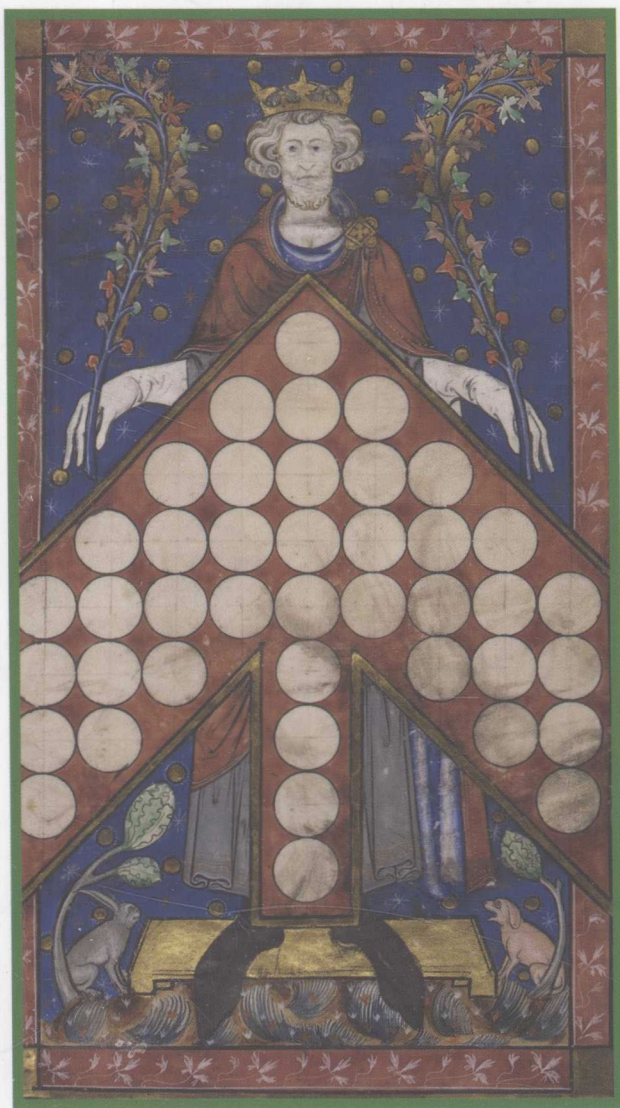


# LAW AND KINSHIP



## IN THIRTEENTH-CENTURY ENGLAND

Sam Worby

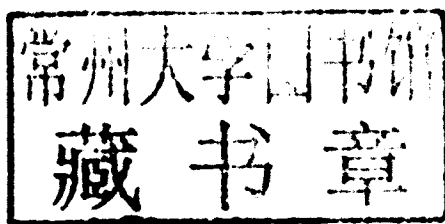
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STUDIES IN HISTORY

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# LAW AND KINSHIP IN THIRTEENTH-CENTURY ENGLAND

*Sam Worby*



THE ROYAL HISTORICAL SOCIETY  
THE BOYDELL PRESS

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In what follows all faults, omissions and errors are my own.

Sam Worby  
July 2009

## Abbreviations

BL	British Library
Bodl. Lib.	Bodleian Library, Oxford
Bracton	Bracton, <i>De legibus et consuetudinibus Angliæ</i> , ed. G. E. Woodbine, trans. (with revisions and notes) S. E. Thorne, Cambridge, MA–London 1968–77
Britton	<i>Britton: the French text carefully revised with an English translation, introduction and notes</i> , ed. F. M. Nichols, Oxford 1865
CUL	Cambridge University Library
Digest	<i>The Digest of Justinian</i> , Latin text ed. T. Mommsen with P. Krueger; English trans. ed. A. Watson, Philadelphia 1985
Glanvill	<i>The treatise on the laws and customs of the realm of England commonly called Glanvill</i> , ed., intro., notes and trans. G. D. G. Hall; guide to further reading M. T. Clanchy, Oxford 1993
Institutes	<i>The Institutes of Justinian: text, translation and commentary</i> , ed. J. A. C. Thomas, Amsterdam–Oxford 1975
Isidore, Etymologies	Isidore of Seville, ‘ <i>Etymologiarum libri XX</i> ’, <i>PL</i> lxxxii.73–728
LQR	<i>Law Quarterly Review</i>
PL	<i>Patrologia cursus completus, series latina</i> , ed. J. P. Migne, Paris 1844–1904
WCL	Worcester Cathedral Library
X	‘ <i>Decretales Gregorii P. IX</i> ’, in <i>Corpus iuris canonici: editio Lipsiensis secunda post Aemilii Ludouici Richteri</i> , ed. A. Friedberg, Leipzig 1879–81

Gratian, ‘*Decretum*’, in *Corpus iuris canonici: editio Lipsiensis secunda post Aemilii Ludouici Richteri*, ed. A. Friedberg, Leipzig 1879–81, is cited in the conventional canon law manner; it is not named, but the sections are referred to as, for example, C.1 q.1 c.1 for causa 1, quaestio 1, canon 1.

# Contents

List of illustrations	vi
List of tables	vi
Acknowledgements	vii
Abbreviations	viii
Introduction	1
1 Canon law kinship structures	9
2 Common law kinship structures	39
3 The dominance of canon law kinship ideas	68
4 Kinship laws in practice	92
5 Trends underlying legal kinship structures	115
Conclusion	141
Appendices	
1. Raymón of Penyafort's <i>Quia tractare intendimus</i>	147
2. The historical introduction to <i>Sciendum est</i>	163
3. Common law adaptations of canon law treatises: <i>Quibus modis</i>	167
4. Common law adaptations of canon law treatises: <i>Triplex est</i>	175
Bibliography	183
Index	193



## *List of illustrations*

- |    |  |    |
|----|--|----|
| 1. | A four-degree <i>arbor consanguinitatis</i> (tree of consanguinity):<br>BL, MS Add. 41258, fo. 37v. Reproduced by permission of the<br>British Library.                                    | 12 |
| 2. | A four-degree <i>arbor affinitatis</i> (tree of affinity): Bibliothèque<br>nationale, Paris, MS Latin 4000, fo. 186v. Reproduced by<br>permission of the Bibliothèque nationale de France. | 16 |

## *List of tables*

- |     |  |     |
|-----|--|-----|
| 1.  | Types of kinship alleged in the canon law sample   | 102 |
| 2.  | Degrees of kinship alleged in the canon law sample   | 117 |
| 3a. | Degrees of kinship: thirteenth century (post-1215)   | 118 |
| b.  | Degrees of kinship: fourteenth century   | 118 |
| c.  | Degrees of kinship: fifteenth century  | 118 |
| 4.  | Main actions involving kinship at common law, second half of<br>thirteenth century                       | 121 |
| 5.  | Kinsmen named as <i>propositus</i> in the common law sample  | 122 |
| 6.  | Distance in canon law degrees between the plaintiff and<br><i>propositus</i> in common law cases         | 123 |
| 7.  | Distance in canon law degrees between the plaintiff and any<br>kinsman mentioned in the count of descent | 124 |

## Introduction

In late medieval England, in order to marry, or inherit, people had to fit their own experiences of family through formal legal frameworks, which thus had a social force beyond the purely taxonomic and intellectual. In thirteenth- and fourteenth-century England the canon law was the foremost kinship system as a general framework for classifying the family. Even the common law, which had its own kinship system centred on inheritance, was touched by canon law ideas.

Charles Donahue Jr's magisterial comparative study of marriage in England, France and Belgium has confirmed a remarkable pattern of family interaction for England. His thorough and statistical analysis of the surviving records of cases before the archbishop of York's consistory court in the fourteenth and fifteenth centuries, and Ely consistory court between 1374 and 1381, incidentally seems to confirm that there was no clan or corporate kinship system operating in the areas covered, and, by inference, in England more widely (given the consistency of results between the two evidence sets). There were, he shows, even relatively low levels of parental involvement in marriage choice. Given the importance of marriage as a social institution and the potential consequences flowing from choice of partner – in property, alliance and social standing for example – it seems remarkable that an average of only 37 per cent of York cases showed evidence of parental involvement.<sup>1</sup> While there was evidence for arranged marriages in the records of both courts, many couples appear to have acted independently.<sup>2</sup> Whether this is qualified as 'astonishingly' or 'unusually' individualistic, the fact remains that many couples operated with relative freedom within the scope of the canon law marriage rules.<sup>3</sup>

This individualistic pattern confirms a picture of family interaction for England found elsewhere, through evidence of marriage patterns, but also more broadly.<sup>4</sup> From the Anglo-Norman nobility to later medieval peasants, the picture is of a limited family (although this book will not in fact

<sup>1</sup> C. Donahue, Jr, *Law, marriage, and society in the later Middle Ages: arguments about marriage in five courts*, Cambridge 2007, 750 (*Texts and commentary* [<http://www.cambridge.org/uk/catalogue/catalogue.asp?isbn=9780521877282>], n. 524).

<sup>2</sup> *Ibid.* 102, 216, 297.

<sup>3</sup> Michael Sheehan has found this 'astonishingly individualistic', Charles Donahue, 'unusually': *ibid.* 297, 609.

<sup>4</sup> See, for example, M. M. Sheehan, 'The formation and stability of marriage in fourteenth-century England: evidence of an Ely register', in J. K. Farge (ed.), *Marriage, family, and law in medieval Europe: collected studies*, Toronto 1996, 38–76. See also A. MacFarlane, *Marriage and love in England: modes of reproduction, 1300–1840*, Oxford 1986, esp. ch. iii,

focus on peasant kinship, but rather on kinship insofar as it was a general structure, transcending class and status). The extended kindred did not live together; the typical co-resident family appears to have been nuclear.<sup>5</sup> There is evidence of kin interaction, particularly suggestive of closeness between siblings.<sup>6</sup> There is a broad consensus about the narrowness of the operative kin group in England. It was rarely much larger than the immediate family, mostly the co-resident nuclear family, with some obligations and traceable contact extending out to cousins, and some closeness to siblings and occasionally to uncles and aunts. This pattern is unusual in comparison to other areas of Europe. It is suggestive to note that Franco-Belgian courts showed evidence for a higher level of family involvement in marriage arrangements.<sup>7</sup> It is also striking to contrast the pattern of relatively informal clans able to act together in some European countries, such as Italy.<sup>8</sup>

Formal legal kinship structures were among several potential overlapping layers of ideas about kinship. They had particular force because they applied at vital milestones in people's lives, such as marriage and inheritance. If thirteenth-century men and women wanted to marry legitimately they had to shape their actions to the kinship structures of the Church, or, at least, to have been aware of those kinship structures – to have narrated their kinship in a manner that fitted with the law, or tried to avoid it. To claim an ancestor's land and enforce their inheritance at common law via a writ of right, or a writ of cosinage, they had to narrate their family history and structure their kin in a way that fitted that system. The two great legal systems operating in England at the time were central to people's understanding of and practice in relation to kinship. This book will focus mainly on the thirteenth and fourteenth centuries. It will show that canon law kinship was in some senses dominant as a general way of thinking about kinship. Along the way it will also attempt to explore the gap between legal kinship in books and in practice, and between formal and official conceptions of kinship and people's

and *The origins of English individualism: the family, property and social transition*, Oxford 1978, for example at pp.197–8.

<sup>5</sup> On Anglo-Norman co-residency patterns see J. S. Moore, 'The Anglo-Norman family: size and structure', *Anglo-Norman Studies* xiv (1991), 153–96 at p. 193. On peasant patterns see B. A. Hanawalt, *The ties that bound: peasant families in medieval England*, Oxford 1986, and R. M. Smith, 'Kin and neighbours in a thirteenth-century Suffolk community', *Journal of Family History* iv (1979), 219–56.

<sup>6</sup> Z. Razi, 'Intrafamilial ties and relationships in the medieval village: a quantitative approach employing manor court rolls', in Z. Ravi and R. Smith (eds), *Medieval society and the manor court*, Oxford 1996, 369–91; C. Howell, *Land, family and inheritance in transition: Kibworth Harcourt, 1280–1700*, Cambridge 1983, 217–20, 234; J. C. Holt, 'Feudal society and the family in early medieval England, IV: the heiress and the alien', in his *Colonial England, 1066–1215*, London 1997, 245–69 at p. 259.

<sup>7</sup> Donahue, *Law, marriage, and society*, 513, 608–13.

<sup>8</sup> J. Heers, *Le Clan familial au moyen âge: étude sur les structures politiques et sociales des milieux urbains*, Paris 1974. For bibliography on continental kinship see G. Melville and M. Staub (eds), *Enzyklopädie des Mittelalters*, Darmstadt 2008, ii. 408.

## INTRODUCTION

everyday experiences and their potentially less well defined ideas about relatedness.

Kinship connections were theoretically, practically and poetically important. In literature, for example, they often formed a background web of interconnectedness.<sup>9</sup> Yet they were also contingent in practice and could be used or referred to in such various circumstances that it can be difficult to apply the concept of kinship as a form of connection between people consistently. Formal legal kinship, however, offers structure. Anthropologists from Louis Dumont to Pierre Bourdieu have stressed the importance of official images and norms concerning kinship, of idealised patterns and structures, in shaping the way people understand family.<sup>10</sup> This is not to suggest that people always obeyed or followed such official, ideal patterns, rather that these ideal official norms visibly influenced the way in which people acted, or how they narrated their actions. The special force of law (for example in providing public recognition of licit marriages, and providing a mechanism of enforcement for the conventions behind inheritance patterns) made these legal images and norms potentially powerful.

Formal kinship systems also influenced the way people perceived the ordering of society. It has been argued that 'rational behaviour involves classification, and the activity of classification is a human universal',<sup>11</sup> and that taxonomy or classification is 'a basic need and imposition of mind upon an otherwise jumbled richness of nature'.<sup>12</sup> This applies equally well to the history of kinship systems. The structures and edifices of medieval kinship systems limited and ordered the jumbled richness of natural families. Or, at least, they offered a scheme to fit the immediate need or question, and a background narrative of connectedness. While these questions of taxonomy had immediate practical effect on people's lives, they also had less tangible effects on their thoughts and ideas. Therefore understanding these structures leads to an understanding of what and how people would have known about kinship and why this mattered, as well as exploring the historical trends and developments in this area relevant to England.

Kinship is many-layered. This book will descend through layers from the formal and written to the practised. The first two chapters explain the most formal (thus the simplest and most ideal) expressions of legal kinship, in the books of the canon and common laws. The fourth chapter explains how these rules were complicated by practice and litigants' attempts to use and

<sup>9</sup> For example in Malory, *Works*, ed. E. Vinaver, 2nd edn, Oxford 1971.

<sup>10</sup> L. Dumont, *Introduction to two theories of social anthropology: descent groups and marriage alliance*, ed. and trans. R. Parkin, Oxford 2006, 88, 93; P. Bourdieu, *Outline of a theory of practice*, trans. R. Nice, Cambridge 1977, 35, and *The logic of practice*, trans. R. Nice, Cambridge 1992, 172.

<sup>11</sup> M. Douglas, *Purity and danger*, New York 2002, p. xvii.

<sup>12</sup> S. J. Gould and R. Wolff Purcell, *Crossing over: where art and science meet*, New York 2000, 14.

manipulate them in the respective courts. The final chapter suggests that an informal pattern of practical kinship knowledge existed beneath the laws. The book centres on formal kinship because the two legal kinship systems explored were shared ways of understanding kinship and encapsulated the only widespread, structured conceptions of the extended family in late medieval England. Thus, an exploration of the dynamics of formal kinship is interwoven with the explanation of how kinship law operated. The third chapter demonstrates the dominance of canon law as a general way of thinking about kinship in literate and legal circles, a pattern shown to have operated more widely by the court-based evidence in the fourth chapter. The final chapter looks beyond the law and explains both the dominance of the canon law and why there was room for it in thirteenth- and fourteenth-century England.

### Kinship

Before exploring legal kinship systems in detail some preliminaries are necessary. The first of these is to make clear how the concept of a kinship system should be understood in this book. A casual modern understanding of kinship recognises it as a biological fact, based on procreation, a category very much informed by modern western assumptions and scientific knowledge. To this 'fact' is attributed 'social significance'.<sup>13</sup> It has a public element and is governed by both norms (expectations and models of how people should behave and even feel), and laws (rules about how people should or should not behave). Deeper thought about kinship might lead the casual thinker to recognise it as a formal category, encompassing in-laws and adoptees, based on analogies to blood relationships. Kinship can mean other things too (a sense of fellow feeling for example), that will not be dealt with here, since they go beyond the bounds of legal kinship.

Anthropologists have explored the question of what constitutes a kinship system in detail, although kinship studies have waxed and waned in fashion. Something called kinship is a widespread notion. It is commonly tied to descent; it is difficult to imagine a kinship system which would not include this. It is, however, possible to focus on bonds other than descent, for example to analyse and characterise kinship systems as based on 'relations of exchange between units', and focused on bonds created by marriage as successfully done by Claude Levi-Strauss.<sup>14</sup> It is also possible to seek characteristics of kinship systems. This book will take the latter approach as better suited to the legal cultures examined, and, at the risk of being too specific to those legal cultures, will suggest the specific institutions and features that can be said to characterise a kinship system.

<sup>13</sup> L. Holy, *Anthropological perspectives on kinship*, London 1996, 1.

<sup>14</sup> Dumont, *Introduction to two theories*, 71.

## INTRODUCTION

For purposes of convenience, a kinship system can be recognised as a way of thinking about and narrating bonds between people in terms of a recognised biological connection or analogy with biological connection. The term 'recognised' is used here because, for example, not all children are biologically related to both of their 'parents', a fact acknowledged by English medieval commentators. The author of the common law text *Bracton* was aware that, in the case of children born of adultery in circumstances where the husband could have fathered the child, 'common opinion sometimes is preferred to truth'.<sup>15</sup> So long as the marriage was legitimate and the husband could have been the father (and did not disavow the child) the child would have been the father's legitimate heir. Thus there could be a difference between legal and biological parenthood. Other characteristics of a kinship system include an in/out boundary and a method of ordering. These are the 'systematic' elements that imply that the kinship system is more than a casual and fleeting series of groupings. Kin terminology can reflect this ordering; internal reasoning can be used to justify it. Ordering also implies a focus, meaning a person to whom others relate or not. This need not be a monolithic or mythical ancestor; in fact every person will, in one sense, be the focus of their own 'kindred'. To make such a classificatory system worthy of attention (certainly of the amount of attention devoted to it in this book) it should also have a social force or purpose, meaning that it should be operative rather than purely ornamental or structural. A kinship system in this sense will not be a taxonomy elaborated only for its own sake. A kinship system may not contain all of these elements. It is possible to conceive of one without, for example an in/out boundary, but it is more difficult to conceive of such a system as having an effective social force. This checklist risks circularity, biased as it is towards the type of kinship system found in the legal cultures examined in this book, yet it offers a useful shorthand by means of which common underlying elements can be recognised. Thus, for the purposes of this study, a kinship system is a way of classifying people, rooted in biological relatedness, either directly or by analogy. To be more than an 'idle ingenuity' it should also have a social force or purpose.<sup>16</sup> As this definition makes clear, the discussion of kinship systems in this book is principally about structures and many practical matters will not be covered in detail. An approach to kinship that focuses on structures also directs attention to the interaction between structures and patterns of behaviour.

<sup>15</sup> Bracton, *De legibus et consuetudinibus Angliæ*, ed. G. E. Woodbine, trans. (with revisions and notes) S. E. Thorne, Cambridge, MA–London 1968–77, ii. 186. All references to *Bracton* will be to this edition.

<sup>16</sup> On 'idle ingenuities' see F. Pollock and F. W. Maitland, *The history of English law before the time of Edward I*, 2nd edn, with new introduction and select bibliography by S. F. C. Milsom, Cambridge 1968, ii. 389.

### Terminology

Kinship studies can be weighted with a significant baggage of specialist terms. This book will try to avoid technicalities, but some are insurmountable and should be explained. Consanguinity, affinity and *parentela*, will be the technical phrases most frequently met. Thus, consanguinity (*consanguinitas*) is used in the canon law sense to mean blood kinship; affinity (*affinitas*) is used to mean kinship created through marriage or sex (the fact that the canon law could regard kinship as created through a casual sexual encounter may seem peculiar. The underlying rationality, such as it was, will be discussed further in chapter 1); and *parentela* is used in the common law sense to mean a person's descendants.<sup>17</sup> The general term kinship can be a translation for a host of concepts in medieval Latin: thus one translator uses it for *parentela*,<sup>18</sup> *cognatio*,<sup>19</sup> *a sanguine*<sup>20</sup> and for *affinitas*.<sup>21</sup>

A particularly dangerous term in any exploration of medieval kinship is the word cousin since it could be used both specifically and vaguely to encompass a general sense of relatedness, and since there were occasions when the definition of who was a cousin was under dispute. An example of this is a canon law case where a man was reported to have called his granddaughter and potential grandson-in-law both 'cosin'.<sup>22</sup> Cousin could be used as a word for almost any kinsman, but could also be a term of art. The term cousin will therefore be avoided where possible in this book and otherwise defined. Instead, consanguine, affine or, generally, kinsman, will be preferred.

As well as general terms, each legal system had its own terminology of kinship.<sup>23</sup> The canon and civil laws had a rich collection of possible specific Latin kin names (see figure 1). Within this four-degree tree there are sixteen specific kin names on the vertical axis and twenty for collaterals, giving a total of thirty-six. A tree picturing the canon law kinship system prior to 1215 would have contained a total of sixty: an additional twelve named ascendants and descendants and a further twelve named collaterals. Half of each total were names for male relatives and half were for females. They built upon a repetitive pattern, for example *avus* for grandfather, *proavus* for great-grandfather, *abavus* for great-great-grandfather and so on. Other relatives were named through combinations, thus *filius propatruī* for the son of the great-grandfather's brother. Together it amounts to a formidable mass of

<sup>17</sup> Ibid. ii. 296.

<sup>18</sup> Bracton, ii. 195, 352, 353, 407; iii. 384.

<sup>19</sup> Ibid. ii. 200.

<sup>20</sup> Ibid. ii. 303.

<sup>21</sup> Ibid. ii. 423.

<sup>22</sup> Donahue, *Law, marriage and society*, 189, 729 (*Texts and commentary*, n. 387).

<sup>23</sup> On Latin terms for kinship or kindred more generally see A. Guerreau-Jalabert, 'La Désignation des relations et des groupes de parenté en Latin médiéval', *Archivum Latinitatis Medii Aevi* xlvī–xlvii (1988), 65–108.

## INTRODUCTION

terminology. It is unlikely that this was often employed outside an academic context.

At common law a relatively narrow range of terms designating specific kin occurred in both the Latin records and Anglo-French reports. However, the situation was made more complicated by the two languages involved (even more so as English was likely to be used by litigants outside formal settings). In the ascending line the terms tended to be *pater* / *pere* (father), *mater* / *mere* (mother), *avus* / *aiel* or *ael* (grandfather), *avia* / *aiele* (grandmother), *proavus* / *besaiel* (great-grandfather), *proavia* / *besaiele* (great-grandmother), *abavus* / *tresaiel* (great-great-grandfather) and *abavia* / *tresaiele* (great-great-grandmother). In the Anglo-French there are rare examples of *quartael* (great-great-great-grandfather)<sup>24</sup> and *quint ael* (great-great-great-great-grandfather).<sup>25</sup> In the descending line the terms are *filius* / *fiz* (son), *filia* / *fille* (daughter), *nepos* / *neveu* (grandson or nephew) and *neptis* / *nece* (granddaughter or niece). In the collateral lines they are *frater* / *frere* (brother), *soror* / *soere* (sister), *avunculus* / *uncle* (for either uncle), *amita* / *aunte* or *amite* (for either aunt) and *consanguineus* (as a general term for kinsman or male cousin) or *consanguinea* (as a general term for kinswomen or female cousin) / *cosin* (general term for kinsman or cousin). It should be said that these lists are not exhaustive. However, a provisional, impressionistic conclusion may be drawn, viz, that common lawyers, clerks or reporters were more comfortable using specific terms for direct ancestors rather than for collateral relatives, a conclusion that reflects the importance of the direct line to English kinship.

Generally, this book uses the term specific to the context, either grandfather, *aiel* (from an Anglo-French source) or *avus* (from a Latin one), and supplies a translation where necessary. It is now time to move on to examine the detail of first canon law, then common law kinship.

<sup>24</sup> *Year books of the reign of King Edward the first: michaelmas term, year XXXIII and years XXXIV and XXXV*, ed. and trans. A. J. Horwood, London 1879, 125.

<sup>25</sup> *Year books of the reign of King Edward the third: year XVI (second part)*, ed. and trans. L. O. Pike, London 1900, 571.



