave an overview of more than 1,000 years of German legal history. In the chapters on modern history, Conring dealt with the *Reichskammergericht*, the Imperial Chamber Court. He said that the assessors of this court were obliged to obey the older decisions of their own court. They had to look at these judgments in the same

1 H Conring, *De origine iuris Germanici* (1643); German translation: H Conring, *Der Ursprung des deutschen Rechts* (1994); on Conring and his work M Stolleis (ed), *Hermann Conring* (1983), A Jori, *Hermann Conring* (2006).

2 For further details, Cf M Schmoeckel, "Lotharische Legende", in *Handwörterbuch zur deutschen Rechtsgeschichte* (henceforth, HRG), vol III (2016), col 1056–1058; P Oestmann, "Lotharische Legende", in *Enzyklopädie der Neuzeit* (henceforth, ENZ), vol VII (2008), col 1009–1011; N Jansen, *The Making of Legal Authority. Non-legislative Codifications in Historical and Comparative Perspective*, Oxford: Oxford University Press, 2010, 36–38.

way as at formally enacted laws and statutes.[3] However, some details in Conring's argumentations are not correct from a modern point of view. In addition, his footnotes are sometimes careless and inaccurate, but this is not a key issue. Conring did not study law, he studied philosophy, natural sciences and medicine.[4] He was later called a polymath – a professor of medicine, philosophy, political science and rhetoric. He was not a participant in the legal system but a careful observer. As an observer, Conring was sure that the decisions of the Imperial Chamber Court were legal sources like other laws, and that the highest courts of the Empire used the precedents of their own courts like other sources to solve legal problems and decide new cases. Conring believed that this was exactly what was prescribed in a law passed by the German *Reichstag* – the Imperial Diet – in 1570,[5] but he was wrong. As important as the result is the fact that the Imperial Chamber Court used its own precedents to decide cases and these precedents had the same quality as laws. In fact, there is little research on the specific German tradition of precedents in modern literature.[6]

From this point of reference, and inspired by Conring's observation, this chapter discusses two questions. On the one hand, I aim to demonstrate how the judgments of the Imperial Chamber Court influenced German legal practice and German law. On the other hand, I ask how the Imperial Chamber Court itself used precedents as authorities in its own forensic practice. So, there are two perspectives to the same question; both are quite new for German legal history. Of course, there is plenty of literature concerning the history of the Imperial Chamber Court;[7] however, when we ask whether the decisions of the court had any influence on the development of

3 Conring, *Der Ursprung des deutschen Rechts*, 229–230.

4 For a short overview on his CV, see G Kleinheyer and J Schröder (eds), *Deutsche und Europäische Juristen aus neun Jahrhunderten*, Tübingen: Mohr Siebeck, 2017, 104–107.

5 Conring, *Der Ursprung des deutschen Rechts*, 229. For the edition of the laws of the Holy Roman Empire see J J Schmauß and H C v Senckenberg (eds), *Neue und vollständigere Sammlung der Reichs-Abschiede*, Franckfurt am Mayn: Koch, 1747.

6 Focusing on the nineteenth century, C Günzl, "Germany's Case Law Revolution. Dealing with previous decisions in the 19th Century", in W Eves, J Hudson, I Ivarsen and S White (eds), *Common Law, Civil Law, and Colonial Law: Essays in Comparative Legal History, Twelfth to Twentieth Centuries*, Cambridge: Cambridge University Press, 2021, forthcoming.

7 The classical study is R Smend, *Das Reichskammergericht*, Weimar: Hermann Böhlaus Nachfolger, 1911; short overviews in English by P Oestmann, "The Law of the Holy Roman Empire of the German Nation", in H Pihlajamäki et al (eds), *The Oxford Handbook of European Legal History*, 2018, 748–752; A Baumann, "The Holy Roman Empire: the Reichskammergericht", in A Wijffels and C H van Rhee (eds), *European Supreme Courts*, London: Third Millennium Publishing, 2013, 96–103.

the substantive law, there is almost no research to be found.[8] One reason for this is easy to understand – clearly, it is impossible to make detailed statements about questions of influence.

Several years ago, there was a collaborative research group (*Sonderforschungsbereich*) in Munich which worked on authorities in general. As a member of this group, Thomas Duve wrote an essay entitled "With the authority against the authorities".[9] Duve said that thinking within the framework of the authorities had been a typical problem in the early modern period. In the nineteenth century, the authority of the law was generally considered to be the only authority, but I am uncertain whether this applies to modern law. Besides, in connection with early modern legal practice, there is significant consensus that we must reflect on a plurality of sources and authorities in modern research.

B. THE DECISIONS OF THE IMPERIAL CHAMBER COURT AS LEGAL AUTHORITIES

To evaluate the significance of the decisions it is first necessary to look at the sources of the substantive and procedural law as a whole. In early modern Germany, there was very little legislation in the field of private law.[10] For criminal law there was the *Constitutio Criminalis Carolina*, a penal code from 1532 which influenced many European countries.[11] However, for private law there was only the typical mixture of received Roman and canon law, statutes from the different territories, some police ordinances and a lot of customary law.[12] The procedural ordinances of the Imperial Chamber Court contained some sections which explained how the court had to apply the very different legal sources. In accordance with the late medieval theory of the statutes, there existed the so-called "*fundata intentio*" of the Roman and canon laws. The German statutes and customs were also accepted as sources of law, but it was not necessary for the assessors of the court to know

8 For some perspectives on this point, see A Amend-Traut, *Die Spruchpraxis der höchsten Reichsgerichte*, Wetzlar: Gesellschaft für Reichskammergerichtsforschung, 2008.

9 T Duve, "Mit der Autorität gegen die Autoritäten?" in W Oesterreicher et al (eds), *Autorität*, Münster: Lit Verlag, 2003.

10 P Oestmann, "The Law of the Holy Roman Empire", 744–746.

11 English translation of the main chapters by J Langbein (ed), "Prosecuting Crime in the Renaissance England, Germany, France", Cambridge, MA: Harvard University Press, 1974, 259–308.

12 An old but very helpful overview by O Stobbe, *Geschichte der deutschen Rechtsquellen*, Braunschweig: C A Schwetschke und Sohn, 1860/1864.

these laws. It was, however, the duty of the parties to produce those laws and to give evidence on the observance in practice. This principle was regulated in the ordinances from 1495 up to 1555,[13] but it was slightly modified in 1654.[14] However, there was never an explicit regulation saying that the decisions of the court themselves were legal sources or had a specific meaning.

So, when we ask how the Imperial Chamber Court influenced the German law, we must look at two fields of the law. It is easy to see the influence on the procedural law and the organisation of courts. The ordinances from 1495 to 1555 have been very important models for the courts in the different German territories. Many territories renewed their court system in the sixteenth century, often copying the ordinance of the Imperial Chamber Court for their own court of appeal.[15] By and large, territories had a president – a nobleman without expertise in the field of law – but the courts usually provided several educated assessors. The proceedings took place in written form without oral hearing. Sometimes, there existed a kind of audience (*Audienz*), but this was only a symbolic occasion for the procurators to give written statements to the members of the court. The courts' decisions provided no explicit motivation for the parties. When the territories wanted to get a *privilegium de non appellando*,[16] it was necessary to regulate the regional courts in accordance with the Imperial Chamber Court. This demonstrates that there was a kind of unification in the German court system, even when the Imperial Chamber Court was sometimes weak and worked very slowly.[17]

If we take a closer look and ask in what way the decisions of the Imperial Chamber Court influenced the German law, it is much more difficult to give a clear answer. First, it is important to emphasise that approximately 75

13 Ordinance of the Chamber Court of 1555, pt 1, title 13, section 1, in A Laufs (ed), *Die Reichskammergerichtsordnung von 1555*, Cologne-Vienna: Böhlau Verlag, 1976, 93; on this subject, P Oestmann, *Rechtsvielfalt vor Gericht*, Frankfurt: Vittorio Klostermann, 2002.

14 So-called "*Jüngster Reichsabschied*" 1654, section 105, in J J Schmauß and H C v Senckenberg, *Reichs-Abschiede*, vol III, Frankfurt: Ernst August Koch, 1747, 660.

15 The territorial courts have not been thoroughly studied. For some lines of enquiry see, for example, P Jessen, *Der Einfluß von Reichshofrat und Reichskammergericht*, Aalen: Scientia Verlag, 1986; B-R Kern, *Die Gerichtsordnungen des Kurpfälzer Landrechts von 1583*, Cologne-Vienna: Böhlau Verlag, 1991; T Süß, *Partikularer Zivilprozess und territoriale Gerichtsverfassung*, Cologne-Weimar-Vienna: Böhlau Verlag, 2017; F Lebküchler, *Die Grafschaft Tecklenburg und die Justizreform von 1613*, Münster: Aschendorff Verlag, 2019.

16 For a comprehensive note on this point, see U Eisenhardt, *Die kaiserlichen privilegia de non appellando*, Cologne-Vienna: Böhlau Verlag, 1980.

17 P Oestmann, *Wege zur Rechtsgeschichte*, Cologne-Weimar-Vienna: Böhlau Verlag, 2015, 180–182.

per cent of the cases were never decided by a formal final judgment.[18] The Imperial Chamber Court had several competences and tasks in the early modern court system; deciding cases was only one of them – and perhaps not the most important one.[19] However, if we want to look at the influence of the court on German law, we must concentrate on the 25 per cent of cases that were decided formally. The next point is a methodological problem. The Imperial Chamber Court did not motivate its decisions for the parties.[20] So, it was clear who won a case and who lost the lawsuit, but it was not easy to see why the court reached had this judgment. From the sixteenth century onwards, there were some assessors who published the decisions of the Imperial Chamber Court. The large series by Seiler and Barth contained more than 40,000 decisions in total, including interlocutory judgments.[21] However, these large volumes collected only the operative provisions (*Tenor*, *dispositif*) of the judgments. It was therefore impossible to know anything about the cases, legal problems and reasons. As a result, these collections of judgments were probably helpful for young advocates, procurators and judges to see examples of how to work in accordance with the *stilus curiae*; but regarding the influence on the law itself, we must look elsewhere.

I believe that the best sources for our goal are printed books from the so-called "literature of decisions" (in German, "*Entscheidungsliteratur*"). An important repertory by Heinrich Gehrke offers the best overview of this type of book.[22] Gehrke looked at more than 390 publications from the sixteenth to the eighteenth century, from several authors, many courts and several law faculties. Among them, the literature written by members of the Imperial Chamber Court is probably the most significant. In contrast to Seyler and Barth with their printed decisions, most of the other authors

18 Ibid, 164.

19 Consideration of the efficiency of work of the Chamber Courty by B Diestelkamp, "Das Reichskammergericht im Rechtsleben des 16 Jahrhunderts" in Id, *Recht und Gericht* (1999), 255–259.

20 On the history of the motivation of judgments, see S Hocks, *Gerichtsgeheimnis und Begründungszwang*, Frankfurt: Vittorio Klostermann, 2002; and C Günzl, *Auf dem Weg zur modernen Entscheidungsbegründung*, Doctoral dissertation, University of Münster, 2019, forthcoming.

21 R Seyler and C Barth, *Urtheil Und Beschaydt Am Hochlöblichen Kayserlichen Cammergericht*, Speyer: Melchior Hartmann, 1604/1605.

22 H Gehrke, *Die privatrechtliche Entscheidungsliteratur Deutschlands*, Frankfurt: Vittorio Klostermann, 1974; Id, "Deutsches Reich", in H Coing (ed), *Handbuch*, vol II (1976), 1343–1398; short information in English by U Müßig, "Superior courts in early modern France, England and the Holy Roman Empire", in P Brand and J Getzler (eds), *Judges and Judging in the History of the Common Law an Civil Law: From Antiquity to modern Times*, Cambridge: Cambridge University Press, 2012, 225–227.

worked in another style. They did not publish decisions but so-called "observations". These observations were very short treatises of one or five pages, collected in books called "Observationes". The oldest of these publications, written by Joachim Mynsinger, contained 400 observations in the first edition, and 600 observations in the later editions. It had been in print since 1563 and was one of the best known and most frequently quoted legal books in early modern Germany, perhaps even in Europe.[23] If Mynsinger did not quote decisions of the court, he provoked a scandal. And yet other members of the court complained that he had revealed the secrets of the consultations. However, Mynsinger was successful and the ice was broken. Fifteen years after Mynsinger, a second assessor of the court, Andreas Gail, published a book of the same name, "Observationes".[24] Many details found in his volume were highly similar to those in Mynsinger, leading Mynsinger to accuse his colleague Gail of plagiarism. In the end, this proved to be no disadvantage to Gail's book – his observations were more frequently printed than Mynsinger's and his book probably had the most editions of a legal book in early modern Germany. By the second half of the eighteenth century, Gail's text had been through nearly thirty editions.

Other authors from the Imperial Chamber Court published the written statements of the assessors, the so-called "relations" (in Latin: *Relationes*; in German: *Relationen*). In the years around 1600, these assessoes included Johann Meichsner[25] and an anonymous author using the pseudonym Adrian Gylmann.[26] These collections of relations were much more extensive than Gail's or Mynsinger's observations, more expensive and quite difficult to use. But with the help of these volumes it was possible to reconstruct the decision making of the Imperial Chamber Court in an authentic way. In the first half of the eighteenth century, the assessor Georg Melchior Ludolff[27] was

23 W Sellert, "Mynsinger von Frundeck, Joachim" in HRG, vol III (2016), col 1731–1732; S Schumann, *Joachim Mynsinger von Frundeck (1514–1588)*, Wiebaden: Harrassowitz, 1983.

24 P Oestmann, "Observationes" in S Dauchy et al (eds), *The Formation and Transmission of Western Legal Culture*, Cham: Springer (2016), 129–132; K v Kempis, *Andreas Gaill*, Frankfurt-Bern-New York-Paris: Peter Lang, 1988.

25 J Meichsner, *Decisionum diversarum in camera imperiali judicatarum, adjunctis votis et relationibus . . . tomus I–IV*, Frankfurt: Wolfgang Richter, 1603/1606. Reprinted several times up to 1693.

26 A Gylmann, *Symphorematis Supplicationum, pro processibus, super omnibus ac singulis imperii romani constitutionibus, in supremo Camerae Imperiolis Auditorio impetrandis*, 6 vols, Frankfurt: Wolfgang Richter, 1601/1608 (a very unclear collection with different titles for the seperate volumes).

27 For further details on his CV, see S Jahns, *Das Reichskammergericht und seine Richter*, vol II, pt 1, Cologne-Weimar-Vienna: Böhlau Verlag, 2003, 371–387.

the most prominent author of literature on the Imperial Chamber Court. He wrote observations, but also commentaries on the court's ordination and treatises on other subjects. In the second half of the eighteenth century, the assessor Johann Ulrich Cramer[28] published a series called *Wetzlarer Nebenstunden* – 128 small volumes of essays on cases decided by the Imperial Chamber Court.[29] These essays were often not written by Cramer himself; rather, he collected several hundred relations written by his colleagues. Eventually, this method enabled the readers to acquire knowledge of the judgments as well as of the motivations of the court.

It is unnecessary to provide all the details about the learned literature written by court members. For the purpose of this chapter, it is sufficient to note that many books of this so-called "chamber literature" (*Kameralliteratur*) were widespread and common for most of the judges, advocates and procurators and across all law faculties within the Holy Roman Empire. So, when we ask whether the decisions of the European central courts were authorities for the development of the law, we can give at least three answers. First, the judgments – the bare results – did not play such a big role. In modern German law, the decisions of the federal court are one of the most important authorities.[30] This was unthinkable in early modern times. Second, the learned literature written by court members was often used by other courts as authorities in the decision-making process. However, even this is not the central point. The most important result is the internal discussion within the legal literature of the time. Practitioners and professors wrote their books, and this very specific mixture of forensic practice and learned treatises formed the well-known German style of the *Usus modernus pandectarum*.[31] If we can agree that legal literature is a part of the law, especially in early modern times before codification, then the decisions of the Imperial Chamber Court were one of the most important sources of the *Usus modernus*, though admittedly an idirect one. The result is not new. In 1776, Johann Stephan Pütter, professor for public law at the University of Göttingen, wrote that in his time hardly any practical legal works were published that did not refer to Mynsinger or Gail.[32] Therefore, it seems clear that until

28 On his CV, S Jahns, *Das Reichskammergericht*, vol II, pt 1, 655–673.

29 J U v Cramer, *Wetzlarische Nebenstunden*, 28 vols, Ulm: Johann Conrad Wohler, 1755/1772.

30 Sometimes, they have binding force like formally enacted laws: § 31 Bundesverfassungsgerichtsgesetz.

31 Overview by K Luig, "Usus modernus" in HRG, 1st edn, vol V (1998), col 628–636.

32 J S Pütter, *Litteratur des Teutschen Staatsrechts*, vol I, Göttingen: Vandenhoek, 1776, 128. On this quotation, see Oestmann, "Observationes", 132.

the end of the Empire this "chamber literature" remained a central point of reference for German legal discussions.

It is not entirely clear whether the situation in different European territories was identical in this regard. At least in the Holy Roman Empire there existed two of the highest imperial courts: the Imperial Chamber Court and the Imperial Aulic Council (the *Reichshofrat*). This Aulic Council did not produce nearly as much literature as the Imperial Chamber Court. In the perception of its contemporaries, the Aulic Council was not so much a specialised court but rather a political institution; close to the Emperor and powerful, but not that interesting for the scholarship of law and jurisprudence.[33] Many law students went to Speyer or Wetzlar (the domiciles of the Chamber Court) to work there as young trainees. Remarkably fewer went to Vienna or Prague to study at the Aulic Council. It was only in the eighteenth century that the literature concerning the Aulic Council attained any considerable significance. By this time in the last century of the Holy Roman Empire, the contemporaries no longer spoke about the chamber procedural law, but spoke instead about the imperial procedural law, the *Reichsgerichtsprozess*.[34] However, even during this time, the chamber literature without doubt maintained its leadership.[35]

A few examples can illustrate what has been discussed so far. The first is a lawsuit in the city of Lübeck.[36] In the 1690s, Conrad Ludwig Heyer – a major in the army of Mecklenburg – fell in love with a very young, rich girl, Catharina Lefever, who was a member of a patrician family in Lübeck. The girl's father was dead and her brothers refused to agree to an engagement between their sister and the soldier. Eventually the major eloped with the girl to Mecklenburg, where they married just one or two days later. The brothers were outraged and went to the court of the city of Lübeck and sued both the major and their sister. They claimed that the abduction of a woman was a severe crime under Roman law, meaning that the soldier must be punished with the death penalty. Furthermore, they claimed that the sister should have lost all her stakes in the family assets and therefore

33 Overview of the Aulic Council by E Ortlieb, "The Holy Roman Empire: the Imperial Court's System and the *Reichshofrat*", in A Wijffels and C H van Rhee (eds), *European Supreme Courts*, London: Third Millennium Publishing, 2013, 86–95.

34 J F Seyfart, *Teutscher Reichs-Proceß*, Halle: Fritschische Buchhandlung, 1738.

35 Contemporary catalogue of this literature by E J K v Fahnenberg, *Litteratur des Kaiserlichen Reichskammergerichts*, Wetzlar: Phil Jac Winkler, 1792.

36 Case study by P Oestmann, "Lübecker Rechtspraxis um 1700: Der Streit um die Entführung der Catharina Lefever" (2000) 80 *Zeitschrift des Vereins für Lübeckische Geschichte und Altertumskunde*, 259–293.

be disinherited. Given the wealth at stake, the case was an important one. The sister eventually won the lawsuit before the city court of Lübeck, but the brothers filed an appeal against this judgment. At the Imperial Chamber Court, the sister also won the appeal. It was clear to everyone that a girl who married her lover must not be disinherited by her family when the guardian refused his approval without providing an objective reason.

The case caused a huge sensation in early modern Germany. At the trial in Lübeck the parties asked some well-known law faculties to give their opinion on the case. This way, the law faculty of Halle – at that time the best and most progressive German faculty – was involved in the lawsuit. It was Samuel Stryk, the author of the famous *Usus modernus pandectarum*,[37] who had to work out the statement of the faculty. He was in favour of the young couple and decided the case for the sister. This is unsurprising since the private "transmission of files" (*Aktenversendung*) was a kind of market,[38] and the consultant did not want to lose his clients for future occasions. However, Stryk did not, as a private person, give this opinion. He took his report back to the faculty and the faculty as a whole gave the statement. Afterwards, Samuel Stryk wrote a book entitled *De dissensu sponsalitio*,[39] in which he explained all the legal problems in this respect regarding marriage and elopement. As an appendix to his book, he added the statement of his own law faculty of Halle. It is clear that his personal experience in deciding the legal questions from Catharina Lefever and her husband encouraged Samuel Stryk to write this 370-page long treatise. The book was published in 1699. In that same year, the litigation before the city court of Lübeck was still in progress. Catharina Lefever and Conrad Ludwig Heyer's procurator changed his legal arguments and began often to quote Stryk's book. Eventually, the spouses won both lawsuits. This example leads us to a preliminary result: when we look at legal authorities, we can clearly see that the single case of a bride and her groom spurred the production of learned literature and that this very same literature became an important authority in the very same trial. At this stage of the *Usus modernus*, it is impossible and not useful to distinguish between theory and practice. For the sake of com-

37 On this collection, J Schröder, "Specimen Usus Moderni Pandectarum", in S Dauchy, G Martyn, A Musson, H Pihlajamäki and A Wijffels (eds), *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing*, Cham: Springer, 2016, 235–238.

38 U Falk, *Consilia. Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit*, Frankfurt: Vittorio Klostermann, 2006.

39 S Stryk, *Tractatus de dissensu sponsalitio*, Wittenberg: Johann Wilhelm Meyer & Gottfried Zimmermann, 1699.

pleteness, it is worth adding that in this case Halle was not the only law faculty that was asked for a decision. Catharina's brothers asked the University of Jena for an opinion, and the city court of Lübeck itself decided to make a regular "transmission of the file" to the law faculty of Tübingen.

A further example comes from the mid-eighteenth century; again from a lawsuit starting in the imperial free city of Lübeck. It was a litigation between some relatives who quarrelled about an inheritance.[40] When the rich wife of a senator died, one half of the property went to the husband, and the other half to her relatives. One of these relatives was Johann Adolph Krohn, who had studied law and was at that moment the mayor of Lübeck. The other relative was Anna Maria von Spilcker. While Krohn was the uncle of the deceased woman, and Spilcker her aunt, there was a crucial difference. Both of Krohn's parents were themselves actually the grandparents of the deceased woman, but only Spilcker's mother was grandmother to the deceased. Spilcker's mother had married twice – the first husband was the grandfather of the deceased, while the second husband was the father of Spilcker. Therefore, Spilcker was the aunt of the "defunct", but only from one of her parents, not both. This situation was known as a "half birth" (*halbe Geburt*). So, Krohn and Spilcker began to argue about the claims of the half birth. It was quite clear that in Roman law a half-birth relative had the same legal claim as a double-born one.[41]

In early modern statutory law, the solution was complex and varied from city to city. In the statutes of Lübeck, this case was not clearly defined. There was some discrimination against half-birth relatives, but there was no specific provision that said anything about aunts. Thus, it was unclear whether a broad interpretation of the city law was allowed. The contemporary theory of the statutes maintained that statutes had to be strictly interpreted, without allowing for any extension.[42] However, in the mid-eighteenth century, the law of several territories effectively had, in part, its own interpretation. As such, according to the literature, it remained unclear as to whether the strict

40 The records were edited by P Oestmann, *Ein Zivilprozeß am Reichskammergericht. Edition einer Gerichtsakte aus dem 18 Jahrhundert*, Cologne-Weimar-Vienna: Böhlau Verlag, 2009. Cf M Doms, *Rechtsanwendung im Usus modernus. Eine Fallstudie zum Erbrecht der halben Geburt*, Doctoral dissertation, University of Münster, 2010, available at: https://d-nb.info/1010264680/34 (last accessed 23 January 2020).

41 On the legal order of succession in the case without a last will, U Babusiaux, *Wege zur Rechtsgeschichte: Römisches Erbrecht*, Cologne-Weimar-Vienna: Böhlau Verlag, 2015, 47–82.

42 P Oestmann, *Rechtsvielfalt vor Gericht*, 7–8; R Zimmermann, "Statuta sunt stricte interpretanda? Statutes and the Common Law: a Continental Perspective" (1997) 56 *Cambridge Law Journal*, 315–328.

interpretation still applied, or whether it was necessary to allow for analogies in the statutory law. Of course, Spilcker wanted the case to be decided according to the Roman law, while Krohn argued that there was an old German tradition and custom in Lübeck to give preference to the double birth. An out-of-court settlement was unthinkable, and so Spilcker sued the mayor at the city court of Lübeck. During this lawsuit both parties started to produce legal literature. The son of the mayor, Hermann Georg Krohn, was a jurist and wrote a treatise entitled "The precedence of the double birth over the half birth".[43] He collected many examples from early medieval sources up to the Saxon Mirror (*Sachsenspiegel*) and published many court decisions to prove his own argument. On the other hand, Johann Christian Bacmeister, a nephew of Anna Maria Spilcker, was an assessor at the high court of appeal in Celle (*Oberappellationsgericht*),[44] and he also wrote a book on this subject, entitled "Refutation of the so-called 'precedence of the double birth over the half birth'".[45] Later, Hermann Georg Krohn wrote a second treatise to disprove Bacmeister's opinion.[46] The case proved complex and the court of Lübeck transmitted the file to the law faculties of Halle, Leipzig and Frankfurt/Oder.

In the end, this litigation became one of the most spectacular cases in Germany at that time. At the city court of Lübeck the mayor won his case, and the widow Spilcker and her nephew therefore appealed before the Imperial Chamber Court. After four years spent before the court of Lübeck, it took a further seven or eight years until the Imperial Chamber Court issued a decision on the long-lasting lawsuit. By this time, both parties were long since dead, but the legal question had been solved. The assessors in *Wetzlar* decided that the half birth had the same position in the law of succession as the double birth. This judgment was pronounced in May 1756.[47] Only one year later, the decision was printed together with the written opinion of the responsible assessor in *Wetzlarer Nebenstunden*, the above-mentioned series by Johann Ulrich Cramer.[48] The decision of

43 H G Krohn, *Versuch die Lehre von dem Vorrechte der vollen Geburth . . . in Richtigkeit zu bringen*, Lübeck: Jonas Schmidt, 1746.

44 On this court, one of the most important German courts of the eighteenth century, see S A Stodolkowitz, *Das Oberappellationsgericht Celle und seine Rechtsprechung im 18 Jahrhundert*, Cologne-Wiemar-Vienna: Böhlau Verlag, 2011.

45 J C Bacmeister, *Abhandlung von dem Recht der vollen und halben Geburt*, Hannover: Förster, 1748; reprinted in K G Krohn, *Abhandlung von dem Vorrechte der vollen Geburth*, Lübeck-Leipzig: Jonas Schmidt, 1748. The title in this second edition was "Refutation" (*Widerlegung*).

46 H G Krohn, *Weitere Ausführung des Versuchs*, Lübeck-Leipzig: Jonas Schmidt, 1748.

47 P Oestmann, *Ein Zivilprozeß*, 577.

48 J U Cramer, *Wetzlarische Nebenstunden*, vol VI (1757), 84–142, "Ob und wie weit die volle Geburth vor der halben ein Vorrecht bey der Erbfolge habe".

the Imperial Chamber Court had thus become part of the German legal literature.

In 1769, another twelve years later, a lawyer in Lübeck, Johann Carl Henrich Dreyer, published an overview of the laws of the city of Lübeck. The collection had a chapter concerning law books (*Rechtsbücher*) and decrees of Lübeck. In this chapter, we find the Imperial Chamber Court decision in the case of *Spilcker v Krohn*.[49] Dreyer, an author who wrote several books on the law and legal history of Lübeck, and who worked as a counsel of the city magistrates, wrote that a decision of the Chamber Court usually applied only to the two litigants of that lawsuit. However, in this particular case, he was certain that the 1756 judgment was a *beträchtliche Rechts-Urkunde*, a "substantial certificate of the law". Dreyer wrote that this judgment had settled the legal problems of the half birth for all time. He also quoted some aspects from the treatises of Krohn and Bacmeister, and informed the reader that even other scholars of the time wrote their essays on this very problem, among them Friedrich Esajas Pufendorf, one of the most prominent legal authors in Lower Saxony.[50] Therefore, plenty of literature existed on this important case. In his collection of the laws of Lübeck, Dreyer stated with certainty that the best treatise by far was the relation of the Imperial Chamber Court in the case of *Spilcker v Krohn*. He admired the diligence, profundity and strength of the opinion of the Wetzlarian assessor.

This example shows very clearly that the decisions of the Imperial Chamber Court were regarded as formal sources of the law and that at the same time they had the authority to change the substantive law in the German territories. Of course, this case is a stroke of luck because it is not at all easy to find such convincing sources. One must have a lawsuit with over-regional impact, a controversial legal question and reflections in the contemporary literature. One must also discover a final decision, and this decision must be printed in a contemporary collection. Nevertheless, I am sure that it is possible to find more of these examples. Presumably, it should be possible to also find such cases for regional courts or for some reports from law faculties (*Fakultätsgutachten*). However, the importance of the Imperial Chamber Court must not be overstimated. Especially in the eight-

49 J H Dreyer, *Einleitung zur Kenntniß der . . . von E Hochw. Rath der Reichsstadt Lübeck von Zeit zu Zeit ergangenen allgemeinen Verordnungen*, Lübeck: Christian Gottfried Donatius (1769), 319.

50 F E Pufendorf, *Observationes iuris universi*, vol II, 2nd edn (1779), *observatio* 192, "An ultra fratrum filios duplicitas vinculi in successione cognatorum jure Romano inspiciatur?", and *observatio* 193, "De Duplicitate vinculi in successione collateralium ex jure Germanico".

eenth century, a large part of the cases came from the small city of Wetzlar and the surrounding region.[51] The Chamber Court was not a powerful and brilliant court of justice,[52] such as the Lübeckian High Court of Appeal after 1820 or the *Reichsgericht* after 1879. In early modern times, the case law of the highest courts was not the leading factor in the development of new law. The contemporary *Usus modernus* was a mixture of written and unwritten laws, of theory and practice, of universities and courts, of noble-born and learned judges.[53] Therefore, we must be careful when we ask such modern questions concerning the influence of the court decisions for the modernisation of substantive law.

C. AUTHORITIES IN THE OPINIONS OF THE IMPERIAL CHAMBER COURT

In the second part of this chapter I will change my approach to look at legal authorities from another point of view: which authorities did the Imperial Chamber Court itself accept when it had to decide legal problems? The sources are once again the records of the appellate proceedings in the above-mentioned lawsuit *Spilcker v Krohn* concerning the half and full birth. As mentioned previously, the Imperial Chamber Court passed its final judgment in May 1756. The assessor Johann Wilhelm Summermann[54] was the consultant (*Referent*) and had to prepare the final decision. He worked out a statement of more than 100 pages, ending with the draft of the operating part of the decision (*Urteilstenor*). In his so-called "relation" (*Relation*) he decided the case in favour of the half birth. The starting point of his argumentation was the *fundata intentio* of Roman law.[55] Even in the mid-eighteenth century, the assessor Summermann assumed that the Roman law was received across the whole of Germany in such a way that the litigant who argued in accordance with it was to be preferred until the opposing party proved that a special law had to be applied. According to Roman law, the half and full birth were equivalent in cases of inheritance without testaments. So,

51 Repertory by J Hausmann, *Repertorien des Hessischen Hauptstaatsarchivs Wiesbaden*, section 1, vol III, Wiesbaden: Hauptstaatsarchiv, 1984–1986.

52 On some troubles in the eighteenth century, see A Denzler, *Über den Schriftalltag im 18 Jahrhundert. Die Visitation des Reichskammergerichts von 1767 bis 1776*, Cologne-Weimar-Vienna: Böhlau Verlag, 2016.

53 K Luig, "Usus modernus", col 628–636.

54 His CV in S Jahns, *Das Reichskammergericht und seine Richter*, vol II, pt 2, 1409–1426.

55 The relation is completely edited in Oestmann, *Ein Zivilprozeß*, 519–571, on the *fundata intentio*, see ibid, 539.

assessor Summermann had to show that the city of Lübeck had no divergent statutes. To reach this purpose, he examined all the arguments of the Lübeckian mayor and his son and rejected them. In this extensive explanation, he exemplified the value of each authority that Krohn and son used to demonstrate the precedence of the full birth. Assessor Summermann proceeded in seven steps.[56] The first was the natural law; the second, the medieval German law; the third, the old legal sayings; the fourth, the specific customary tradition in the city of Lübeck; the fifth, the analogy of the Lübeckian law; the sixth, the precedents of older court decisions; and the seventh, the opinion of the scholars.

Concerning the natural law, the mayor Krohn argued in his treatise that it should be obvious that one is not the same as two, and that the double birth had to be treated in another way than the half birth. The assessor of the Chamber Court interpreted the natural law in a way that meant that in general the full birth could have some advantages in comparison with the half birth, but that the half birth must never be excluded completely.[57] By this means, he did not explicitly deny the legal authority of the natural law because in the end Summermann's interpretation of the natural law was in accordance with his own decision.

After discussing the natural law, assessor Summermann arrived at the second argument, the so-called "old German law". He accepted that perhaps in ancient times the old Germans favoured full birth. However, he exclaimed: "But this does not concern us! *Laudamus veteres sed nostris utimur annis*."[58] This was an unidentified quotation from the Roman poet Ovid, inviting praise for the old times, but to live for one's own times. In particular, the assessor criticised the *Sachsenspiegel*, the Saxon Mirror of the thirteenth century. This private work by Eike von Repgow was allegedly only a poorly patched compilation, in which its author had failed to understand the deeper meaning of the law of inheritance.[59] Ultimately, Summermann was certain that it was impossible to reconstruct a uniform and consistent medieval German law because the most important sources came from a period when the Roman law was already known in the Empire. In the eighteenth century there were some radical Germanists such as Christian

56 Ibid, 543–571.
57 Ibid, 543–547.
58 Ibid, 547.
59 Ibid, 548–549.

Thomasius[60] or the so-called "Legal Antiquarians" (*Rechtsantiquare*).[61] At least on this point, the Imperial Chamber Court distanced itself from this old German law. Medieval sources were no authority in disputed cases.

The third aspect was the legal sayings (*Rechtssprichwörter*). Allegedly, there existed such a saying in Westphalia that the half birth "had to go back". The defendant Krohn argued that this saying was part of the statute of the city of Soest and had come from Soest to Lübeck in the twelfth or thirteenth century. The assessor Summermann checked the details and used a collection of German statutes, edited by Georg Melchior von Ludolff, a former assessor of the Chamber Court in the first half of the eighteenth century.[62] In this collection he found exactly the opposite – meaning that in medieval Soest, half and full birth were treated in the same way. Thus, the simple allegation of a legal saying had no authority if the statutes of the same city said the contrary.[63]

In the next section, the chamber assessor considered the specific situation of the law of Lübeck. The mayor Krohn and his son had said that even in the centuries before the reception of Roman law, as well as in early modern times, all statutes in Lübeck had always privileged full birth. Assessor Summermann looked at the wording of several sections of the law books and tried to interpret them. In the final analysis, he was sure that the statute favoured the full birth in only a very few cases, not in general in the law of inheritance.[64] Statutory law was therefore indeed an authority for the decision of legal disputes in theory. However, the court maintained the possibility to interpret the law independently. Whether Summermann's approach was a strict interpretation of the technical meaning of the theory of the statutes is difficult to say. All in all, Summermann was persuaded that the Roman and the Lübeckian law matched each other on this point.

Afterwards, assessor Summermann looked at the precedents – some older judgments of the city council of Lübeck.[65] Krohn and his son had referred to about 20 decisions of the court of Lübeck on inheritance cases. Whether these judgments had to be considered as widely recognisd legal authori-

60 F L Schäfer, *Juristische Germanistik*, Frankfurt: Vittorio Klostermann, 2008, 84–92.

61 E Landsberg, *Geschichte der Deutschen Rechtswissenschaft*, vol III, pt 1, Munich-Leipzig: R Oldenbourg, 1898, 240–271.

62 G M v Ludolff, *Collectio quorundam statutorum provinciarum et urbium Germanicae cum praefatione*, Wetzlar: Nicolaus Ludwig Winckler, 1734, 791–810, "De Jure Susatensi Sivè Vom Recht der Stadt Söst".

63 Oestmann, *Ein Zivilprozeß*, 552–553.

64 Ibid, 553–559.

65 Ibid, 561–566.

ties was, however, unclear to the assessor. On two ocassions he explicitly wrote "whether we should recognise such precedents as decisive factors". Whether he was himself willing to follow these precedents is unclear, but we can look at other sources on this point. During the discussions with the other members of the court's Senate, three other assessors used the legal precedents as an argument. They all said that the most important precedents were in favour of the widow Spilcker and not the mayor Krohn.[66] Assessor Summermann was of the same opinion. He explained the inconsistencies among the twenty decisions to be due to the long period – three centuries – during which they had been given. All the decisions assimilated the full and half birth and ultimately followed the solution of the Roman law. Because of this consistency of the case law, the Chamber Court did not decide explicitly whether precedents had to be treated as legal authorities. Of course, the assessor used these arguments to strengthen his own decision. This, however, does not mean that those legal precedents would have had the authority to replace the Roman law had they favoured the opposite solution.

The last section of Summermann's statement was devoted to the learned literature. On this point Summermann had very clear ideas: "what matters is not the opinion of some doctors, especially if only a few of them, but the prescribed laws and the actual [legal] practice."[67] This is one of the few sentences that provides clear evidence for the authorities accepted by the Chamber Court. These were the laws in plural – so not only Roman law, but also the statutes and other sources. Beyond these laws, the court also looked at the actual legal practice. In the German tradition, this practice was sometimes called the "green observance" (*viridis observantia*) – green perhaps because the practice bloomed like a flower or a tree.[68] Even when the irrelevance of the learned literature was established as the starting point, assessor Summermann would accurately evaluate all the authors quoted by the defendant. Concerning David Mevius and Samuel Stryk, two important representatives of the *Usus modernus*,[69] he demonstrated that their opinion was neither accurate nor in fact closer to the Roman law. In one case, however, it was plain that the defendant had indeed referred to an author who

66 Transcript of the session of the Imperial Chamber Court in P Oestmann, *Ein Zivilprozeß*, 572–575.

67 Ibid, 566: "*Allermaßen es nicht darauf ankomt, was einige und zumahl wenige Doctores dafür gehalten haben, sondern auf die vorgeschriebene Rechte und würckliche praxin.*"

68 Ibid, 320–322.

69 N Jörn (ed), *David Mevius* (1609–1670), Hamburg: Verlag Dr Kovač, 2007; J Schröder, "Specimen Usus Moderni Pandectarum", 235–238.

undoubtedly favoured the full birth. This was Joachim Lucas Stein, a well-known northern German scholar of Lübeckian law from the mid-eighteenth century.[70] Stein was still alive, and his book was the newest among all the relevant literature. Nevertheless, the Chamber assessor paid little attention to Stein's theory. He wrote that Stein's theory was only a single opinion in contrast to a wealth of other authors, and that he worked in an indiscriminate and haphazard way – and not without mistakes. According to assessor Summermann, Stein wanted to be a reformer rather than an interpreter of the law.[71] As such, reforming and improving the law was not the task of the literature. As a second argument Summermann mentioned several other authors whom the defendant had not quoted. This way he showed that his knowledge of the literature on the law of Lübeck did not need the help of the litigants, and that he was able to evaluate mainstream opinion. Summermann made frequent use of legal literature in all parts of his "relation". Very frequently, when quoting a phrase, he would also give a precise reference (e.g. "in my book on page . . ").[72] This makes clear that the assessor used the books that he quoted. Many early modern practitioners owned only one or a few textbooks or commentaries,[73] but the Imperial Chamber Court founded a court library in the first half of the eighteenth century.[74] It was therefore possible for the members of the court to use many erudite works. Whether all these books were authorities in a formal sense is unclear. In the court practice, solving legal questions without recourse to this kind of literature would have been unthinkable.

D. CONCLUSION

It is difficult to give a generalised answer to the question: Did the decisions of the highest imperial courts in the Holy Roman Empire leave some traces in the (substantive) law? Did the early modern jurisdiction have the power to modify and change the law? Were the highest courts regarded as authori-

70 J L Stein, *Gründliche Abhandlung des lübischen Rechts*, Leipzig, Rostock: J Schmidt, 1738/1746, vol II, tit 2.

71 Oestmann, *Ein Zivilprozeß*, 569–570.

72 Some examples ibid, 558, 561, 568–569 and 571. Summermann uses the Latin abbreviation *pm* = *pagina mea* or *pagina mihi*.

73 This is claimed about the *Iurisprudentia Romano-Germanico forensis* by Georg Adam Struve: G Kleinheyer and J Schröder, *Deutsche und Europäische Juristen*, 558.

74 I Scheurmann, "Wetzlarische Beiträge zu einer pragmatischen allgemeinen Rechtsgelehrsamkeit . . .", in W Speitkamp (ed), *Staat, Gesellschaft, Wissenschaft. Festschrift für Hellmut Seier zum 65 Geburtstag*, Marburg: N G Elwert, 1994, 229–244.

ties in scholarly discussions? And, asking the same question in the reverse, what kind of authorities did the highest imperial courts recognise when they had to solve controversial legal problems?

In contrast to modern law, when speaking about early modern times, it is not possible to differentiate between abstract discussions of the learned literature and practical decisions and motivations of the courts. In the period of the *Usus modernus*, the legal science in the Holy Roman Empire was a highly practical kind of scholarship. On the other hand, many judges published relations, observations, consultations and other written statements originating from internal discussions among the assessors or judges.

Examining single lawsuits can clarify some details. These two cases from the city of Lübeck show how thin and ambiguous the boundaries between literature and case law were. In fact, it is possible to prove some influence of the Imperial Chamber Court on the development of the German law. However, it is unclear whether specific, single case studies may be generalised. Even if the history of the Imperial Chamber Court has been well known for a long time, and even if early modern procedural law has been explored for many decades, there are still pieces missing from this puzzle. Some very important questions concerning the relation between court authority and the substantive law remain unanswered. This chapter has tried to clear a path through the jungle and to show some possibilities to offer approximate answers. But most of the work remains to be done.