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COMMUNICATION

SIR JOHN DAVIES, THE ANCIENT CONSTITUTION, AND CIVIL LAW[1]

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In 1603 Sir John Davies, a Wiltshire lawyer trained at the Middle Temple, travelled to Dublin to assume his duties as solicitor-general for Ireland. His appointment followed the defeat of Tyrone's rebel forces and the final subjugation of the long-recalcitrant kingdom. As one of the principal advocates of English policy during the next sixteen years (solicitor-general, 1603–6, attorney-general, 1606–19), Davies worked to consolidate and perpetuate this military conquest by a series of judicial decisions which transformed the legal and administrative structure of the island. In cases brought before the central law courts in Dublin, Davies' arguments compelled the Irish judiciary to eliminate the Gaelic law and to assimilate the autonomous Gaelic lordships, to reduce corporate liberties and franchises, to impose religious conformity, and to create a national monetary system. In 1615 the attorney-general presented these revolutionary decisions in his publication of the *Irish Law Reports*.[2] In many of these cases, he had buttressed his arguments with frequent references to the civil and canon laws used in continental legal tribunals.

Davies' use of continental law was so extensive as to cast doubt upon the conventional notions of an insular common law mentality put forward by Professor J. G. A. Pocock. In his well-known study, *The ancient constitution and feudal law*, Pocock asserted:

> There was no reason why a common lawyer should compare his law with that of Europe except an intellectual curiosity arising and operating outside the everyday needs of his profession.[3]

This assumption that English lawyers practised their trade in a professional climate devoid of all practical contact with European law is, however, extremely narrow and fails to take into consideration the extent to which common lawyers were exposed to the civil law tradition in the seventeenth century. The major points of contact with foreign legal sources were: the law practised in the numerous non-common law jurisdictions, the legal training at the universities and Inns of Court, the early Stuart political controversies concerning public law, and finally the movement for law reform that began at the end of the sixteenth century. All these influences gave common lawyers considerable exposure to the principles and

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[2] Sir John Davies, *Le primer report des cases in les courts del roy* (Dublin, 1615). There is an excellent English translation: *A report of cases and matters in law resolved and abridged in the king's courts in Ireland* (Dublin, 1762). Hereafter cited as *Irish reports*.

[3] J. G. A. Pocock, *The ancient constituion and feudal law* (Bath, 1974), p. 90.

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procedures of the civil law, and as Davies' work in Ireland demonstrates, this familiarity often had concrete effects in the decisions rendered by common law judges in litigation pending before the central courts.

Even a cursory glance at the English legal system as it existed in the early seventeenth century reveals the plethora of non-common law jurisdictions that operated alongside the common law courts. These included the hundreds of church courts that adjudicated English ecclesiastical law, the High Court of Admiralty and twenty Vice-Admiralty Courts that exercised their authority according to the rules of an emergent system of international maritime law, and the small and infrequently convened Court of Chivalry that determined cases according to the law of arms. Professor Brian Levack has shown that all these minor non-common law jurisdictions were readily accommodated, even by Coke, within the larger framework of the common law; for English jurists held that these lesser jurisdictions and their substantive law had been used time out of mind, and had acquired the full status of customary law.[4] In his study of English law reporting, Dr Lewis Abbott argued that common law judges and advocates frequently consulted civilians on difficult points of law outside the purview of the common law.[5] Coke himself admitted that the common lawyers, 'in matters of difficulty do use to confer with the learned in that art of science, whose resolution is requisite to the true deciding of the case in question'.[6]

The English universities and Inns of Court provided additional opportunity for acquaintance with the civil law tradition. As university education became less clerical in the sixteenth century, and as admissions to Oxford and Cambridge increased between 1540 and 1640, many future practitioners of the common law spent at least some time at universities where training in the classics, in rhetoric and in the civil law itself was not unusual.[7] One recent study has shown that this exposure to classics and to continental law was sustained by readings at the Inns of Court. Lord Chancellor Ellesmere himself acquired the basics of Roman law through readings at Lincoln's Inn.[8] William Fulbecke, a member of Gray's Inn trained in both the civil and common laws, wrote a treatise in which he openly encouraged students of the common law to learn the fundamentals of Justinian's *Corpus iuris civilis*.[9] The judge James Whitelocke was a student of Gentili, and John Dodderidge, Justice of the Court of King's Bench, was reputed to have been trained, not only in the civil law, but in the canon law as well.[10]

If the existence of the non-common law tribunals and of the civil law training at universities and Inns of Court shows the avenues by which continental law could penetrate English legal thinking, the political debates of the Jacobean period provide dramatic examples of the uses to which such knowledge could be put, particularly

[4] Brian Levack, *The civil lawyers in England 1603–41*. (Oxford, 1973), pp. 145–6.

[5] L. W. Abbott, *Law reporting in England, 1485–1585* (London, 1973), pp. 190–1.

[6] *The reports of Sir Edward Coke* (London, 1738); 3 *Co. Rep. Pref.* p. xx b.

[7] D. S. Bland, 'Rhetoric and the law student in sixteenth-century England', *Studies in Philology*, LIV (1957), 498–508; R. J. Schoeck, 'Rhetoric and law in sixteenth-century England', *Studies in Philology*, L, (1953), 119–27; Louis Knafla, 'The matriculation revolution and education at the Inns of Court in renaissance England', *Tudor men and institutions*, ed., A. J. Slavin (Baton Rouge, 1972), p. 252; also 'The law studies of an Elizabethan student', *Huntington Library Quarterly*, XXXII (1969), 227, 231–4.

[8] L. Knafla, *Law and politics in Jacobean England* (Cambridge, 1977), p. 49.

[9] W. Fulbecke, *Directive or preparative to the study of the law* (London, 1602), pp. 26–9.

[10] For Dodderidge and Whitelock see E. Foss, *A biographical dictionary of the judges of England* (London, 1870), pp. 223, 721–2.

in controversies surrounding public law and the nature of the royal prerogative. Perhaps because the common law evolved as an accretion of rights, duties and obligations over real property, legal controversialists found its vocabulary deficient for enunciating principles of public law. Searching for additional and more fruitful concepts, Jacobean lawyers were understandably attracted by the Roman law of Justinian. There they could find, as Maitland pointed out in his introduction to *Bracton and Azo*, a highly organized and flexible system of public law to buttress the less adequate formulations of their own legal tradition.[11]

A striking example occurs in the debates over impositions which featured certain borrowings from the more universalist second-century Roman concepts enshrined in the *ius gentium* or natural law.[12] It will be recalled that in 1610 the House of Commons aired a number of secular and ecclesiastical grievances which led into a debate on the ability of the king to levy impositions without parliamentary consent. Dissenting voices argued that the royal prerogative itself did not constitute sufficient authority either to make or alter a law. As Justice Whitelock asserted, in acts of parliament the 'act and power is the King's but with the assent of the Lords and Commons which maketh it the most sovereign and supreme power above all and controllable by none'.[13] While some opposed this view by defining sovereignty as vested in the king's person rather than in the corporation of the king-in-parliament, more innovative royalists like Sir John Davies got around Whitelock's theory by recourse to the laws of nature or of nations. In his treatise on impositions, Davies argued that the king's right to levy impositions had no relationship to parliamentary authority at all. On the contrary, parliament had no jurisdiction in such matters, because impositions had their origins in the 'ius gentium, the law of nature and the law merchant, which pertained to the crown alone'.[14]

Appeals to the *ius gentium* of ancient Roman law could also be employed against the interests of the crown. In 1604 the law of nature served to justify a proposal by Nicholas Fuller, a puritan lawyer, to abolish the Court of Wards.[15] In 1628 Sergeant Ashley explained confidently to the House of Lords that it was 'the ius gentium whichever serves for a supply in defect of the common law when ordinary proceedings cannot be had'.[16] This pragmatic view was corroborated by John Dodderidge, chief justice of the Court of King's Bench, whose manuscript treatise on the king's prerogative cited over 38 civilians and canonists. Dodderidge confessed that:

> We do, as the Sorbonnists and civilians, resort to the law of nature, which is the ground of all law, and then drawing that which is more conformable for the commonwealth, do adjudge it for law.[17]

[11] F. W. Maitland, *Select passages from the works of Bracton and Azo*: *Seldon Society*, VIII (1894), XXX.

[12] See Ulpian on *ius naturale* in *D.* 1.1.1.3; *Inst.* 1.2.2. Natural law was identified with the instincts all men share with other creatures. The law of nations or *ius gentium* was seen as a component part of the natural law, but was for the most part used interchangeably with natural law. See J. A. C. Thomas, *Textbook of Roman law* (New York, 1976), pp. 62–5.

[13] G. W. Prothero, *Select statutes and other constitutional documents illustrative of the reigns of Elizabeth and James I* (Oxford, 1898), pp. 351–2; S. R. Gardiner, *Parliamentary debates in 1610*, Camden Society LXXXI (1867), 89, 90 and 119.

[14] B. M. Harl. MS 278, fos. 411a–412a, 418–b–422b.

[15] P.R.O. Wards 15.6.1, as cited in C. Russell, *The crisis of parliaments, 1509–1660* (Oxford, 1977), p. 255.

[16] *House of Lords journal*, III, 758.

[17] I am indebted to Professor Brian Levack for calling my attention to this manuscript, Harl. MS 5220, fo. 4b.

Thus even senior members of the English bar acknowledged the usefulness of Roman doctrine in formulating principles of public law.

The pragmatic approach to use of Roman doctrine was not limited to issues of constitutional law. In 1604 Sir Thomas Craig, a Scottish Bartolist, wryly commented that the common lawyers, while never admitting the use of Roman law, could still readily 'salute it from the threshold'.[18] He then went on to show how Roman private law, particularly the laws of female succession and heritable property, featured in the reports of Plowden and Dyer. The traditional interpretation of the Germanic origins of seisin has also been called into question, and Professor Charles Donahue has cautiously put forth a notion suggesting a parallel between the Roman law of acquisitive prescription and the law of possession arising from the limitation act of 1624.[19] Even in the realm of property law, the common law was influenced by foreign legal doctrine.

At this point an important qualification is necessary. Outlining the attractions which made some common lawyers abandon their Littleton for Justinian is not equal to supporting those historians who argue that the common law was severely threatened by a 'reception' of Roman law either in 1534 or in the first decades of the seventeenth century. Such was the thesis put forward by Maitland for the 1530s in his famous Rede Lecture, a theory which was subsequently revived and applied by C.H. McIlwain to the early Jacobean period.[20] If however, by reception of Roman law we mean the assimilation of an expeditious Roman procedure to overcome the shortcomings of the more dilatory common law, or a conspiracy to build a more centralized and perhaps despotic government – then nothing of the sort took place in either period. As Professors Thorne, Elton and others have shown, the humanist Thomas Starkey's suggestion in the 1530s that England receive the law of the Romans amounted to little more than one man's modest programme for law reform.[21] We know also that neither Henry VIII nor Thomas Cromwell had any intention of erecting a despotic government inspired by the principles of the *Lex regia* found in Justinian's corpus, and that the new prerogative courts cannot be described as forums of strict civil law procedure. As Elton has shown, the purpose of the prerogative courts was to supplement and correct the common law in those areas where its enforcement or authority were deficient.[22] There is slightly more basis for a 'reception' in the early seventeenth century when tracts by two civilians, John Cowell, regius professor of civil law at Cambridge, and Alberico Gentili, regius professor of civil law ot Oxford, appeared to uphold an expanded royal prerogative on the basis of maxims drawn from the *Lex regia* of Justinian's *corpus*.[23] But such was the public outcry that James himself was compelled to repudiate the powers urged on his behalf.

[18] T. Craig, *De unione regnorum Brittanniae tractatus*, *Scottish History Society*, LX (1909), 312, 326–7. Also Peter Stein, 'The influence of Roman law in the law of Scotland', *Juridical Review*, new series (1962–3), p. 219.

[19] Charles Donahue, 'The civil law in England', *Yale Law Journal*, LXXXIV (1974), 180.

[20] F. W. Maitland, *English law and the renaissance* (Cambridge, 1901); see also C. H. McIlwain, *The political works of James I* (Cambridge, Mass., 1918), pp. xl–xli.

[21] Maitland's reception thesis was thoroughly demolished in 1966 by Professor Thorne. See 'English law and the renaissance' in *La storia del diritto nel quiadro delle scienza storiche* (Florence, 1966), pp. 437–45.

[22] G. R. Elton, 'The political creed of Thomas Cromwell', *Transactions of the Royal Historical Society*, 5th ser. (1965), p. 78.

[23] John Cowell, *The Interpreter* (Cambridge, 1607); see especially 'Prerogative of the king'; A. Gentili, *Regales disputationes ires: id est de potestate regis absoluta* (London, 1605), pp. 3–58.

Enough has been said to indicate the ways in which English common lawyers could exploit the civil law, but it is important to note also the growing support for law reform within the legal profession during the early seventeenth century. The common law itself did possess the means to execute change – by statute, by equity as illustrated by the use of trust, and by constructive fiction as in the replacement of real actions by ejectment. None the less, pressures to reform the statute law in the 1590s, the proposed union between England and Scotland in 1604, and the English expansion into Ireland compelled English jurists such as Dodderidge, Bacon and Hobart, and the civilians Cowell and Hayward to compare the deficiencies of the common law with the codified and more systematic civil law.[24] Once more, the picture of common law insularity and antagonism to foreign innovation gives way before the common lawyers' pragmatic appreciation of the civil law tradition.

To this point we have found that both legal training and the existence of numerous non-common law tribunals would have acquainted Jacobean lawyers with the precepts and practice of continental law, at the same time that the political and administrative problems of the period encouraged selective use of the civil law tradition for rhetorical purposes and to supply deficiencies in the common law itself. Given these facts, we must conclude that Pocock's argument for a common law 'frame of mind' is, if not illusory, at least very much overstated. This impression becomes even stronger if we examine more closely the specific evidence upon which Pocock based his conclusions.

Like so much of the literature on Jacobean law, Pocock's theory of a common law *zeitgeist* bears the indelible stamp of Sir Edward Coke. For Coke the common law embodied the 'highest perfection and reason', and his voluminous *Reports* are riddled with rhetorical bombast praising the certainty, immutability and perfection of the common law whose origins stretched unbroken into some distant and idealized Anglo-Saxon past.[25] For Coke a *continuum* of English law ran from Anglo-Saxon time to the early seventeenth century, a truly Teutonic vision made possible by interpreting the Norman incursion of 1066 as the vindication of a valid claim to the English throne through trial by combat. By denying the Norman conquest, Coke maintained that the ancient laws survived intact, unsullied by the corrupting influences of Norman feudal law, or of the Roman and canon laws practised in continental tribunals. Coke's antipathy to the civil law tradition was notorious and is best summarized in the famous passage in his *Institutes* where he claimed:

> Upon the text of the civil law there be so many glosses and interpretations and again upon these so many commentaries and all these written by doctors of equal degree and authority and therein so many diversities of opinion that they do rather increase the doubts and uncertainties and the professors of that noble science say that it is like a sea full of waves.[26]

This invective against the civil law seems to support Pocock's assertion that Coke was insular as insular could be, but there are strong reasons to suspect that neither

[24] For Bacon see *An offer to the king of a digest to be made of the laws of England*, in Spedding, *Bacon's works*, VII, 358–62. See also his *Elements of the common lawes of England containing a collection of some principall rules and maxims of the common law, with their latitude and extent* (London, 1630), p. 139. Bacon's influence can be seen in James I's proposal for law reform. See C. H. McIlwain, *The political works of James I*, pp. 292–3, 311–12, 332; also D. Veall, *The popular movement for law reform, 1640–1660* (Oxford, 1970), pp. 65–74. See also Brian Levack, 'The proposed union of English law and Scots law in the seventeenth century', *The Juridical Review*, part 2 (1975), pp. 103–10.

[25] Sir Edward Coke, *Reports*, II, preface, fos. vii and viii.

[26] Coke, *Institutes*, II, proeme, p. vi.

the *Institutes* nor the *Reports* represent an adequate measuring stick to gauge Coke's attitude toward the civil law. An examination of Coke's library, for example, shows that the Chief Justice maintained a complete collection not only of the *Corpus iuris civilis* and the canon law, but also the glossators as well as selected works of the humanist jurists.[27] In commenting on Coke's awareness of continental law and jurisprudence, T. E. Scrutton, in his study of Roman law influence in early modern England, uncovered quite a number of references to the civil law in Coke's *Reports*.[28] More recent scholarship has reinforced Scrutton's findings, and Professor Peter Stein has discovered that some of Coke's maxims were derived from Justinian's *Digest*.[29]

If Coke's aversion to using civil law principles when expedient is itself in doubt, it is equally unclear to what extent he typified the English legal profession in the early Stuart period. Among contemporaries, Coke's place as a jurist seems to have been less influential than many modern historians assume. Sir Francis Bacon, for example, spoke slightingly of Coke's *Reports* and cautioned readers that there were 'many peremptory and extrajudicial resolutions more than are warranted'.[30] In 1615 Lord Chancellor Ellesmere, in his *Observations upon the Lord Coke's reports*, provided a more devastating critique of the *corpus* of Coke's work and summarized the *Reports* as 'sunt mala, sunt quaedam mediocria, sunt bona plura'.[31] He then went on to warn that Coke, 'in order to serve his own conceits', deliberately misrepresented judgement to establish his own views touching the decision of the court. It seems, therefore, that even among contemporaries Coke did not possess the inviolable authority depicted by many modern historians. In the eighteenth century, Justice William Mansfield described Coke as 'an uncouth crabbed author who has disappointed and disheartened many a Tyro'.[32] In the nineteenth century, one English jurist wryly observed that Coke rarely had any authority for what he wrote, and James Stephen, in his history of English criminal law written in 1883, attributed Coke's prominence not to any technical legal expertise, but to the fact that his voluminous *Reports* dominated English legal literature – a monopoly 'behind whose work it was not necessary to go'.[33]

If Sir Edward Coke cannot be seen as wholly representative of English legal thought in the seventeenth century, it is necessary to examine the remaining evidence that supports Pocock's 'common law frame of mind'. Aside from Coke, the balance of Pocock's argument rests on Sir John Davies' introduction to the *Irish law reports*.[34] No other English lawyer of the seventeenth century, with the exception of Coke, praised the certainty of the common law more than Davies; no other lawyer so emphasized the immemorial character of English law and no other English jurist compared the common law more favourably to the civil law. A brief illustration of Davies' rhetorical style provides a flavour of his invective against civilian critics of

[27] S. E. Thorne, *A catalogue of the library of Sir Edward Coke* (New Haven, 1950), pp. 38–41.

[28] T. E. Scrutton, 'Roman law influences in Chancery, Church Courts, Admiralty and Law Merchant' in *Select essays in Anglo-American legal history* (Cambridge, 1907), I, 209–10.

[29] Peter Stein, *Regulae iuris* (Edinburgh, 1974), p. 101.

[30] Spedding, *Bacon's works*, XIII, 65.

[31] Lewis Knafla, *Law and politics in Jacobean England* (Cambridge, 1977), p. 298.

[32] John Holliday, *The life of William late earl of Mansfield* (London, 1797), p. 90.

[33] Peregrine Bingham, *Reports of cases argued and determined in the Court of Common Pleas, 1822–34*, 10 vols. (London, 1834), II, 296; James Stephen, *A history of the criminal law of England*, 3 vols. (London, 1883), II, 205.

[34] Of the several editions of the reports, the introduction may only be found in: Sir John Davies, *Le primer report des cases in les courts del roy* (Dublin, 1615) and *Les reports des cases & matters in ley resolve & adjudged in les courts del roy en Irland* (London, 1674).

the common law. Against aspersions cast at the dilatory nature of English litigation, Davies cited Bodin's reference to a case that pended in the French courts for over a hundred years.[35] He then launched a rejoinder to the civilians and canonists by comparing, as Coke compared, the decisions of the doctors to a sea full of waves. To elaborate his point, Davies borrowed a rather extraordinary metaphor from the sixteenth-century Spanish canonist Loudovico Gomez who compared the work of the civilians and canonists to:

Calices in capite elephantis, qua vident priora et posteriora.[36]

On the basis of such evidence, it was not unnatural for Pocock to conclude that Davies conformed to all the attitudes ascribed to Coke. This interpretation, however, can only be sustained by isolating the introduction from the text of Davies' *Irish reports*. If we peer beyond the introduction and examine the substance of the legal arguments used by Davies in the Irish courts, a rather different pattern emerges. Indeed the *Reports* show that the Irish Attorney-General cited the civil and canon laws as frequently as statute law in active Irish litigation.[37] On the basis of the *Reports* themselves, we must conclude that Davies does not fit the pattern of a common law orthodoxy.

Davies' familiarity with the Roman and canon laws probably originated in his educational training at Oxford and the Middle Temple. If it is true that Davies studied at New College, Oxford, we can infer some exposure to the civil law tradition there. The New College statutes, issued by William of Wykeham in 1379, established a strong legist tradition by stipulating that ten fellows were to study canon law and ten civil law.[38] Such an emphasis on legal training, and the college's collection of civil and canon law manuscripts, second only to that of All Souls, provided ample study material, and we know from the text of the *Irish reports* that Davies consulted some of the college's canon law manuscripts.[39] A more important source of contact with civil law practice may have been Davies' friendship with the Dutch civilian, Paul Merula. During the fall of 1592, while still a student at the Middle Temple, Davies journeyed with two friends to the Low Countries to visit Merula at the university of Leyden. Professor of civil law and jurisprudence and mentor of Grotius, Merula was one of the premier jurists of his day.[40] Two letters written by Davies to Merula reveal a close professional friendship, and we cannot discount the possibility that Davies' mysterious absence from the Middle Temple records between 16 October 1595 and 9 February 1598 may have been due to an extended period of study on the continent.[41] This sojourn in the Low Countries, where the civil law

[35] Davies, *Le primer report*, fo. 6b.

[36] Davies, op. cit. fos. 5a–5b. For Gomez see J. F. Schulte, *Die Geschichte der Quellen und Literatur des Canonischen Rechts* (Stuttgart, 1880), III, 554. An Irish civilian picked up the cudgel in defence of his profession: see William Clerke, *An epitome of certaine late aspersions cast at civilians, the civil and ecclesiasticall laws, the courtes christian, and at bishops and their chancellors* (Dublin, 1631), p. 6.

[37] There are 98 statute citations (English and Irish) and 85 Roman and canon law citations.

[38] Carte MSS 62, fos. 590a–590b; A. Wood, *Athenae oxomiensis* (London, 1691), pp. 430–2; T. Ashton, 'Oxford's medieval alumni', *Past and Present*, LXXIV (1977), 13–16.

[39] In the Case of Commendams, for example, Davies cites materials from the library of New College. See *Irish reports*, pp. 193, 195.

[40] For Merula see J. W. Wessels, *History of Roman Dutch law* (Grahamstown, 1908), p. 234.

[41] Bodleian Library D'Orville MSS, 52, fos. 49–50; B.M. Cotton MS Julius C.v, fo. 49. It has also been suggested that Davies may have accompanied one of the expeditions to the isles; P. Finklepearl, *John Marston of the Middle Temple* (Cambridge, Mass., 1969), pp. 50–4.

was accepted in commerce and in other areas where it did not conflict with Dutch customary law, provides an analogy to the situation in England and Ireland, and Davies' subsequent use of the civil and canon laws to consolidate the Tudor conquest may reflect his observations on the relationship between the civil and customary law in the Netherlands.

Of course, residual civil law influences existed in Ireland as they did in England at the beginning of the seventeenth century. There were the same ecclesiastical and admiralty jurisdictions, Trinity College Dublin was empowered to confer degrees in civil law, and certain categories of Roman law may have supplied the organizational framework to administer the Brehon law.[42] However, the use of the civil law in Ireland was significantly expanded by Davies and other English jurists as they attempted to justify and consolidate English sovereignty over the island.

The most important and most drastic use of civil law principles is found in the assertion by Davies and other contemporary jurists of an English title to Ireland by right of conquest. According to established civil law doctrine, conquest eliminated all prior and current rights to property and rule on the part of the conquered. Professor Donald Sutherland has shown that the patterns of proprietary exclusiveness laid down in Justinian's *corpus* to describe the status of real and moveable property taken by conquest were elaborated and extended by medieval and early modern jurists to imply a sovereign title to all conquered territory.[43] The classical antecedents to this latter doctrine are particularly evident in Grotius, Gentili and Zouche, and the same principles appear to have coloured discussions on Irish sovereignty even before Davies used similar arguments in the *Reports* and the *Brief discovery*.[44] As early

[42] D. E. C. Yale, 'Notes on the jurisdiction of the Admiralty in Ireland', *Irish Jurist* III (1968), 146–62. See also Archbishop Usher's treatise on the 'Reception of the imperial laws in Ireland', Bodleian Library, Tanner MSS 458 fo. 21a; V. T. H. Delaney, 'A note on the history of legal education in Ireland', *Northern Ireland Legal Quarterly*, XI (1955), 217. K. W. Nicholls has shown that the municipal code of Galway employed certain aspects of Roman law: see his *Gaelic and Gaelicized Ireland in the middle ages* (Dublin, 1972), p. 49. In 1578 the Jesuit Edmund Campion, while visiting the recorder of Dublin – Sir Richard Stanyhurst – described certain schools in Gaelic districts where students memorized Justinian's *Institutes*: E. Campion and M. Hamner, *Two histories of Ireland* (Dublin, 1633), p. 18. In 1609, the classical training of the professional scholars surprised even Davies, who remarked: 'for the jurors, being fifteen in number, thirteen spake good Latin, and that very readily' (SP/63/227/fo. 94a). In 1608 John Leighe, the high sheriff of Tyrone, complained that legal matters were being settled in his district by 'Breghans or judges according to the rule of the Popish canons' (*Cal. Car., 1603–24*, pp. 30–1).

[43] D. Sutherland, 'Conquest and law', *Studia Gratiana*, XV (1972), 33–51; The origin of this tradition is of course in the *ius gentium* of the classical Roman law. The notion that a violent conquest could generate just title may be found in the following selections from Justinian's *corpus*: *D.* 11.7.36; *D.* 41.2.18.4; *D.* 41.2.1.1; *D.* 49.15.4; *Inst.* 2.1.17; see also the marginal gloss on each of the above in *Digestum vetus seu pandectorum iuris civilis commentariis accursii & multorum insuper aliorum tam veterum* (Lugduni, 1569). It is interesting to note that the medieval *Book of feuds* defines a conquest feud as superior to any held by succession: *The jus feudale by Thomas Craig* (Edinburgh, 1934), I, 164.

[44] S. P. Scott (ed.), *Hugo Grotius, De iure belli et pacis* (Indianapolis, 1926), Bk. 3.6.11.1; Bk. 3.6.4.1; Alberico Gentili, *De iure belli libri tres* (Oxford, 1933), II, 307, 381, 385; Richard Zouche, *Iuris et iudicii fecialis, sive iuris inter gentes et quaestionam de eodem explicatio* (Washington, 1921), p. 138. It is interesting to note that Edmund Borlase, an Irish polemicist, grounded an English title to Ireland by right of conquest 'as Grotius in his excellent piece, *De Iure Belli & Pacis* notably well argues': Edmund Borlase, *The reduction of Ireland to the crown of England* (London, 1675), pp. A2–A3.

as 1534 Patrick Finglas, Henry VIII's Chief Baron of the Exchequer, claimed that the true restoration of English sovereignty in Ireland lay in a military conquest.[45] This proposition may have influenced Thomas Cromwell's draft bill of the same year to establish a public law title to Ireland by right of conquest.[46] The purpose of Cromwell's plan was to exploit the radical powers conferred by conquest to secure a resumption of all spiritual and temporal land by the crown. At the time the state lacked the financial and military assets to make this claim a reality, but in 1558 a proposal was again made to initiate a military conquest based on the model of the Roman law, anticipating by 45 years the solution applied by Davies and other English jurists at the end of Tyrone's rebellion in 1603.[47]

In the wake of Tyrone's rebellion, the legal theory of conquest as propounded by Davies had two purposes. First Ireland, including the Gaelic dynasts, would have to accept the English common law as its own, without competition from the Brehon law, especially such customary procedures of Gaelic landholding and descent as gavelkind and tanistry. Second, conquest would justify the eradication of the domestic Irish laws and the elimination of all derivative claims, foreign and Gaelic, that were contingent upon the papal donation of Ireland in 1154.

The papal donation, a legacy from the middle ages, cropped up on several occasions during the sixteenth century and compelled English lawyers and polemicists like Davies, Ellesmere and Coke to deny papal temporal jurisdiction in Ireland by invoking the powers of conquest.[48] Thus despite Pocock's claim that 'conquest was not admitted in the age of Blackstone any more than in the age of Coke', Davies and other legal theorists held that the military victory of 1603 superseded the limited sovereignty left by an incomplete medieval conquest.[49] This use of the conquest doctrine imposed a legacy on future discussions of Irish sovereignty. As Dr A. G. Donaldson has shown in his study of English statutes in Ireland, the maxims of the Roman law doctrine of conquest continued to serve as a justification for English sovereignty through the end of the nineteenth century.[50]

The text of Davies' *Irish reports* shows that the civil and canon laws also played a significant role in litigation argued before the central common law courts in Dublin. This projection of continental law onto the forum of active litigation represents an elaboration of the tendency of the common lawyers to identify the law practised in the various civil law jurisdictions as the common law of the land.[51] Davies endorsed this tendency to ascribe a customary status to foreign law in his application of the

[45] Patrick Finglas, 'A breviate of the getting of Ireland and the decaie of the same', in W. Harris, (ed.), *Hibernia, or some antient pieces relating to Ireland, never hitherto made publick* (Dublin, 1747), p. 88.

[46] *L & P, Henry VIII*, VII, 1211; *L & P Henry VIII*, VIII, 527; SP Henry VIII, II, 341–2. For a general discussion see R. D. Edwards, 'The Irish Reformation parliament of Henry VIII, 1536–37', *Historical Studies*, VI (1968), 61. Dr Brendan Bradshaw has elucidated further the development of Henrician religious policy: see 'The opposition to the ecclesiastical legislation in the Irish Reformation parliament', *Irish Historical Studies*, XVI (1969), 285–303.

[47] B.M. Harl. MS 35, fo. 197b.

[48] Coke, *Reports*, VII, 30, 38–9; *Fourth institute*, p. 559; L. Knafla, *Law and politics in Jacobean England*, p. 232; Davies, *Reports*, pp. 110–14.

[49] Blackstone explicitly states that Ireland's status is directly related to the law and right of conquest. See William Blackstone, *Commentaries on the law of England in four books* (Oxford, 1763), I, 100.

[50] A. G. Donaldson, 'The application in Ireland of English and British legislation made before 1801' (Queen's University, Belfast: unpublished thesis, 1952), pp. 321–3.

[51] Brian Levack, *Civil lawyers*, pp. 145–6.

medieval canon law to several common law cases argued before the central courts in Dublin.

Davies' obvious familiarity with the medieval canon law can only be explained by the fact that, despite the split with Rome, the canon law continued to be used in the various ecclesiastical jurisdictions within England. There had been, it is true, a number of attempts to adapt the old 'Popish canons' to the radically altered political situation launched by the supremacy. In 1534 the English parliament provided that the king might appoint a commission of 32 jurists to prepare a new code of the 'King's ecclesiastical laws of the church of England', but the king failed to act on the statute.[52] A further enabling statute passed in 1536 extended the provision of the act of 1534, but Henry once again failed to act. In 1544 a new statute authorized another commission which apparently did receive the royal assent, but the appearance of a new book of ecclesiastical law in 1546 failed to obtain royal approval. A similar effort authorized in 1550 to carry on the task of Henry's earlier commission was discontinued during the Marian reaction. Further attempts to reform the old canon law under Elizabeth were no more successful, and the appearance of John Foxe's *Reformatio legum ecclesiasticarum*, which represented a synthesis of the work of earlier reformers, never received the approval of the queen, parliament or convocation.[53] This meant that the pre-Reformation *Corpus iuris canonici*, excised of those provisions repugnant to the royal supremacy, continued to be practised in the various ecclesiastical courts in England. In his use of this canon law, Davies, like other English civilians and common lawyers, took the position that the canon law of Rome was received through the medium of provincial and diocesan legislation – a view which attained the status of orthodoxy and was espoused by Stubbs and the Anglican hierarchy at the end of the nineteenth century.[54] In other words, Davies subscribed to a constitutional theory which held that the *Decretum* of Gratian, the *Decretales* of Gregory IX, the *Liber Sextus* of Boniface VIII, the *Clementines* or rescripts of Clement V and the *Extravagantes* or uncodified edicts of succeeding popes all represented a body of law that had acquired the status of English customary law.

Such was the rationale Davies used in arguing the Irish Case of Commendams, where he defined the evolution of the legal doctrine authorizing clerics to hold plural benefices *in commendam* by citing no less than a dozen authorities from the standard text of the *Corpus iuris canonici*.[55] Davies explained his lavish display of canonical learning by claiming that the canon law of Papist Europe was accepted as a

[52] 25 H. VIII, c. 19; 27 H. VIII, c. 15 and c. 20; 35 H. VIII, c. 16; D. Logan, 'The Henrician canons', *Bulletin of the Institute for Historical Research*, XLVII (1974), 99–103.

[53] J. Spalding, 'The Reformatio Legum Ecclesiasticarum of 1552 and the furthering of discipline in England', *Church History*, XXXIX (1970), 162–71.

[54] William Stubbs, 'The history of the canon law in England', *Select essays in Anglo-American legal history* (Cambridge, 1907), I, 263–5; *Seventeen lectures on the study of medieval and modern history* (Oxford, 1900), pp. 354–6; also his introduction to *Report of the commissioners, the constitution and working of the Ecclesiastical Courts* (London, 1883), pp. 24–5; J. W. Gray, 'Canon law in England: some reflections on the Stubbs–Maitland controversy', *Studies in Church History*, II (1966), 48–51.

[55] Davies, *Irish reports*, pp. 185–229. The case dealt with a dispute between a local incumbent, Cyprian Horsefall, and a royal appointee, Robert Wale, to a vicarage in the diocese of Ossory: James Ware, *The history and antiquities of Ireland*, trans. by Richard Harris (Dublin, 1764), I, 419; *Irish Fiants* 4256 and 6706.

customary law of the English church.[56] The argument is further developed in Davies' presentation of the Case of Proxies and the Case of the Dean and Chapter of Fernes.

In the Case of Proxies, argued on a demurrer before the assembled barons of the Irish exchequer court in 1605, Davies secured a crown right to procurations, a kind of tax levied to support ecclesiastical visitation, which before the dissolution had belonged to the hospital of St John of Jerusalem of the abbey of Thomas Court in Dublin.[57] Following the dissolution, these procurations were alienated by the crown to supplement the income of crown officials as well as others loyal to the English government. In a test case that was later endorsed by a judicial resolution, Davies succeeded in securing a resumption of the coveted proxies by supplementing his common law brief with numerous citations from the medieval canon law.[58] In this instance, however, Davies took a slightly different approach from that pursued in the Case of Commendams. Rather than define the nature of proxies through the standard text of the *Corpus iuris canonici*, he referred instead to two well-known sixteenth-century secondary handbooks on the medieval canon law. From the text of the Irish reports it is possible to identify these secondary works as the *Institutiones iuris canonici*, written by the sixteenth-century Italian jurist, Giovanni Paolo Lancelloti, who organized the canon law according to the categories set down in Justinian's *Corpus iuris civilis*, and the *Catalogus gloriae mundi*, a compendium of legal and antiquarian knowledge assembled by the sixteenth-century French jurist Barthélemy de Chasseneux.[59] Unlike the standard *corpus* of the canon law, these secondary works proved particularly useful to persons lacking formal training in the canon law for the simple reason that they were indexed. Not only were these sources instrumental in recovering the procurations to the crown, but they were also subsequently endorsed, through Davies' *Reports*, as an authoritative exposition of Anglican canon law in John Godolphin's *Repertorium canonicum* in 1678.[60]

This reliance on secondary texts is further illustrated by the Case of the Dean and Chapter of Fernes where the canon law of corporate consent was defined once again through Lancelloti and supplemented by the fifteenth-century Italian jurist, Nicolo de Tudeschi, whose authority in canonical studies earned him the title 'lucerna

[56] Davies argued that the Pope's decretals were never entirely received in any European country outside the Pope's temporal authority. In other words, England would only use those canons which 'by such acceptance and usage obtained the force of laws in such particular realm of state and became part of the ecclesiastical law of such nation'. *Irish reports*, p. 196.

[57] Davies, *Irish reports*, pp. 1–17.

[58] SP/63/234/fo. 140a; SP/63/234/fo. 142a. The difficulty with procurations seems to have troubled Davies for several years. See his letter to Salisbury concerning Beeston's Case in 1608 (SP/63/223/fo. 122a; *CSPI, 1606–8*, p. 436); For the litigants in Davies' *Reports*, see *Irish Fiants*, 4094, 5593 and 6797. The Case of Proxies represents one illustration of a general attempt to restore the church to its patrimony. See W. A. Phillips, *The history of the church of Ireland From the earliest times to the present day* (Oxford, 1933), II, 498–500.

[59] Joannes Paulus Lancelloti, *Institutiones iuris canonici, quibus ius pontificum singulari methodo libris quatuor combrenditure* (Lovanni, 1578), pp. 406–7; Davies, *Reports*, pp. 5, 7, 17. For biographical details on Lancelloti see. J. F. Schulte, *Die Geschichte der Quellen und Literatur des Canonischen Rechts* (Stuttgart, 1880), III, 451 and A. G. Cicognani, *Canon Law* (Westminster, 1949), p. 320; Barthélemy de Chassaneux, *Catalogus gloriae mundi* (Lugduni, 1546), p. 119. For Chassaneux see *Biographie universelle ancienne et moderne* (Paris, 1844), VII, 699–700. I owe a debt of gratitude to Dr Richard Fraher of Harvard University who assisted me with identifying these canon law citations.

[60] John Godolphin, *Repertorium canonicum or an abridgment of the ecclesiastical laws* (London, 1678), pp. 75–9.

iuris', or lamp of the law.[61] In this instance the Roman canon law facilitated the recovery of the manor of Fedart which had been unlawfully alienated by the dean and chapter. Like the Case of Proxies, the Case of the Dean and Chapter of Fernes also served to define precisely, through the vehicle of the Roman–canon law, the canon law of Protestant England concerning valid alienation of ecclesiastical property. Gibson's eighteenth-century edition of the Anglican canon law used this case as an authoritative exposition of the ecclesiastical law of corporate consent.[62]

In his interpretation of the medieval canon law, Davies was in line with the view taken up by Phillimore, Stubbs and the Anglican hierarchy in the late nineteenth century. This orthodox position, which was almost universally upheld by English theologians and ecclesiastical historians from the time of the Reformation, maintained that the canon law of England, before and after the Reformation, was binding in the English ecclesiastical courts, not by reason of papal *auctoritas*, but through the discriminating authority of English provincial synods. This official interpretation of the medieval canon law remained unchallenged until the appearance of Maitland's devastating study of Lyndwood's *Provinciale*.[63] Contrary to accepted theory, Maitland discovered that medieval English canonists and theologians readily accepted the canon law on the basis of papal *auctoritas*, and that English provincial synods had no authority to either receive or reject decretals from Rome.

The practice of acribing customary status to continental law was also followed in some of the secular litigation in the central Irish courts. In the Case of the County Palatine of Wexford, Davies discussed the origins and the jurisdictional powers assigned to a palatinate by citing the well-known maxim attributed to Baldus, the famous medieval Italian jurist, that 'solus princeps qui est monarch et emperator in regno suo, ex plenitudine potestatis potest creare comitem palatinum'. He then went on to say that according 'to this rule, the king of England may well create an earl palatine, as he is monarch and emperor in his reign'.[64] The importance of the case lies in its definitive statement of the nature and authority of palatine jurisdictions in Ireland, and it is significant to note that the case was cited as justification for restoring the Ormonde palatinate in 1660.[65] A further illustration of Davies' pragmatic approach to the civil law may be seen in his arguments reported in the Case of the Bann Fishery. In the absence of fully adequate common law precedents, Davies fortified his brief to secure the seizure of the richest fishery in Ulster by citing 'divers rules of the civil law and the customary law of France agreeable to our law in this point'.[66] Once again the *corpus* of civil law, as defined

[61] Like the Case of Proxies, the Case of the Dean and Chapter of Fernes represents one illustration of a general programme to recover the patrimony of the church. For the property in question see *Fiants* 6471, 6237 and 6243; Ware, op. cit. I, 446–8; Lancelloti, op. cit. pp. 25 and 28; Nicholas de Tudeschi, *Omnia quae extant commentaria primae partis in primum & decretalium librum* (Venice, 1588), VI, 99–100; Davies, *Irish reports*, pp. 129–32. For Tudeschi see J. F. Schulte, op. cit. II, 312–13 and A. G. Cicognani, op. cit. p. 336.

[62] Edmund Gibson, *Codex juris ecclesastici anglicani or the statute, constitutions canons and rubricks articles of the Church of England* (London, 1713), p. 781.

[63] F. W. Maitland, *Roman canon law in the Church of England* (London, 1898), pp. 1–50. This was elaborated in a second chapter entitled 'Church, state and decretals', pp. 51–99.

[64] Davies, *Reports*, 164–5; Baldus de Ubaldis, *Opera omnia* (Venice, 1577), V, 79. For Baldus see Walter Ullmann, *Law and politics in the middle ages* (London, 1975), pp. 111–12.

[65] Nat. Lib. Dublin, MS 11,044. This document was found in a tin box of roughly 300 unfoliated papers, most of which date after 1660.

[66] Davies, *Reports*, p. 158.

by the sixteenth-century French humanist legal scholars, Jacques Cujas and Renattus Choppinus, made up for the shortcomings of Davies' own legal brief. Although the dictates of natural geography tell us that rivers flow toward the sea, Davies' application of the civil law led to the government's seizure of the Bann Fishery because the sea flows into rivers.[67]

The Case of Mixed Money reveals Davies once again exploiting the civil law on a difficult question of public law. The case arose from the refusal of Irish merchants to accept base money for debts antecedent to the appearance of the debased coin in 1601. In the absence of common law principles, Davies justified a prerogative right to alter the coinage by referring to a compendium of civil law tracts entitled *De monetis et re nummaria*, edited by René Budelius, a sixteenth-century French civilian responsible for the operation of the Bavarian mint.[68] Through Budelius, Davies adopted some of the more authoritarian legal principles developed by Bodin, Dumoulin and other French humanist lawyers to establish a prerogative right to alter the intrinsic value of money without the consent of estates or parliaments.[69] As Davies smugly noted, 'in this point the common law of England agrees well with the rules of the civil law'.[70] The results of the case were to saddle the merchant class and the army with the Irish war debt. In 1609, four years after the Case of Mixed Money, Davies demonstrated his esteem for Budelius' work by sending a copy to Cecil as a gift to guide him in legal matters associated with his newly acquired post of lord treasurer.[71]

Davies' legal pragmatism could be illustrated by further litigation from the *Irish reports*, but the examples already discussed are more than sufficient to show that Davies' alleged common law orthodoxy arises solely from Pocock's uncritical acceptance of the introduction divorced from the text of the *Irish reports*. As we have discovered, a more critical examination of that text shows Davies to have been a thoroughly cosmopolitan and innovative legal thinker fully acquainted with the sources of continental law and jurisprudence. Indeed, Davies' familiarity with the civil law tradition justifies not only a revision of the notion that common lawyers in the Jacobean period rejected foreign doctrine in framing principles of common law, but also a revision of Pocock's central thesis – that the common lawyers' sense of history stemmed from their ignorance of continental legal scholarship.

Such is the reputation of Pocock's thesis that it has reappeared in a more recent historical controversy. In an exchange in *Past and Present*, Mr Christopher Brooks and Mr Kevin Sharpe took issue with Dr D. H. Kelley over the alleged insularity of the common lawyers.[72] Like Pocock before him, Kelley contended that in the

[67] Jacques Cujas, *Corporis iuris civilis* (Amsterdam, 1681), II, 741; Renattus Choppinus, *De domanio Franciae* (Frankfurt, 1701), pp. 111–15. For biographical details on Cujas see D. H. Kelley, *Foundations of modern historical scholarship: language, law and history, in the French renaissance* (New York, 1970), pp. 112–15. For Choppinus see *Biographie universelle ancienne et moderne* (Paris, 1844), VIII, 199.

[68] René Budelius, *De monetis et re nummaria* (Köln, 1591). For Budelius see *Biographie universelle ancienne et moderne*, VI, 112.

[69] Davies, *Reports*, p. 54; 'Monetandi jus principium ossibus inhaeret. Jus Monetae comprehenditur in regalibus quae nunquam a regio sceptro abdicantur.'

[70] Davies, *Reports*, p. 54.

[71] SP/63/226/f/18a; *CSPI, 1608–1610*, p. 135.

[72] K. Sharpe and C. Brooks, 'English law and the renaissance', *Past and Present*, LXXII (1976), 133–42. See Kelley's rejoinder, pp. 143–6 of the same issue. The controversy was sparked by D. H. Kelley, 'History, English law and the renaissance', *Past and Present*, LXV (1974), 24–51. See also Kelley's book: *Foundations of modern historical scholarship*.

political controversies of Jacobean England, English lawyers, untouched by the scholarly tradition of the French historical school of jurisprudence, interpreted their history through the ahistorical context of some mythical Anglo-Saxon past. By contrast, French lawyer-polemicists served the political controversies of the French wars of religion in a different way. They exploited the counterpoint of written civil law and unwritten customary law to unravel their historical past through the feudal origins of their laws and institutions. In other words, the historical arguments put forth by the common lawyers in the political controversies of early seventeenth-century England, as evidenced by writers like Sir Edward Coke and Sir John Davies, were possible only because English jurists remained ignorant of the civil law tradition, and of the impact of humanist scholarship on the development of law and jurisprudence on the continent. Since it has been argued here that Coke himself was not wholly ignorant of the civil law tradition, and that Davies was thoroughly familiar not only with the Roman and canon laws, but also with the literature of French legal humanism, it is no longer possible to accept the view, as presented in *The ancient constitution and feudal law*, that the common lawyers' sense of history stemmed from their congenital ignorance of continental law and jurisprudence. In other words the creation of a common law 'frame of mind' to explain the use of a mythical Anglo-Saxon past in structuring the course of English history needs to be thoroughly revised, because it implies that lawyers like Davies did not understand what they read. Such a revision lies beyond the scope of this study, but future research might very well focus on simpler and more obvious reasons of utility.

Given the convoluted nature of hermeneutics and philology developed by continental legal scholars, the myth of an Anglo-Saxon heritage, which appeared as early as the reign of Edward I in the Mirror of Justices, provided a ready-made and far more straightforward instrument to structure a national past.[73] Although Kelley recently altered his description of early modern common lawyers from 'insular' to 'peninsular', a more fitting adjective would be eclectic.[74]

[73] J. W. Whittaker, *The mirror of justices*, *Selden Society*, VII (1893) (London, 1895), pp. ix–xi, 3.

[74] K. Sharp, C. Brooks and D. H. Kelley, op. cit. p. 146.