

English Common Law and the *Ius Commune*: The Contributions of an English Civilian

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I. INTRODUCTION

Any student of legal history who believes that the European *ius commune* played a meaningful part in the origins and development of English law will profit from reading Reinhard Zimmermann’s masterpiece, *The Law of Obligations*. Indeed, that student will read it with joy. I am one of that number, and I remember my own reaction well when his book first appeared—equal parts of admiration and encouragement. Not only was the book a sparkling and learned treatment of many important aspects of the civil law, subjects about which I needed to learn more, it also proved to be the source of specific examples of connections between the two relevant legal systems in England. That subject was one of my special interests then. It still is. Significant differences between the two legal systems did exist. No doubt about that. However, more than occasional coincidence also connected them, linking the European *ius commune* and the English common law, and not only in minor or accidental matters. Where most English historians had seen large differences and even enmity between them, Professor Zimmermann concluded that the “European *ius commune* and the English common law had not been so radically distinct as is often suggested.”¹ It would be, he added, “a fruitful exercise” to attempt a

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1. *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (Cape Town 1990), xi (Oxford 1996), xi.

comparison of legal rules and achievements “against the background of a common Western civilization.”²

That comparison is what I have attempted to do in this essay, albeit on a small scale. I thought it would be sensible to take up and examine the works of an English civilian, one of those lawyers whose career was centered in the ecclesiastical courts and whose principal sources of authority were drawn from the Roman and canon laws. Many of these men wrote legal treatises. They thus left written accounts of the use of laws drawn from the *ius commune* that others might consult. A little digging would therefore make it possible to investigate whether what a civilian had written had been treated as a legitimate source of law in cases that had come before one or another of the English royal courts, courts in which the English common law was in force.³

II. HENRY SWINBURNE

My choice for this inquiry fell upon Henry Swinburne (ca. 1551-1624), an eminent ecclesiastical lawyer. He had written two books on the law applied in the courts of the English church. Both dealt with subjects that also sometimes came before the royal courts. The question of whether Swinburne’s works had been used in common law courts could therefore be investigated. That he was a suitable subject of research also seemed certain. Sir John Baker recently described him as the first “post-Reformation English canonist,”⁴ and he was without doubt a learned member of his branch of the legal profession. His work is treated as authoritative in modern accounts of the history of testamentary law as it was applied in England’s ecclesiastical courts.⁵

True, Swinburne was an unusual civilian in one sense. He spent his career as an advocate and a judge in the courts of the northern province of

2. Ibid. See also his “Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen civil law and common law,” in *Zeitschrift für Europäisches Privatrecht* 1 (1993), 4-51.

3. My understanding with a fuller description of this profession is found in *THE PROFESSION OF ECCLESIASTICAL LAWYERS: AN HISTORICAL INTRODUCTION* (Cambridge 2019). For inspiration from an exploration of the subject in earlier periods, see David Seipp, “The Reception of Canon Law and Civil Law in the Common Law Courts before 1600,” *Oxford Journal of Legal Studies* 13 (1993), 388-420.

4. J. H. Baker, *Monuments of Endlesse Labours: English Canonists and their Work 1300-1900* (London and Rio Grande, OH 1998), 56-70, at 57.

5. Lloyd Bonfield, *Devising, Dying and Dispute: Probate Litigation in Early Modern England* (Farnham and Burlington, VT 2012), 85, 292; Brian Edwin Ferme, *Canon Law in Late Medieval England: a Study of William Lyndwood’s Provinciale with Particular Reference to Testamentary Law* (Rome 1996), 122.

York.⁶ Most prominent civilians made their home in London, where the principal appellate courts of the province of Canterbury met and where Doctors' Commons was located.⁷ Swinburne was an exception in that geographical sense, but not otherwise. A monument that includes a sizable statue of Swinburne still stands in the north aisle of the quire of York Minster, a lasting tribute to his ability and to his standing among his contemporaries in the northern province. One of his books dealt with the law of last wills and testaments, the other on the law of marriage and divorce, subjects over which the ecclesiastical courts in England then exercised primary jurisdiction.⁸ In assessing the possible influence on the common law from without, most relevant to the present study is the fact that the margins of Swinburne's discussions of each of these two subjects were filled with citations to the texts of the *ius commune* and the huge commentary on it written by Continental jurists. Swinburne did mention Parliamentary statutes and also other secular works of reference when they were relevant to his subject.⁹ He also dealt with the troublesome problem of the wills of married women, for example, citing both common and civil laws and seeking a middle ground in dealing with a controversial subject.¹⁰ However, the overwhelming bulk of the works he cited as authoritative came from the *ius commune*.¹¹ His definition and discussion of the powers

6. For his life and works, see J. Duncan M. Derrett, *Henry Swinburne (?1551-1624) Civil Lawyer of York* (York 1973); R. A. Marchant, *The Church under the Law* (Cambridge 1969), 45-50; Carson Ritchie, *The Ecclesiastical Courts of York* (Arbroath 1967), 65-66; it was for this reason that he was not included in the fundamental studies on the civilians by Daniel Coquillette, *The Civilian Writers of Doctors' Commons, London* (Berlin 1988); Brian Levack, *The Civil Lawyers in England, 1603-1641* (Oxford 1973); Javier Matínez Torrón, *Anglo-American Law and the Canon Law: Canonical Roots of the Common Law Tradition* (Berlin 1998), 110.

7. See G. D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (Oxford 1977).

8. *Brief Treatise of Testaments and Last Wills* (London 1590) (hereinafter cited as *Brief Treatise*). Later editions were published in 1611, 1633, 1677, 1728, 1743, 1793, and 1803. Less successful was his *Treatise of Spousals or Matrimonial Contracts* (London 1686), a later edition appeared in 1711.

9. *Brief Treatise*, Pt. II § xxi (proclamations of summons to court to be made at church door).

10. *Ibid.*, Pt. II § ii. I have tried to reconstruct the situation from the perspective of the civilians in "Married Women's Wills in Later Medieval England," in *Wife & Widow in Medieval England*, Sue Sheridan Walker ed. Ann Arbor, MI 1993), 165-82; see also Janet Loengard, "The Widow's Appareil: Paraphernalia and the Courts," *ibid.*, 358-72. An example of citation to Swinburne's treatment of the subject is *Wycherley v. Shrimpton* (Chan. 1719-20) in *Reports of Cases in the Court of Chancery in the Time of King George I (1714 to 1727)*, W.H. Bryson ed. (Tempe AZ 2019), no. 359.

11. Derrett's valuable spadework (*supra* note 6) lists the relevant secondary works found in Swinburne's two treatises. Those from the *ius commune* occupy pp. 34-47; those to the English writers only pp. 47-49, and some of the latter were to works written by other English civilians. See

of executors and the different forms of testaments then in use, for example, was derived almost entirely from the civil and canon laws and from other Continental works interpreting them.¹² To judge by Swinburne's two treatises, it appears that neither the English law of last wills and testaments nor that of marriage and divorce could be adequately described without their use.¹³

That conclusion was, however, only background to an investigation. The project was to discover whether what was found in Swinburne's works played any role in the development of the English common law. I was hopeful. I quickly discovered that his works were mentioned by English treatise writers in later centuries.¹⁴ Matthew Mirow's 1992 thesis on Readings on wills at the Inns of Court showed that his work was occasionally mentioned in them.¹⁵ However, my task required having direct recourse to the cases brought before the royal courts. I sought to discover whether what Swinburne wrote had been cited and used in them. The relevant question was this. Was his work on these two subjects used? Or was it either ignored or rejected as irrelevant in the courts of the common law? These courts dealt with cases involving both testaments and marriage, but that does not mean that what Swinburne had written on these subjects played any part in the decisions in them.¹⁶ It could have. Or not. One has to look. Although it is not the sole available source, most of the relevant evidence is found in *The English Reports*, the multi-volume

also Peter Stein, "English civil law Literature," in *Ins Wasser geworfen und Ozeane durchquert: Festschrift für Knut Wolfgang Nörr* (Cologne 2003), 979-92.

12. *Brief Treatise*, Pt. IV § ii.

13. See Martin Avenarius, "Römisches Erbrecht und Religion: Interdependenzen von Herrschafts-, Vermögens und Kulturperpetuierung in Pontifikaljurisprudenz sowie Dogmatik und Praxis des *ius civile*," in *Der Einfluss religiöser Vorstellungen auf die Entwicklung des Erbrechts*, Reinhard Zimmermann ed. (Tübingen 2012), 7-78; *Three Civilian Notebooks 1580-1640*, R. H. Helmholz ed. Selden Society 127 (2011), 170.

14. See, e.g., George Meriton (1634-1711), *Touchstone of Wills, Testaments, and Administrations* (London 1668), 5, 11; Geoffrey Gilbert (1674-1726), *The Laws of Devises, Revocations and Last Wills* (London 1756), 31; J. B. Bird, *The Laws respecting Wills, Testaments, and Codicils*, 4th ed. (London 1802), 5, 28; Eardley Mitford fl. ca 1800), *The Laws of Wills, Codicils and Revocations* (London 1806), 5, 12, 88; Thomas Wentworth (d. 1628), *The Office and Duty of Executors* (London 1774), 62; William Sheppard (d. 1675), *Touchstone of Common Assurances* (London 1651), ch. 23 passim.

15. "Reading on Wills in the Inns of Court 1552-1631," Cambridge Univ. Ph.D. dissertation (1992), 159, 163-64.

16. See, e.g., R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere* (Cambridge 1901). The larger question of authority is examined in Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Continent* (Tübingen 2001), and David Ibbetson, "Authority and Precedent," in *Law and Authority in British Legal History, 1200-1900*, Mark Godfrey ed. (Cambridge 2016), 60-84.

collection of cases decided before 1865.¹⁷ It is the standard source of our knowledge of post-medieval English case law. The task is to discover whether Swinburne's works appeared in the arguments and decisions found in these *Reports*, limited of course to the volumes devoted to cases heard in the royal courts where the common law found its home.¹⁸

This is a test feasible today only because the availability of online key word search strategies, something not available before 1990. The tools did not then exist. Before their development, in order to arrive at satisfactory results on a question like mine, searchers would have had to read virtually all the reported cases found in *The English Reports*—a task so laborious no sensible person would undertake it. Word search strategies have made the research feasible. A student can find all the mentions of a specific word or phrase in one or another of the books used in this series. In my search, it was the author's name. Taking account of slight variations in spelling, I was able to find virtually all of the cases in which the name "Swinburne" appeared. Then I read them. True, this method is not perfect. Done mostly by machines, the references contain errors and faulty attributions. It can be difficult not to be misled by some of them. For this reason, searchers must use the system as only a starting point. They must follow it into the *Reports* themselves and do more than count the number of mentions. This subject is a good example. Using only Swinburne's name produces more than fourteen hundred "hits," but many of them proved to be references to cases in which one of the litigants was named Swinburne. Other false leads turn out to have been in notes to Swinburne's treatises that were not in the original reports themselves, but references to them that added in later editions of the original reports. Most of these false leads can be found and discarded at an early stage, but not all. Some are equivocal.¹⁹ However, read carefully, the cases yield the evidence relevant to my topic, and there is quite a bit of it. It appears openly, as something that was familiar to common lawyers, thus casting real doubt on the

17. Notable additions are the many *English Law Reports of the Early Modern Period* being published by Professor W. H. Bryson of the University of Richmond Law School; see footnotes below for examples.

18. The *English Reports* do contain the reports of litigation in ecclesiastical courts and some of the other English courts, like those of the two Universities, which were governed more directly by the *ius commune*. I have excluded them from this essay. Some of the difficulties in describing their use are described in J. H. Baker, *Introduction to English Legal History*, 4th edition (London 2002), 182-86.

19. E.g., *Sir Moyle Finch's Case* (CP 1606), 6 Co. Rep. 63a, 65a, 77 Eng. Rep. 348, 353 (quoting a Latin maxim Coke stated to be part of "the ecclesiastical law" without specific attribution to his source. A later editor has supplied the source as coming from the work of Swinburne.

common opinion that whatever influence the canon law exercised was hidden or even shameful.²⁰ The most recent citation found (though not in the *English Reports*) comes from 1947, where Swinburne's treatise on matrimonial law was cited as relevant in a dispute over the validity of a marriage contracted by proxy in Buenos Aires.²¹

III. GENERAL SUBJECTS

Broad features are found throughout the citations to Swinburne's works found in the *English Reports*. Leaving aside the Court of Delegates, where common lawyers and civilians both served as judges and lawyers,²² and where many references to Swinburne's treatises are found among the reports, a large number of them, probably the majority, come from the Court of Chancery, which had a more natural connection to the civil law than did the courts of Common Pleas or King's Bench.²³ Another was that in all these courts citations to Swinburne's works were normally accompanied by parallel citations to cases from the common law, particularly in the eighteenth century cases. Again, exceptions are there to be uncovered.²⁴ In one, it happened that a judge simply added a mention of Swinburne's treatise to the identical point that another judge had just made but had only cited common law authorities. The second judge seems to have added to the strength of another's argument with a point also found in Swinburne's treatise.²⁵ On the whole, however "mixed" lists—sometimes long entries including Swinburne among common law precedents are more commonly found. In them, the multiplication of

20. See, e.g., W. J. Jones, *The Elizabethan Court of Chancery* (Oxford 1967), 10-11: "the doubtful influence of canon law, an inspiration which cannot be discounted although it was never openly avowed."

21. *Apt v. Apt* (1947), 63 *Law Times Reports*, May 2d, 223, 228.

22. Both common law and civil law treatises were often mentioned in reported cases; see e.g., *Wenman v. Taylor* (Del. 1796), in *Case Notes of Sir Soulden Lawrence 1787-1800*, James Oldham ed. Selden Society 128 (2013), 124. The mixture of common lawyers and civilians there is well described in G. I. O. Duncan, *The High Court of Delegates* (Cambridge 1971), 178-200.

23. E.g., *Eldred v. Child* (Chan. 1725), Sel. Cas. (t. King) 49, 25 Eng. Rep. 216; *Stapleton v. Cheales* (Chan. 1711), Pr. Ch. 318, 24 Eng. Rep. 150. Evidence on the larger point of similarities between Chancery and the civil law is usefully surveyed in David Harbecke, *Modernisation through Process: the Rise of the Court of Chancery in the European Perspective* (Frankfurt 2018), 179-210, and Michael Macnair, *The Law of Proof in Early Modern Equity* (Berlin 1999).

24. See, e.g., *Kennell v. Abbott* (Chan. 1797), 4 Ves. Jun. 802, 804-05, 31 Eng. Rep. 416, 417: A lawyer faced with a legacy made under a serious mistake of fact, took note that "The books of the Common Law are barren upon such questions. Swinburne has collected the authorities from the Civil Law."

25. *Taylor v. Plumer* (KB 1815), 3 M. & S. 562, 577, 105 Eng. Rep. 721, 727, in which after mention of a common law case involving bankruptcy of a factor we find, the addition: "Lord C.J. Lees adds to this: "Swinburne 506, 6th edit. [which] is upon the same foundation."

supporting citations without suggesting any special justification for mentioning Swinburne's treatment was the norm. In a case from the mid-eighteenth century dealing with the law of gifts *causa mortis*, for example, Swinburne's treatise appears first in a list of authorities supporting the court's decision, but it was followed immediately by eight citations to cases from common law courts.²⁶ By that time, there would have been relevant decisions from the latter on this particular subject, and it is obvious that they would have mattered in cases similar to the one at issue. What seems remarkable is that Swinburne's account of the subject was not discarded, even despite the availability of common law authority. What he had written more than a century before continued to be cited. Apparently, its authority still counted for something.

A second general characteristic found in the English reports was their relatively frequent use of Swinburne's authority in cases involving writs of prohibition, the writs used to prevent the ecclesiastical courts from dealing with matters beyond the scope of their jurisdiction.²⁷ Some conflict between the jurisdiction the church claimed and what the common law would permit existed, and writs of prohibition directed to the judges of the ecclesiastical courts were made available to the litigants when the courts of the church stepped over the line by claiming too much. However, that line was sometimes an uncertain one. Determining whether the church courts had stepped over it could be a matter of dispute. Issuance of the writs was a matter of course, but their legitimacy could later be challenged by objecting that the real matter at issue in the church's courts belonged there. For determining questions like this, it was often important to know exactly what was being done in the consistory courts, and that is where citation of Swinburne's work was relevant. His treatise described what the courts customarily did, as for instance in appointing guardians *ad litem* to safeguard the rights of an infant legatee. Did these guardians exercise any rights over property bequeathed to the infant? If they did, they had gone too far. What Swinburne's treatise had to say about that question was of

26. *Ward v. Turner* (Chan. 1752), Dick. 170, 172, 21 Eng. Rep. 234, 235. The Chancellor and apparent author of the note was Lord Hardwicke. Almost identical is *Nosworthy v. Basset* (KB 1688), Comb. 90, 91, 90 Eng. Rep. 362.

27. See W. R. Jones, "Relation of the Two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries," in *Studies in Medieval and Renaissance History Volume VII*, William Bowsky ed. (Lincoln, NB 1970), 79-210; G. B. Flahiff, "The Writ of Prohibition to Court Christian in the 13th Century," *Mediaeval Studies* 6 (1944-45), 261-313; idem, *Mediaeval Studies* 7 (1945), 229-290; Charles M. Gray, *The Writ of Prohibition: Jurisdiction in Early Modern English Law* (2004), vol III., https://chicagounbound.uchicago.edu/lib_pubs/7 accessed on 28 September 2021.

obvious relevance in more than one contest over the legitimacy of a writ of prohibition. It described the ordinary practice in the church's courts. The burden of defending a particular prohibition's legitimacy would be to show that what was being claimed in one of those courts contravened common law rules, and so we find Swinburne's description of what happened in ecclesiastical court practice being cited in the English royal courts.²⁸ A similar example is the order of payment of the outstanding debts owed by testators.²⁹ The common law rules about this differed from those of the church's courts, and Swinburne's text was sometimes cited to call attention to the difference and to justify it in terms of the traditional law—in other words to show that the prohibition at issue was unwarranted. These examples do not mean that what he had written was necessarily decisive in the royal courts. They do mean that it was relevant.

A third general characteristic found in citations to Swinburne's reports was their statement of rules on the administration of the law of wills and trusts, which English lawyers treated as having been based upon customary law. There is something else to be said in favor of emphasizing this aspect of the development of English law besides its service as an entry point for Swinburne's views. Custom played a part in the canon law itself, and aspects of the testamentary law used in the English ecclesiastical courts were customary in origin and character. The English church's jurisdiction over last wills and testaments had a more extensive reach than that found in the formal canon law.³⁰ The Gregorian Decretals did have a title devoted to the subject, but the law of the church made no claim to exclusive probate jurisdiction, and it left many questions unanswered. Much of what it did contain related only to the testamentary capacity of the clergy.

In England the result of this absence of common law authority was an ecclesiastical law formed from an amalgam of Roman law, canon law, provincial and diocesan statutes, and local customary practices.³¹ The

28. *E.g.*, *Bishop of Carlisle v. Wells* (KB 1676), Jones, T. 90, 84 Eng. Rep. 1161; *Loury v. Raynes* (KB 1677), 3 Keble 839, 84 Eng. Rep. 1043, 2 Lev. 217, 218, 83 Eng. Rep. 526-27; *Henderson v. French* (KB 1816), Mau. & Sel. 406, 407, 105 Eng. Rep. 1099, 1100.

29. *Taylor v. Plumer* (KB 1815), 3 M. & S. 562, 577, 105 Eng. Rep. 721, 727. *See also Bracton on the Laws and Customs of England*, Samuel Thorne ed. (Cambridge, MA 1977), IV, 267 (f. 407b).

30. X 3.26.1-20; *See, e.g.*, Hostiensis, *Summa Aurea*, tit. *De immunitate Ecclesiae*, no. 13, noting that the church exercised jurisdiction in secular subjects like this *ratione pacti vel consuetudinis vel privilegii*.

31. *See* Brian Ferme, *Canon Law in Late Medieval England: A Study of William Lyndwood's Provinciale with particular reference to Testamentary Law* (Rome 1996); Michael

Decretal law itself was relevant, but insufficient in itself to state the law adequately. Resources drawn from the existing common law sources were no better. The royal courts exercised no comparable jurisdiction until passage of the Wills Act in 1540,³² and even after that date the ecclesiastical courts continued to exercise jurisdiction over the validity and interpretation of many (though by no means all) English last wills and testaments. In fact, the church's jurisdiction over the subject lasted into the nineteenth century.³³ Swinburne's principal treatise described it, furnishing learned citations in its margins to the varied sources from which it had been drawn. Once the Wills Act had become law, many of the same problems that arose in the church's courts arose in their new venue and Swinburne's treatment of them was of possible relevance. Establishing the basic rule that a man's last will and testament took effect as the law stood at the moment of his death and not at the time it was written, for example, could call for citation to Swinburne's treatise on the subject. And it did.³⁴ The effect of age conditions attached to bequests arose in both temporal and spiritual courts, and Swinburne's discussion of the problems they created could be cited as relevant in resulting disputes. Sometimes it was.³⁵ The rules establishing the privileges of charitable bequests found in Swinburne's work could help to shape the requirements for validity when a charitable bequest came before a royal court. That too happened.³⁶

IV. SPECIAL SUBJECTS

A few legal matters that were dealt with in Swinburne's treatise appeared in the Law reports with greater frequency than did his treatment of others. In cases involving these subjects, common lawyers appear to

Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Toronto 1963).

32. 32 Hen. VIII, c. 1.

33. See R. B. Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge 2006), 167-73.

34. *Robinson v. Robinson* (Chan. 1756), 1 Burr. 38, 48, 97 Eng. Rep. 177, 183; see also *Kennell v. Abbott* (Chan. 1797), 4 Ves. Jun. 802, 807, 31 Eng. Rep. 416, 418, where one lawyer described him as "a general writer upon the testamentary law of this country" and *Lomax v. Holmden* (Chan. 1749), in *Paul Jodrell's Chancery Reports (1737 to 1751)*, W. H. Bryson ed. (Tempe, AZ 2020), no. 370.

35. See *King v. Withers* (Chan. 1712), in *Reports of Cases in the Court of Chancery from the time of Lord Harcourt (1710-1714)*, W. H. Bryson ed. (Richmond VA, 2014), no. 254; *Williams v. Fry* (KB 1672), 2 Keble 867, 868, 84 Eng. Rep. 548, 549.

36. *Mills v. Farmer* (Chan. 1815), 19 Ves. Jun. 483, 486, 34 Eng. Rep. 595, 596. See generally Gareth Jones, *History of the Law of Charity 1532-1827* (Cambridge 1969), 5-9, asserting that the jurisdiction of the ecclesiastical courts had "become unpopular" by the start of the 16th century.

have found Swinburne's treatment of particular use, and they appear to have turned to his treatise without hesitation.³⁷ I have found six areas where this happened. The first of such particular citations existed in questions raised by gifts *causa mortis*.³⁸ An import from the Roman law, English law has long permitted gifts of chattels to be made in anticipation of the testator's death even though they were nowhere mentioned in the testator's last will and testament. They were thus an exception to the law's requirement, and indeed they are still with us—as an exception to the rule that gifts taking effect at a person's death had to comply with the writing that is required by our statutes on the subject of testamentary gifts. Taken into the common law, most American law students come into contact with gifts *causa mortis* in their course in the law of real and personal property. In England, they became part of the common law, and the outcome of cases being heard in the royal courts sometimes faced a problem for which the early common law furnished little help—as in the question of whether actual delivery of the gift before the death of the donor was a requirement for the gift's validity. Here, citation to what Swinburne had written about the subject was of relevance, and it is no surprise to find that it was cited as of value several times in the early law reports.³⁹

A second area in which the relevance of Swinburne's opinion was treated as of particular note lay in areas of the law in which jurisdiction was shared by the Court of Chancery and the courts of the church. The context in both was related, and it would have been awkward had the two systems taken widely divergent paths.⁴⁰ So, for instance, when a question of the existence of an advancement to a last will and testament arose in Chancery—that is an *inter vivos* payment of a sum of money or the delivery of a chattel to a legatee when the same sum or chattel was bequeathed in the donor's last will and testament—one finds that Swinburne's discussion of the question being treated as relevant.⁴¹ In one

37. See, e.g., *Abney v. Miller* (Chan. 1743), in *Jodrell's Reports* (*supra* note 34), no. 179.

38. Dig. 39.6.1-44; Cod. 8.56.1-4; see also Reinhard Zimmermann, *Law of Obligations* (*supra* note 1), 493; and Andrea Massironi, "Gifts Mortis Causa in the Ius commune: Contract and Last Will," in *Succession Law, Practice and Society in Europe across the Centuries*, Maria Gigliola di Renzo Villata ed. (Milan 2018), 473-516.

39. *Ward v. Turner* (Chan. 1752), 2 Ves. Sen. 431, 435, 439, 28 Eng. Rep. 275, 278, 280 (cited by counsel and judge); see also *Tate v. Hilbert* (Chan. 1793), 2 Ves. Jun. 111, 113, 116, 118, 30 Eng. Rep. 548, 549, 552; *Lawson v. Lawson* (Chan. 1718), 1 Peere Wms, 441, 442, 24 Eng. Rep. 463; *Blount v. Burrow* (Chan. 1792), 1 Ves. Jun. 546, 547, 30 Eng. Rep. 481.

40. See, e.g., *Banks v. Sladen* (Chan. 1830), Tam. 407, 409, 48 Eng. Rep. 162, 163.

41. *Orm v. Smith* (Chan. 1712), 2 Vern. 681, 23 Eng. Rep. 1042, and also reported as *Smith v. Orm*, in *Reports of Cases in the Court of Chancery in the Time of Queen Anne (1702 to 1714)*,

other case, here involving a similar but slightly different difficulty in assessing the likely intent of a testator, one finds a telling argument for one side in a dispute from 1797: “The legacy is clearly void,” counsel for one side argued, “The books of the Common Law are barren upon such questions. Swinburne has collected the authorities from the Civil Law,” and he thought they should be followed where no contrary authority existed.⁴² Counsel for the other side countered, claiming that “The whole Civil Law, as a general body is not adopted to our law even as to legacies.”⁴³ He argued that the court should look elsewhere. However, his argument was rejected. The holding by the Master of the Rolls was that the apparent legacy was the product of a mistake. As Swinburne had concluded, the legacy could not be claimed where an advancement had been shown.⁴⁴

A third subject in which Swinburne’s treatise commonly played a role in the royal courts involved the proof of last wills and testaments to which had been added codicils in which identical or almost identical provisions were found. Suppose, for instance, a testator left £100 to a friend or relative in his will and then later did the very same thing in a codicil to that will. Was this an effective gift of £200 or was it simply a reaffirmation of the provision found in the earlier last will and testament? Here the surrounding circumstances and the language used might matter, but in the absence of anything suggesting the opposite, Swinburne’s view was that the legatee was entitled to both. That was the rule that seems to have been taken into the common law. In other words, here in most instances Swinburne’s view of the subject seems to have carried the day.⁴⁵ Problems like this one do sometimes arise today, but in an age before professional lawyers drafted most of the wills brought before the courts of church and crown, problems like this arose more often than they now do.

W. H. Bryson ed. (Tempe, AZ 2021), no. 354. *See also* Owen v. Owen (Chan. 1719), *Jodrell’s Chancery Reports* (*supra* note 34), no. 2.

42. Kennell v. Abbott (Chan. 1797), 4 Ves. Jun. 802, 804-05, 31 Eng. Rep. 416, 417. These citations, drawn from Swinburne, were to Dig. 35.1.6 and 35.1.72.

43. *Ibid.* at 4 Ves. Jun. 806, 31 Eng. Rep. 418.

44. *Ibid.* at 4 Ves. Jun. 810, 31 Eng. Rep. 419. A similar case in principle was *Sergeson v. Sealey* (Chan. 1742), in *Jodrell’s Chancery Reports* (*supra* note 34), no. 144.

45. *James v. Semmens* (CP 1793), 2 H. Bl. 213, 219, 126 Eng. Rep. 512, 516, “the Court held that the rule as laid down in Swinburne was the true one. Other examples: *Francis v. Dichfield* (Chan. 1742), 2 Coop. t. Cott. 531, 533, 47 Eng. Rep. 1289, 1290; *Duke of St. Albans v. Beauclerk* (Chan. 1743), 2 Atk. 636, 640-41, 27 Eng. Rep. 780, 782-83; *Hatton v. Hooley* (KB 1772), Lofft 122, 130, 132, 98 Eng. Rep. 566, 571-72; *Ridges v. Morrison* (Chan. 1784), 1 Bro. C. C. 389, 390, 393, 28 Eng. Rep. 1195, 1196-97; *Moggridge v. Thackwell* (Chan. 1792), 3 Bro. C.C. 518, 525, 29 Eng. Rep. 677, 681.

“Deathbed” wills and “deathbed” changes to existing wills were common. That this caused problems is clear from the contents found in records the English courts have left behind.⁴⁶ What should happen, for instance, if the two sums differed? Suppose the will had left £100, the codicil £150. Was the latter a new bequest or simply an increase in the amount given? It is not hard to see why common lawyers might have turned to Swinburne’s analysis for guidance, as it appears some of them did. At least they did so when it stood in accord with the advancement of the interests of their clients. For purposes of this inquiry, the point is that common lawyers showed no hesitation about doing so even though Swinburne’s sources were drawn almost exclusively from the European *ius commune*. The reports of the royal courts treated Swinburne’s treatise as stating what the customary practice had long been in England, sometimes adding an endorsement of “the reason that is given by Swinburne.”⁴⁷

A fourth special subject in which Swinburne’s treatises commonly played a role involved the powers and rights of men and women who labored under a disability. Minor children, married women, the deaf, the blind, and the mentally deficient are examples. Their status came before the law under a variety of circumstances, some of which Swinburne’s treatises discussed. Could they contract a valid marriage? Could they make a valid will? Swinburne dealt with these and related questions, often in cases where the common law was of only indirect use.⁴⁸ Looking for guidance on the capacity of a minor to enter into a binding marriage contract, for instance, one common lawyer “relied on Swinburne, title *Espousals*, par. 17.”⁴⁹ Similarly, in a case involving the capacity of a deaf mute, the lawyer found an answer in the same treatise, where Swinburne had written that consent could be given by signs, adding that “any sign of assent is sufficient.”⁵⁰ The will of a blind man was also upheld as a valid nuncupative will at least partly on the basis of what Swinburne had

46. See Bonfield, *Devising, Dying and Dispute* (*supra* note 5), 34-42, 59-60; R. H. Helmholz, “Deathbed Strife and the Law of Wills in Medieval and Early Modern England,” in *Planning for Death*, Mia Korpiola and Anu Lahtinen eds. (Leiden 2018), 239-57.

47. *Annand v. Honywood* (Chan. 1680), 2 Freeman, 22 Eng. Rep. 1056. See also *Seymour v. Noseworthy* (Ex. 1665), in *Reports of Cases in the Court of Exchequer in the Times of King Charles II*, W. H. Bryson ed. (Tempe, AZ 2017), no. 32.

48. E.g. *Stapleton v. Cheales* (Chan. 1711), Pr. Ch. 318, 24 Eng. Rep. 150 (dealing with an age requirement as it related to the validity of a testamentary bequest).

49. *Holt v. Ward* (KB 1730), 1 Barn. K.B. 348, 349, 94 Eng. Rep. 235. See also *Thecars Case* (CP 1628), Lit. 177, 179, 124 Eng. Rep. 195, 196 (legitimacy of a child born after the father’s death); *Garbet v. Hilton* (Chan. 1739), 9 Mod. 211, 88 Eng. Rep. 403 (legacy conditioned upon marriage with consent of legatee’s parents).

50. *Harrod v. Harrod* (Chan. 1854), 1 Kay & J. 4, 15, 69 Eng. Rep. 344, 349.

concluded on the subject.⁵¹ Establishing that the crime of sodomy could be committed by a man with a young girl was similarly supported by his discussion in a case before the justices at the Rochester assizes in 1718.⁵² And, as noted briefly above, Swinburne's attempts to state the then current legal effect of wills of married women figured in several cases heard in the royal courts.⁵³

A fifth area of the law that called forth repeated references to Swinburne's treatise on testamentary law was one that remains uncertain to this day—bequests of the “contents” of a specific place or container.⁵⁴ Does that category include only what was found there on the testator's death or what was there when he made his will? Does the size of the “container” matter? The ordinary rule that a will speaks as of the time of the testator's death may be inconsistent with what the testator meant when he made the bequest. Swinburne's treatise attempted to set out workable rules to deal with an admittedly difficult subject, and his efforts were later cited as relevant in the royal courts. Thus a bequest by a ship captain of “all his goods and chattels” on board the sailing ship *Warwick*, for instance, called forth a citation to Swinburne's treatment of the subject, although it seems to have entailed as much argument in the Court of Chancery about what he had meant as it did a definitive answer.⁵⁵ A related problem was the bequest of overly broad or ambiguous categories, as in a gift of “all my goods.” When the question of whether a testamentary gift of “household furniture” included plate, china, and books came before the Court of Chancery in 1763, it called for citation to what Swinburne had written on the subject.⁵⁶ A related problem was that of bequests of specific assets, like shares of stock, which the testator had sold or disposed of before his death. Was the executor required to purchase equivalent assets to meet their absence? In these uncertainties, Swinburne's discussion appears to have

51. *Longchamp ex dem Goodfellow v. Fish* (CP 1807), 3 Bos. & Ful. 416, 417, 127 Eng. Rep. 690, 692.

52. *Rex v. Wiseman* (KB 1718), Fort. 91, 96, 92 Eng. Rep. 774, 776.

53. *E.g.*, *Scammell v. Wilkinson* (KB 1802), 2 East. 552, 556, 102 Eng. Rep. 481, 482; *Pinbury v. Elkin* (Chan. 1719), 2 Vern. 758, 760, 23 Eng. Rep. 1095, 1096.

54. It is still a problem; *see* Thomas Atkinson, *Handbook of the Law of Wills*, 2d ed. (St. Paul MN, 1953), 829-31.

55. *Chapman v. Hart* (Chan. 1749), 1 Ves. Sen. 271, 27 Eng. Rep. 1026. Similar but referring to the contents of a room, was *Bronker v. Coke* (KB 1707), Holt K.B. 243, 245, 90 Eng. Rep. 1033, 1034; and *Robinson v. Robinson* (KB 1757), 1 Burr. 38, 48, 97 Eng. Rep. 177, 183.

56. *Kelly v. Powlet* (Chan. 1763), Dick. 359, 360, 21 Eng. Rep. 308. Similar were *Kendall v. Kendall* (Chan. 1828), 4 Russ. 360, 370, 38 Eng. Rep. 841, 844, and *Ryall v. Rolle* (Chan. 1749), 1 Atk. 165, 181, 26 Eng. Rep. 107, 117 and also *Hills v. Wirley* (Chan. 1743), in *Jordell's Chancery Reports* (*supra* note 34), no. 190.

been useful in the secular courts.⁵⁷ The interpretive problems were the same, and his discussion of them was found useful.

A sixth area of law in which Swinburne's discussion was sometimes treated as relevant were cases involving testamentary gifts to be paid or delivered at a future date. Common examples are those stating that they were to be made when the legatee married or had reached a certain age. The person named might not marry at all, or he (or she) might die before reaching the designated age. The question was always whether the time for payment was annexed to the gift itself or only to the moment of its payment. If the former, it lapsed. If the latter, it was not conditional and ordinarily would be upheld. It was to be paid, although the question of to whom in cases of death raised problems of its own. Swinburne's treatise contained a learned discussion of this problem, one filled with citations to the *ius commune*. His discussion even touched the problem caused by simultaneous deaths—the question that has given rise to the Uniform Simultaneous Death Act in American jurisdictions in recent years.⁵⁸ Lawyers sometimes need all the help they can get. This is one such area of the law. Perhaps it is not surprising to find the *Brief Treatise* being cited in appropriate cases that arose in the Court of Chancery.⁵⁹ It should also be said that more references were made to common law cases than to Swinburne's treatises. Many more! It is almost as if his work was being treated as their equivalent.

V. CRITICISM AND PRAISE OF SWINBURNE'S TREATISES

That Swinburne's works were as often introduced as they were in the cases found in the *English Reports* did not mean that they were always accepted as authoritative. Some Reports did not mention his works even where they might have been relevant, and the common lawyers who cited to his treatises did not always have a genuine respect for what he or any other civilian had written on a subject that came before the royal courts. In fact, there is criticism as well as praise of the man and his work to be found in the *English Reports*. Of course, some of that criticism came from lawyers speaking for clients whose victory in the case at hand depended upon rejection of a rule or principle found in Swinburne's two treatises.

57. Purse v. Snablin (Chan. 1738), *Alexander Forrester's Chancery Reports (1732-1739)*, W. H. Bryson ed. (Buffalo, NY 2006), no. 37.

58. *Brief Treatise*, Pt. 7 § 23.

59. Booth v. Booth (Chan. 1798), 4 Ves. Jun. 399, 401, 31 Eng. Rep. 203, 204. Similar is Smell v. Dee (Chan. 1707), in *Reports of Cases in the Court of Chancery in the Time of Queen Anne* (*supra* note 41), no. 84.

Putting the interests of their client came first, and that meant claiming that Swinburne was mistaken or irrelevant. Of course, the same thing might also be said of the positive use of Swinburne's treatises that is also found in the common law courts where his work was cited. Both may have been simply the product of a lawyer's duty to put the interests of his client before his own. Even the praise or criticism uttered by one of the judges in the royal courts might be attributed to a desire to reach the result he had chosen rather than a sign of actual respect for Swinburne and the law upon which he drew.

A typical example of this ambivalence comes from a late eighteenth century case involving the issue just discussed. It involved bequest to a testator's niece "from and immediately after her marriage." The lawyer for the claimant cited Swinburne's treatise to support his argument that the niece's marriage was not a condition of the gift's validity. It merely specified the day on which it was to be paid and hence should not be denied to a woman who had not married at all. The lawyer for the defendant rejected the argument and apparently the relevance of any use of the *Brief Treatise*. He replied that "[t]he passage in Swinburne is simply an opinion of his own."⁶⁰ It should not count for more than that, he said, and decidedly not in the common law. The judge upheld the gift's validity nonetheless. We cannot tell whether it was Swinburne's authority that made the difference. We know only that his treatise on the subject was used and that its conclusion was followed over the objection of the losing party's lawyer.

With that note of caution, it is worth citing a few examples of the value that common lawyers ascribed to Swinburne's works found in the *English Reports*. They are of obvious relevance to the question of the relationship between the *ius commune* and the common law. I will attempt a summary. First the criticism. Some of it consisted of simple assertions that the law found in Swinburne's treatise did not apply in the common law. "No authorities from the civil law have any force or application in this case," asserted one judge, who then went on to single Swinburne's treatise out for irrelevance at the Kent Assizes in 1807.⁶¹ "We are not to be bound by the nice scruples of the civil law," claimed another lawyer, speaking in a 1747 case dealing with the requirement that two reliable witnesses without an interest in the outcome have been present at the execution of a

60. Booth v. Booth (prior note), and Piggot v. Morris (Chan. 1725), Sel. Cas. (t. King), 26, 27, 25 Eng. Rep. 203.

61. Longchamp ex dem. Goodfellow v. Fish (CP 1807), 3 Bos. & Ful. (N.R.), 415, 419, 127 Eng. Rep. 690, 692.

last will and testament.⁶² In a third such case, which involved the validity of a gift tied to marriage with the consent of trustees, one of the judges cited Swinburne's treatise on the subject, but also remarked that "the civil law seems to agree with our law in this, and so far I am for receiving it and no further."⁶³

Other lawyers were more directly critical of the treatment of substantive law found in Swinburne's treatises, as in a Chancery case from 1729 dealing with a question of the lapse of a devise of land. The judge held that what he found on the subject in Swinburne's treatise was "so perplexed on that head" that it had no value even as guidance in the matter that had come before him.⁶⁴ In a 1792 case involving a gift *causa mortis*, the report from the Chancery seems to have gone out of its way in rejecting what it called "the inaccuracy of Swinburne's definition" on the subject.⁶⁵ It was also Lord Hardwicke's opinion that the common law had chosen to follow the civil law on the subject but had received it "only so far as the gift had been accompanied with delivery."⁶⁶ In other words, there had been a partial reception of the civil law on the subject. Common lawyers employed what they found in the *ius commune*, consulting what Swinburne had written about it, but they had a mind of their own in making use of what they found there, even criticizing it for various faults.⁶⁷

What about praise? There was some. One common lawyer referred to Swinburne as standing among the "great men" of law in England, placing him together with Sir Edward Coke in his group of worthies.⁶⁸ Another praised Swinburne for his introduction of the law found in Continental works on testamentary law as particularly useful; they were "strong upon the reason and fitness of the thing."⁶⁹ In a third, a judge in

62. *Holdfast v. Dowsen* (Exch. 1747), 1 Black. W. 8, 12, 96 Eng. Rep. 5, 6.

63. *Hervey v. Aston* (KB 1738), Wils. K.B. 83, 95, 125 Eng. Rep. 1067, 1074. *See also* *Reynish v. Matin* (Chan. 1746), in *Paul Jodrell's Chancery Reports* (*supra* note 34), no. 277.

64. *Green v. Rod* (Chan. 1729), Mos. 182, 25 Eng. Rep. 338. Similar was *Chapman v. Hart* (Chan. 1749), 1 Ves. Sen. 271, 27 Eng. Rep. 1026.

65. *Blount v. Burrow* (Chan. 1792), 1 Ves. Jun. 546, 547, 30 Eng. Rep. 481.

66. *Ward v. Turner* (Chan. 1752), Dick. 170, 172, 21 Eng. Rep. 234, 235.

67. *E.g.*, *Duke of St. Alban's v. Beauclerk* (Chan. 1743), in *Jodrell's Chancery Reports* (*supra* note 34), no. 198, arguing that Swinburne's treatment was internally contradictory.

68. *Goodright ex dem. Roffe v. Harwood* (KB 1773), Lofft. 282, 284, 98 Eng. Rep. 652, 653. *See also* *Francis v. Dichfield* (Chan. 1742), in *Jodrell's Chancery Reports* (*supra* note 34), no. 127, where Coke and Swinburne and no one else are cited together in support of a question involving revocation of wills.

69. *Windham v. Chetwynd* (KB 1757), 1 Burr. 414, 430, 97 Eng. Rep. 377, 386. In another case his treatise was cited along with Coke on Littleton as stating the law in a contest over a legacy's payment to a person not accurately described in the will, *Beaumont v. Fell* (Chan. 1723), in *Reports of Cases in the Court of Chancery in the Time of King George I* (*supra* note 10), no. 576.

the Court of Common Pleas lauded his work, stating that “the rule as laid down in Swinburne was the true one.”⁷⁰ Similarly, a lawyer in a fourth case found in the *English Reports* praised Swinburne’s treatise for stating “the best doctrine” on the subject of interpreting the words of a last will and testament.⁷¹ It thus appears safest to conclude that among the common lawyers opinions about the value they ascribed to his work were mixed.⁷²

VI. CONCLUSION

Despite the existence of occasional evaluations of Swinburne’s work like those just mentioned, it is both true and relevant that the majority of citations to his work in the *English Reports* contained neither praise nor criticism. They were simply legal citations—apparent but silent acknowledgements that English law encompassed, or at least found useful, some parts of the civil law on particular subjects, one that had been discussed learnedly in one of Swinburne’s two treatises. Most uses found in the Reports contained no explanation and no justification for their presence.⁷³ In a case dealing with the validity of a marriage, a common lawyer remarked simply, “the same doctrine is to be found in Swinburne.”⁷⁴ In another case, one involving a legacy of money, the report stated simply that “we follow the rule of the canon law” as it was stated and described in Swinburne’s treatise.⁷⁵ Some of those few lawyers who said anything more on the subject stated explicitly that the reason for their use was that the laws which Swinburne described were parts of established English custom. Seemingly this meant something like the custom according to which ecclesiastical courts had long dealt with the laws of wills and trusts in England. It included but also extended beyond what was found the texts of the *Corpus iuris canonici*. Thus some citations to Swinburne’s text that gave a justification stated explicitly that the doctrine found in his work “is of no authority except as it has been received and allowed by usage.”⁷⁶ Its application in the common law had been allowed,

70. James v. Semmens (CP 1793), 2 H. Bl. 213, 218, 126 Eng. Rep. 512, 515-16.

71. Ridges v. Morrison et al. (Chan. 1784), 1 Bro. C.C. 389, 390, 393, 28 Eng. Rep. 1195, 1196-97.

72. Professor Seipp, dealing with an earlier period, described that attitude as one of “muted ambivalence”. See his “Canon Law and Civil Law,” (*supra* note 2), 417.

73. See, e.g., Hornsby v. Evans (Chan. 1739), in *Jodrell’s Chancery Reports* (*supra* note 34), no. 56.

74. Doe ex dem. Hodsdon v. Staple (KB 1788), 2 T. R. 684, 688, 100 Eng. Rep. 368, 370.

75. Scott v. Tyler (Chan. 1788), Dick. 712, 722, 21 Eng. Rep. 448, 452.

76. Atkins v. Hiccocks (Chan. 1737), West. T. Hard 114, 117, 25 Eng. Rep. 849, 850; Informative on this point is Paul Brand, “Law and Custom in the English Thirteenth Century

as one lawyer concluded, because it could claim to be a long established English custom, one as applicable in the common law as it had been in the courts of the English church. The powers and duties of English executors were in part determined by the church's formal law, but they were only used because they had been willingly received in practice.⁷⁷

Such an explanation for the influence of the European *ius commune* on the English common law is relevant to the larger question raised and illuminated by Reinhard Zimmermann's demonstration of the place in the evolution of the English common law occupied by the European *ius commune*. Laws taken over from the medieval canon law had a long life, and one reason this was so seems to have been that the concept of an English custom was capacious enough to include texts from it.⁷⁸ It was a legitimate part of a customary regime that was, in part at least, communicated through the works of English civilians like Henry Swinburne.⁷⁹ When pressed, common lawyers invoked his work as one example of custom's role as a legitimate source of law. That it had long been used in England seems to have been reason enough to justify its place in the courts of the common law. The term "custom" thus had an expansive scope.⁸⁰ It does seem strange to conclude that some of the laws found in the *Corpus iuris civilis* and the *Corpus iuris canonici* were taken into the common law because they could be considered components of English customary law.⁸¹ However, that is exactly what is suggested by the ways

Common Law," in *Custom: the Development of a Legal Concept in the Middle Ages*, Per Andersen and Mia Münster-Swendsen eds. (Copenhagen 2009), 17-31

77. E.g., *Josseline v. Brewet* (Exch. 1721-22), in *Report of Cases in the court of Exchequer in the time of King George I (1714-1727)*, W. H. Bryson ed. (Tempe, AZ 2014), no. 192.

78. See Paul A. Brand, "The Common Lawyers of the Reign of Edward I and the Canon Law," in *Studies in Canon Law and Common Law in Honor of R. H. Helmholz*, Troy Harris ed. (Berkeley, CA 2015), 27-40, at 40; Charles Donahue, Jr., "Ius Commune, Canon Law, and Common Law in England," *Tulane Law Review* 66 (1992), 1745-80; M. C. Mirow, "Last Wills and Testaments in England 1500-1800," in *Recueils de la Société Jean Bodin pour l'histoire comparative des Institutions* 60 (1993), 1747-83.

79. Accord: *Dewhurst v. Shaw* (Exch. 1675-77), in *Reports of Cases in the Court of Exchequer in the time of King Charles II*. W. H. Bryson ed. (Tempe, AZ 2017), no. 184; *Atkins v. Hiccocks* (Chan. 1737), West. t. Hard. 114, 117, 25 Eng. Rep. 849, 850.

80. See David Ibbetson, "Custom in Medieval Law" and Alan Cromartie, "The Idea of common law as custom," both in *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Amanda Perreau-Saussine and James Bernard Murphy eds. (Cambridge 2007), 151-75 and 203-27; also helpful is Emanuele Conte, 'Consuetudine, Coutume, Gewohnheit and Ius Commune: An Introduction,' in *Rechtsgeschichte: Legal History* 24 (2016), 234-43.

81. A parallel with French developments on the subject is instructive; see Marie Seong-Hak Kim, *Custom, Law and Monarchy: A Legal History of Early Modern France* (Oxford 2021), 33-35; Sarah Rigau deau, *Le testament en droit canonique du XIIe au XVIe siècle* (Paris 2021), 495.

Swinburne's two treatises were used when they were cited as authorities in the courts of the English common law.