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# INFIDELS IN ENGLISH LEGAL THOUGHT: CONQUEST, COMMERCE AND SLAVERY IN THE COMMON LAW FROM COKE TO MANSFIELD, 1603–1793\*

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*English common law reports are dense with ideas. Yet they remain mostly untapped by intellectual historians. This article reveals how intellectual history can engage with law and jurisprudence by following the notion that “infidels” (specifically non-Christian individuals) deserved to receive exceptional treatment within England and across the globe. The starting point is Sir Edward Coke: he suggested that infidels could be conquered and constitutionally nullified, that they could be traded with only at the discretion of the monarch, and he confirmed their incapacity to enjoy full access to the common law. This article uncovers how each of these assertions influenced the development of the imperial constitution in the seventeenth and eighteenth centuries, when it came to war, trade and slavery. Identifying each of the major moves away from Coke’s prejudices, this article argues that sometimes common lawyers responded to political change, but at other times anticipated it.*

The history of law must be a history of ideas. It must represent to us not merely what men have done and said, but what men have thought in bygone ages . . . we must infer what people thought in the past from what they wrote.

F. W. Maitland, “The Corporation Aggregate,” 1893.<sup>1</sup>

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\* During the preparation of this paper, I benefited from the critical observations of Professor Paul McHugh and Dr Will Bateman, both antipodean public lawyers of the highest caliber who continue to push me in new directions at Cambridge. And the reviewers sourced by Dr Duncan Kelly for this journal were extraordinarily helpful and inspiring. Responding to their challenging and generous reports made me think more clearly about the history of legal thought.

<sup>1</sup> Frederic William Maitland, “The Corporation Aggregate: The History of a Legal Idea,” unpublished lecture, 25 May 1893.

The English common law relies upon the abilities of counsel and judges to interpret and evaluate precedents. This makes the law reports, which record the argumentation used to inform the judgments subsequently offered as precedents, critical to the process of administering justice. So they are today, as they were in the early modern period, when the industry professionalized. As reports became produced in large quantities and consumed by students, so too were they eradicated of variations in language, style and substance. Whether adjectival or declaratory, all of the ideas found within the reports could then be seen to fall, as still they can today, into one of two categories: *ratio decidendi*, which is the reasoning behind a specific decision that binds later judges, and *obiter dictum*, which is an observation hashed out in the course of reaching a specific decision that is not considered to bind judges but may nevertheless be persuasive to them. This article will concern itself principally with *dicta* in order to consider the circumstances whereby they have come to be discredited or used to develop new precedents in the context of legal and political crises associated with trade, war and slavery. Specifically it will look at those circumstances which compelled individuals working within the English common law to consider the idea that infidels were somehow different to Christians. Inspired by work at the crossroads of legal history and the intellectual history of the British Empire, this article presents a novel way to write the history of ideas.<sup>2</sup> This involves setting aside, but never forgetting, some of the best-known treatises and pamphlets in history, political philosophy and political economy, in order to take jurisprudence seriously on its own terms.<sup>3</sup> Approaching the law reports in their totality, and in

<sup>2</sup> Recent intellectual histories of empire which take law seriously include Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge, 2014); Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Princeton, 2015); Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton, 2015). The classic text is still David Armitage, *The Ideological Origins of the British Empire* (Cambridge, 2000). Intellectual legal histories include Alan Cromartie, *Sir Matthew Hale: Law, Religion, and Natural Philosophy* (Cambridge, 1995); Cromartie, *The Constitutionalist Revolution: An Essay on the History of England* (Cambridge, 2006); Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Oxford, 1991); Lobban, *A History of the Philosophy of Law in the Common Law World, 1600–1900* (Dordrecht, 2007); Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge, 2015). The pioneer of this tradition was Maitland, of course.

<sup>3</sup> This is not, of course, to suggest that the law reports represent the only place where law was discussed and acted out in the making of modern empires. Historians continue to maintain that “legal posturing” was performed in a variety of different contexts by colonists, merchants, mid-level bureaucrats, governors, ministers, crown law officers, diplomats and others who together shaped the legal mind of imperialism. Ronald Robinson and John Gallagher with Alice Denny, *Africa and the Victorians: The Official Mind of Imperialism* (Basingstoke, 1982); Lauren Benton, *A Search for Sovereignty: Law and Geography in*

isolation, encourages us to think like common lawyers did: for them, no material was more important than these reports. They represent a repository of ideas. Furthermore, and this is not trifling, here is an approach that allows for some consideration as to how far the trajectory of any single idea may be determined by the medium of its presentation.

This article begins with a consideration of perhaps the most important English common lawyer of his time, Sir Edward Coke (1552–1634). Coke was a man who expressed a number of the profound constitutional anxieties associated with the Tudor–Stuart transition. For J. G. A. Pocock, it was at this very moment that there began to flourish a kind of “historical thought” especially idealistic of timeless custom. It has been tempting for some legal historians to simplify and contort Pocock’s argument to suggest that, as the royal prerogative came to be used and misused by Stuart kings, so too did the “common law mind” look with greater selectivity and insularity into the English medieval past for evidence of institutional stability *perseverant* of that prerogative.<sup>4</sup> Coke’s pronouncements in *Calvin’s Case* (1608) may be seen in this light, though it is more difficult to see all of Coke’s offerings upon the subject of infidels in a similar way. Besides running the risk of overlooking some subtleties of distinction between *dicta* and *ratio* in his jurisprudence, more recent scholars, like David Chan Smith and Ian Williams, have persuasively cautioned against seeing Coke’s approach to the powers of crown, parliament and common law as inflexible. Instead we might rather see Coke as somewhat more of a reformist than he has been allowed by the strictest proponents of the theory that his “ancient constitutionalism” was entirely oppositional to the royal prerogative.<sup>5</sup>

Commerce and empire were crucial to the modernization of the English common law. Scholars of *Calvin’s Case* and the imperial constitution have

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*European Empires* (Cambridge, 2009); Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge, MA, 2016); Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford, 2011).

<sup>4</sup> J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study in English Historical Thought in the Seventeenth Century* (Cambridge, 1987), esp. 30–69. See also Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (Basingstoke, 1992).

<sup>5</sup> David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578–1616* (Cambridge, 2014); Ian Williams, “Edward Coke,” in Denis Galligan, ed., *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford, 2014), 86–107; Cromartie, *Constitutionalist Revolution*, 179–233. For doubts about the ability to generalize about a “common law mind” see J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore, 2000).

long appreciated this.<sup>6</sup> What is less common among historians, however, is an approach which takes a selection of Coke's ideas on the same topic from different sources in order to follow these through the jurisprudence. Doing so, as this article does, reveals how lawyers and judges responded to developments at home and abroad. The jurist of most importance in this frame will be Lord Mansfield (1705–93), whose reputation for intervention made him a favorite among private law reporters then, and historians now.<sup>7</sup> As a revamping Chief Justice, Mansfield made a sport of discrediting Coke's *dicta*, conscious of the need to make the common law more functional within a religiously tolerant commercial society such as Great Britain, he thought, should become.<sup>8</sup> Between Coke and Mansfield there lived John Holt (1642–1710), who is thoroughly interesting for managing to survive the officeholding upheavals of the 1680s to become a proponent of the unpopular idea of imposing limitations on government.<sup>9</sup> This article will suggest, moreover, that a number of Holt's observations about infidels within debates about conquest, commerce and slavery became influential in the development of the imperial constitution in his lifetime too. As Holt and his colleagues were made to engage with Coke's assertions about infidels, they were also confronted with an odd adaptation of these ideas; that is, one which suggested that the faithlessness of heathen slaves could provide for the possibility of recognizing property in them.

By no means, it is important to qualify, did Coke introduce the concept of faith into the English legal tradition. In the Middle Ages, tenants abided by the feudal expectation that an oath of fidelity (or "fealty") was owed to their lords. Analogical to this was the expectation that clerks, merchants and men of religion from Christendom beyond England were required to profess, upon arrival into the realm, their fidelity to the king (*ad fidem regis*).<sup>10</sup> Separate to this was the qualification of good faith (*bona fide*) for actions and obligations. This was a recognizable standard for individual interactions within the later medieval

<sup>6</sup> Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21/3 (2003), 439–82; Gavin Loughton, "Calvin's Case and the Origins of the Rule Governing 'Conquest' in English Law," *Australian Journal of Legal History* 8 (2004), 143–80; Poole, *Reason of State*, esp. 19–167.

<sup>7</sup> See especially James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols. (Chapel Hill, 1992); Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill, 2004).

<sup>8</sup> David Lieberman, *The Province of Legislation Determined* (Cambridge, 1989), 88–121.

<sup>9</sup> Philip A. Hamburger, "Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London v. Wood*," *Columbia Law Review* 94/7 (1994), 2091–2153.

<sup>10</sup> For aliens, birthright and status in England see Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge, 2000).

common law, just as it had been for civilians, canonists and theologians on the Continent.<sup>11</sup> A requirement of faithfulness was even set out in the very name of the action at common law which developed in the sixteenth century to account for contracts (*assumpsit et fideliter promisit*).<sup>12</sup>

By contrast, what pertained within English law to faithlessness—specifically the inability to keep faith with other Christians—was obscure ever since the early emergence of this prejudice around the time of the Crusades. It may have been natural for William of Newburgh (1136–98) to associate the Jews of York with “perfidy,” for this had become something of an ethnographic trope across Western Europe since at least Isidore of Seville (560–636), but how far such rhetoric can be said to have influenced English law is certainly a question.<sup>13</sup> Many Jews bought and sold land and other things in England without much difficulty or harassment; or, at least, they did until 1290, when Edward I orchestrated a widespread eviction of Jews entirely on the basis of what he perceived to be the pernicious effects of their moneylending, rather than their faithlessness.<sup>14</sup> With England purged of its Jewish population during the fourteenth, fifteenth and sixteenth centuries, that left few subjects of the realm around to identify openly as non-Christians—and none, it is surely more important for the purposes of this article, to record their pleas before the courts of common law. Not until 1520 was the inability of a “pagan” to have an action at common law first observed by Justice Richard Broke on a case of trespass in the Court of Common Pleas: to Broke’s mind, the circumstances of that case—concerning the disputed ownership between

<sup>11</sup> James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World, 1250–1550* (Liverpool, 1979); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Grand Rapids, 2001); James Gordley, *The Philosophical Origins of the Modern Contract Doctrine* (Oxford, 1991), esp. 30–68; Martin Joseph Schermaier, “Bona Fides in Roman Contract Law,” in Reinhard Zimmermann and Simon Whittaker, eds., *Good Faith in European Contract Law* (Cambridge, 2000), 63–92; James Gordley, “Good Faith in the Medieval *Ius Commune*,” in *ibid.*, 93–117; Wim Decock, *Theologians and Contract Law: The Moral Transformation of the *Ius Commune* (ca. 1500–1650)* (Leiden, 2013).

<sup>12</sup> David Ibbetson, *Historical Introduction to Law of Obligations* (Oxford, 1999), 126–52.

<sup>13</sup> Bat-Sheva Albert, “Isidore of Seville: His Attitude towards Judaism and His Impact on Early Medieval Canon Law,” *Jewish Quarterly Review* 80/3–4 (1990), 207–20; Wolfram Drews, *The Unknown Neighbour: The Jew in the Thought of Isidore of Seville* (Leiden, 2006).

<sup>14</sup> Paul Hyams, “The Jews in Medieval England,” in Alfred Haverkamp and Hanna Vollrath, eds., *England and Germany in the High Middle Ages* (Oxford, 1996), 173–92; Hyams, “Faith, Fealty and Jewish ‘Infidels’ in Twelfth-Century England,” in Sarah Rees Jones and Sethina Watson, eds., *Christians and Jews in Angevin England* (York, 2013), 125–47; P. Elman, “The Economic Causes of the Expulsion of the Jews in 1290,” *Economic History Review* 7/2 (1937), 145–54.

two Christian Englishmen of a bloodhound—required a distinction between damages and injury, for which purpose it was necessary to run through the legal disabilities of outlaws, traitors and pagans (all of whom featured alongside women and villeins).<sup>15</sup> Pagans belonged to this motley crew of common law rejects owing to their inability to keep faith and swear oaths, a disability that was subsequently expanded, through legislation, to make them out to be the enemies of the crown.<sup>16</sup>

In other words, whereas *good faith* could attach itself to customs governing the intention and performance of individuals within contractual relations, and *fidelity* could attach itself to the symbolism and ceremony of loyalty and ligeance, *infidelity* was a vague condition of legal disability up to the end of the Tudor period. Coke's importance owes to his association of infidels with three particular characteristics in the early seventeenth century: infidels could be conquered and taken over *in toto*; infidels could be traded with only at the discretion of the monarch; infidels could never give evidence at common law. While these novelties were conceived in England from *dicta* and commentaries offered to explain conditions in England, their effects would be most remarkable beyond the British Isles. Lawyers at home and abroad had no choice but to return to Coke time and again to make sense of the developing imperial constitution from the earliest settlement at Jamestown to the aftermath of the Seven Years War. As a result, a variety of different colonial interests were drawn into contemplations of their activities in relation to Coke's feelings about infidels. At different times, chartered corporations, private traders, slavers, planters and settlers were affected in their own different ways by the *idea* of infidels.

In his assessment of Protestant wariness towards infidels in early modern empires, Richard Tuck argues that the idea of maintaining distance from non-Christians *because* they were non-Christians had finally become absurd by the early eighteenth century. Within the English common law tradition, Tuck sees *East India Company v. Thomas Sandys* (1683–5) as the turning point, despite judgment in that case actually supporting Coke's argument for the prerogative

<sup>15</sup> *Y[ear] B[ooks]* Trin. 12 Hen. VIII, fo. 4, pl. 3 (1520.003ss): “Et home foit faire damage a moy, & ne faire injury (damnum absque injuria); Come si l’ Seignior bate son villein, ou l’ baron sa feme, ou on bate un home utlage ou traitor, ou pagan, ils n’ auront accion, pur ceo qu’ilz ne sont pas able de suir action.” For the observation that the reference here to pagans is “esoteric” see J. H. Baker, *The Oxford History of the Laws of England*, vol. 6, 1483–1558 (Oxford, 2003), 598 n. 13.

<sup>16</sup> The earliest statutory expression of “infidels,” found in a few Tudor statutes, recurs with similarly miscellaneous association to other foes of the crown: each of the Treason Acts of 1534, 1551 and 1571 takes aim at “any person” that might be “an Heretick, Schismatick, Tyrant, Infidel or Usurper of the Crown.” See *Treasons Act* (1534), 26 Hen. VIII, c. 13; *Treason Act* (1551), 5–6 Edw. VI, c. 11; *Treason Act* (1571), 13 Eliz. I, c. 1.

to impose restrictions upon trading with infidels.<sup>17</sup> This article will suggest, instead, that it was not until the other side of the Glorious Revolution that Coke's views upon infidel disability were abandoned. Additionally, it is acknowledged here that prohibiting communication and trade with infidels was only one of the hindrances faced by non-Christians in English law. When it came to the circumstances of conquered infidels, Coke's *dicta* were not dismissed definitively until the delivery of Lord Mansfield's adjudication in *Campbell v. Hall* (1774), as is shown below. When it came to the assertion that infidelity provided for a qualified property in slaves, again it was Lord Mansfield, in *Somerset v. Stewart* (1772), who did the same.

In conclusion, this article will reveal how the question of non-Christian deposition provides a fine way to understand, per Maitland, "what people thought in the past" not only about infidels but also about the entire common law enterprise. Here, as with every one of the major turning points presented in this article, we see one of two tendencies shown by common lawyers on the topic of empire: sometimes they responded to political change, and at other times they anticipated it.

#### "ALL INFIDELS ARE IN LAW *PERPETUI INIMICI*"

The earliest and constitutionally most significant instance whereby Sir Edward Coke was drawn into contemplation of infidels occurred with the changing of the dynasty. When James VI of Scotland accepted the English crown to become James I late in 1603, his head quickly swelled into it. Embracing a superciliousness and style as the self-ordained "King of Great Britain," James grew fond of the prerogative and frightened the House of Commons. In a flurry of no less than fifty royal proclamations in just the first two years of his reign, one issued in October 1604 advertised the king's desire to reign above a "Union" of the realms, which also proclaimed that "divers of the ancient Lawes of this Realme are Ipso facto expired," just because of his succession.<sup>18</sup> This reeked of conquest, but common lawyers generally took little fright from the prerogative instrument of proclamation, so they were happy to remain unconvinced (for the time being) by this suggestion that their whole enterprise was somehow now in jeopardy.<sup>19</sup> parliamentarians, on the other hand, would require further convincing that they

<sup>17</sup> Richard Tuck, "Alliances with Infidels in the European Imperial Expansion," in Sankar Muthu, ed., *Empire and Modern Political Thought* (Cambridge, 2012), 61–83.

<sup>18</sup> *Royal Proclamation* (20 Oct. 1604), in James F. Larkin and Paul L. Hughes, eds., *Stuart Royal Proclamations* (hereafter *SRP*), 2 vols. (Oxford, 1973–83), 1: 94–8.

<sup>19</sup> Baker, *Oxford History of the Laws of England*, 64–6. For the expansion and contraction of royal proclamations during the Tudor period see R. W. Heinze, *The Proclamations of*

were not, in fact, sitting in a conquered institution, with James himself doing little to diminish these fears by his desperate invocation of muddled imagery to explain a constitutional relationship between Scotland and England: “*London* must be the Seat of your King, and *Scotland* joined to this kingdom by a golden Conquest, but cemented with Love, as I said before; which, within, will make you strong against all civil and intestine Rebellion.”<sup>20</sup>

So unprecedented were these developments—and those metaphors—that the laws of England had no advice to offer on the rights available to, and jurisdiction over, Scottish *postnati* (that is, those subjects of the Scottish crown born after the union of the two realms in 1603). Here was the issue to charge up the common lawyers. For centuries, the fullest access to English law required a subject to profess singular allegiance within England. As separate realms were now united under the same crown, it remained to be seen, in the common law, whether or not this rule would be upheld or modified. A defect like this might have been addressed through statute were the issue less directly to concern the new king and his powers. After a special commission installed to investigate the matter only deferred it back to parliament, however, the issue was watchfully set aside for the scrutiny of the courts. A collusive action led in 1607 to the bringing of two suits in the name of a Scottish infant and legatee, Robert Colville, who had been born fresh upon the accession of James to England. Occasioning the input of England’s legal professionals in the King’s Bench and the Exchequer Chamber, there was clearly more at stake in these proceedings than whether or not the three-year-old Colville was capable of inheriting land in England. What gave *Calvin’s Case* (1608), as it became known, its great “weight and importance” was the chance it provided to resolve a series of controversies about mixed allegiances, the process of naturalization, the substance of birthright and the prerogative itself.<sup>21</sup>

Conquest emerges as one of the key issues in *Calvin’s Case*. Though nobody in support of the *postnatus* considered James’s accession of 1603 to be a conquest, still it had to be shown through persuasive argumentation that it was *not* a conquest. The problem here was that the common law contained no clues about what a conquest actually consisted of. Nor did the common law contain much apart from a few incidents of personal prescriptive pleas to indicate how conquest might disturb existing usages and customs.<sup>22</sup> What *Calvin’s Case* presented, during the

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*the Tudor Kings* (Cambridge, 1976); Frederic A. Youngs, *The Proclamations of the Tudor Queens* (Cambridge, 1976).

<sup>20</sup> *Journal of the House of Commons*, vol. 1, 1547–1629 (London, 1802), 363.

<sup>21</sup> Polly Price, “Natural Law and Birthright Citizenship in *Calvin’s Case* (1608),” *Yale Journal of Law and the Humanities* 9/1 (1997), 73–145; Brian Levack, *The Formation of the British State: England, Scotland, and the Union, 1603–1707* (Oxford, 1987), chap. 3.

<sup>22</sup> Appeals both to the time and, more generally, to the person of William the “Conquestor” were levelled by defendants, plaintiffs and judges during the long fourteenth century



constitutionally anxious beginnings of the Stuart period, was the opportunity to develop the historical argument that conquest did very little which the common law recognized.

Counsel for both sides talked at great length about the extent to which the conquest of Ireland “by descent,” as such it could be interpreted, allowed for the laws of England to be imposed there, what privileges the Irish enjoyed as English subjects as a result, and how (though this was largely Coke’s mastery) it was parliament which bonded its relation to the crown.<sup>23</sup> The Norman conquest was even discussed, if as an abstraction, for *Calvin’s Case* was less about the reception of foreign conquerors in English law than about the reception of foreign-born subjects.<sup>24</sup> For Coke, the conquest of 1066 had no relevance except insofar as it generated a mixture of claims by descent in Jersey and Guernsey, which formed only small parts of a great historical survey in which little could be said for the conquest of 1066.<sup>25</sup> It was in this survey that Coke developed his theory of allegiance, which required some categorization of the types of alien that may be recognized or shunned by English law.<sup>26</sup> This drew him into an unconnected exploration of the “diversity between a conquest of a kingdom of a Christian king, and the conquest of a kingdom of an infidel”:

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largely as a means of garnishing some liberty, franchise or usage with ancientness, with uneven results. *YB Mich.* 22 Edw. 1, RS 339–43, pl. 20 (1294.020rs); *YB Hil.* 3 Edw. 2, 20 SS 44–45, pl. 29 (1310.029ss); *YB Pasch.* 5 Edw. 2, 33 SS 14–19, pl. 19 (1312.080ss); *YB Trin.* 7 Edw. 2, 247–8, pl. 36 (1314.132); *YB Hil.* 14 Edw. 2, 422–3, pl. 30 (1321.030); *YB Hil.* 4 Edw. 3, 98 SS 707–8, pl. 375 (1330.824ss); *YB Hil.* 19 Edw. 3, RS 555–9, pl. 50 (1345.050rs); *YB Mich.* 21 Edw. 3, 60a–b, pl. 7 (1347.207); *YB Hil.* 29 Edw. 3, 17b, pl. 52 (1355.052); *YB Trin.* 49 Edw. 3, 22b–23a, pl. 8 (1375.033). The conquest of 1066 was sufficiently beyond the “temps de memory” thereafter to keep it from the attention of the common law.

<sup>23</sup> For Francis Bacon’s stance see *Cobbett’s Complete Collection of State Trials* (hereafter *CST*), 33 vols. (London, 1809–26), 2: 591–2, seeing also Bacon’s *Discourse on the Union of Kingdoms*, in James Spedding, ed., *The Letters and Life of Francis Bacon*, vol. 3 (London, 1863), 93, which makes the distinction between violent unions and natural unions, whereby, in the former, “the conquering state doth extinguish, extirpate, and expulse any part of the state conquered, which it findeth so contrary as it cannot alter and convert it.” Ellesmere, by no means a Chancellor inclined to disrobe the king of his prerogative, refuted the idea of an absolutist conqueror of Ireland. See *CST* 2: 681, which aligned him with the position of Yelverton, a judge from the King’s Bench, in distinguishing between “an undoubted title made by lawe” and “a doubtfull title wonne by the sword.” For Coke’s argument that England and Ireland were separate but unequal dominions, though allowing the Irish as “natural born subjects [to be] capable of and inheritable to laws in England,” see *CST* 2: 647–8; 7 *Coke Reports* (hereafter *Co. Rep.*), 17b, 22b, 23a; *The Selected Writings of Sir Edward Coke*, ed. Steve Sheppard, vol. 1 (Indianapolis, 2003), 207–8, 218–20.

<sup>24</sup> See, however, *CST* 2: 586–7, 601, 681.

<sup>25</sup> *CST* 2: 645; 7 *Co. Rep.* 21a; *Selected Writings of Sir Edward Coke*, 214–15.

<sup>26</sup> See Kim, *Aliens in Medieval Law*, 176–99.

for if a king come to a Christian kingdom by conquest, seeing that he hath *vitae et necis potestatem* [a power over life and death], he may at his pleasure alter and change the laws of that kingdom, but until he doth make an alteration of those laws, the ancient laws of that kingdom remain. But if a Christian king should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated; for that they be not only against Christianity, but against the law of God and of nature, contained in the Decalogue: and in that case, until certain laws be established amongst them, the king by himself, and such judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said.<sup>27</sup>

Insofar, then, as Coke was prepared to contemplate the legal personalities of conqueror and conquered, it was religion, more than political or corporate affiliation, which mattered. According to Coke's improvisation, victorious wars waged upon non-Christian polities vested more to the conqueror than those waged upon Christian polities. And that was not all:

All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace; for as the Apostle saith, 2 Cor. 15. *Quae autem conventio Christi ad Belial, aut quae pars fideli cum infideli*, and the Law saith, *Judaeo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere.*<sup>28</sup>

The first of these expressions is Italian, not Latin, and appears to derive from the *Discorsi* of Machiavelli, at least one copy of which Coke appears to have owned. Whereas Machiavelli referred, however, to Equians and Volscians as enemies of the Romans, Coke referred here to infidels as enemies of Christians. In support, Coke gives 2 Corinthians.<sup>29</sup> But he gives nothing away in respect of the passage following “the Law saith,” which establishes that no Christian, by virtue of his

<sup>27</sup> CST 2: 638; 7 *Co. Rep.* 17b; *Selected Writings of Sir Edward Coke*, 207. The power of life and death derived from Roman political thought; it had been adopted by Bodin in his familial analogies of Book One of the *Six Livres de la Republique* (1576). For similarities between Bodin and Coke see Price, “Natural Law and Birthright Citizenship,” 73–145.

<sup>28</sup> CST 2: 638; 7 *Co. Rep.* 17b; *Selected Writings of Sir Edward Coke*, 206–7.

<sup>29</sup> “Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness? And what concord hath Christ with Belial? or what part hath he that believeth with an infidel?”: 2 Cor. 6:14–15 (KJV). Belial (בְּלִיָּאֵל) often connotes the Devil, but translates literally as “without any value.” Misgivings of this kind appear in Exodus, Deuteronomy and other parts of the Old Testament.

redemption, should ever be made the slave of a Jew or anyone else who blasphemes against Christ.<sup>30</sup>

The extent to which Coke was knowingly placing an Easter egg here for subsequent jurists of the British Empire to fall upon in their considerations of an expanding Christian empire is, of course, a question. Alternatively, and more traditionally, these remarks might instead be understood as part of Coke's larger agenda of venerating the resilience of laws within England: infidels are invoked only to reveal what sort of conquest 1066 was not. Elsewhere, best of all in the prefaces of his *Reports*, Coke is at more strenuous pains to show "that the Common Law of England had beene time out of minde of man before the Conquest, and was not altered or changed by the Conquerour."<sup>31</sup> In this, Coke was unshakeable for the rest of his life.

Coke never wrote again about the conquest of infidels, though he had other observations to make about their disabilities at common law. When, around the same time, a case came before the Court of Common Pleas concerning the validity of trading privileges granted to Sir Edward Michelborne, Coke remembered infidels again. The report, however, is brief. In 1604, Michelborne received letters patent for himself from James I/VI which permitted him to trade into Asia. Subsequently Michelborne headed into the Indies, where he plundered some booty from the Vereenigde Oostindische Compagnie, before returning home to England. Were his letters patent still good for another voyage after this? Or were they in conflict with Elizabeth's 1601 charter of incorporation for the East India Company, which included—as was her style—provisions of trading exclusivity within them?<sup>32</sup> These were likely the questions which prompted Coke to return the politics of religion to the common law on the question of traders beyond the realm. In his assessment of the legality of Michelborne's exploits, Chief Justice Coke laid down "that no subject of the King [can] trade within any realm of

<sup>30</sup> Of the handful of copies of Machiavelli's *Discourses on Livy* to be found in the Holkham Hall collection at the Bodleian Library, none contains any marginalia. I was advised to look here by Gavin Loughton, whose lead I gratefully follow, seeing Gavin Loughton, "Coke's Theory of Infidels as 'Perpetui Inimici': His Sources" (unpublished paper in my possession); Loughton, "The Extension of English Law following Conquest and Settlement: The Origins of the Colonies Rule" (unpublished M.Phil. thesis, University of Oxford, 2002).

<sup>31</sup> Edward Coke, *Le Tierce Part des Reportes del Edward Coke Lattorney Generall le Roigne de Diuers Resolutions & Iudgements Donnes aucc Graund Deliberation* (London, 1602), preface; *Selected Writings of Sir Edward Coke*, 63. See also Coke, *La Huictme Part des Reports de Sr Edw. Coke* (London, 1611), preface; *Selected Writings of Sir Edward Coke*, 245–60. For a fine assessment see George Garnett, "The Ould Fields': Law and History in the Prefaces to Sir Edward Coke's Reports," *Journal of Legal History* 34/3 (2013), 245–84.

<sup>32</sup> William Hyde Price, *The English Patents of Monopoly* (Cambridge, MA, 1913), 1–34; Cecil T. Carr, *Select Charters of Trading Companies, AD. 1530–1707* (London, 1913), i–cxxxvi.

infidels, without license of the King.” His only cited authority for this remark is an obscure trading license, “made in the time of Ed. 3,” apparently issued by the king to keep subjects from lapsing from their “faith and religion.”<sup>33</sup> It is not clear what, if any, pressure the East India Company had placed on the case, nor can we be sure what result came of it. Michelborne never returned to Asia; his name is listed among the named members of the Virginia Company by its charter of 1609, but he was dead by the time the charter was issued by the great seal.<sup>34</sup> Importantly, *Michelborne* had revealed another side to Coke: in the report, Coke identifies among the personal powers of the monarch a right to impede traders from leaving the realm to communicate with non-Christians. In this was an assertion that ran contrary to the one offered by a burgeoning free-trade lobby that parliament through legislation should wrest control of commerce from the crown.<sup>35</sup>

The third of Coke’s contributions in shaping the defective personality of infidels at common law differs in form and context to *Calvin’s Case* and *Michelborne*, where his arguments take the form of *dicta* and reason in judgments. Rather, it would be his scholarly commentaries and elaboration on the work of the English jurist Littleton, *The Institutes of the Lawes of England* (1628–44), wherein Coke professed his belief that infidels, along with those of “non-sane memory,” could never appear as witnesses in England, and only Christians could take oaths.<sup>36</sup> A number of factors, among them Coke’s career at this time moving out of the courts and into parliament, and the opportunities he took while making this transition to reiterate his own views on contentious aspects of the law, combine to instil some caution into modern scholars in approach of this compendium.<sup>37</sup> Seventeenth-century common lawyers in training and in practice shared no such caution. They consulted the *Institutes* when it suited their particular purposes,

<sup>33</sup> *Michelborne v. Michelborne* (1609) 123 English Reports (hereafter ER) 952. Hereafter, as the modern English reports contain information about the other sources, only the ER citation will be given.

<sup>34</sup> *Calendar of State Papers* [hereafter CSP] *Domestic, 1603–10* (London, 1857), 121; The Second Charter of Virginia (23 May 1609), Yale Avalon Project, at [http://avalon.law.yale.edu/subject\\_menus/17th.asp](http://avalon.law.yale.edu/subject_menus/17th.asp), accessed 23 March 2017; D. J. B. Trim, “Michelborne, Sir Edward (c.1562–1609),” *Oxford Dictionary of National Biography* (Oxford, 2004) (hereafter ODNB).

<sup>35</sup> R. Ashton, “The Parliamentary Agitation for Free Trade in the Opening Years of the Reign of James I,” *Past & Present* 38 (1967), 40–55; Theodore K. Rabb, “Sir Edwin Sandys and the Parliament of 1604,” *American Historical Review* 69 (1964), 661–9.

<sup>36</sup> Coke on Littleton, 6b (L1, c1, sect. 1), and 3, c14, p. 165. Littleton (1407–81) may have written, in his *Treaties on Tenures*, upon the incapacity of those “de non sane memorie,” yet he wrote nothing on infidels. See, for example, T. E. Tomlins, ed., *Lyttleton, His Treatise of Tenures, in French and English* (London, 1841), 38, 438–9.

<sup>37</sup> Williams, “Coke,” 91–2.

and subsequently the work is one of the most-cited texts in the reports before Blackstone. Though Coke's offerings in the *Institutes* were not always strictly derived from the precedents of case law (and that is to be charitable), still many of these ideas influenced the common law on infidels well after Coke's death in 1634.

“THAT STRANGE EXTRAJUDICIAL OPINION . . . AS TO THIS PURPOSE IS WHOLLY GROUNDLESS”

The earliest pieces of news and fool's gold from Jamestown had already reached England by the time Coke's contributions to *Calvin's Case* were quickly rushed into print (in English instead of the Law French) to appear in the *Seventh Part* of his reports at the end of 1608.<sup>38</sup> There may have already been some talk about the conquest of infidels in London, then, before Robert Gray, early in 1609, delivered a sermon contemplating the prospect of conquering Virginia and its annexure thereby to England. But unlike Coke, whose mostly needless remarks about the conquest of infidels had been offered hypothetically to imply a restriction upon the arbitrary will of conquerors within Christian realms, Gray gestured more towards the motions to be made *before* a conquest than to any of those consequences that may follow afterwards. Citing unnamed authorities, Gray suggested that “all Polititians doe with one consent holde and maintaine, that a Christian King may lawfullie make warre uppon barbarous and savage people, and such as live under no lawfull or warrantable government, and may make a conquest of them.”<sup>39</sup> Scarce can be made of this kind of grandstanding, which is best, in this window, to be seen as part of a wider attempt to drum up support for the flailing enterprise in Virginia by preachers and laymen looking favorably upon the Virginia Company of London.<sup>40</sup> After 1622, however, Gray's prophesy played out, as the London “court” of the Virginia Company and the Jamestown government looked actively “to destroy” their “barbarous and

<sup>38</sup> Edward Coke, *La Sept Part des Reports Sr. Edw. Coke* (London, 1608).

<sup>39</sup> Robert Gray, *A Good Speed to Virginia* (London, 1609), 24: “so that the warre be undertaken to this ende, to re-claime and reduce those savages from their barbarous kinde of life, and from their brutish and ferine manners to humanitie, pietie, and honestie.” These remarks, which place the preacher within an older-fashioned “holy war” genre more so than they do within the common law tradition, were at odds with those of contemporaries like Leyva, Molina, Las Casas and Vitoria. For an introduction see Anthony Pagden, “Conquest and the Just War: The ‘School of Salamanca’ and the ‘Affair of the Indies,’” in Muthu, *Empire and Modern Political Thought*, 30–60.

<sup>40</sup> Andrew Fitzmaurice, *Humanism and America: An Intellectual History of English Colonization, 1500–1625* (Cambridge, 2003), 58–92.

p[er]fidious enemys,” the Powhatans, right up to 1624.<sup>41</sup> The faithlessness of the Powhatans was also invoked in this window to undermine Powhatan donations of land. The company resolved to avoid all identification of any legal personality in an infidel sufficient to allow either his public or his private alienation of land.<sup>42</sup> Perceived defects in the capacity of infidels well favored the Virginia Company, in other words, before Charles I replaced the company administration with a system of direct rule and inaugurated the first New World crown colony in the history of the British Empire in 1625.<sup>43</sup>

The Virginia Company may have waged war upon the Powhatans in 1622–4, just like the Massachusetts Bay corporation would upon the Pequots in 1637, but it was not until the reign of Charles II that corporations chartered for foreign trade began to receive explicit authorization to declare martial law and wage wars on infidels abroad. The East India Company would become the most enthusiastic recipient of the powers of war and peace upon infidels. Though founded by the patents of Elizabeth I in 1600, and sustained thereafter by the patents of James I and an obscure guarantee of Protector Cromwell, only in 1661 did the corporation receive a charter permitting it “to continue or make Peace or War with any Prince or People, that are not Christians, in any Places of their Trade.”<sup>44</sup>

<sup>41</sup> Edward Waterhouse, “A Declaration of the State of the Colony and . . . a Relation of the Barbarous Massacre” (1622), in Susan Myra Kingsbury, ed., *Records of the Virginia Company of London* (hereafter *RVCL*), 4 vols. (Washington, 1906–35), 3: 556–7, seeing also 672–3 and 683, and 4: 450–55; John Smith, *The Generall Historie of Virginia, New England & The Summer Isles* (1624), in *The Travels of Captaine John Smith*, vol. 1 (Glasgow, 1907), 286.

<sup>42</sup> There came before the London court in July of 1622 an enquiry about a land grant to a Mr Barkham, which appeared to have been issued around 1619 on the condition that within two years Barkham should have “compounded” individually with the Powhatan leader, Opechancanough, for access. Against the backdrop of war in the Chesapeake, it had finally become necessary for the corporation to contemplate the origin of its powers to distribute English titles away from England. These powers, it was tabled up in the minutes, were considered not to be founded in any expression of consent by Opechancanough. “[T]his Graunt of Barkhams was held to be verie dishonorable preiudiciall to the Companie in regard it was lymitted with a Proviso to compound with Opachankano, whereby a Soueraignity in that heathen Infidell was acknowledged, and the Companies Title thereby much infringed.” Minutes of Court (17 July 1622), *RVCL* 2: 94–5.

<sup>43</sup> Virginia Company Archives, Ferrar Papers (Magdalene College, Cambridge), 515; *RVCL* 2: 478–9, 4: 294–398; Wesley F. Craven, *The Virginia Company of London, 1606–1624* (Charlottesville, 1957), 54–8; Discourse of the Old Company (April 1625), National Archives of the United Kingdom, State Papers 1/3/40, 195; *Royal Proclamation* (13 May 1625), *SRP* 2: 26–9.

<sup>44</sup> Letters Patents (3 April 1661), *Charters Granted to the East-India Company from 1601*, vol. 1 (hereafter *CEIC*) (London, 1773), 76, seeing also Letters Patents (9 Aug. 1683), *ibid.*, 120. James Muldoon has argued that we see the distinction in English charters

In other words, all infidels found between the Cape of Good Hope and the Straits of Magellan could be (and would be) attacked without need for prior endorsement of the home government.<sup>45</sup> This was no one-off grant, either: the Hudson's Bay Company was granted similar powers of war and peace for non-Christians in Rupert's Land in 1670; in 1672, the Royal African Company was likewise equipped with a martial capability for all of its dealings with non-Christians along the west coast of Africa.<sup>46</sup> If it was not bizarre enough, within the English legal tradition, that a Christian prince might justly impose an entirely new constitutional predicament upon non-Christian communities by virtue of their faithlessness alone (per *Calvin's Case*), now chartered corporations were vested, by the royal prerogative, with powers of subordinating non-Christian communities as just such a Christian prince might.

In this period, for the first time since Coke, infidels made a comeback in the common law reports. These reports are highly abbreviated, but appear to reveal some ambivalence with regard to his *dicta*: whereas the conquest of infidels was easily invoked as a point of contrast to discussions about legal receptivity in Ireland and Wales, there is evidence of a slight move away from the idea that infidels were automatically the "perpetual enemies" of the king (oddly, however, in a case concerning the recovery of property seized from a Christian Dutch merchant).<sup>47</sup>

Infidels were soon to figure in separate discussions about the empire as a result of the great doubts which abounded in the middle decades of the seventeenth

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between Christian and non-Christian peoples as mimicry of the custom established by the Alexandrine bulls for Iberian imperial endeavours. See James Muldoon, "Columbus's First Voyage and the Medieval Legal Tradition," *Medievalia et Humanistica* 19 (1992), 11–26; Edward Cavanagh, "Charters in the *Longue Durée*: The Mobility and Applicability of Donative Documents in Europe and America from Edward I to Chief Justice John Marshall," *Comparative Legal History* (forthcoming 2018).

<sup>45</sup> Phil Stern reveals that the company went to war upon its own authority against Shaista Khan, the *nawab* of Bengal, and the Ayutthaya Kingdom of Siam, during the late 1680s. See Stern, *Company-State*, 61–82. When the company's aggression towards English subjects and foreigners became the trigger of passionate pamphlet wars at home, the absence of detailed reflection upon the difference between Christian and non-Christian targets of corporate warfare in critiques otherwise elaborate about the causes and consequences of military conduct is notable. For context see *ibid.*, 142–53. For the expansive new charter of April 1686, which introduced a more universal authorization to defend the company's establishments against all aggressors, see Letters Patents (12 April 1686), *CEIC*, 138.

<sup>46</sup> *The Royal Charter for Incorporating the Hudson's Bay Company Granted by His Majesty King Charles the Second, in the twenty-second year of his reign, A.D. 1670* (London, 1816), 16–17; Carr, *Select Charters*, 191.

<sup>47</sup> *Crow v. Ramsey* (1670) 84 ER 1122; *R v. Williamson* (1672) 89 ER 31; *Witrong v. Blany* (1673), 84 ER 789.

century over the status of overseas colonies and plantations.<sup>48</sup> It had become unclear, in the Stuart period, whether or not colonies like Virginia or Jamaica should be considered conquests, and, consequentially, how far and why the king's prerogative could alone create laws for them. Until *Blankard v. Galdy* (1693), no reported case at common law contained any clues as to *which* overseas possessions could be considered conquered and *what* their conquests entailed for government. This case concerned an attempt to recover debts in Jamaica. When counsel in defense made recourse to a statute from Elizabeth's time to disqualify the action, counsel for Blankard advanced the argument that Jamaica "was an island beyond the seas, which was conquered from the Indians and Spaniards in Q. Elizabeth's time, and the inhabitants are governed by their own laws, and not by the laws of England."<sup>49</sup> Chief Justice John Holt found for the plaintiff, but he did more than that. Modifying *Calvin's Case*, his judgment removed all actions of this kind, concerning Jamaica, from the consideration of the Court of King's Bench. As the more detailed report of the judgment makes clear, Holt felt that Jamaica was "a conquered country." Whether that conquest was of Christian Spaniards or infidel natives was unclear; regardless, the court qualified in conclusion that "in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity."<sup>50</sup> Whatever the needlessness of any recourse to the "law of God," this was a pragmatic distinction: sometimes it was unpractical, uneconomical and administratively impossible for formerly non-Christian plantations to receive automatically all the laws of England upon conquest, as was just becoming clear during the reign of Charles II.

What is more remarkable for our purposes is Holt's decision to apply this idea to Virginia a few years later in *Smith v. Brown and Cooper* (1702). This was a case before the Court of King's Bench which saw two individuals attempting to escape from obligations to pay for a slave they agreed to buy on the grounds that the conveyance of human chattel was contrary to the laws of England. Chief Justice Holt would not be moved, "for the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases; and we cannot take

<sup>48</sup> *Proceedings and debates of the House of Commons, in 1620 and 1621*, vol. 1 (Oxford, 1766), 318–19; Matthew Hale, *The Prerogatives of the King*, ed. D. E. C. Yale (London, 1976), 43.

<sup>49</sup> *Blankard v. Galdy* (1693) 91 ER 356.

<sup>50</sup> *Blankard v. Galdy* (1693) 91 ER 357. See also *Blankard v. Galdy* (1693) 90 ER 1089. At around the same time, the House of Lords was referred on appeal from Barbados the matter of *Dutton v. Howell* (1693) 1 ER 17, which designated that colony to be "a Plantation, and not a Conquest." As to the automatic abrogation of infidel laws provided by Coke—which did not therefore apply to Barbados—the Lords declared that "tho' Coke quotes no Authority for it, yet 'twas agreed, that this might be consonant to Reason."



notice of it but as set forth,” for “negroes are saleable” there. Quite how Virginia was so conquered—if at all by a corporation—was not clear. What is surely more important is how, with the merest of twists to Coke’s jurisprudence, the conquest of infidels was here perceived to provide for the jurisdictional separation of slavery abroad from slavery at home.<sup>51</sup>

After Holt’s opinions appeared in the Salkeld reports (published between 1717 and 1722), it became increasingly possible to contemplate separately the performance of conquest and the process of settling. This led to some muddling of the freshly made theoretical distinction between the two types of colony, and how, if at all, the presence of infidels could help to define either condition. In practice, the colonial peripheries defied neat classification. In Maryland between 1722 and 1726, *Blankard v. Galdy* was consulted by members of the lower house to determine “how far they are to be regarded [as] Conquerors or Occupants,” in respect to the reception of English laws after the usurpation of the “Native Indian Infidels.”<sup>52</sup> In Newfoundland during the 1730s, jurisdictional conflicts between magistrates and “fishing admirals” raised similar dilemmas over the applicability of certain statutes too, leading the solicitor general, Francis Fane, to advise “that all the statute laws made here previous to H.M. subjects settling in Newfoundland are in force there: it being a settlement in an infidel country . . . laws passed here subsequent to the settlement . . . will not extend to this country unless it is particularly mentioned.”<sup>53</sup> References either side of this opinion to the Privy Council and Chancery from Barbados confirmed a similar stance towards the receptivity of English statutes, along with further confirmation of Holt’s convention that only such “laws and customs” as “are contrary to our religion” are voidable “by the conquering prince.” Again, however, there appeared no concrete examples or guidelines to allow for some clarification of the distinction between settled/“uninhabited” and conquered colonies, let alone any judgment about the types of law and custom that might be considered repugnant to the Church of England.<sup>54</sup>

<sup>51</sup> *Smith v. Brown and Cooper* (1705) 91 ER 566.

<sup>52</sup> Proceedings (1725), Maryland State Archives, SC M 3194, 694–7. Responding, then, to the pushback of Lord Baltimore, the committee resolved upon the preferable designation of a plantation instead of a conquered country, referring “your Lordship . . . to consider . . . the Arguments in the Case of Dutton and Howell” (regardless of that judgment actually finding for a ruthless governor against the local legal authorities in Barbados).

<sup>53</sup> Opinion of F. Fane (30 March 1731), *CSP America and West Indies, 1731* (London, 1938), 76. This represented a mixture of ideas found in *Blankard v. Galdy* (1693). For a discussion see Jerry Bannister, *Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland, 1699–1713* (Toronto, 2003), 64–103. Compare, however, Jamaica, by Rex v. Vaughan (1769), 98 ER 308.

<sup>54</sup> *Anonymous* (1722) 24 ER 646; *Re: Conquest* (1744) 22 ER 188.

Although India was not yet considered to be compatible in relation to distinctions of this kind, political developments in Bengal would contribute to the abandonment of faith as a criterion for determinations of legal obligations in overseas territories. Following the death of Aurungzeb in 1707, the unified Mughal empire to which the East India Company had grown accustomed began to spall off in a number of jostling successor states. In this context, the scope for martial conduct expanded, which was endorsed in the martial provisions of new charters granted to the company in 1726 and 1753.<sup>55</sup> The latter of these was issued just in time for the official outbreak of war with France, an event responsible for removing any practical division between Christian and non-Christian combatants in India. Even though European trading companies had been squaring off with each other intermittently during the 1740s—often on behalf of their allied Indian princes—the formal outbreak of the Seven Years War in 1756 made the crown a direct interest in the company’s skirmishes with the French state, the French East India Company and native Indians. A theater of war of such complexity was unforeseen by basic wartime legislation on the matter of French prizes, which made no provision for royal armies, corporate armies and native armies facing off on many fronts, sometimes in uneven combinations, and sometimes on their own.<sup>56</sup> In consequence, as the attorney general and solicitor general were confounded to propose a way to distinguish between company “treaties” and crown “conquests,” it was deemed no longer practical or necessary to distinguish between enemies on account of their faith. Their new preference was instead to develop a distinction between “European” and “Indian.”<sup>57</sup>

<sup>55</sup> The new charter of 1726 endorsed the creation of standing armies made up of locals and led by company officers. The charter also endorsed moves “upon just Causes, to invade and destroy” enemies; “to encounter, expel and resist, by Force of Arms, and also to kill, slay and destroy, all such Persons”. These liberties were again confirmed in 1753. See Letters Patents (24 Sept. 1726), 382–3, 388, 394; Letters Patents (26 Jan. 1753), *CEIC*, 433–4, 440–41, 447–8.

<sup>56</sup> 29 Geo. II, c. 34.

<sup>57</sup> Referred Queries (16 Nov. 1757), British Library, Hardwicke Papers, MS 35917, 22–5; Copy of the Attorney and Solicitor Generals Report, on the Petition of the East India Company (24 Dec. 1757), in Sheila Lambert, ed., *House of Commons Sessional Papers of the Eighteenth Century*, vol. 26 (Wilmington, 1975), 6–7; British Library, India Office Records, A/2/7, 99–108. When finally the company’s warlike conduct against Indians was contemplated within English courts of law, in *Nabob of the Carnatic v. East India Company* (1791–3), faith was inconsequential to the otherwise lengthy trial. Those parts of *Calvin’s Case* (1608) pertaining to the conquest of infidels were no longer deemed relevant in the 1790s. By this time, besides, an informal corporate empire had been superseded, with Pitt’s India Act (1784), by a more formal system of governing Indian territories with crown oversight. See *Nabob of Arcot v. East India Company* (1791) 29 ER 544; *Nabob of the Carnatic v. East India Company* (1791) 30 ER 391; *The Nabob of Arcot v. The East India Company* (1793) 29

Besides those in the sub-continent, the Seven Years War (1756–63) had a number of overseas theaters in the Atlantic. Victorious in many of these, Great Britain collected a number of new cessions, which finally prompted parliament and the courts to contemplate anew the juristic meaning of conquest and its place in the imperial constitution. Early on, Quebec formed the centerpiece of discussions on this head: being Christian, though Catholic, its receptivity to English laws (and English Protestantism) remained uncertain for over a decade.<sup>58</sup> The island of Grenada fell into the same boat, of course, but what brought it, and not Quebec, to the attention of the courts was not the applicability of statutory law there, but rather the issue of prerogative taxation. When the planter, Alexander Campbell, called the king's jurisdictional bluff by bringing an action to recover the amount he paid to a crown customs officer, the matter made its way to the King's Bench. With that, the scene was set for a special verdict to expose what conquest actually entailed for king and parliament in the British Empire.

Chief Justice presiding was Lord Mansfield. True to form, he appeared uneasy about references to *Calvin's Case* during the arguments of *Campbell v. Hall* (1774).<sup>59</sup> When Archibald MacDonald invoked Coke in his appearance for Campbell, Mansfield interjected with an observation that those "opinions are very loose." Later, when Francis Hargrave, appearing for the customs collector, Hall, insisted that the ability to alter conquered constitutions belonged entirely to the royal prerogative, and proceeded to use *Calvin's Case* to distinguish

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ER 841 ("There is one objection made to the person of the plaintiff in this case, that he is not a Christian: but that objection has been over-ruled these many years"); *Nabob of the Carnatic v. East India Company* (1793) 30 ER 521. Stat. 24 Geo. III, s. 2, c. 25.

<sup>58</sup> "Is it possible," asked Mansfield with exasperation of Prime Minister Grenville in 1764, "that we have abolished their laws, and customs, and forms of judicature all at once?—a thing never to be attempted or wished. The history of the world do[es]n't furnish an instance of so rash and unjust an act by any conqueror whatsoever: much less by the crown of England, which has always left to the conquered their own laws and usages, with a change only so far as the sovereignty was concerned . . . The fundamental maxims are that a country conquered keeps her own laws, 'till the conqueror expressly gives new." Mansfield to Grenville (24 Dec. 1764), *The Grenville Papers*, ed. William James Smith, vol. 2 (London, 1852), 476–8. The classic treatment remains Philip Lawson, *The Imperial Challenge: Quebec and Britain in the Age of the American Revolution* (Montreal and Kingston, 1989).

<sup>59</sup> From at least 1759, Mansfield had shown himself to be an eager proponent of the devaluation of *dicta* from *Calvin's Case*. For example, *Rex v. Cowle* (1759) 97 ER 601: "What was dropped about [regarding the constitution of Berwick] in *Calvin's case*, was a mere obiter opinion, thrown out by way of argument and example. My Lord Coke was very fond of multiplying precedents and authorities; and, in order to illustrate his subject, was apt, besides such authorities as were strictly applicable, to cite other cases which were not applicable to the particular question under his judicial consideration."

between countries acquired by “conquest” and by “descent,” what little credibility remained for Coke’s lines on infidels is clear from the interchange that followed:

*Hargrave:* Coke mixes it with another distinction between Infidel and Christian countries which is now justly exploded. But this ought not to prejudice the other part of the doctrine, which is not liable to the same objection—

*Mansfield:* Don’t quote the distinction for the honour of lord Coke.

*Hargrave:* My lord, I cite the case, not on account of the distinction between Infidel and Christians, but for the doctrine assented to by the judges in respect to the right of the king over all conquered countries. Though the difference derived from the religion of the country may be absurd and unreasonable, still there may be other parts of the case not liable to objection. Lord Coke, describing the king’s power over a conquered country, says, “He may at pleasure alter and change the laws of the kingdom: but till he does make an alteration the ancient laws remain.” So that according to the opinion in this case, the king has the complete power of changing the laws of the conquered people, as he thinks proper and convenient.<sup>60</sup>

Later in the trial, when John Glynn, for Campbell, mentioned Coke’s *dictum* about conquered infidels only to confirm that he should hope “for the honour of lord Coke [that] it ought not to be spoken of [again]”, he was nearly correct.<sup>61</sup> It would be spoken of again, but once more, as Mansfield drove the final nail into the coffin with his ruling. Still deferential, Mansfield moved the modern jurisprudence of his court from Coke’s medieval prejudices: “The laws of a conquered country continue until they are altered by the conqueror . . . the absurd exception as to pagans, in Calvin’s case, shews the universality of the maxim. The exception could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the crusades.” Preserving Coke’s distinction between “conquest” and “descent,” Mansfield is elsewhere less mannerly in his contempt for “that strange extrajudicial opinion, as to a conquest from a pagan country . . . which as to this purpose is wholly groundless, and most deservedly exploded.”<sup>62</sup>

That Mansfield should have offered in the process some new *dicta* of his own, advice more befitting the wars of the later eighteenth century, should not be surprising either, nor indeed should it surprise that it would be these *dicta* which gave *Campbell v. Hall* (1774) its weighty importance in the imperial

<sup>60</sup> *Campbell v. Hall* (1774), *CST* 20: 294–5.

<sup>61</sup> *CST*, 20: 308.

<sup>62</sup> *CST*, 20: 323, 325.

constitution. Among other things, Mansfield went out of his way to clarify the relationship between crown, parliament, and colonial legislatures. According to Mansfield, the king's power to create laws by his prerogative alone for Grenada was disqualified by his earlier endorsement of the installation of a legislative assembly for the island. Thereupon, only such laws as were passed by the imperial parliament, and those passed subordinately "by the assembly with the governor and council," were valid in conquered countries. Over the next few decades, those plantation colonies of the West Indies which accrued to Great Britain were governed according to this *dictum*, but teething problems abounded, for merely the *acquisition* of colonies by conquest or cession imposed no *obligation* upon the crown to grant local legislatures. Many colonies therefore went without legislatures for some time, wherever they were regarded, from the viewpoint of London, as unready for self-government in the English model.<sup>63</sup> Trinidad by dint of its mixed composition and hybrid legal system, for example, was administered after 1797 by a despotic crown governor who preferred instead to corrupt those customs he inherited from the previous Spanish *régimen* than to receive English laws, and this was no aberration thanks to *Campbell v. Hall*.<sup>64</sup> Courtesy of Mansfield, conquest in English legal thought, though shorn of its ridiculous intolerance of non-Christian legal systems, now carried a clear message to colonial subjects that their teleological progression towards self-government was something that had to be accomplished and politely received. This too would remain a recurring theme in the imperial imagination for the next 150 years.

“AS TO THE TRADING WITH INFIDELS, AND THEIR BEING PERPETUI INIMICI, THIS WAS LAUGHED AT BY HIM”

*Michelborne* was exhumed in 1681. This was done to find a meaningful way to address the problems caused by private unlicensed traders abroad, those called “interlopers.” Interlopers had been raising all sorts of questions about infringements upon the liberty or privilege of trade throughout the 1670s. Multiple authorities in different corners of the world developed strategies in response that were often inconsistent in approach and jurisdictionally dissonant. Colonial courts and councils, company tribunals, courts of admiralty,

<sup>63</sup> See D. J. Murray, *The West Indies and the Development of Colonial Government, 1801–1834* (Oxford, 1964). For wider context see Ward, *Colonial Self-Government*; Benton and Ford, *Rage for Order*.

<sup>64</sup> For the abuse of gubernatorial power in colonial Trinidad see James Epstein, *Scandal of Colonial Rule: Power and Subversion in the British Atlantic during the Age of Revolution* (Cambridge, 2012).

vice-admiralty, common law and equity, the Commons, the Lords, and the Councils of Trade and Plantation—each reporting to the Privy Council, which in its turn, referred questions to the revolving doors of the king’s lawyers—were all confounded by interlopers and the odium of monopoly.

Making matters more complicated, infidels were thrown into this mix. Referred an enquiry about the East Indies trade by the Privy Council in November of 1681, the attorney general, Robert Sawyer, recalled Coke’s recommendation in *Michelborne* that trading with infidels was impossible without the king’s license. As Sawyer would advise the king, “by law, your Majesty’s subjects ought not to trade or traffic with any infidel country not in amity with your Majesty, without your licence.” Sawyer therefore recommended a royal proclamation be issued to “require your subjects’ obedience” to this assertion, and to remind potential interlopers that the company’s license to prohibit others from India was “good in law.”<sup>65</sup> The same day, Charles II issued a proclamation to this effect, forbidding all private trade with “infidels or barbarous nations,” and restating the exclusive trading region of the East India Company.<sup>66</sup> This was not positive law, but an expression of how the king and council thought law should bind, and as such it did not sit around for long before facing a test in the courts.

Late in 1682, king and council received inside word that Thomas Sandys, unaffiliated with the East India Company, was outfitting a ship bound for the Indian Ocean. On 13 December, the king’s advocate general in the Court of Admiralty, Sir Thomas Exton, was directed to issue an order “that the said ship shall not go nor trade with any infidel country within the limits of the East-India Company’s charter without His Majesty’s licence.”<sup>67</sup> The wording here is curious for its conflation of reasons for restricting the trade within this particular region: owing to its irreligion (“shall not go nor trade with any infidel country”), and also its delimitation within letters patent (“within the limits of the East-India Company’s charter”). It is telling for us that the infidel portion of this equation for staying the ship on the Thames appears absent from the presentations before the Court of Chancery, where the issue headed next. Here, where common law *dicta* and *ratio* need not apply, representatives for the company hoped for a swift first-instance honoring of the charter. In January, Lord Keeper Francis North cared not for any argument about infidels, assessing only the validity of the seizure on the basis of the patent, and “the Antiquity of their Possession, which had not

<sup>65</sup> Opinion of Sawyer (16 Nov. 1681), in William Forsyth, ed., *Cases and Opinions on Constitutional Law* (London, 1869), 422–3.

<sup>66</sup> *Royal Proclamation* (16 Nov. 1681), in Robert Steele, ed., *A Bibliography of Proclamations of the Tudor and Stuart Sovereigns*, vol. 1 (Oxford, 1910), 452.

<sup>67</sup> *Sands v. Exton* (1682) 83 ER 255.

been till now of late Interrupted by these Interlopers.”<sup>68</sup> Sandys, for his part, declared simply that the patent was a monopoly and therefore void. Although North thought that the patent had been issued for the regulation of trade rather than for its monopolization, he refused to be drawn into an assessment of its validity, which was better the job, he insisted, for the common law.<sup>69</sup>

Submissions and appeals were brought into the inferior courts in the middle of 1683, requiring arguments to be rehearsed intermittently before the King’s Bench up to the beginning of 1685. Space does not permit any excursion here into the many fascinating aspects of this case, which circled around the prerogative writ of *ne exeat regnum* (restricting departure from the realm), the authority of letters patent in regard to the awarding of exclusive trading privileges, the extent to which the corporation could be considered a monopoly, and the extent to which the company’s activities ran afoul of statutes from the time of Edward III (1327–77) opening the seas to all merchants and prohibiting stockpiling.<sup>70</sup> Besides all of that, *East India Company v. Thomas Sandys* (1683–5) necessitated a conversation about the power of the crown to permit or prohibit trading with infidels. “I do conceive that by the law of the land,” offered counsel for the company, the up-and-coming John Holt, citing *Michelborne*, “that no subject of England can trade with infidels, without licence from the king; or at least it is in the power of the king to prohibit it.” This Holt followed up with a reminder that infidels were the perpetual enemies of England. Off Holt then set on a zealous imploration of the “preservation of Christianity,” before rounding off with a recitation of Coke on the cessation of all laws upon the conquest of infidels.<sup>71</sup> In response, George Treby, the recorder for London, took aim, first, at Coke’s remarks upon infidels in *Michelborne*: “a casual saying,” based on “slender authority,” and “reported as *dictum obiter* . . . which the clerk took, and likely mistook, for it is no where said in my lord Coke’s own books, though they are voluminous . . . Neither Mr. Holt nor I can find [the licence from Edward III], nor does my lord Coke tell us where it was.”<sup>72</sup> But this hardly mattered: “If the law had been according to this conceit,

<sup>68</sup> Thomas Vernon, *Cases Argued and Adjudged in the High Court of Chancery*, vol. 1 (London, 1726), 128.

<sup>69</sup> *Ibid.*, 129–30.

<sup>70</sup> *The Great Case of Monopolies between the East-India Company and Thomas Sandys* (1683–5), the best consolidated edition of which appears in *CST*, 10: 371–554.

<sup>71</sup> *Ibid.*, 373, 374, 375, 378: “The profession and preservation of Christianity is of so high a nature, that of itself it supersedes all law: if any law be made against any point of the christian religion, that law is ipso facto void. Why? Because it is made against the prime and original end of government. If the king conquer a christian country, their law continues till it be altered by the King; but if he conquers a pagan country, the law ceases ipso facto to be law; for the law of infidels is contrary and repugnant to the christian religion.”

<sup>72</sup> *Ibid.*, 390–91.

there would have been much said and done about it in divers cases.”<sup>73</sup> So much, then, for *Michelborne*. Moving onto *Calvin’s Case*, Treby was more categorically dismissive. “As to this singular opinion of infidels being perpetual enemies, it is not easy to understand what my lord Coke means by it”:

It seems by these words, that it is to be understood of a spiritual discord in respect of religion, and not a temporal between the nations: for he says, it is because they are the Devil’s subjects, and he relies upon the texts of scripture: and if this perpetual hostility be taken in a political and proper sense, and the law be so, it destroys the licence and privilege of the Company, and their action brought, and all possibility of such a thing for them. There is not nor can be any peace, treaty or intercourse between the English and the Indians, but a constant never-ceasing state of war; and especially if it lie founded upon a Divine precept: for whatsoever prerogative the king may have, he cannot have a prerogative to dispense with the canon of the scripture.

Treby, tempted here to argue that prohibitions from trading with infidels applied as much to the company as it did Sandys, ultimately dismissed the whole “notion” to be “a conceit absurd, monkish, fantastical and fanatical.”<sup>74</sup> Trade ought to be free between consenting peoples regardless of their predispositions of faith.<sup>75</sup>

Before the King’s Bench in the summer of 1684, the solicitor general, Heneage Finch, opened proceedings with a reminder of *Michelborne* before then recounting Holt’s case.<sup>76</sup> The most original interpretation in Finch’s presentation concerned the ordering of the empire, one that was probably conceived, it might be guessed, with all of those references from the Privy Council about the Caribbean fresh in his mind. Chartered trading corporations, Finch declared, “are in the nature almost of foreign plantations, under a regulated and Christian government within themselves, whereby those mischiefs are prevented, that would have fallen upon an unlimited and unregulated trade with infidels, that are enemies to our religion and nation; which the law . . . takes so much care to prevent.”<sup>77</sup> That the politics of Caribbean legislatures could be seen in the same light as trading companies purely to reaffirm the suggestion in *Michelborne* that trade with non-Christians was prohibited gives a remarkable indication of how functionally synthetic—but still unthought-through—the

<sup>73</sup> *Ibid.*, 390: “there would have been proceedings against persons that had traded to Grenada, (of which the Moors lost the dominion within these 200 years) to Barbary, to Turkey, and other infidel places in Asia, Africa, or America, but we never heard or read of any till now.”

<sup>74</sup> *Ibid.*, 391–2, 394.

<sup>75</sup> *Ibid.*, 402–405. For an alternative and more succinct account of Treby’s argument, which only catches the end of Holt’s, see *East India Company v. Sandys* (1683) 90 ER 62.

<sup>76</sup> *CST*, 10: 406.

<sup>77</sup> *Ibid.*, 411.



imperial constitutional imagination had become within officialdom by the end of the Stuart period.

Responding to this for Sandys was Henry Pollexfen, who was adamant that this case concerned neither the king's power to organize trade nor his power to prevent subjects from leaving the kingdom, but was rather just about monopoly and the means by which the joint-stock corporation had acquired it.<sup>78</sup> Unlike the regulated trading companies for the Levant and Russia, which allowed merchants to trade with their own stocks in distributive collaboration with the corporation, the East India Company operated on a closed model with a sole stock, which restricted all trade to direct employees of the corporation. "[W]e must be as silly as the infidels they deal with in these matters not to distinguish betwixt these corporations," Pollexfen joked, before then vilifying the corporation for being organized around a joint stock.<sup>79</sup> What made this case all the more absurd to Pollexfen, perhaps more than anyone else, was the irrelevance of religion to any contemplation of the trading privileges found in the possession of a fictitious corporate personality.<sup>80</sup> He then concluded with a parting stab at Coke's remarks about infidels in *Calvin's Case* in relation to the customary reception of Jews, "Turks," and "Barbars," with whom no contract could be possible if they truly were perpetual enemies in the common law.<sup>81</sup> Nothing of this was sufficient to influence the decision of Chief Justice George Jeffreys, however, who ruled unequivocally for the prerogatives of the crown and, by extension, of the chartered corporation. This unusual adjudication advised Sandys to consider himself lucky to have been stopped from attracting penal punishment, for as Jeffreys warned with much ambiguity, should Sandys had gone out to trade with infidels in the Indies, then the consequences would have been far worse.<sup>82</sup>

<sup>78</sup> Ibid., 419–28.

<sup>79</sup> Ibid., 435–6: "In whom is the property? In the corporation. Who buys and sells all? The corporation. Who are the debtors for the money that buys and provides these merchandizes? The body politic, the corporation, the invisible body. Who shall be sued for all these debts? The body politic; sue them as you can, they will either be too great and too rich to contend with, or else in that condition as you know not how or where to have them. An invisible body, subsisting only in *intelligentiá legis*, a body politic without soul or conscience, as the law says it to be."

<sup>80</sup> Ibid., 440–41: "how fixed those are in their religion they daily take in; and how then can there be confidence in a body politic, which the law says has neither soul nor conscience? What confidence can be reposed in such a person about religion?"

<sup>81</sup> Ibid., 442, 445–50.

<sup>82</sup> Unconvinced by the need to distinguish between joint-stock and regulated corporations, and less than enamoured of corporations generally, Jeffreys entered a decision that was above all one for the prerogative: foreign trade may be restrained by the king; corporations begin and end in the crown; "the king is absolutely master of war and peace"; and more

One final controversy regarding monopoly and letters patent came into King's Bench before the disappearance of James II, though it is often overlooked. Early in 1687, Pollexfen appeared for an interloper against the Company of Merchant Adventurers. Holt, one of the king's newest serjeants, appeared for the corporation with Finch, fresh from his dismissal the year earlier from his position as solicitor general for his refusal to support a Catholic appointment to the mastership of an Oxford college.<sup>83</sup> The "very ancient company" of London at the center of the dispute had enjoyed privileged control of the cloth export trade to the Low Countries for over two centuries. On the basis of its Elizabethan letters patent, the corporation brought a special action against a trader by the name of Rebow, who "did trade into those parts without their authority, and imported goods from thence."<sup>84</sup> Fresh on the heels of *Sandys*, the case against Rebow was polished. Pollexfen, in response to the counsel for the company, was clever to insist that this case was different from *Sandys* for the critical reason that nobody considered Western Europe to be an infidel territory.<sup>85</sup> This forced the litigants into deeper reflection upon the king's prerogative to regulate trade; or, more specifically, how this prerogative measured up, first, to fourteenth-century statutes of the realm opening the seas to all merchants, and second, to the prohibitive tenor of the common law towards patents of monopoly. Finch now found the tide running against him. With the suit irreparably discredited, because no infidels were involved, he made the desperate objection at this stage that the company's patents were good because "we trade with separate stocks," rather than "a joint-stock."<sup>86</sup> The case fell apart and no judgment was entered, with the report left only to suggest ambiguously that prerogative grants touching staple trades were void without parliamentary authorization.<sup>87</sup>

This turned out to be the first of many common law rulings which slowly, if unevenly, peeled back some of the privileges granted by prerogative to chartered

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of that besides. *Ibid.*, 518–54, comparing also *The Argument of the Lord Chief Justice of the Court of King's Bench Concerning the Great Case of Monopolies* (London, 1689).

<sup>83</sup> Paul D. Halliday, "Finch, Heneage, First Earl of Aylesford (1648/9–1719)," *ODNB*; and Halliday, "Holt, Sir John (1642–1710)," *ODNB*.

<sup>84</sup> *The Company of Merchant Adventurers v. Rebow* (1686) 87 ER 81, 82.

<sup>85</sup> *Merchant Adventurers v. Rebow* 87 ER 83–4.

<sup>86</sup> Two years earlier before the King's Bench, it had been Pollexfen who first made the tactical separation of joint-stock and regulated models in his case against Finch and the East India Company. But this time, when Finch tried the same, it worked completely to Rebow's advantage—for, as Pollexfen told the bench, if the Merchant Adventurers operated on an open model, then they could not possibly maintain any action at law to exclude others on the basis of provisions in letters patent.

<sup>87</sup> *Merchant Adventurers v. Rebow* (1687) 90 ER 340.

trading companies.<sup>88</sup> The most important intervention in this respect curtailed the ability of the Royal African Company and the East India Company to seize vessels suspected of interloping, and once again, Holt as Chief Justice leaves his mark upon the law. The case concerned Jeffrey Nightingale, an interloping slave trader, who sought to recover his ship, the *James*, which had been seized by the Royal African Company's vice-admiralty court. Upon an action of trover (for the recovery of damages for the conversion of personal property) in the King's Bench, a special verdict was delivered on the validity of the charter, which necessarily entailed the measuring of the company's delegated authority of vice-admiralty against the common law's protections against the seizure of property. The case gets uneven coverage in the reports, with Sir Bartholomew Shower's account of his own showing in defense of Nightingale the most elaborate and, for our purposes, revealing. Anticipating an argument "that infidels are alien enemies, and to trade with them is unlawful, and therefore a seizure lawful," Shower is reported to have offered the following appraisal:

I find [no] pretence for such an opinion in the books; there is nothing but Michelburn's case, and that is but a short and imperfect note of a case, and all that it amounts to is this: that the King may restrain his subjects from commerce with them, which argues nothing to this purpose here in our case, and it is plain that commerce is allowable with the Jews, which according to the gospel are greater enemies to Christianity than the Gentiles are. That it was not unlawful antecedent to their charter, appears from the statutes, for they open the seas to all merchants for all manner of trade, as 18 Edw. 3, st. 2, c. 3, "that the seas are open to all manner of merchants to pass with their merchandizes where it shall please them". Besides, the charter prohibits trade there, not because it is inhabited by infidels, but doth indefinitely forbid all but the company, whether the country shall be Christian or Pagan. Secondly, it is no argument that they were infidels, and trade with them might be prohibited, that therefore the goods should be forfeited . . . I will suppose their principle true, that they are *perpetui inimici*, and then according to that notion a trade with them is treason, as an abetting of the King's enemies; and yet even in that case there ought to be no seizure of the offender's goods till conviction, or at least indictment or inquisition: but further, I will suppose their charter makes it unlawful, yet it cannot impose the penalty of confiscation of goods, for by Magna Charta no man is to be dispossessed of his property but by *legale iudicium parium suorum*.

A wonderful example of the chaotic method typical of common law arguments of the period, all this maneuvering between different interpretations of custom, statute, case law, letters patent, and the Magna Carta might instead be seen as just

<sup>88</sup> William A. Pettigrew and George W. van Cleve, "Parting Companies: The Glorious Revolution, Company Power, and Imperial Mercantilism," *Historical Journal* 57/3 (2014), 617–38.

the kind of thing good counsel had to do to win cases. Holt indeed was swayed, awarding damages and costs to *Nightingale*.<sup>89</sup>

This beckoned the return of Thomas Sandys to the courts in 1692 to make good his earlier losses. Procedurally and jurisdictionally, his task was made somewhat harder by having to prove a tort for which the company should be responsible (for in his case it had been the king who ordered Admiralty to seize his ship). Here is not the place for a detailed account of the complexities involved in this fascinating interchange which, despite the company's attempts to evade the charge by hiding behind a corporate personality, ultimately confirmed on appeal that Sandys should expect damages.<sup>90</sup> It is sufficient here merely to note how, in arguing for the company in the first stages, Sir Creswell Levinz is said to have "laughed at" any notion that trading with infidels was prohibited because they were perpetual enemies. With this gesture, "the Court seemed to agree . . . for how shall they be converted, if conversation with them is not lawful?"<sup>91</sup>

**"SO ODIOSUS, THAT NOTHING CAN BE SUFFERED TO SUPPORT IT, BUT POSITIVE LAW"**

If the recognition of property within persons was impossible within England, this did not necessarily mean that slavery was therefore impracticable in the English Atlantic. Rather, all it ensured was that no suits could be heard at common law anywhere that required an assessment of the value of human chattel. This was about to change, however, and the rehashing of Coke's remarks upon infidels and villeinage allowed for this. Thus came about the oddest cameo for infidels in English courts in the century following 1670: made to perform in such a way as to make chattel slavery compatible with the common law.<sup>92</sup>

*Butts v. Penny* (1676) introduced faithlessness definitively into the jurisprudence of slavery. Before the Court of King's Bench, it was alleged by trover that "negroes were infidels, and the subjects of an infidel prince," and for that reason purchasable and sellable "by the custom of merchants." Mainstream reports of the case are spare and highly compressed, but it appears that the

<sup>89</sup> *Nightingale & Al' v. Bridges* (1689) 90 ER 1160, and 89 ER 496. The report again appeared to imply, as it had done in *Rebow*, that prerogative grants contrary to the common law were void without the special authorization of parliament.

<sup>90</sup> A clear case history is given before the account of the appeal at *Child & Al' v. Sands* (1693) 90 ER 774. See also *Sands qui tam v. Child & Al'* (1693) 90 ER 436.

<sup>91</sup> *Sands v. Child and Lynch* (1693) 90 ER 148; also 83 ER 725.

<sup>92</sup> For these developments in their wider legal and imperial contexts see George van Cleve, "Somerset's Case and Its Antecedents in Imperial Perspective," *Law and History Review* 24/3 (2006), 601–69; Holly Brewer, *Inheritable Blood: Slavery and Sovereignty in Early America and the British Empire* (forthcoming, 2018).

*Institutes* were used to facilitate an enquiry into the suitability of the analogy of villeinage, despite the very little by way of support offered by Coke (or Littleton, for that matter) on chattel slavery. In the course of subsequent argument, it then appears to have been implied that baptism was sufficient to enfranchise slaves, but until such point “there might be a property in [negroes] sufficient to maintain trover.”<sup>93</sup>

The implication that baptism might modify the personality of a formerly faithless slave was queried in *dicta* and *ratio* of subsequent case law often hinging on the technicalities of common law pleading.<sup>94</sup> The first case of importance would be *Sir Thomas Grantham’s Case* (1686). Having come into the possession of a “monster” from “the Indies,” Grantham wished to make a spectacle in England of his rare disfigurement. Upon returning to England in 1685, however, the slave was baptized and detained, compelling Grantham to bring a writ of replevin in order to restore his property. His action appears to have been successful notwithstanding doubts about the type of property actually restorable.<sup>95</sup> Trover emerged again in *Gelly v. Cleve* (1694). There it was held, before the Court of Common Pleas, “that trover will lie for a negro boy; for they are heathens, and therefore a man may have property in them.”<sup>96</sup> Trespass was subsequently allowed for “qualified property” in slaves in *Chamberline v. Harvey* (1696), following the baptism and removal to England of a slave originally in the possession of Chamberline without his consent. Elaborate arguments were made on either side of the proposition that baptism brought about the manumission of a slave. In the end, however, this was inconsequential to the more important contention of the case, namely as to the kind of damages awardable to slave owners (ultimately circumscribed here to account only for the loss of *service* instead of value or damages).<sup>97</sup> One final case of importance in this window was *Smith v. Gould* (1705), which cast fresh doubts upon the action of trover for slave property. Turning over *Butts v. Penny*, and finally dismissing the notion that infidels were

<sup>93</sup> *Butts v. Penny* (1676) 84 ER 1011; *Butts v. Penny* (1676) 83 ER 518.

<sup>94</sup> This point is made better by William M. Wiecek, “Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World,” *University of Chicago Law Review* 42/1 (1974), 86–146, at 90.

<sup>95</sup> *Sir Thomas Grantham’s Case* (1686) 87 ER 77.

<sup>96</sup> *Gelly v. Cleve* (1694), a note about which exists at *Chamberlain v. Harvey* (1696) 91 ER 994.

<sup>97</sup> Van Cleve, “Somerset’s Case,” 616–17. Interestingly, the argument about conversion availing freedom was shown to be an agreeable custom in England because “Mohometan” countries observed similar conventions. *Chamberline v. Harvey* (1696) 87 ER 601: “And if this be a custom allowed amongst infidels, then baptism in a Christian nation, as this is, should be an immediate enfranchisement to them, and they should thereby acquire the privileges and immunities enjoyed by those of the same religion, and be intitled to the laws of England.”

property by default, Chief Justice John Holt recommended that the superior action to bring was a suit in trespass upon the servitude of a captive, the ownership over whom was ambivalently conceded.<sup>98</sup>

The real scare, first exposed in *Chamberline v. Harvey* (but impossible without the support of the *Institutes* and *Calvin's Case*), that slaves converting to Christianity might hasten their evasion of the completest condition of chattel, carried over into the early eighteenth century. In the slaveholding American colonies, a consensus began to emerge, from a slew of statutes, that a slave who converted after enslavement would not attain freedom, but a slave originally Christian in his or her country of birth might enjoy the case for conditional leave from bondage.<sup>99</sup> However bold it was to measure straight-talking colonial legislation against the abbreviated judgments of English law reports, the result of these acts was a drop in opposition among slaveholders to converting their slaves to Christianity. Reservations about slave baptism remained among a few slaveholders, particularly those in Jamaica, until the crown law officers were advised to weigh in on the question in 1729.<sup>100</sup> In that year, the attorney general, Philip Yorke, and solicitor general, Charles Talbot, offered their opinion that a slave was not made free just by reaching Great Britain, “nor doth baptism bestow freedom on him, or make any alteration in his temporal condition, in these kingdoms.”<sup>101</sup> Ostensibly, the opinion was offered to encourage slaveholders to christen their slaves and also to deter escapees from attempting to reach the British Isles, but stood, for two decades, without much by way of support before the judgment of the Court of Chancery in *Pearne v. Lisle* (1749). Yorke, now as Lord Chancellor, here confirmed his opinion of 1729 while in the process discrediting *Smith v. Gould* (1705):

I have no doubt but trover will lie for a Negro slave; it is as much property as any other thing . . . There was once a doubt, whether, if they were christened, they would not become free by that act . . . till the opinion of Lord Talbot and myself, then Attorney and Solicitor-General, was taken on that point. We were both of opinion, that it did not at all alter their state.<sup>102</sup>

<sup>98</sup> *Smith v. Gould* (1705) 91 ER 567; *Smith v. Gould* (1706), 92 ER 338.

<sup>99</sup> Marcus W. Jernegan, “Slavery and Conversion in the American Colonies,” *American Historical Review* 21/3 (1916), 505–7.

<sup>100</sup> When Jamaican legislation of 1712 prevented slaves from providing evidence against “free negroes,” doubts were raised again about what kind of liberty baptism ought to convey there. See Opinion of Edward Northey (16 April 1717), in George Chalmers, ed., *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (Burlington, 1858), 497–9.

<sup>101</sup> See Prince Hoare, *Memoirs of Granville Sharp, Esq.* (London, 1820), 5.

<sup>102</sup> *Pearne v. Lisle* (1749) 27 ER 48.

Only in equity could the presiding Lord Chancellor cite his own benediction as attorney general in order to disqualify precedents at common law. But statute was now on his side: seeing negroes as property was encouraged by imperial legislation of 1732.<sup>103</sup>

The combined effect of this statute, the colonial statutes and *Pearne v. Lisle* was to remove the question of infidel status from the equation of property rights in slaves for the next few decades, however repugnantly this was beginning to run against the feelings of metropolitan opponents to slavery. Legal scholar William Blackstone pulled no punches in his treatment of “the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty,” in his *Commentaries on the Laws of England* (1765–7):

The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection, to a Jew, a Turk, or a heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection in England before, as after, baptism.<sup>104</sup>

This was stirring, but not, strictly speaking, jurisprudence. The definitive chance for that would have to wait until *Somerset v. Stewart* (1772).<sup>105</sup> This case concerned the detention of James Somerset, an African slave, in England, in preparation for his voyage in bondage to Jamaica. Ordering Somerset to be discharged and given freedom, Lord Mansfield in the Court of King’s Bench declared slavery to be “so odious, that nothing can be suffered to support it, but positive law.”<sup>106</sup> With that, Mansfield threw away the old common law of slavery and created a new common law of slavery, one that anticipated, but could not yet respond to, the momentous discord about to break out between central abolitionism and peripheral proslavery. Faithlessness played no part in the legalism of this distinction as it then developed in the British Empire: following *Somerset*, through to the statutory abolition of the slave trade in 1807, and finally with the substitution of slavery with apprenticeships in 1833, parliament and the common law strode with their heads together, Whig alongside wig, to eradicate slavery.<sup>107</sup> In the southern slaveholding

<sup>103</sup> Stat. 5 Geo. II, c. 9.

<sup>104</sup> Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (Philadelphia, 1893), 1: 424.

<sup>105</sup> *The Case of James Somersett* (1772), *CST*, 20: 1–82. See also Wiecek, “*Somerset*,” 86–146.

<sup>106</sup> *CST*, 20: 82. For speculation as to what Mansfield might have meant by “positive law” in this context see the discussion at Oldham, *English Common Law*, 313–18.

<sup>107</sup> It is fair to say, as well, that these accomplishments would have been far trickier were it not for the development of the new crown colony model and introduction of the carrot of self-government, both of which were the result of Mansfield’s admixture of his own brand of juristic pragmatism with that of Coke’s and Holt’s in *Campbell v. Hall*.

states of America, by contrast, lawyers tried their hardest to forget *Somerset* in order to develop their own common law of slavery for the nineteenth century.<sup>108</sup>

### “THE COMMON LAW WORKS ITSELF PURE”

This article has shown how, piecemeal, after *Nightingale*, judges in the English courts of common law aggressively queried many of the incapacities associated with the legal personality of infidels. Certainly the most stubborn of these incapacities to carry into the eighteenth century was the inability of infidels to give evidence in court. It is ironic that some of the earliest moves away from Broke and Coke on this head concerned only Christians. In *Wells v. Williams* (1697), for example, the plaintiff was a French Protestant who brought a suit for the recovery of debts. His action was queried owing to his status as an “alien enemy,” it was alleged for Williams, amid the Nine Years War. “But now,” counsel for Wells retorted, “commerce has taught the world more humanity.”

It was beginning to teach the world political economy, as well. At the end of so many years of making new enemies on the Continent, it was never so evident to common lawyers that it was now necessary to retain peaceful foreign merchants “*sub protectione*” in England, and to provide them with the fullest capacity to maintain actions at law. Finding for the French plaintiff, the Chief Justice of the Common Pleas also took the opportunity to affix to the judgment a repudiation not only of Coke’s *dictum* about *perpetui inimici* but also Broke’s *dictum* about pagans in the Year Books of Henry VIII.<sup>109</sup> The Chief Justice in question was George Treby, who as counsel for Thomas Sandys had been the first to take issue with Coke’s pronouncements on infidels thirteen years earlier, losing, though, as he did on that occasion. Treby could now try to set things right, if only with his own *dicta*. As such, that left it up to later judges to determine if they could be used to overturn preceding *dicta* and custom touching the inability of non-Christians to bring actions and give evidence in court. Herein we see a recurring trend in the early modern common law, a trend which, this article has argued, can best be understood by historians of ideas sensitive to the contingencies of personae, politics and pragmatism, all of which together shaped the laws of England and its empire. The replacement of old *dicta* with new *dicta* amounts to more than just

<sup>108</sup> Wiecek, “*Somerset*,” 118–41; Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill, 1996).

<sup>109</sup> *Wells v. Williams* (1697) 91 ER 46: “for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons.”

See also *Wells v. Williams* (1697) 91 ER 1086.



a thing of jurisprudence; it reveals the history of political and economic ideas at work.

Few examples illustrate this phenomenon better than *Omychund v. Barker* (1744), which allowed Hindus to swear oaths, and present depositions, in pursuit of debts from the East India Company. Great Britain, at this stage, was strategically embedded in an alliance against France, amid a global fight over monarchy and religion that was soon to reach the shores of the Carnatic. All the while, the first intellectual strides were being made towards embracing “commercial society” and abandoning all “jealousy of trade.”<sup>110</sup> It was in this context that the law officers of the crown were appointed counsel to “witnesses of the Gentoo religion” before Chancery late in 1744. “It is of the greatest moment,” argued the attorney general, Dudley Rider, “that we should have commerce and correspondence with all mankind; trade requires it, policy requires it, and in dealings of this kind it is of infinite consequence, there should not be a failure of justice.” These sentiments were then advanced, in the framework of an argument for a reforming common law tradition, by the capable solicitor general, William Murray (twelve years before swearing into the King’s Bench as Lord Mansfield). For the young Mansfield, Coke’s remarks from the *Institutes* were “not warranted by any authority, nor supported by any reason, and lastly contradicted by common experience.” Recognizing, further, that the age of discovery had given way to the age of global commerce, Mansfield argued that the statutory requirement for providing oaths had fallen out of step with the times, warning that Chancery, if careless, may commit the same error: “All occasions do not arise at once; now a particular species of Indians appears; hereafter another species of Indians may arise; a statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.”<sup>111</sup> Expressions like this were to become emblematic of a common law tradition that could look just as comfortable tearing strips off its competing institutions as it could in Coke’s time. That Edmund Burke, during the impeachment of Warren Hastings before the Lords, would “use Lord Mansfield’s expression” about the common law and the fountain of justice, while making the case for “conforming our Jurisprudence to the Growth

<sup>110</sup> David Hume had recently published the first edition of his *Essays Moral and Political* (1741), wherein he decried the “great Jealousy” of nations with regard to commerce, being the rudiments of a more developed argument in “Jealousy of Trade” (1758) for all nations to adopt “enlarged and benevolent” policies of trade towards each other. See David Hume, *Essays, Moral and Political* (Edinburgh, 1741), 180–82 (“Of Liberty and Despotism”); Hume, *Essays and Treatises on Several Subjects* (London, 1758), 187–9 (“Of the Jealousy of Trade”).

<sup>111</sup> *Omychund v. Barker* (1744), 26 ER 21, 22–3.

of our Commerce and of our Empire,” suggests something of the circumstantial importance of the expression.<sup>112</sup>

Mansfield’s quickly iconic description of the common law working itself pure is all the more interesting because of its utterance before the Lord Chancellor in a court of equity. There, not only was his opinion shared, but the idea would be pushed even further by his senior colleague, John Willes, the Chief Justice of the Common Pleas. Willes argued more persuasively than Mansfield that the common law had to purge its impurities in order to make Christian toleration compatible with undiscriminatingly free trade. Not only bad statutes, but bad *dicta* too, had to be discarded in the process. Obstructing infidels from maintaining an action in English courts was “contrary not only to the scripture but to common sense and common humanity . . . and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits.”<sup>113</sup> Now in a new Christian spirit of commerce, Hindu men were allowed to present depositions in the courts. Tradition could not entirely be abandoned in the process, however: it was clarified that Hindu testimony was permissible only because Hindus believed in their *own* deity.<sup>114</sup>

Part of the magic of the English common law, from the old Year Books through to the present, is the motivation it gives to its practitioners to engage with old contexts for the purpose of evaluating the reiteration of *dicta* and *ratio* in changing political and economic circumstances. In one sense, the common lawyers of the seventeenth and eighteenth centuries worked more as intellectual historians than their Continental colleagues did, if only by the antiquity of the actions, the formality of the pleadings and the encouragement they received to recall precedents in context. In another sense, however much they hoped to avoid reliving the mistakes of their ancestors, the deliberate and self-preservationist insularity of their profession instilled in its practitioners a need to keep a little distance from debates in the Commons, coffeehouse gossip and the writings of men like Bacon, Hobbes, Child, Locke, Hume, Smith and Burke. Sometimes, undoubtedly, counsel and judges translated many of these externalities into the bespoken

<sup>112</sup> Edmund Burke, “Debates on Evidence” (30 April 1794), in *The Writings and Speeches of Edmund Burke*, ed. P. J. Marshall and William B. Todd, vol. 7 (Oxford, 2000), 168–9. See Lieberman, *The Province of Legislation Determined*, 88–98; Bourke, *Empire and Revolution*, 820–50.

<sup>113</sup> *Omichund v. Barker* (1744) 125 ER 1312, seeing also 26 E.R. 15. Compare *Mary Collins v. Lord Boyd* (1755) at *Morison’s Dictionary of Decisions* (Edinburgh, 1909), no 9608.

<sup>114</sup> English law was ecumenical before it was agnostic, while atheists waited for the Oaths Act (1888), 51 & 52 Vict., c. 46.

vocabulary of the common law. But at other times, they were clearly ahead of the curve, anticipating rather than responding to broader political changes.

Following infidels through this common law world reveals, first, a willingness to adapt old rules for new circumstances, coupled, second, with a fear of moving too far from the precedents of old case law. Now, both of these characteristics are still attributable to common lawyers today, well after the globalization of their enterprise (a development, it needs only be added, that might not have occurred if its strong intolerance towards non-Christians had not been expunged).

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