Famous English Canon Lawyers: V

HENRY SWINBURNE, B.C.L. († 1624)

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The first post-Reformation English canonist in our series seems, on the face of his *curriculum vitae,* a very different kind of lawyer from the medieval writers previously described. He was not a doctor of law, and seems to have spent a mere three years at university. He went up to Oxford as a relatively mature student (in his early 20s) in 1576, having already served an apprenticeship as clerk in the registar's office at York and having become a notary public and actuary of the Consistory Court in the early 1570s. He was a local boy, born and educated in the city of York, and came to the attention of the ecclesiastical authorities as a promising clerk at about the age when more fortunate youngsters were sent to Oxford or Cambridge. Swinburne's study therefore began in the office, and in the routines of clerical writing: a preparation which, in other spheres of law also, could prove as valuable as college life for the true scholar.

It is thought that the young clerk was taken under the wing of Dr Richard Percy, who was Commissary of the Exchequer Court at York from 1570. Swinburne wrote of Percy with great deference, and reported in 1590 that he was engaged upon the preparation of a code of English canon law, 'now well towardes accomplishment'.[1] Percy at the least provided Swinburne with an exemplar, and it may well be that he assisted more positively in arranging for the latter to spend three years at Oxford.[2] Any any rate, we know that Swinburne went up to Hart Hall in 1576, and three years later took his B.C.L. degree from Broadgates Hall (now Pembroke College).[3] Two years after graduation, he was admitted as one of the very small group of advocates practising in the ecclesiastical courts at York. Very little is known of these provincial bars, save that they were apparently independent of Canterbury.[4] In the southern province, it was in practice necessary to possess a doctorate in Law before admission as an advocate in the Court of Arches,[5] and it is these scarlet-robed advocates, mostly members of Doctors' Commons, whom we tend to think of as the English Civilians. At York, however, a bachelor's degree in Law was a sufficient qualification, and only a minority of the advocates had doctorates. Swinburne's son Toby was similarly admitted as an advocate at Durham without a doctor's degree.[6]

Henry Swinburne practised as an advocate at York from 1581 until his death in 1624. Some of his opinions, written in English, have been discovered.[7] Like all practising civilians, he concurrently held judicial and administrative

1. *Testaments* (1591), sig. B2.
2. The suggestion is made by R. A. Marchant, *The Church under the Law* (1969), pp. 43, 45; and see J. D. M. Derrett, *Henry Swinburne, Civil Lawyer of York* (Borthwick Papers no. 44, 1973), p. 6. What follows is based very largely on Marchant and Derrett.
3. A. Wood, *Athenae Oxonienses* (1815 ed.), II, col. 289.
4. In York Minster there were formerly a number of monumental inscriptions to 'advocates of the court of York', dating from 1406 onwards: F. Drake, *Eboracum* (1736), pp. 495 (Alan of Newark, 1412) and 497 (John Harewood, 1406). Likewise the proctors: ibid., pp. 497, 500.
5. The only degree required by written constitutions was the B.C.L., added in the 1340s to the requirement of at least four years' legal study and a year's attendance on the courts: P. Brand, *The Origins of the English Legal Profession* (1992), p. 149. However, the requirement of a doctorate was established by the 16th century and was said by Ayliffe and Burn to be a custom of England.
6. Marchant, op. cit., p. 249 (in 1637). He proved to be a papist delinquent: Derrett, op. cit., p. 9.
7. In Durham Cathedral MS. Raine 124. One of them is printed in Derrett, op. cit., p. 29.

offices, the chief of which were as Commissary of the Exchequer Court of York (1604-24) and Commissary of the Dean and Chapter of York (1613-24). The Exchequer Court was primarily concerned with testamentary business, and it seems a likely inference from the subject of Swinburne's first treatise that he had been involved in its affairs since Dr Percy's time. Quite apart from his experience in clerkship and in private practice, there was also widespread deputising; Swinburne had, for instance, been holding deanery courts in the 1590s.[8]

Lowly though his background may have been, Swinburne's reputation places him in the ranks of the famous; and indeed his fame was deserved. He was the first writer on the Canon law in English, and he adopted a felicitous informal style designed to be understood by laymen as well as experts. His principal work, *A briefe treatise of Testaments and last Wills* (1590/91), passed through several editions and – like a modern textbook – evolved in the hands of successive editors. It was the leading textbook on wills for two hundred years. His second work, *A treatise of Spousals, or Matrimonial Contracts* (1686), was published posthumously from an incomplete manuscript now in Lincoln's Inn.[9]

OF TESTAMENTS

The greater of Swinburne's two treatises was printed by John Windet in 1591[10] with the characteristically prolix title, *A Briefe Treatise of Testaments and last Willes, Very profitable to be understoode of all the Subjects of this Realme of England, (desirous to know,* Whether, Whereof, *and* How, *they may make their Testaments: and by what meanes the same may be* effected *or* hindered,) *and no lesse delightfull, aswell for the rarenes of the worke, as of the easines of the stile, and method: Compiled of such lawes Ecclesiasticall and Civill, as be not repugnant to the lawes, customes, or statutes of this Realme, nor derogatorie to the Prerogative Royall . . . By the Industrie of Henrie Swinburn,*[11] *Bachelar of the Civill Lawe.* It was seen through the press by Swinburne himself, whose care is evident from the fact that the first edition contains corrections on pasted slips; some copies even contain corrections in ink made at the author's direction.[12] The exception clause on the title-page was an allusion to the statute of 1534 under which, pending the publication of a projected code of ecclesiastical law, the old Canon law was to continue in force so far as it was not 'contrariant or repugnant to the king's prerogative royal or the customs, laws or statutes of this realm'.[13] Swinburne mentions in his preface the continuing failure to produce this code, although Dr Percy had made good headway with a draft, and feelingly indicates the reason:

> Great and wonderful is the number of the manifolde writers of the Civil and Ecclesiasticall Lawes, and so huge is the multitude of their sundrie sorts of books . . . (apparent monuments of their endlesse and invincible labours) that in my conceite, it is impossible for any one man to read over the hundred part of their works, though living an hundred yeeres hee did intende none other worke.

The result of this failure was that the ecclesiastical law of England was 'secretly hidden from the subjects of this realme in corners of many bookes of straunge countries, and forreine language'. To remedy this, he had brought the subject into a 'narrow compasse' – a mere 600 pages – with the hope that 'this one

8. Marchant, op. cit., p. 120.
9. Linc. Inn MS. Misc. 577.
10. The date on the title-page is 1590, but the colophon is dated 1591.
11. The name is spelled Swinburne at the end of the dedication and the preface, and this is the spelling usually preferred.
12. Derrett, op. cit., p. 11.
13. 25 Hen. VIII, c. 19, s.2.

litle booke may serve in steed of many great volumes'. He was apologetic about writing in English, but his object was to make the work as widely available as possible. Nevertheless, he hoped the book would also be of use to the 'Justinianists, or yong students of the Civill law', and for their benefit he provided full references to authorities in the margin, in abbreviated Latin.

The nearest equivalent texts of the common law, the readings on the Statute of Wills 1540 by such as James Dyer (1552) and Ambrose Gilbert (1556), consisted principally of lists of cases connected by a few disjointed generalisations. By contrast, Swinburne's orderly exposition was a model of clarity and scientific technique. He began with an analytical table, reminiscent of the later schemes of Finch and Hale, setting out the whole subject in diagrammatic form. First, with due warnings about the danger of definitions, he defines testament, will, codicil and legacy. Then he considers capacity, subject-matter, form and interpretation, the appointment and duties of executors, and finally the factors which might vitiate a testament. The treatment is decidedly bookish, and it may be questioned – notwithstanding Swinburne's extensive practical experience – how far it squared with English practice. For instance, he treats heresy, apostasy, manifest usury, incest, and sodomy, as disqualifications from testatorship, although he concedes that English law departed from the general Canon law in not recognising prodigality as a disqualification; for none of these propositions, though supported by an impressive array of continental learning, is any English authority or example cited.[14] Swinburne's discussion of the proof of insanity makes the important point that a witness could not depose merely that the deceased was mad, but must give evidence of the supporting facts. Yet his examples were derived from books: they might say that 'they did see him throw stones against the windowes, or did see him usually to spit in men's faces, or being asked a question they did see him hisse like a goose or barke lyke a dogge'. These homely examples derive not from the Exchequer Court of York, but from the writings of the jurists Baldus (d. 1400?), Corneus (d. 1492), Decius (d. 1536), Mascardus (d. 1588), and Mantica (d. 1614). Then again, in considering the evidence needed to prove bastardy, Swinburne relies on ancient authors as establishing that a woman could influence the appearance of her offspring by the image in her mind at the time of conception,[15] and that men became barren at the age of 80 'if not before'.[16] In a partial concession to natural science, the author says that judges in deciding such questions might take the advice of physicians, midwives, 'and especially such as bee skilfull in astrologie'.[17]

The book certainly achieved its object, and represents a landmark in jurisprudence. The essential gist of masses of obscure Latin texts, including in many cases the arguments on both sides of a question, was made available to the lay public – and, ultimately, to a legally trained posterity unable to cope with the original sources. As a result, Swinburne remained the first recourse on the subject for over two hundred years. The treatise was reprinted by the Company of Stationers (who in 1607 acquired the copyright) in 1611, 1635 and 1640. The 1611 edition was also, of course, in Swinburne's lifetime, and it claimed on the title-page to have been 'newly corrected and augmented with sundry principall additions, by the industrie of Henry Swinburn'. The following two editions seem to have been treated as one by the trade, for the 'very much enlarged' version which appeared in 1677, under the imprint of the law printers George Sawbridge,

14. *Testaments*, ff. 54v-60v.
15. *Testaments*, ff. 162-164.
16. *Testaments*, fo. 164v. In the case of aged men, the learning was not that they could not perform sexual acts, but that they could not procreate: *Spousals*, p. 50.
17. *Testaments*, fo. 166.

Thomas Roycroft and William Rawlins, was described as the fourth edition. The price of this new edition was 7s.[18] Further editions were produced, and sold at the price of one guinea, in 1728 and 1743. A Dublin edition appeared in 1793, in two octavo volumes, described as the seventh edition. The English seventh (and final) edition was heavily edited by the conveyancer John Joseph Powell of the Middle Temple (d. 1801), prepared for the press by James Wake of Lincoln's Inn, and published in three volumes by William Clarke and Sons in 1803. It is clear proof of the continuing importance of Swinburne's text to all English lawyers, and of its accessibility, that this final edition should have been the work of barristers trained in the law of real property rather than of a Civilian from Doctors' Commons.

OF SPOUSALS

Swinburne's second treatise was never finished, and the completed portion was not printed in his own lifetime. There is some evidence that he intended it as the first part of a larger work on matrimony, with two further books on marriage and divorce.[19] The finished part was printed posthumously in 1686, at the hand of an anonymous editor, by Samuel Roycroft, on behalf of Robert Clavell, at the Peacock in St Paul's Churchyard. It is much shorter than *Testaments,* occupying 240 pages exclusive of the preliminaries.

By 'spousals' *(sponsalia),* Swinburne meant the contract to marry, whether by words of the present or future tense, and he sets out a great deal of rather esoteric erudition on the construction and effect of various kinds of engagement. Despite the heavy use of pedantic scholarship in the continental tradition, the lightness of touch found in *Testaments* is even more evident here. Swinburne wrote as we may suppose he spoke – 'here methinks some man doth pull me by the sleeve, and tell me in my ear, that this distinction fighteth with the former definition' – 'yet is not the second part [of an opinion] able to withstand the Canon shot . . . but must needs also fall and be battered with the same Bullet'.[20] More rigorous editing might have reduced the length of the book, but would have detracted from its immediacy.

The author's views on personal behaviour are, as one might expect from an ageing ecclesiastical judge, towards the conservative side. In his discussion of whether a contract made by infants could be ratified at full age by conduct short of cohabitation or copulation, he argues that conduct such as kissing and embracing could be regarded as implied ratification. It is true that some argue that such evidence is inconclusive, 'because these amorous actions . . . are often practised as preambles and allurement rather to accomplish the accomplishment of unlawful lusts, and to quench the flames of youthful desires, than to tye the indissoluble knot of chast wedlock'. But Swinburne thought this an uncharitable supposition: *delictum non praesumitur.*[21] Elsewhere he allows that people might marry once they were past the age of childbearing, for mutual solace: 'But I speak this rather to defend the marriage of the aged from unlawfulness, than to commend it for comliness'.[22] His lack of sympathy with the times positvely boils over when it comes to the subject of rings, where he inveighs against 'the Vanity, Lasciviousness, and intollerable Pride of these our days, wherein every skipping Jack, and

18. E. Arber ed., *The Term Catalogues 1668-1709,* I (1903), p. 286. The second-hand price of the older editions had been quoted in the 1670s as 10s.: *The General Catalogue of Books printed in England . . . Collected by Robert Clavell* (1675), p. 62.
19. The editor of the 1686 edition says that Swinburne left unfinished notes on these portions. *Spousals* itself contains forward references to the unfinished part.
20. *Spousals,* pp. 8, 205. The words here omitted show that 'Canon shot' was meant as appalling pun.
21. *Spousals,* p. 42.
22. *Spousals,* p. 50.

every flirting Jill, must not only be ring'd (forsooth) very daintily, but must have some special Jewel or Favour besides, as though they were descended of some noble house. . .'.[23] Here we find a mature Swinburne venturing to be himself, in contrast with the objective but detached and seemingly unworldly compiler of learned texts. In either character, Swinburne is still pleasing to read and easy to understand.

For all its charm, this second work was not destined to enjoy the same success as *Testaments,* because the subject-matter was already archaic by the time it was printed. Had Swinburne finished the remainder of the projected volume, with the sections on marriage and divorce, it would doubtless have outshone *Testaments,* and might have lasted even until the present day. In the event, there was only one further edition, in 1711.

SWINBURNE'S ACHIEVEMENT

Swinburne's failure to take the doctorate probably had more to do with his personal circumstances than his prowess in the Oxford law school. Certainly his writings demonstrate that a doctor's degree was not an absolute prerequisite of legal learning in the Latin tradition. Though he wore his learning lightly, with touches of humour and homespun philosophy, his scholarly pains are evident in the copious citations, which have been carefully analysed by Professor Derrett. Over 225 authors are cited, ranging from the classics to the latest continental writers on Canon law. Swinburne was not only familiar with the modern English reporters, Dyer and Plowden, and naturally with the *Decisiones Rotae,* but more remarkably he was also au fait with the law reports of the *jus commune,* with d'Afflitto and Capece of Naples, with Corsier of Toulouse, and with Boyer of Bordeaux. The enormous range of learning displayed naturally raises the question where Swinburne could have read the books. It seems unlikely that he can have owned them all himself. Professor Derrett made the suggestion that he must have paid regular visits to Doctors' Commons; but it now seems unlikely that there was any library there during his lifetime.[24] More likely the source was the cathedral library at York, together with any private libraries to which Swinburne gained access, augmented by such study notes as he had brought back from Oxford. If only half of these law books were available in York, that city can have been no mean research centre in Canon law in the time of James I. Visitors to York Minister may still see Swinburne's kneeling effigy habited in the black laced gown of his Oxford baccalaureate;[25] but they may with some justification venerate him as a professor of the less exalted law school at York.

Provincial in his background and occupations, Swinburne was certainly not provincial in his thought and writing. Professor Helmholz has recently demonstrated the continued vitality of continental jurisprudence in England after the Reformation:[26] it was no objection in an Elizabethan ecclesiastical court that a living authority was an arrant papist. But the cosmopolitan character of Canon law was not to continue much longer. Swinburne was one of the last, if not the last, major English legal writer in the European *jus commune* tradition. His bold decision to write in plain English carried much of that learning effortlessly into the nineteenth century; but freedom of access to that scholarship began to disappear with his generation. The heavy leather-bound 'monuments of endless and invincible labours' were about to enjoy a long retirement.

23. *Spousals,* p. 209.
24. G. D. Squibb, *Doctors' Commons* (1977), p. 88, questioning Derrett, op. cit., pp. 18, 32.
25. There is a very inaccurate whole-page engraving of the monument in Drake's *Eboracum* (1736).
26. *Roman Canon Law in Reformation England* (1990), esp. ch. 4.