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CALVIN'S CASE AND THE ORIGINS OF THE RULE GOVERNING 'CONQUEST' IN ENGLISH LAW

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I INTRODUCTION

When the monarch of England acquires a new territory by conquest he or she may change the laws of that place; but, until then, its old laws remain in force. I shall call this common law rule 'the conquest rule'. It is almost always expressed as but one part of larger, composite common law rule. This larger rule is best known from Chapter 4 of Book 1 of the first edition of Blackstone's *Commentaries*:

Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been gained by conquest, or ceded to us by treaties. And both of these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held (Salk 411, 666[[1]]), that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them (P. Wms 75[[2]]). But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country (7 Rep. 17b *Calvin's case*. Show Parl C.31).[3]

This larger rule (which I shall call 'the colonies rule') as stated by Blackstone thus has three main elements:

1. it divides territories newly acquired by the king into two broad categories. The first category is comprised of territories acquired by settlement of empty, or at least uncultivated, lands. The second category is comprised of territories acquired by conquest and territories ceded under treaties;

2. as to settled lands, English settlers take English law with them to their new home, as their 'birthright';

3. as to conquered and ceded lands, their old laws remain, unless and until the king changes them (with an exception in the case of laws that are against the law of God).

It follows that the colonies rule is of importance in the legal history of the British Empire, and in the legal histories of the places that were once, or are still, part of that empire.

In the colonies rule's dichotomy between settled lands on the one hand, and conquered and ceded lands on the other, 'settled lands' have, over time, assumed far and away the more important place.[4] It is hard to find cases of an English colony that the judges have agreed should be regarded as having been 'conquered'.[5] Nevertheless, the conquest rule — that is, that part of the colonies rule that deals with conquered lands — was the earliest to emerge. When discussing settlement, Blackstone cannot find a case worth citing earlier than 1693. When discussing 'conquest' he can go back to *Calvin's case* in 1608. Moreover, *Calvin's case* itself, as well as several other seventeenth century cases, went back further and cited the Angevin conquest of Ireland and the subjugation of Wales in the middle ages as instances of the conquest rule.[6]

A thorough history of the colonies rule — to which this essay is a contribution[7] — begins, therefore, with the conquest rule. How far back can this rule be traced in English law?

II THE MEANING OF 'CONQUEST' AT COMMON LAW

There appears to be no major reported common law case that has ever tried to define the term 'conquest'. However, the ordinary meaning of the word entails the acquisition of territory by force of arms.

One of the most salient features of 'conquest' at common law is the irrelevance of motivation or justification. An acquisition of land by force of arms counts as a legally valid 'conquest' regardless of the justice or injustice of the act. As Conrad has Marlow put it in the *Heart of Darkness*, '[t]hey were conquerors, and for that you want only brute force'.[8] Marlow adds that the practice — 'not a pretty thing when you look into it too much' — can be redeemed by an unselfish 'idea at the back of it'. But that there is a good or bad motive behind a conquest does not effect its characterisation as a 'conquest' or the validity of the conqueror's title to land so acquired. To common lawyers, acquisition of territory by force is an 'act of state' that municipal courts must simply accept.[9] The rule into whose origins we are enquiring can therefore be shortly paraphrased: when the king of England acquires a new land by force of arms then, regardless of the justice or injustice of the acquisition, the land belongs to the king and he may alter its laws, though until he does so the old laws of the place remain in force.

III THE SPREAD OF ENGLISH LAW FROM THE NORMAN CONQUEST (1066) TO THE CONQUEST OF WALES (1284)

Does, as *Calvin's case* suggest, the origin of the rule lie in the middle ages?

It is true that during the period between the Norman conquest of England and the end of Edward I's final subjugation of Wales, the area under the sway of English laws increased dramatically. There

would not be another expansion of English authority on a comparable scale until the seventeenth century.

So far as the conquest rule is concerned, the most important event of this period is the Angevin conquest of Ireland. Medieval Ireland was not a politically united land. It was a patchwork of sub-kingdoms whose rulers' allegiances to their local kings varied from place to place and from time to time. No Irish ruler was ever powerful enough to reduce the whole island to a lasting obedience of the kind that the kings of England frequently enjoyed. When, in what follows, we speak of 'Ireland', it is to a geographical, not political, entity that we refer.

Henry II went to this land with a large army in 1171.[10] Historians now question whether Henry's expedition of 1171-1172 justifies the description 'conquest'.[11] His large army met little opposition, and the various native rulers quickly submitted.[12] Pope Alexander III gave his blessings to the whole enterprise once it was successfully concluded and Henry had ensured reform of Irish ecclesiastical law.[13] Many of Henry's men stayed in Ireland to enjoy lordships of their own. Settlers followed. It seems strange to modern lawyers to speak of the Angevin 'settlement' of Ireland. The colonies rule has trained us to think of 'conquests' and 'settlements' as two mutually exclusive categories. In this dualism Ireland has always been a conquest: in his report of *Calvin's case* Coke stated that Ireland 'originally came to the Kings of England by conquest',[14] and all the cases have followed him.[15] Yet as a historical fact, Henry II's 'conquest' was followed by settlement.

In 1210 Henry's son, by then King John, went to Ireland. He also went with a large army, and with the principal purpose of establishing his authority among the not wholly obedient Anglo-Norman baronage there. The expedition was successful. Those Anglo-Norman barons who did not flee submitted to John, as did many Irish chieftains. By the end of the expedition, only a few Irish rulers in parts of the north lay wholly outside John's control.[16] It appears that John issued a charter requiring English laws to be observed by the Anglo-Irish barons. He may have followed this up by sending to Ireland a register of original writs.[17] Later references in the Patent and Close Rolls of Henry III confirm that John ordained that English laws were to be in force in Ireland.[18] English penetration into Ireland increased steadily up until about the reign of Edward I. This was both in terms of the amount of area brought under English control, and the introduction of English judicial administrative machinery, eg, a Chancery, itinerant justices, a 'central' court in Dublin, the sheriff's tourn, etc.[19] (After the reign of Edward I, for factors beyond the scope of this essay, English influence in Ireland began a long decline that was not reversed until the sixteenth century.)

Ireland was not the only place into which English law penetrated in the middle ages. Norman adventurers had ventured into Wales between the conquest of England and the 1130s. The situation in south and east Wales was markedly different from that in the north. In the south ('the March') Norman barons carved out lordships for themselves, sometimes out of what had previously been Welsh kingdoms.[20] The legal systems that emerged in them were curious amalgams of Welsh law, English law, and feudal principle. Those three same ingredients, differently dispersed in the various lordships, represented a series of working compromises between the conquering barons and conquered Welsh.[21] These compromises were not governed by any overarching legal principle. Some land was held by English land tenure, some by Welsh rules. Welsh courts existed alongside English ones. The barons devised their own forms of the English original writs, but some Welsh procedures were retained. This plurality survived for centuries. It was acknowledged in Magna Carta: chapter 56 provides that disputes about tenements in the March are to be settled by the law of the March.

The north of Wales ('the Principality'), managed at first to maintain a greater degree of independence from England. But this diminished over time, and the Principality finally succumbed completely after a short war in 1276-7 and then an unsuccessful revolt in 1282-3.[22] In the Statute of Wales of 1284 Edward 'annexed and united' Wales to the Crown of the realm of England. He declared that he had sifted through the laws of the Welsh, abolished some, allowed some, corrected some, and added others.[23] Welsh law, in the March and the Principality, survived in various forms until Henry VIII.[24] He resolved 'utterly to extirpe all and singuler the senister usages and customes' in Wales that differed from those in England. Thereafter English law prevailed.[25]

IV DID THE CONQUEST RULE EXIST IN MEDIEVAL ENGLAND?

There is a puzzling feature about the expansion of English law between 1066 and 1284. Notwithstanding what the references in the later cases might suggest, there does not appear a rule of law to regulate it. There is no reference to a medieval version of the conquest rule in *Glanvill*, nor in *Bracton*, nor in the early Year Books. There are fragments of discussion about conquest, but not a clear common law rule.

It is true that Norman rules of inheritance distinguished between land obtained by inheritance on the one hand, and 'acquired' land on the other, the latter category perhaps including lands obtained through conquest.[26] The rule is mentioned in *Leges Henrici Primi*[27] and also in *Glanvill*.[28] But the distinction did not survive into the common law[29] (though it appears to have survived in some borough customs[30]). Roman law had a number of rules concerning the rights to things captured in war.[31] These rules were known in England. The historian Henry of Huntingdon (writing between 1125 and 1145), for example, resorted to Roman law in accounting for Caesar's conquest of the Gauls, the Roman subjugation of Britain, and Henry I's defeat of the French king.[32] The author of *Bracton*, like Henry of Huntingdon, knew of the Roman rules about things captured in war. When it came to discussing the topic 'Of Acquiring Dominion' (a topic which takes up a sizeable part of the treatise) there are a handful of references to these rules.[33] But these references are brief and scattered, not amounting to a clear rule, and certainly not the conquest rule. The author of *Bracton* does not seem inclined to formulate such a rule. He tells us that Ireland and Wales are in the power and dominion of the King, but he does not tell us how this came about.[34] Indeed, in several places Bracton stresses the illegitimacy (in private law) of property acquired by force in time of war.[35]

Of course, we should not look for a legalism that did not exist in such matters. 'Twelfth-century England had no constitution', there was 'no coherent theory of sovereignty' says Holt.[36] Moreover, as Plucknett observed, one must bear in mind:

> the fundamental character of the common law, an understanding of which is vital if English legal history in the middle ages is to be read aright; the common law is the product of administrative procedures ... . The common law, therefore, crystallizes around procedures ... . The common law system of writs, returns, and pleadings is thus modelled on the routines of business organization as it existed in the twelfth century ... .[37]

As aggressive as the English king was during the middle ages, it is a little unreal to suppose that the business of conquest had become so routine that a standard administrative procedure had grown up around it and then become crystallised in a common law rule.

Nevertheless, it would misstate the evidence to say that the medieval lawyers of England never talked as if there were legal rules about the acquisition of territory by force. Sutherland finds Roman law rules about conquest in certain passages in the *Dialogus de Scaccario*.[38] There are, in the Irish documents from the reign of Edward I, some instances of liberties in Ireland being traced back to (and possibly derived from) the English 'conquest' of Ireland.[39] And, most important of all, during Edward I's quo warranto campaign from 1278 to 1294, some lawyers appear to have explored the proposition that certain franchises that appeared to be acquired by prescription (ie by uninterrupted use over a long period) are actually derived from William's invasion in 1066.[40] Reconstructing the details of the argument as it was proposed in the courts involves some speculation. The manuscript evidence of the argument, in the Year Books and elsewhere, is brief and enigmatic.[41] However, it appears that the argument was to the effect that rights acquired by prescription are ultimately derived from the conquest itself — not from a grant from William the Conqueror in return for assistance.[42]

So, while we can hardly say that England's medieval lawyers knew of the conquest rule as stated by Blackstone, we cannot say that they had no use for rules about the acquisition of territory by force either.

V THE MEDIEVAL ATTITUDE TO CONQUEST

The answer is that England's medieval lawyers had a doctrine to deal with conquest, but it was not *our* doctrine of conquest.

Unlike as is the case with the conquest rule, medieval legal thought did not accept that military aggression, alone and of itself, could result in the legally valid acquisition of new territory. '[L]aw is always what does right; for will and force and violence are not right', said the author of the *Leges Anglorum*, writing early in the reign of John.[43] Bracton said that a king is a king when he rules well 'but a tyrant when he oppresses by violent domination the people entrusted to his care'.[44] According to John of Salisbury, princes are forbidden to gather to themselves treasures of silver and gold, or procure affluence from rapine.[45] Geoffrey of Monmouth had King Arthur proclaim that '[n]othing that is acquired by force and violence can ever be held legally by anyone'.[46] On the continent, some lawyers impugned the legality of the Roman Empire on the grounds that it had been obtained by force. Their opponents could not deny that force was no legal basis for the Empire, and had to try to dodge the attack in other ways.[47] Canon law even demanded that the right of infidels to their lands and self-government be respected, in point of doctrine at least. Pope Innocent IV writing c.1250 had examined the question of whether the lands of the infidels were legally open to conquerors and held that, as a general rule, they were not.[48] (There was a rival and more bellicose doctrine about infidels advanced by the canon lawyer Hostiensis, but Innocent IV's statement of the position appears to have been more widely accepted.[49])

However, that the middle ages would have looked with suspicion, even hostility, on Blackstone's enunciation of the conquest rule does not mean that conquest could never be legally permissible then. Sometimes, it could.

Canon law was a more appropriate forum than the common law for the formulation of rules of high constitutional importance about the acquisition of territory by force. And canon law allowed that there could be a 'just war'. Indeed that this was the only kind of war that canon law would recognise as having legal standing. M H Keen, in his discussion of the law of war in the late middle ages, notes something equally true of the period of interest to us: 'the first principle of the legists was that only a just war could have legal consequences'.[50]

A just war is not the same as 'conquest' in the sense of the word that is used in the conquest rule. The just war is primarily defensive or retributive, not aggressive. The influential canon lawyer Gratian (writing c.1140)[51] synthesized the ecclesiastical authorities into this formula: the just war must be authorised by a legitimate public authority, and be waged in response to some kind of injury: for instance, to recover lost goods, to punish wrongs, or in self-defence.[52] These criteria found their way, by a circuitous route, into Bracton's treatise. The civilian jurist Azo, following Justinian, wrote that war could be attributed to the law of nations.[53] But then Azo added something not found in the corresponding passage in the *Digest*, namely Gratian's limiting criteria for the just war: the wars that are founded on the law of nations (says Azo) are those declared by the prince and/or to repel an attack.[54] Bracton reproduced, with only minor alterations, Azo's rendition of the *Digest* complete with the canon law interpolation.[55] Thus the canon law's suspicion of aggressive wars is present in an English law book.[56]

None of this necessarily meant that the acquisition of an empire through force was, in the eyes of canon law, impossible. A ruler might acquire an empire after waging a series of just wars. But such a chain of events would be very regrettable. As Saint Augustine had said of the Roman empire:

... to rejoice in the extent of empire is not a characteristic of good men. The increase of empire was assisted by the wickedness of those against whom just wars were waged. The empire would have been small indeed, if neighbouring peoples had been peaceable, had always acted with justice, and had never provoked attack by any wrong-doing. In that case, human affairs would have been in a happier state ... To make war and to extend the realm by crushing other peoples, is good fortune in the eyes of the wicked; to the good it is stern necessity ... . It is a wicked prayer to ask to have someone to hate or to fear, so that he may be someone to conquer.[57]

The general position was, then, conquest out of a lust for power was impermissible and, indeed, sinful. Force of arms could only be used to vindicate some pre-existing right or title.[58]

This is a far more restrictive rule than our conquest rule. Medieval rulers who wanted to expand the area under their dominium did their best to give the appearance of working within this narrower legal framework. Hence royal apologists in England preferred to recast what we would call conquests as if they were something else: gifts, inheritances, or vindications of subsisting rights in a just war.

The chronicler William of Poitiers (c1020 – c1087?) took this approach when he sought to present a legal case for the Norman conquest of England.[59] Edward the Confessor, he said, had granted his entire kingdom of England to Duke William. William was not fighting a war of expansion. The Duke merely fought to 'claim his inheritance' which had been 'wrongfully seized' by the usurper Harold.[60] William was 'determined to avenge this injury with arms [armis injuriam ulcisi] and claim his inheritance'.[61] The chronicler's choice of words here is extremely suggestive. It mirrors St Augustine, who had written that 'those wars are normally called just which avenge injuries [quae ulcisuntur injurias]', for example, 'to restore what has been unjustly taken'.[62] Traces of the same formulation of the just war appear in the writings of St Isidore of Seville (c.560-636)[63] and can ultimately be traced back to the classical definitions set out by Cicero, [64] a writer whom William of Poitiers confessed to admire.[65] In other words, William of Poitiers was trying to pass off a conquest as if it were a 'just war' of the kind permitted in the authoritative sources of canon law. We find this argument carrying the day in an English court as late as the Eyre of Northamptonshire of 1329-1330.[66] Indeed, this is may be the sense in which we should generally understand the use of 'conquest' in the quo warranto arguments of Edward's time: not as an acquisition of new lands by the sword alone, but rather as the reclamation of territory that, in law (or so the rationalization went), belonged to him the conqueror all along.

Other medieval writers resorted to dodges in their discussions of 'conquest'. Gerald of Wales (who had studied canon law and, indeed, claimed to have lectured in it[67]) called his work *Expugnatio Hibernica* (the *Conquest of Ireland*). Even so, he suggested that the Angevin subjugation of Ireland under Henry II and John was not so much the aggressive expansion of English authority as the exercise of a pre-existing hereditary right. Drawing on fables in Geoffrey of Monmouth's *Historia regum Britannie*, Gerald said that Ireland belonged to the king of England because the first 'Irish' settlers had been sent there by the king in the beginning (before that, according to Geoffrey, the island was 'completely uninhabited desert'); or alternatively, that the native Irish were descended from lands under Angevin rule; or alternatively, that the kings of Ireland had once paid tribute to the mythic King Arthur.[68] (As to this last reason, Gerald avoided mentioning the fact that in Geoffrey's account Arthur's claim came from his prior violent conquest of Ireland. [69]) Similarly, a chronicler whose work survives in the Great Chartulary of Glastonbury (compiled c.1338-1340 from earlier documents), so as to be able to claim that the kingship of the land of the Scots had fallen to Edward I by descent, went so far as to falsely assert that David I of Scotland (1124-1153) died without an heir.[70] Likewise in a letter of 1301 to the Pope Edward I based his claim to the lordship of Scotland principally on inheritance.[71]

Portraying what seemed like military domination as the claiming of an inheritance was not the only option. Another legitimate way of acquiring authority over new lands in the middle ages was to have the natives voluntarily submit – by oaths of fealty or, better, homage. A royal apologist could try to recast a conquest in that light. Gerald's fourth justification of Henry II's claim to Ireland was to deny that force was involved in the acquisition. The native Irish rulers 'freely bound themselves in submission to Henry II king of England by the firm bonds of their pledged word and oath'.[72] And when all other legitimations failed, there was papal authority. This was Gerald's fifth and final justification for Henry's acquisition of Ireland. The Pope claimed to have authority over Ireland, and indeed all islands, by virtue of the (forged) Donation of Constantine. [73] Thus Gerald could assert that Henry's expedition was legitimate because he was the Pope's agent.[74] Gerald produced a papal bull that Adrian IV had issued in 1154 authorising Henry to enter Ireland in order to extend the authority of the church and correct the 'evil customs' of the Irish

(a document that Henry himself had declined to act on when it was first issued).[75] These are the lengths that even historians would go to, to avoid asserting that kings could legitimately extend their kingdoms by force alone.

Alternatively, a war of domination might be presented as the enforcement of a feudal bond. In 1276-7, when Edward I went against Llywleyn ap Guffudd, the prince of Wales, it was for the ostensible reason that Llywleyn had failed to fulfil his feudal obligations to the king, and so was a rebel and disturber of the king's peace. Edward's justification was not in terms of conquest (which was his deeper motive), but in terms of enforcement of feudal duty.[76]

VI WHY THE CONQUEST RULE DID NOT EXIST IN ENGLISH LAW IN THE MIDDLE AGES

We are now in a position to give some interim answers. The conquest rule as expounded by Blackstone did not exist in English law in the middle ages. There are several reasons for this.

In the first place, such a rule could hardly be contemplated by the common law, which at that time generally did not aspire to the formulation and enforcement of great rules of constitutional law.

In the second place, the body of law more suited to the formulation of such rules — the canon law — was generally suspicious about, if not frankly hostile to, the notion that a ruler could lawfully acquire new territory by force alone. This limited the scope for the development of any rule about legal rights springing from conquest alone.

In the third place, such place as could be found for force as a tool of territorial expansion was limited to 'just war' theory. Under such theory, ordinarily force could be used to vindicate an existing right to territory, not to create a new right. This all but foreclosed the possibility of a medieval version of the conquest rule. Under the conquest rule as we know it the acquisition of new territory by force, being an act of state, is 'a catastrophic change, constituting a new departure'.[77] In a legal system where so much is admitted, then the matter of what laws are to apply after the 'new departure' is an obvious problem. But medieval conquerors, labouring under the constraints of just war theory, generally strained to avoid any admission of a 'new departure'. They wanted to be seen as rightful heirs and upholders of the existing legal order, not bringers of 'catastrophic change' with plenary power to alter the laws; they wanted to give the appearance of continuity, and not 'introduce discontinuity and usurpation into what should be a seamless web of legitimacy'.[78]

Thus William the Conqueror did not try to present himself as having wrought a catastrophic change in England's legal order. On the official line, the military victory in 1066 simply showed, as in the case of trial by combat, that his claim to the Crown was a just one all along. As William of Poitiers put it, the Conqueror, 'this wise and Christian man was firmly convinced that the omnipotence of God, which wills no evil, would not allow a just cause to fail ...'.[79] Thus, as Maitland points out, William dealt with those he defeated not as if they were part of a conquered population, but as if they were rebels against the rightful king:

> ... the capital instance of harsh treatment consists in an application of theory that they have not been conquered by foreign enemies, but, having rebelled against one who was de jure king of the English, are to be lawfully punished for their unlawful deeds. Those who fought by Harold's side forfeited their lands, and so of course did those who resisted William after he was crowned. These forfeitures, so far from clearing the way for pure Norman law, had the effect of bringing the barons under English land law.[80]

Similarly William, as rightful king of England, was keen to be seen as the upholder of the ancient laws and customs (however much he may have actually changed them). We have several instances of William the Conqueror expressly confirming the pre-existing law.[81] He ordered the shire and hundred courts to be attended as in the past.[82] In the famous Penenden trial of 1072 (or

thereabouts), William ordered Aethelric, Bishop of Chichester, 'a very old man, very learned in the laws of the land' to be brought by chariot 'in order to discuss and expound these same old legal customs'.[83] We even have a writ of the conqueror ordering litigation concerning the ownership of land to be stopped if the (Norman) litigants 'refuse to proceed as they would have proceeded in the time of King Edward'.[84]

For all these reasons, it was impossible for the conquest rule as we know it, with its connotations of catastrophic change and with the awarding of plenary power to the conqueror however unjust the conquest, to exist in the middle ages.

VII HOW ENGLISH LAW DID SPREAD IN THE ABSENCE OF THE CONQUEST RULE: THE REALITIES OF POWER

Yet as we have seen, in the period between the Norman conquest and the final conquest of Wales, the king of England did extend his authority, and the authority of English law, to other parts of Britain, by force and by threat of force. If we are hard pressed to find a law book expounding a theory of how it happened, we nonetheless cannot deny the phenomenon.

How are we to explain the medieval penetration of English law to other parts of Britain in the absence of legal rule to justify it? 'In truth', says Davies 'it requires an exceptional degree of historical innocence to see feudal rituals, obligations and terminology – especially between rulers – other than in terms of structuring the realities of power'.[85] These 'realities of power' – so influential to later lawyers that they took them to be a precedent – are what we must examine to explain the process by which English law was established in places like Ireland and Wales in the middle ages.

Power in the shape of the Royal Will was one of the principal factors shaping the legal landscape of Ireland. The power and will of the English king was an operative factor in bringing English law to Ireland even before John went there in 1210 and extracted from his Irish barons oaths to observe English law.[86] The events of 1210 themselves we have already noted. Subsequently, in the reign of Henry III, the king's strictures to the Irish barons take the form of reminders of what the barons had promised the king in 1210. In 1228, Henry III commanded his justiciar to cause the whole of the ruling class of the Irish counties to come before him, to read John's 1210 charter to them, and to enjoin them 'on pain of forfeiture to firmly keep those laws'.[87] In 1233 Henry III again reminded the Anglo-Irish that it was 'manifestly contrary' to the English laws and customs established by John for the ecclesiastical court to be hearing pleas touching advowsons, lay fees and chattels.[88] And yet again in 1246 Henry III ordered that, for the common benefit of Ireland and the unity of the King's dominions,

... all the laws and customs which are observed in England should be observed in Ireland, and the said land should be subject to the said laws, and should be ruled by the same, as the Lord, King John, when he was last in Ireland, ordained and ordered to be done.[89]

Of course, all of this equally shows us that the power of the king's will had limits: if the king had been omnipotent there would have been no need to obtain from the barons promises to obey English law, nor to repeatedly remind the barons of what had happened in 1210. Nonetheless, bounded as it was by all the factors that affect the waxing and waning of political power, the king's will could affect the law. When medieval English judges of the time of Henry III and Edward I discuss Ireland they appear to do little more than the minimum necessary to give effect to the royal will. That Ireland broadly shares English law is put as a laconic assertion of fact which the courts accept and into which they do not enquire. Judges in Ireland must not 'proceed contrary to law and custom of Ireland, which enjoys English law', and there is little further analysis.[90] It is, during the thirteenth century, a matter of obedience to the King's will and respect for his authority.

Similarly, Davies has shown that an important feature in shaping the legal position of the lordships in the March of Wales and in the Principality was the king's will.[91] In some instances the Welsh

found certain English legal practices useful, and so were not hostile to them. In others however, the King played a stronger hand. The culmination of the latter tendency occurred in 1284 when, after completing the conquest of Wales, Edward I promulgated the statute of Wales in which he stated that having considered the laws and customs of Wales, he had abolished certain of them, allowed some, and corrected some.[92]

Thus the extension of English law to other parts of Britain in medieval times between the Norman conquest and about the end of the thirteenth century occurred by exercises of power and convenience that were not the subject of very clear legal rules. At the most, if there was a rule it was to the effect that the extension of English law was a matter within the discretion of the king. But if this be a rule, it is a rule that was only imperfectly followed and it is rule we must infer; for lawyers did not expressly articulate it. Furthermore, speaking of the king's will in this way may be to misrepresent it. Jolliffe has shown that one of the essential features of Angevin kingship was its extra-legal power, its 'ungoverned strength'[93] or 'force unrationalized'.[94] Describing the king's will as if it were an instrument of constitutional authority is to court anachronism.

VIII THE FASHIONING OF A RULE ABOUT CONQUEST IN THE SEVENTEENTH CENTURY

A *The Position in the Late Middle Ages*

There is little evidence that English lawyers developed a significantly new doctrine of conquest between the 1300s and the late 1500s. Keen suggests that well into the fourteenth century warriors sought to present aggressive wars in the guise of 'just wars'.[95] Christopher Allmand draws attention to the coronation oath of Henry VI in 1429 (ie. during the wars between England and France over Acquitaine, Normandy and other parts of France which English kings considered theirs as a matter of feudal right) in which Henry was exhorted, consistent with canon law discussed above, to avenge injuries ('ulciscaris iniusta') and be the powerful defender of his country.[96] Allmand also refers to Sir John Fortescue's characterisation, in the mid fifteenth century, of war as 'a legal trial by battle [in which] he [ie. the King] seeks the right he cannot obtain by peaceful means'.[97] And when Henry VII came to the throne, the supporters of the defeated Richard III were not treated as 'conquered', but as rebels who were guilty of treason against the rightful king. Richard himself was pointedly referred to as the 'late duke of Gloucester' who had named himself King Richard III by usurpation.[98] Thus the defeated supporters of Richard were governed by the same theory that had been applied to Harold's supporters after the battle of Hastings. By this theory Henry VII was not a 'conqueror' in the sense a common lawyer today would use the word; rather the verdict of God, that Henry was the rightful king all along, was revealed in Henry's victory at the battle of Bosworth.[99] In the early seventeenth century, George Buck and Francis Bacon, in their respective histories of Richard III and Henry VII, describe Henry basing his claim to the throne on several legal arguments, one of them being conquest or 'de jure belli'. But to the extent that Henry did rely on such a basis, it seems unlikely that he would have advanced it in anything other than the 'just war' sense.[100]

B *New Interest in Conquest by the Late Sixteenth Century*

The next great period of English expansion began with the colonization of America in the early seventeenth century. This was the period that saw the creation of the conquest rule by common lawyers. They reached back to the medieval conquests of Ireland and Wales for their source material and transformed them to fashion a new legal doctrine of conquest.

Medieval English law's suspicion about the rectitude of using force to extend English rule never completely disappeared. However, by the late sixteenth and early seventeenth centuries there are signs of a new interest in the concept of conquest. This was perhaps prompted or hastened by the need of the European powers to find some basis in the Law of Nations for acquiring territories in the new world.[101] The Spanish seem to have led the way in a modest, if shortlived, rehabilitation of the concept of conquest — albeit in a way consistent with just war theory. Specifically, the

Spanish conquest of America was but a way to perfect legal rights whose ultimate source lay elsewhere, for instance in Papal grants based on the Pope's duty to convert unbelievers.[102] The charter that the Spanish monarchs granted to Columbus before he set sail, and their patent of privileges to him, variously spoke of the discovery, acquisition and conquest of new lands.[103] It may not be coincidence that Henry VII's letters patent to John Cabot of 1496, like the Spanish monarchs' patent to Columbus, authorised the recipient to 'subdue, occupy and possesse [*Subjugare, Occupare & Possidere*]' such lands as he discovered.[104] Later royal authorisations to Humfrey Gylberte (1578) and Sir Walter Raleigh (1584) also mentioned 'conquest'.[105]

There are other indications that English lawyers were become more accepting of the legitimacy of conquest as a basis of legal right. In a case late in Elizabeth I's reign it was said that, by an Act of Parliament, Henry IV and his heirs possessed the Isle of Man 'per Conquest'.[106] There was no suggestion in the report that conquest was wrong or illegitimate. And in argument in *Calvin's case* before the Exchequer Chamber in 1608 Francis Bacon appeared to be a positive advocate for conquest. He praised English law as 'the law of a warlike and magnanimous nation fit for empire'.[107]

IX THE BACKGROUND TO *CALVIN'S CASE*: THE DEBATE ABOUT THE UNION BETWEEN ENGLAND AND SCOTLAND

Calvin's case is important for another reason. It shows that in the early seventeenth century English politicians, lawyers and writers had reasons other than the Americas to prompt them to think about the concept of 'conquest' in a systematic way. A potent spur was the intense political debate about James I's project for a closer union between England and Scotland. This issue first arose when James I (James VI of Scotland) assumed the throne of England in 1603. Arguments about the Union project, in and out of Parliament, occupied much of the nation's political energy in the years up to 1608.[108]

During these arguments 'conquest' was used in technical sense. It became a word that denoted one specific method (amongst several) by which a king expands his kingdom. Participants in the political debates had looked to history for precedents about political union. They examined other unions that had occurred in Europe: Castile with Aragon, France with Normandy, England with Ireland, and many others. These precedents were analysed, distinctions were drawn up between different types of unions, and classifications were proposed. For example, on 26 April 1604 Sir Edwyn Sandys made a long speech in Parliament setting out his objections to the union project. In the course of his speech he surveyed the different kinds of ways unions could occur and listed three ways: by marriage (ie. of one ruler to another), by election, and by conquest.[109] Francis Bacon, later to appear as counsel in *Calvin's case*, almost certainly heard this speech, for the *Journals of the House of Commons* records him as being the next speaker. Bacon was immersed in the theoretical problems of union. The very next day he reported to the Commons from the Committee it had established to set down the reasons and objections for union. The Committee had considered precedents, at home and abroad, including those involving conquest.[110] Outside of Parliament tracts and treatises were also written about the union project, including by Bacon himself.[111] Some of them also undertook the task of classifying political unions throughout history.[112] One such treatise is Sir Henry Savile's 'Historical Collections' of (1604).[113] Savile analysed many examples of political unions from European history. He fitted all historical instances of the unions of sovereign states into three kinds: (a) by conquest, (b) by inheritance and (c) by marriage. As examples of the category of conquest, Savile nominated the Angevin conquest of Ireland and also 'so many states in Italy and so many kingdoms abroad to the Romans in ancient times'.[114] One of Francis Bacon's works distinguished union by conquest from union by marriage.[115] In the hands of politicians and historians, 'conquest' had become a recognised, analytic category. Thus Sergeant Moore reports that when the most senior judges of England appeared before a Parliamentary Committee in 1607 to give their opinions on the effect of the union of the kingdoms of England and Scotland, the judges also referred to the distinction between acquisition of a kingdom by marriage and acquisition by conquest.[116]

X THE CONTINUATION OF THE POLITICAL ARGUMENT ABOUT UNION IN *CALVIN'S CASE*

Calvin's case was the political argument about union carried on by other means.[117] The case was contrived as a vehicle for resolving the question of whether people born in Scotland after the accession of James I to the throne of England were aliens in England.[118] The legal issue was sufficiently important for arrangements to have been made to bring parallel cases in Chancery and in King's Bench.[119] Argument was then removed to the Exchequer Chamber, to be heard in 1608 before fourteen judges: judges from the three common law courts and the Lord Chancellor Lord Ellesmere.

The political background to *Calvin's case* throws light on the sources for the terms and concepts used in it. When it came to argue *Calvin's case*, the lawyers (several of whom had been important participants in the political debate) continued using many of the same terms and concepts that had been used in the prior political argument. The change of forum, though, had an important effect: the terms of historical analysis were turned into legal concepts. Francis Bacon, now appearing as counsel for the plaintiff, described the ways the king could acquire new lands. His list resembled Sandys' and Savile's taxonomies: 'countries devolute by descent and acquired by conquest'.[120] Lawyers for the defence also produced taxonomies that resembled Savile's.[121] Coke's report of the case likewise contrasts the acquisition of a kingdom by descent to the acquisition of a kingdom by conquest.[122] If we had read nothing but law reports, we should think that with *Calvin's case* 'conquest' emerges almost out of nowhere as a fully formed, precise legal concept. This is because the work of first conceptualising it had been done outside of the law courts.

XI THE EXAMPLE OF ANGEVIN IRELAND IN *CALVIN'S CASE*

The lawyers in *Calvin's case* did not just adopt the concept of 'conquest' from the political speeches and historical treatises. The lawyers also made use of the historical evidence there cited to formulate a specific legal rule about the consequences of conquest. Some of this evidence had to be discarded. Savile's treatise, for example, referred to such events as the conquest of Naples by the King of Aragon and the conquest of Portugal by the King of Castile.[123] These could have little relevance for English law. Sir Henry Spelman's writings were more useful. In his treatise 'Of the Union', also from 1604, he cited the Norman conquest, the English conquest of Wales, and the English conquest of Ireland as evidence of the proposition that conquerors may 'impose laws at their pleasure' on the conquered.[124]

The lawyers in *Calvin's case* focused on the example of Ireland. Bacon, counsel for the plaintiff, made particular use of Irish history in his argument. Bacon's brief was to show that Scots born after James I's accession to the throne were not aliens in England. The logic of Bacon's argument proceeded as follows. An alien is a person who owes no bond of allegiance to the king. Whether such a bond exists is a matter of natural law, not positive law.[125] Scots and English had different national laws, but by operation of a transcendent natural law all Scots and English had a bond of allegiance with the same king. It followed that Scots and English were subjects alike, and a Scot could not be an alien in England. Bacon alleged the same could be said of Angevin Ireland before 1210. Until then (he said), the Irish kept their own native laws, but the Irish and English were nonetheless all subjects who owed a bond of allegiance to the king of England. It is in this context — to support the argument that English and Irish in Angevin times were all subjects of the same king though they had different national laws — that Bacon purported to deduce from the historical evidence the proposition of law that the laws of conquered countries remain until the king decides to change them:

> ... the laws of England are not superinduced upon any country by conquest; but that the old laws remain until the king by his proclamation or letters patent declare other laws; and then if he will he may declare laws which be utterly repugnant, and differing from the laws of England. And hereof many ancient precedents and records may be shewed, that the reason why Ireland is subject to the laws of England is not *ipse jure* upon conquest, but grew by charter of King John ... .[126]

It followed that being a subject of the king transcends positive law, it is a matter of natural law.

Serjeant Hutton for the defence appears to have used Ireland as evidence for the contrary argument.[127] His objective was to show that being a subject of the king was a function of national law. Scots and English did not share the same laws; hence Scots were subjects of the King of Scotland under Scottish law, and English were subject of the King of England under English law. Scots were therefore aliens in England, and vice-versa. It is true, Hutton acknowledged, that the Irish were subjects of the English king after the Angevin conquest, but that was precisely because it was a case of conquest. Upon conquest, and contrary to what Bacon urged, there was an automatic union of laws. As a result, the Irish became subjects of the king of England. Hence the union of England and Ireland had no bearing on the union of England and Scotland. The Union of England and Scotland was achieved peacefully by descent and with each kingdom's native laws preserved.

The judges therefore had to choose between two versions of Irish history: (a) Bacon's, in which Ireland kept its native laws until 1210; and (b) Hutton's, in which Ireland received English laws immediately upon conquest. The judges opted for Bacon's view. There is a passage in Lord Ellesmere's (reconstructed) speech in the Exchequer Chamber which is very similar to Bacon's argument about Ireland.[128] Coke's report likewise relies on the argument that Ireland was first fully conquered by Henry II, but English law was not introduced until the reign of John. Coke fortifies the point with a reference to the rolls.[129] What had been an exercise of the 'realities of power' by King John in the thirteenth century had become, in the hands of lawyers of the seventeenth century, a legal precedent. Bacon, Coke and Ellesmere had taken historical events of Angevin times and transmuted them into legal authority without giving any suggestion of the metamorphosis.[130]

XII COKE'S FORMULATION OF THE RULE ABOUT CONQUEST IN *CALVIN'S CASE*

From the point of view of the history of the conquest rule, the culmination of *Calvin's case* is a passage in Coke's report that discusses 'conquest' in some detail. Coke analysed the argument about conquest and held the law to be this:

... there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitae et necis potestatem*, 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 the 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 of 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 ... .[131]

Here is the first statement of the conquest rule in English law reports.

Most of Coke's long report of *Calvin's case* is copiously annotated with references to the Year Books. The obiter passage about conquest is different. It is unsupported by citations to authority, save for a reference (shortly following the passage quoted above) to the example of Angevin Ireland. This gives us a clue to the source of the remarks. Coke did not take them out of the Year Books. It seems that he adopted them from Bacon's speech to the Exchequer Chamber. Bacon divided his speech to the Exchequer Chamber into three parts. The first part consisted of introductory observations. In these observations Bacon purported to discuss the case from the point of view of pure reason alone:

... your lordships will give me leave in a case of this quality, first to visit and open the foundations and fountains of reason, and not begin with the positions and eruditions of municipal law... .[132]

It was under the cover of addressing the issue from the point of view of reason that Bacon introduced many of the arguments that had most likely been exercising his mind during the political debates about union.

A comparison reveals important similarities between Coke's influential analysis of conquest and passages from the introductory part of Bacon's speech. Coke's report states that when the king comes to a new kingdom by conquest, seeing he has 'vitiae et necis potestatem', he may at his pleasure alter and change the laws of that kingdom.[133] Bacon had argued:

... the conqueror hath power of life and death over his captives; and therefore where he giveth them themselves, he may reserve upon such a gift what service and subjection he will.[134]

Coke also said in his report that until the king did make an alteration of the laws of a conquered kingdom, its ancient laws remained. Bacon had said in his speech (citing the case of Ireland):

... the laws of England are not superinduced upon any country by conquest; but that the old laws remain until the king by his proclamation or letters patent declare other laws ... .[135]

We should however be careful in attributing too much originality to Bacon. Bacon was simply drawing his arguments from the contemporary political discourse with which all the participants would have been familiar. Nevertheless, if Bacon was not the ultimate source of Coke's remarks about conquest, the similarities between Bacon's speech and Coke's report suggest that he is most likely to have been the proximate source.

XIII EVALUATION OF THE INTERPRETATION OF IRISH HISTORY IN *CALVIN'S CASE*

Was the influential interpretation of Irish history offered by Bacon in *Calvin's case* and accepted by the judges correct?

The short answer is that it was not. English law had appeared in Ireland well before a general expression of the King's will of the kind made by John in 1210. There is no firm evidence of any general decree by Henry II in 1171 that English law would govern the Anglo-Irish.[136] Nevertheless, he and the Anglo-Irish settlers seem to have simply proceeded on the basis that this would be the case. Ireland was divided up and distributed using English legal concepts. In 1171 Henry granted Leinster to Richard de Clare, Earl of Pembroke ('Strongbow') 'in fee'.[137] Before departing Ireland in 1172 Henry granted Meath to Hugh de Lacy.[138] It was to be held by knight's service, for the service of 50 knights.[139] One of the earliest surviving grants by John as Lord of Ireland comes from 1185 and is a grant to Ranulf de Glanville and Theobald Walter in knight's service.[140] There are many other examples of pre-1210 grants of English-style tenures.[141] In this way English real property concepts such as lands in fee, subinfeudation, and tenures such as knight's service came to Ireland in 1171 and in the years immediately following. Other aspects of English law necessarily came to Ireland with creation of English-style seigniories. Hugh de Lacy, as Lord of Meath, had 'all liberties and free customs which the King has or may have there'.[142] Grants by way of sub-infeudation include the English rights of 'judgment of fire, water and *duellum*'.[143] Some grants, by John[144] and by lords under him[145], expressly confer judicial and financial rights using the old Anglo-Saxon terms, 'soc, sac, theam, infangthef'.[146] There was a County Court for Dublin no later than Easter 1199 (albeit one that was significantly different to an English county court[147]). In England, the legal innovations of the Angevins were very popular and were used by even minor landholders.[148] People were probably not inclined to let go of the new legal procedures simply because they had crossed the Irish sea. The Oblata and Fine Rolls of John from before the end of the century record Anglo-Irish lords purchasing common law writs to have their titles vindicated: for example, mort d'ancestor[149], and novel disseisin.[150] From 1204 litigants no longer needed to go to the Chancery in England to obtain the principal writs. John authorised his Justiciar in Ireland to issue the writs of right, novel disseisin, mort d'ancestor, and naifty.[151] Brand has pointed to evidence that trial by jury, trial by battle, the ordeals, and

outlawry were in operation in Ireland before the turn of the century, and that the common law concepts of 'reasonable dower' and seignorial wardship of minors were applied in Ireland before 1210.[152] So when John authorised his Justiciar in Ireland to issue the main English real property writs, and when in 1210 the barons promised to obey English law, these were not introductions of English law; they attested how deeply imbedded English law had already become in the affairs of the Anglo-Irish ruling class.

The error of the seventeenth century lawyers who looked to Angevin Ireland in 1210 for a precedent was to take a decree whose objective was probably an attempt at ensuring the observance of English law that was already present in Ireland to be a decree that introduced English law to Ireland for the first time. For example, in 1207 John forbade any of his freemen from answering for their free tenements in any court, save by royal writ. Plucknett took this to be an extension to Ireland of the ancient rule that no man need answer for his free tenement save by royal writ.[153] However, it does not read that way:

You well know that as well are bound to maintain and guard your rights, so are you bound to preserve and defend your rights in all things ... . We strictly forbid you, by the fealty whereby you are bound to us, to answer for any, or in the court of any, of your free tenements save by precept and writ of us or of our justiciar.[154]

It reads more like an admonition and warning to free tenants not to forsake the protection already bestowed on them by English law. This admonition was only the beginning. In the same year (1207) John rebuked the Anglo-Irish lords for proposing to create a new assize without his permission.[155] It seems probable that the charter of 1210 was similar: trying to regularise and ensure conformity to existing law. When Bacon, Ellesmere and Coke came to consider the case of Ireland they failed to see that English law arrived in Ireland well before 1210 (or obscured it for the purposes of their argument). They presented the records as evidence of John formally introducing English law to Ireland for the first time.

XIV CONTINUING OBSCURITIES ABOUT COKE'S FORMULATION OF THE CONQUESTS RULE IN *CALVIN'S CASE*

We have found the immediate source of the conquests rule: a tendentious use of history by the participants in the union debates of the early seventeenth century. Nonetheless, several points about the genesis of the conquests rule remain obscure. We may hope further research will throw light upon those points; for the present we must be satisfied in merely noting them.

A *The Question of the Importance of Civilian and Canon Law in the Formulation of the Conquests Rule*

One recurring problem in English legal history concerns the matter of how much influence Roman law had on English law in and around the sixteenth and seventeenth centuries. This question resurfaces in the context of the origins of the conquest rule. If the immediate source of the conquest rule is early seventeenth century political debates and treatises, can we nonetheless detect the influence of Roman law in those debates and treatises? There can be no doubt that one aspect of the colonies rule — that empty lands can be acquired by settlement — is ultimately derived from the Roman rules regarding the taking of a *res nullius* by *occupatio*.[156] Does the conquest rule have a like pedigree?

Points of similarity between Roman law and law derived from Roman sources on the one hand, and the common law's conquest rule on the other, can be found. For instance, at the basis of the conquest rule is the proposition that a kingdom might be lawfully acquired by conquest. This has a parallel in the Roman law rule that things captured in war become the property of him who first takes possession of them. This rule is found in several places in Justinian's *Digest*[157] and *Institutes*[158], and is also stated by Cicero.[159] Civilian and canon lawyers of the middle ages both followed the rule.[160] More specific is one passage in the *Digest* that says that the occupation of

hostile lands is effected by the State and not merely soldiers; such lands therefore come into public (rather than private) ownership.[161] This rule found acceptance in modified form among medieval civilian and canon lawyers: lands and tenements captured in a just war became the property of the prince for whom the captors fought, and the people who lived on conquered lands became that prince's subjects.[162]

The rule that conquests belong to the conqueror was in turn adopted into writings on the developing law of nations of the sixteenth century. Perino Belli's *A Treatise on Military Matters and Warfare* of 1563 states that things captured in war belong to the captors, citing Justinian and Cicero.[163] Later, relying on the *Digest* and Bartolus, a qualification is added: captured immovables belong to the sovereign (the Emperor).[164] Balthazar Ayala similarly stated the position in his treatise on the law of war of 1582.[165]

More important for our purposes is the work of Alberico Gentili. Gentili was a notable civilian lawyer. He had fled to Oxford from religious persecution in Italy. He began teaching in Oxford in 1581, became Regius Professor of Civil Law in 1587, and subsequently practised in London as a member of Gray's Inn.[166] Gentili's *De Jure Libri Tres*, first published in 1598 says, again relying on classical sources, that 'it is beyond doubt that lands and other possessions may be acquired under the title of war ...'.[167] Gentili's work contains a detailed consideration of the rights of the victors in war. He was inclined to give wide powers to the conqueror:

... another question may, it would seem, be formulated; namely, whether one who conquers another and gets all his property into his power can presently claim the rights of the conquered over others, over whom the conquered party claimed rights before his defeat or could justly claim them. The Romans thought that when they had conquered Alba they ought to have the same rights in Latium that the people of Alba had previously had. It is true that from the submission of the head the subjection of the members and of property follows, because when the head serves, it is necessary for the members to serve also. And a state which has passed from one sovereign to another is regarded as having passed over with all its attributes... .[168]

In 1602 there was published in London *The Pandects of the Law of Nations* by William Fulbeck, an admirer of Gentili. The work contains comments to similar effect on the rights of conquerors.[169] 'I must conclude', says Fulbeck at one point, 'with shewing the universall and absolute right, advantage, libertie, power, and prerogative of the Conqueror'. Fulbeck then proceeds, like Gentili, to say that all places and things formerly belonging to the subdued people belong to the conqueror, who may take away their ornaments and riches, and sack their cities (unless surrendered upon condition). Only a handful of years later, in *Calvin's case*, Bacon was to make his submissions in *Calvin's case* about the wide rights of conquerors.

In short, with Gentili and Fulbeck we are in the day and the milieu of the most influential participants in *Calvin's case*. Indeed, one of Gentili's patrons was apparently Lord Ellesmere.[170] The same year that Gentili was admitted as a member of Gray's Inn (1600) was the year Francis Bacon gave his reading on the Statute of Uses there. Moreover, by then Fulbeck had been a member of Gray's Inn for over a decade; and had, indeed, collaborated with Bacon in writing a masque produced before Queen Elizabeth in 1588.[171]

Thus we can say that two aspects of the conquest rule – (1) that conquered territory belongs to the sovereign; and (2) that the conquering sovereign has wide powers over those whom he has conquered – have parallels in Roman and Roman derived law. And we have identified the means by which knowledge of Roman law on these points might have passed to common lawyers.

Nevertheless, it is not yet clear to what degree the similarity between Roman (or Romanesque law) and the conquest rule is coincidental and to what degree it is causal. It must be admitted that congruence of the detail of the conquest rule as specifically formulated by Bacon and Coke on the one hand, and any passage of the *Digest* or *Institutes* or Fulbeck or Gentili and their immediate predecessors on the other, is far from perfect. For instance, the passages from Gentili and Fulbeck to which we have just referred do not explicitly discuss the question of what *law* is to apply to

conquered people; and the problem of what law is to apply is at the heart of the common law conquest rule. The closest Gentili comes to such discussion is actually to reject the notion (accepted in Coke's report of *Calvin's case*) that the conqueror has plenary (as opposed to wide) powers over the conquered peoples.[172] Indeed, whereas Bacon's successful submissions in *Calvin's case* are based on the premise that 'the conqueror hath power of life and death over his captives,'[173] Gentili lays down a rule against the slaughter of the vanquished.[174]

More generally, it is hard to gauge the depth of familiarity with the Roman law tradition of the English lawyers who were the most important participants in the formation of the conquest rule, in particular Bacon and Coke.[175] Maitland could not find anything to suggest that Francis Bacon 'had more than a bowing acquaintance with Roman law'.[176] On the other hand, it must be reasonable to suppose that Bacon's immersion in the debates concerning the union of Scotland and England led to him having some knowledge of the Roman law (or at least Roman law-derived) learning about conquest. As for Coke, his library certainly contained many volumes about the civil and canon law.[177] But how familiar was Coke with them? The number of civilian volumes in Coke's library is sometimes cited as evidence of Coke's familiarity with Roman law. But owning a book is not the same as mastering its contents. For only one of the civilian volumes contained in *A Catalogue of the Library of Sir Edward Coke* edited by W O Hassall does Hassall see fit to comment, 'Many marginalia by EC'.[178] T E Scrutton's examination of Coke's *Institutes* led him to conclude that Coke's knowledge of Roman law was sparing and unreliable.[179] A working knowledge of Roman law can probably more readily be attributed to Lord Ellesmere.[180] However, his own estimation of his Roman learning was very modest: 'I professe it not; I have learned little of it ... .'[181] Thus we ought be cautious about inferring a direct or simple causal connection between Roman law and the conquest rule.

For the present we may state this hypothesis. The civilian learning concerning conquest may have had some influence in the formation of the common law's conquest rule, but if so that influence was diffuse. It was the political arguments about the union of Scotland and England that gave point to it. At most, the lawyers in *Calvin's case* may have cannibalised the Roman doctrine — 'a principle' to borrow the words of Holdsworth from another context, 'which had long been in the air'[182] — without much deference to its niceties. Like advocates of all ages, the common lawyers involved in *Calvin's case* took what they needed and shaped it to their own ends. Most importantly, they formulated a rule that allowed to be left behind the notion that only a just war can result in a legally valid acquisition of territory by force. This may not have been wholly accidental. Francis Bacon was apparently conscious of the distinction between force being used to create a right to territory (i.e. what was to become the conquest rule) and force being used to enforce a right to territory (the just war tradition). In *Calvin's case* Bacon submitted that:

... when any king obtaineth by war a country whereunto he hath right by birth, that he is ever in upon his ancient right, *not upon purchase by conquest*.[183]

On the former basis Bacon explains a writ of protection said to date from 13 H VI that purported, on its face, to allow Commissioners en route to Gascony to 'conquer' all who resist them: 'conquer' here (said Bacon) meant merely re-claim what already belonged to Henry by inheritance.[184] But there would be no need for further instances (in common law, at any rate) after *Calvin's case*. Thenceforth acquisition of territory by force of arms counted as a conquest, whatever its justification (or lack thereof); and thus enquiries into justification could pass out of English law and into the spheres of politics and morality. It is the laying aside of the requirement that there be a pre-existing right to the territory that separates the conquest rule from medieval just war theory and the civilian tradition.

Writing in the mid-seventeenth century, Sir Matthew Hale corrected those of his contemporaries who thought that William obtained the kingdom of England by conquest:

the Clayme of King William was not by right of Conquest, but of Succession to King Edward and upon that acco[un]t indeed he Conquered Harold that was an Usurper.[185]

Hale is here alluding to the medieval position and the civilian tradition: that, in those times, a

valid conquest depended on the existence of a right to enforce. The lawyers of Hale's day were apparently losing sight of the old position. To common lawyers of the mid seventeenth century conquest was something that, without more, could generate rights. A doctrine of conquest singular to the common law now existed.

B *The Exception regarding Infidels*

The problem of the extent of the influence of the civilian tradition becomes even more vexed when we turn to consider the one significant difference between Bacon's submissions in *Calvin's case* about the conquest rule and Coke's statement of it in his report. Coke's report superimposes upon Bacon's argument a distinction between Christians and infidels: according to Coke the laws of conquered Christian countries remain in place until the conqueror sees fit to alter them; the laws of infidel kingdoms are automatically void as being contrary to Christianity and to the law of nature. The King or such judges as he shall appoint shall judge infidel cases according to natural equity as kings did in ancient times before any certain municipal laws were given. There is a faint echo here of an observation made by Bacon in the course of his argument:

... you shall find the observation true, and almost general in all states, that their lawgivers were long after their first kings, who governed for a time by natural equity without law.[186]

But Bacon's submissions nowhere make a distinction between conquests of Christian peoples and conquests of infidels.

Coke's source for this distinction is as yet unknown.[187] Neither Hawarde's report nor the anonymous manuscript notes of the speeches in the Exchequer Chamber show any of the other judges relying upon the distinction, nor even mentioning infidels. And yet both sources do have Coke speaking of infidels, thus showing that Coke's remarks on this matter are not a later interpolation when Coke came to write up his report of the case.[188] As to Coke's possible sources for the distinction between Christians and infidels, there is a passing remark by Brooke J in a year book from the reign of Henry VIII to the effect that a pagan is not able to prosecute an action if someone beats him.[189] Coke cited this in his report of *Calvin's case*, amongst several other authorities (including a passage from Corinthians), dealing with the law's supposed hostility to infidels.[190] This may be enough to account for the distinction Coke then proceeds to draw between the conquest of infidel kingdoms and the conquest of Christian kingdoms. Even so, this does appear to be thin authority for so elaborate a distinction.[191]

It is possible to suggest other sources that may have influenced Coke. Pagden has pointed out that the notion that infidels are incapable of 'dominium' (in the sense of rulership) is consistent with the Protestant belief enunciated by Luther and Calvin, and before them Wycliffe, that power derives from God's grace.[192] Following this argument through, infidels were not the recipients of God's grace and so had no legitimate worldly power. It may be that consistency with Protestant doctrine was one of the factors that recommended a distinction between infidels and Christians to Coke.

There is also a strand in the history of canon law that was also hostile to infidels. The canon lawyer Hostiensis, writing in the thirteenth century, had said that infidels were incapable of possessing dominium:

It seems to me that with the coming of Christ every public office and every government and all sovereignty and jurisdiction, both by law and from just cause, was taken from infidels and given over to the faithful through Him who has the highest power and cannot err ... . And we assert that by law infidels ought to be subject to the faithful and not the reverse.[193]

We have already noted that most medieval canonists preferred Innocent IV's contrary view.[194] Nonetheless, Hostiensis's alternative position had canon law adherents throughout the middle ages.[195] His writings on canon law writing enjoyed great popularity until the early modern period.[196] Hostiensis's doctrine on infidels survived to be adopted by the first writers who sought to justify

the Spanish conquests in America.[197] And the great Baldus, a civilian and a canonist, apparently stated in one place that it was lawful to plunder the enemies of the faith and that infidels cannot have true jurisdiction.[198]

But Hostiensis's doctrine cannot be said to represent the prevailing opinion among the canonists and civilians of Coke's era. Hostiensis's doctrine did not in the end win the field in Spain, where the debate about the propriety of conquest of the Americas was hot.[199] Closer to Coke's day, Balthazar Ayala, writing one of the earliest modern treatises on the law of war said that:

War may not be declared against infidels merely because they are infidels, not even on the authority of the emperor or Pope, for their infidel character does not divest them of those rights of ownership which they have under the law universal [*jus gentium*], and which are given not to the faithful alone but to every reasonable creature.[200]

He was able to rely on the authority of Justinian's *Code* on this point.[201] Gentili similarly took the side of those Spaniards who said that religion was not a just reason for war against the Indians. As for Baldus's comment that infidels have no true jurisdiction, Gentili considered this argument to be 'utterly inane'.[202]

What did Coke know of these debates in any event? Some commentators have derived Coke's position on infidels from that of contemporary writers on the law of nations. However, the case they put is not wholly compelling.[203] It is true that Coke's library was stocked with over fifty volumes on civil law and canon law[204] and he professed a modest knowledge of canon law.[205] Nonetheless, again, the resemblance between the doctrine we have traced back to Hostiensis and Coke's distinction between Christians and infidels is very imperfect. At present, the problem remains largely imponderable. The most that can be said is that the case for deriving Coke's distinction between Christians and infidels from the canon law or the law of nations traditions (as opposed to, for instance, drawing on other sources, or just making it up himself) is weaker than the case for deriving the rest of the conquest rule from civilian materials.

XV THE ACCEPTANCE OF THE ANALYSIS OF CONQUEST IN *CALVIN'S CASE*

Coke's analysis of conquest in *Calvin's case* constitutes the earliest version of the conquest rule in an English law report. We have seen that it arose almost accidentally: in a case that had nothing to do with colonial law (such a body of law barely existed), as a somewhat opportunistic side argument to support the proposition that allegiance to the king is a matter of natural law. Even so, these remarks about conquest proved to be remarkably influential. They could easily be extracted from the thicket of argument about allegiance in Coke's report and made to stand alone as a discrete rule about conquest. That is how lawyers chose to treat the passage.[206] It was repeated numerous times in the cases. In 1622 Robert Callis cited it with approval in his reading at Gray's Inn on the Statute of Sewers.[207] We find it being invoked in legal submissions in Virginia in 1683.[208] Similarly, following *Calvin's case*, the example of the Angevin conquest of Ireland was relied upon by judges a number of times in seventeenth century cases. In *Craw v Ramsey* in 1670, a majority of the justices of Common Pleas said that Ireland remained governed by its own laws until King John introduced English ones.[209] Vaughan's report goes so far as to quote at length the relevant extracts from the patent and close rolls pertaining to Ireland from the reign of John and Henry III.[210] And again in *Dawes v Painter* in 1674, when the Common Pleas held (according to Freeman's report) that English law does not automatically extend into the dominions, Ireland provided the example: 'Ireland was not governed by our laws, till it was so specially ordered by King John'.[211] In the same year the rule about conquest was said by Common Pleas to apply to Wales.[212] In *Blankard v Galdy* in 1693 the King's Bench is reported to have said:

The laws by which the people were governed before the conquest of the island [Jamaica], do bind them till new laws are given ... . The reason is, because though a conqueror may make new laws, yet there is a necessity that the former should be in force till new are obtained, and even then some of their

old customs may remain. By the statute of 27 Hen 8, c.27 Wales was united to England, yet some of their customs still remain; it is so likewise in Ireland, which nation, though conquered, still retained their old customs ... .[213]

Ultimately Coke's analysis of conquest found its way into Blackstone's statement of the colonies rule.[214]

Only the curious exception as to infidels failed to survive into modern law. It was neither reasonable nor feasible for an imperial power to show no tolerance of the laws of non-Christians. The correctness of Coke's remarks about infidels were hotly debated in subsequent cases.[215] The Privy Council appears to have attempted a modification of the exception as to infidels in 1722, but it did not catch on.[216] Instead, Lord Mansfield made any attempted modification redundant by rejecting the whole idea of an exception as to infidels 'absurd'.[217] Thereafter, aside from an interesting discussion by counsel in *R v Picton* in 1810[218], the exception almost completely disappeared from English law.[219] The remainder of Coke's remarks about conquest, however, survived and thus became the first element of the colonies rule to be established.

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[1] These two cases are *Blankard v Galdy* (1693) 2 Salkeld 411 [91 ER 356] and *Smith v Brown* (1702?) 2 Salkeld 666 [91 ER 566]. The former case is also reported at 4 Modern 222 [87 ER 359] Holt KB 341 [90 ER 1089] and Comberbach 228 [90 ER 445] although the latter two reports ought be treated with particular caution: see John W Wallace, *The Reporters* (4th ed, 1882), 396, 398-9.

[2] The details of this case, reported very briefly by Peere Williams under the title of 'Case 15 — Anonymous' (1722) 2 P Wms 75 [24 ER 646] have been obscure for a long time. Recent work, however, has thrown some light on the case: B H MacPherson, 'The Mystery of Anonymous (1722)' (2001) 75 *Australian Law Journal* 169.

[3] William Blackstone, *Commentaries of the Laws of England* (facsimile edition of first edition published 1765-69, 1979) 104-5 [Bk 1, ch 4].

[4] Although the significance of the conquest rule was revived by the *Foreign Jurisdiction Act 1890* (Imp) (see esp s 1), and in particular by the wide (and arguably incorrect) operation given to that Act by the courts: see *King v Earl of Crewe; Ex parte Sekgome* [1910] 2 KB 576, 596.

[5] Kent McNeil, *Common Law Aboriginal Title* (1989) gives several examples, including Southern Rhodesia (124 n 69) and part of what is now Ghana (129 n 97). Other examples he gives at 117 n 38, such as Grenada and British Guiana might be classified as conquests or cessions.

[6] *Calvin's case* (1608) 7 Co Rep 1a, 17b, 23a [77 ER 377, 398, 404]; *Craw v Ramsey* (1670) Vaughan 274, 292-8 [124 ER 1072, 1080-4]; *Blankard v Galdy* (1693) 4 Mod 222, 225 [87 ER 359, 361-2]; for a later case see *Campbell v Hall* (1774) 1 Cowp 204, 210 [98 ER 1045, 1048].

[7] For an initial attempt at sketching the origins of the colonies rule as a whole see the author's 'The extension of English law following conquest and settlement: the origins of the colonies rule' (unpublished MPhil thesis, University of Oxford, 2002).

[8] Joseph Conrad, *The Heart of Darkness* (first published 1902, 1988 ed) 31 [ch 1].

[9] The doctrine of the 'act of state' awaits its historian. A start has been made in Sir William Harrison Moore, *Act of State in English Law* (1906) ch 1. Australian courts in particular have had occasion to repeat many times over the past few decades the proposition that the acquisition of sovereignty over new territory is an act of state unimpeachable in the municipal courts, eg *Coe v Commonwealth* (1979) 24 ALR 118, 128, 132; *Mabo v Queensland [No.2]* (1992) 175 CLR 1, 31-2, 69, 78-9; *Coe v Commonwealth* (1993) 118 ALR 193, 199-200; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, 550 [37]. For English authorities see eg *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 7 Moo Ind 476, 529, 531 [19 ER 388, 407, 408]; *Salaman v Secretary of State for India* [1906] 1 KB 613, 625-7, 635, 639-40; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 753.

[10] Giraldus Cambrensis [Gerald of Wales], *Expugnatio Hibernica. The Conquest of Ireland* (A Brian Scott and Francis X Martin trans, 1978) 91 [Bk 1, ch 30]; Art Cosgrove (ed), *A New History of Ireland* (1987) vol 2, 87-8.

[11] Cosgrove, above n 10, 44, and see also 129; Rees Davies, *Domination and Conquest* (1990) 25-6.

[12] Giraldus Cambrensis, above n 10, 93-7 [Bk 1, ch. 31, 33].

[13] See the three letters from Pope Alexander III in 1172 celebrating Henry's success. They are reproduced in translation in Edmund Curtis and Robert McDowell (eds), *Irish Historical Documents 1172-1922* (1943) 19-22, but note Martin's correction of the translation of Letter 1 in Cosgrove, above n 10, 92 (n 4).

[14] *Calvin's case* (1608) 7 Co Rep 1a, 22b [77 ER 377, 404].

[15] Most recently Kirby J of the High Court of Australia in *Commonwealth v Yarmirr* (2001) 208 CLR 1 129 (n 561).

[16] Cosgrove, above n 10, 142-3, and see also the map at 133.

[17] Paul Brand, 'Ireland and the Literature of the Early Common Law' (1981) 16 *The Irish Jurist* (New Series) 95-7; 100-6.

[18] One of my principal sources in this essay for governmental documents concerning medieval Ireland is Henry Sweetman (ed), *Calendar of Documents Relating to Ireland Preserved in Her Majesty's Public Record Office London* (1875-86). This is a 5 volume work covering the period 1171-1307. In this essay I shall by drawing from: volume 1, published in 1875, covering the period 1171-1251 (which volume I shall hereafter cite as *Cal Docs Ire, 1171-1251*); volume 2, published in 1877, covering the period 1252 to 1284 (which volume I shall hereafter cite as *Cal Docs Ire, 1252-1284*); and volume 3, published in 1879, covering the period 1285 to 1292 (which volume I shall hereafter cite as *Cal Docs Ire, 1285-1292*). References will be to document numbers as calendered by Sweetman. As to King John ordaining that English laws are to be in force in Ireland, the two most detailed accounts that are recorded on the rolls are calendared at *Cal docs Ire*, *1171-1251,* #1458 (10 Dec 1226), #1602 (8 May 1228). Other references on the rolls are at #1390 (29 June 1226), #1430 (8 July 1226), #2069 (28 October 1233), #2850 (9 September 1246); *Cal docs Ire, 1252-1284*, #529 (27 January 1256).

[19] Cosgrove, above n 10, 173-5; Jocelyn Otway-Ruthven, 'Anglo-Irish Shire Government in the Thirteenth Century' (1946-1947) 5 *Irish Historical Studies* 1. For a detailed account of the birth of the Irish judiciary, see Paul Brand, 'The Birth and Early Development of a Colonial Judiciary: the Judges of the Lordship of Ireland, 1210-1377' in W N Osborough (ed), *Explorations in Law and History* (1995) 1. English law did not penetrate equally into all parts of Ireland. Even within regions nominally ruled by the Anglo-Irish, there could be areas that were beyond their effective control: see Cosgrove, above n 10, 174. Observance of native laws must have survived in those areas:

Jocelyn Otway-Ruthven, 'The Native Irish and English Law in Medieval Ireland' (1950) 7 *Irish Historical Studies* 1, 4; Geoffrey Hand, 'The Status of the Native Irish in the Lordship of Ireland 1272-1331' (1966) 1 *The Irish Jurist* (new series) 93, 93-4; Rees Davies, *Domination and Conquest. The Experience of Ireland, Scotland and Wales 1100-1300* (1990) 88.

[20] Jocelyn Otway-Ruthven, 'The Constitutional Position of the Great Lordships of South Wales' (1958) 8 *Transactions of the Royal Historical Society*, 5th series 1, esp 1-7.

[21] Rees Davies, 'The Law of the March' (1970-1971) 5 *Welsh History Review* 1, 10-1.

[22] Sir Maurice Powicke, *King Henry III and the Lord Edward* (1947) vol 2, ch 15 esp 647-63; Rees Davies 'Law and National Identity in Thirteenth-Century Wales' in Rees Davies *et al* (eds), *Welsh Society and Nationhood* (1984) 52-69.

[23] *Statute of Wales* 12 Ed I, c.1 (1284) reproduced in *Statutes of the Realm*, vol 1, 55ff.

[24] Rees Davies, 'The Twilight of Welsh Law, 1284-1536' (1966) 51 *History* 143, esp 149-59.

[25] 27 Henry VIII, c.26 (1536) reproduced in *Statutes of the Realm*, vol 3, 563ff.

[26] Sir James Holt, 'Politics and Property in Early Medieval England' (1972) 57 *Past and Present* 3, 12. In *Glanvill*, the contrast is between 'hereditas' and 'quaestus' — in Hall's translation, between 'inherited and acquired land'. Maitland, perhaps unhappily, chose to translate the words as 'heritage' and 'conquest': Sir Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I*, (2nd ed, 1898) vol 2, 308 n 4. However, in doing so he was consciously drawing on Scottish law (see n 4: 'In borrowing from beyond the Tweed the words 'heritage and conquest' ...'). The word 'conquest' as used in Scottish law, at least when Maitland was writing, did *not* denote land acquired by force of arms.

[27] *Leges Henrici Primi* (L J Downer trans, 1972) 225 [70, 21].

[28] Glanvill, *The Treatise On the Laws and Customs of the Realm of England Commonly Called Glanvill* (GDG Hall trans, 1965) 70-1 [vii, i; f.21v-22].

[29] Holt, above n 26, 12; Pollock and Maitland, n 26 above, 308 n 4.

[30] I am indebted to Paul Brand for this piece of information.

[31] *Digest*, 1.5.4, 11.7.36, 41.1.5.7, 41.2.1.1, 41.2.18.4, 49.15.20.1; *Institutes* 2.1.17; Cicero, *On Duties* (Miriam Griffin and E Margaret Atkins trans, 1991) 9 [Bk 1, ch 21]; Donald W Sutherland, 'Conquest and Law' (1972) 15 *Studia Gratiana* 33, 38-44. The ancient Greeks also seem to have had an analogous rule, though its correctness was disputed: Aristotle's *Politics*, I.6 1254b.

[32] Henry of Huntingdon, *Historia Anglorum* (Diana Greenway trans, 1996) 31 [Bk I ch 12], 273 [Prologue to Book V], 699 [Bk X, ch 1]. See also: Greenway's introduction at xxxviii-xxxix; Sutherland, above n 31, 45.

[33] Henry de Bracton, *On the Laws and Customs of England* (Samuel E Thorne trans, 1968-1977) vol 2, 43 [f.9], 52 [f.12], 66 [f.17], 137 [f.44b]. There are echoes of the same rules in corresponding passages in *Fleta* (H G Richardson and G O Sayles trans, 1972) (Selden Society vol 89), 2 [Bk III, ch.2], 6 [Bk III, ch.3], 13 [Bk III, ch.7]. I can find no references or allusions at all to the Roman rules in the corresponding passages of *Britton* (Francis Nicholls trans, 1865), ch 2 and 3 of Bk II.

[34] Bracton, above n 33, vol 4, 191 [f.380b].

[35] Ibid vol 3, 213 [f.240b]; vol 4, 171 [f.373].

[36] Sir James Holt, *Magna Carta*, (2nd ed, 1992) 23, 87.

[37] T F T Plucknett, 'The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: a General Survey' (1939-1940) 3 *University of Toronto Law Journal* 24, 32.

[38] Richard Fitz Nigel, *Dialogus de Scaccario* (Charles Johnson, FEL Carte, Diana Greenway trans, 1983) 52-4, 59-60, 63. That said, there is no express reference to Roman law in any of the passages Sutherland cites.

[39] *Cal Docs Ire, 1254-1284*, #1482 (1278); J Mills (ed), *Calendar of the Justiciary Rolls or Proceedings in the Court of the Justiciar of Ireland, 1295-1303* (1905), 316-317 (1300). I am indebted to Paul Brand for drawing to my attention these two references (in which 'conquest' is used in the sense of acquisition by force), and also to a third unpublished one: PRO C 260/18, no 10, an Irish quo warranto case of 1298 in which the prior of St Patrick, Downpatrick apparently sought (unsuccessfully) to trace various franchises back to the time of John de Courcy, who conquered Ulster in the late 1170s.

[40] Donald W Sutherland, *Quo Warranto Proceedings in the Reign of Edward I 1278-1294* (1963) 82-5, 101-5, 183-5; Paul Brand, '"Quo Warranto" Law in the Reign of Edward I: A Hitherto Undiscovered Opinion of Chief Justice Hengham', in Paul Brand, *The Making of the Common Law* (1992) 393, 427-8, 433.

[41] In this essay I have relied principally on those editions of the Year Books prepared under the direction of the Master of the Rolls in the nineteenth century (indicated herein by the notation '(RS)' – for 'Rolls Series') and the editions published by the Selden Society (in which case I have indicated the volume number in question). For the argument about conquest in quo warranto proceedings see for example: *R v Richard de Baskervile* (1292) YB 20 and 21 Ed I (RS) 112-3; *R v Bishop of Hereford* Coram Rege Roll no.136 (Easter 1293), m.58 in G O Sayles (ed), *Select Cases in the Court of King's Bench Under Edward I* (1938) vol 2 (Selden Society, vol 57) 142; *R v Burgesses of Launceston* (1302) YB 30 and 31 Ed I (RS) 222. For later references to the argument see: *Prior of Coventry v Grauntpie* (1308-9) YB 2 and 3 Ed II (Selden Society, vol 19) 71, 73; *R v Prior of Merton* (1321) YB 14 Ed II (Selden Society vol 86) 177, 178; *R v The Dean and Chapter of St Pauls* (1321) YB 14 Ed II (Selden Society vol 86) 209, 210.

[42] The argument of Hugh of Lowther in *R v Bishop of Hereford*, above n 41, seems to me particularly suggestive of this interpretation. See also Sutherland, above n 40, 82; Brand, above n 40, 427-8. Another significant reference to 'conquest' in the Year Books is given at n 66. There is also an interesting discussion of the Norman conquest in *Simon of Ruston v Richard of Skeyton & ors* (1284): Paul Brand (ed), *The Earliest English Law Reports* (1996) vol 1 (Selden Society vol 111) 169, 171 (1284.11).

[43] I use the translated passage in Bruce O'Brien, *God's Peace and King's Peace. The Laws of Edward the Confessor* (1999) 118.

[44] Bracton, above n 33, vol 2, 305 [f.107b].

[45] John of Salisbury, *Policraticus* (Cary Nederman trans, 1990) 38 [Bk IV, ch.5].

[46] Geoffrey of Monmouth, *The History of the Kings of Britain* (Lewis Thorpe trans, 1969) 209 [Bk IX, ch 16]. See also the letter from Archbishop Theobald to Nigel, Bishop of Ely quoted in Mary Cheyney, 'The Litigation Between John Marshall and Archbishop Thomas Beckett in 1164: a Pointer to the Origins of Novel Disseisin' in John A Guy and H G Beale (eds), *Law and Social Change in British History* (1984) 9, 20 ('But as things done by force and fear are to be considered null ... we command ... that everything which has been restored from you by violence or against your will shall be recalled').

[47] Walter Ullman, *Medieval Papalism* (1948) 132-3.

[48] On *Decretales* 3.34.8, *Commentaria Doctissima in Quinque Libros Decetalium*, translated in Brian Tierney, *The Crisis of Church and State 1050-1300* (1980) 155.

[49] James Muldoon, *Popes, Lawyers and Infidels* (1979) ch 1, esp 27, and also 45, 112-9, 124-8; Kenneth Pennington, 'Bartolome de Las Casas and the Tradition of Medieval Law' in his *Popes, Canonists and Texts 1150-1550* (1990) XIII.6-8.

[50] Maurice H Keen, *The Laws of War in the Late Middle Ages* (1965) 64, 65. See also the discussion of Baldus, 9 (unjust wars are not properly wars at all, but rather *manifesta latrocina*: *Commentaria in usus Feudorum* II.28), and Keen's observations, 93.

[51] Gratian's *Decretum*, C.23, q.2, c.1-2. The Latin is quoted in Frederick H Russell, *The Just War in the Middle Ages* (1975) 62 (n 24), 63 (n 28). There is a translation of c.1 in John Eppstein, *The Catholic Tradition of the Law of Nations* (1935) 81. There is a helpful analysis of Causa 23 in James Brundage, 'Holy war and the Medieval Lawyers' in Thomas Murphy (ed), *The Holy War* (1976) 106-113.

[52] For differing interpretations of the relevant passage see: Brundage, above n 51, 109, esp n 61; Russell, above n 51, 63, n 29. After Gratian there were a diversity of medieval opinions on the criteria for a just war. These were clarifications, elaborations, developments or variations of Gratian's formula. On this see: Russell, ibid, ch 4-5; Keen, above n 50, ch 5.

[53] *Digest* 1.1.5 ('Ex hoc iure gentium introducta sunt bella'); Frederic Maitland (ed), *Select Passages from the Works of Bracton and Azo* (1895) (Selden Society, vol 8) 40. Reliance on this passage of the *Digest* can be found in the works of the canon lawyers. Isidore and Gratian used it: Keen, above n 50, 10.

[54] Maitland, above n 53, 40. Presumably Azo felt justified in making this interpolation by *Digest* 1.1.3.

[55] Ibid 37 [f.4].

[56] See also the ambivalent attitude to war of the civilian lecturer in England in the late twelfth century: Francis De Zulueta and Peter Stein (eds and trans), *The Teaching of Roman Law in England Around 1200* (1990) 10 (1.2).

[57] St Augustine, *Concerning the City of God Against the Pagans* (Henry Bettenson trans, 1984) 154 [Bk IV, ch 15].

[58] In addition to the just war, canon law also knew of the 'Holy War': a positively meritorious war waged in the interests of the Church, for example against infidels and heretics. The criteria for the Holy War were vague. However, the Holy War's scope was confined by the fact that it required papal sanction. It could not be invoked by any secular ruler seeking to extend his domains. For discussion of Holy War see: James Brundage, *Medieval Canon Law and the Crusader* (1969) 21-9; Brundage, above n 51, 103-9; Russell, above n 51, 72-83, 112-26; Herbert Cowdrey, *Popes, Monks and Crusaders* (1984) essay XIII, esp 15-21.

[59] George Garnett describes the Norman accounts of the conquest as 'legal briefs': 'Conquered England' in Nigel Saul (ed), *The Oxford Illustrated History of Medieval England* (1997) 64.

[60] William of Poitiers, *Gesta Guillelmi* (RHC Davis and Marjorie Chibnall trans, 1998) 101 [ii.1] and 81 [i.48] respectively.

[61] Ibid 101 [ii.1]. The argument for Duke William is again set out at length at 119-23 [ii.12]. The weakness of Duke William's claim is shown in: George Garnett, 'Coronation and Propaganda: Some Implications of the Norman Claim to the Throne of England in 1066' (1986) 35 *Transactions of the*

Royal Historical Society, 5th series, 91, 97 (and see also 107-12 for the genesis of the argument); Garnett, above n 59, 62-5.

[62] *Quaestiones in Heptateuchum*, VI, 10a. I have taken the English translation from Eppstein, above n 51, 74.

[63] *Etymologiarum sive Originum Libri*, XX, xviii, 1, 2-4; translation in Eppstein, above n 51, 87.

[64] 'Those wars are unjust which are undertaken without provocation. For only a war waged for revenge or defence can actually be just' ['Illa iniusta bella sunt, quae sunt sine causa suscepta. nam extra ulciscendi aut propulsandorum hostium causam bellum geri iustum nullum potest']: Cicero, *The Republic* (Clinton Keyes trans, 1928) 213 [III.xxiii.35]; 'No war is just unless it is declared and waged to recover lost goods' ['Nullum bellum esse iustum nisi quod aut rebus repetitis geratur aut denunciatum ante sit et interdict']: Cicero, above n 31, 14-5 [Bk 1, ch 35].

[65] William of Poitiers, above n 60, 123 [ii.14].

[66] *R v Abbot of Peterborough* (1329-1330) YB 3-4 Ed III 87, 92-3 (Selden Society vol 97).

[67] Giraldus Cambrensis, above n 10, xiii.

[68] Ibid 149 [Bk 2, ch 6]; Geoffrey of Monmouth, above n 46, 81 [Bk III, ch 12], 198 [Bk IX, ch 10], 204 [Bk IX, ch 12].

[69] Walter Ullman, 'On the influence of Geoffrey of Monmouth in English History' in Clemens Bauer, Laetittia Boehm, and Max Muller (eds), *Speculum Historiale* (1965) 257, 271. The relevant passage from Geoffrey of Monmouth's history is Geoffrey of Monmouth, above n 46, 198 [Bk IX, ch 10].

[70] Rees Davies, *The First English Empire* (2000) 33; Aelred Watkin (ed), *The Great Chartulary of Glastonbury* (1947) vol 1, section entitled 'Introductory Documents' (iii).

[71] See Davies, above n 70, 41-2. The letter itself can be found in ELG Stones, *Anglo-Scottish Relations 1174-1328* (1965) 96-109.

[72] Giraldus Cambrensis, above n 10, 149 [Bk 2, ch 6]; see also 93 [Bk I, ch 31], 95 [Bk I, ch 33], 231 [Bk 2, ch 33] and 311 (n 150).

[73] It is reproduced in translation in Sidney Ehler and John Morral (eds), *Church and State Through the Centuries* (1954) 16-22, esp 20. For commentary see Walter Ullman, 'Donation of Constantine' in W J McDonald (ed in chief) *New Catholic Encyclopedia* (1967) vol 4.

[74] Giraldus Cambrensis, above n 10, 149 [Bk 2, ch 6].

[75] Ibid 145-7 [Bk 1, ch 5]. The arguments and extensive bibliography about this controversial document are summarised in John Watt, *The Church and the Two Nations in Medieval Ireland* (1970) 36 n 3.

[76] Sir Maurice Powicke, *King Henry III and the Lord Edward* (1947) vol 2, 647-8.

[77] *Salaman v Secretary of State for India* [1906] 1 KB 613, 640.

[78] Davies, above n 70, 41.

[79] William of Poitiers, above n 60, 109 [ii.6].

[80] Pollock and Maitland, above n 26, 92.

[81] Ten Articles of William I, chapter 7 confirms the laws of King Edward, 'with the additions which I have decreed for the benefit of the English nation': Agnes Robertson, *The Laws of the Kings of England from Edmund to Henry I* (1925) 241. Likewise the Conqueror issued a charter to the city of London, willing that the Laws of King Edward continue in force there: ibid 231.

[82] Ten Articles of William I, chapter 8a, section 1: ibid 241.

[83] RC van Caenegem, *English Law Suits from William I to Richard I* (1990) vol 1 (Selden Society, vol 106) 9.

[84] Ibid 49 (case 18, c.1082-1087).

[85] Davies, above n 70, 33.

[86] See John's indignant admonition of the Irish barons in 1207 for purporting to arrogate to themselves the power to create a new assize: *Cal docs Ire, 1171-1251*, #329 (for details on this citation, and the next few following, see above n 18).

[87] *Cal docs Ire*, *1171-1251,* #1602 (1228).

[88] *Cal docs Ire*, *1171-1251,* #2069 (1233).

[89] H F Berry (ed), *Statutes and Ordinances and Acts of the Parliament of Ireland King John to Henry V* (1907) 35.

[90] *Cal docs Ire*, *1252-1284*; #1163 (209; see also 203) (1275); #1450 (1278); *Cal docs Ire*, *1285-1292*, #58. For statements in King's writs to judges that English and Irish law are the same, see: *Cal docs Ire*, *1252-1284*, #317 (1253-1254); #318 (1253-1254); #458 (1255). On the other hand, from the late thirteenth century there appears to have been increasing official acceptance that English law had legitimately adapted itself to local circumstances. The result was an official acknowledgement of the existence of a specifically Irish law and custom: Brand, above n 19, 21, 47.

[91] For the march: Rees Davies, 'Kings, Lords and Liberties in the March of Wales' (1979) 29 *Transactions of the Royal Historical Society*, 5th series 41, 53-60. For the principality: Rees Davies, 'Law and National Identity in Thirteenth-century Wales' in Rees Davies *et al* (eds), *Welsh Society and Nationhood* (1984) 52.

[92] 12 Ed I, c.1 (1284) reproduced in *Statutes of the Realm*, vol 1, 55ff. On the King's disposition to pass judgement, and revise, native laws in Ireland, Scotland and Wales, see Rees Davies, 'Lordship or Colony' in James Lydon (ed), *The English in Medieval Ireland* (1984) 142, 156.

[93] JEA Jolliffe, *Angevin Kingship* (2nd ed, 1963) 34.

[94] Ibid 87. Cf Ralph V Turner, *The King and His Courts* (1967) 269.

[95] Keen, above n 50, 84-5.

[96] Christopher Allmand, *The Hundred Years War* (1988) 39.

[97] Ibid 38. In any event, in the late medieval common law there was no conquest rule. Note the absence of anything like a rule about conquest to solve the problem of what law prevails in Wales in *Countess of Gloucester & Hertford v Bluet* (1319) 12 Ed II (Selden Society vol 70) 4, a case well suited to the application of such rule (had it existed).

[98] S B Chrimes, *English Constitutional Ideas in the Fifteenth Century* (1936) 63.

[99] Ibid 62.

[100] Sir George Buck, *The History of Richard the Third* (Arthur Kincaid ed 1982) Book II, 87-9 [ff 88-89v]; Francis Bacon, *The History of the Reign of King Henry the Seventh* (Jerry Weinberger ed, 1996) 29-32. The discussions of the theory of 'conquest' in these two texts must be treated with caution. They were written during the age of (and perhaps with an eye on) the great struggle between King and Parliament, in which the theory of 'conquest' had a significant part to play (on this, see J G A Pocock's controversial *The Ancient Constitution and the Feudal Law* (revised ed, 1987) esp chapter 2, and also Glenn Burgess, *The Politics of the Ancient Constitution* (1993) 82-5). The histories of Buck and Bacon may therefore tell us more about the discourse about 'conquest' in the seventeenth century than in the fifteenth (see esp Weinberger's note in Bacon, ibid 32, n 21). A more reliable treatment of the contemporaneous legal significance of Henry VII's victory is that of S B Chrimes, *Henry VII* (1972) 50-1, 62-3.

[101] The question of what justification in the Law of Nations the European powers relied on when laying claim to the Americas has been the subject of considerable academic argument. The various competing theories that have been propounded from time to time are usefully summarised in John T Juricek, *English Claims in North America to 1660: A Study in Legal and Constitutional History* (PhD Thesis, University of Chicago, 1970) 2-36. For present purposes suffice to say that Juricek must be right in saying, at 36, that 'the rationale behind English claims to North America was not constant from 1497 to 1660'.

[102] Julius Goebel Jr, *The Struggle for the Falkland Islands* (1927) 74-94. More generally on this topic see Muldoon, above n 49, ch 6 and 7. In 1454 Pope Nicholas V issued the bull *Romanus Pontifex* to award to the Portuguese the right 'to invade, search out, capture, vanquish and subdue all Saracens and Pagans whatsoever' (ibid 134). In 1493, following the return of Columbus, Pope Alexander V issued three bulls in which (inter alia) he awarded to Castile the right to acquire lands in the Americas which were not yet in the possession of any Christian prince (ibid 136-138). The three bulls themselves can be found in F G Davenport (ed), *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (1917) 56-83.

[103] Goebel Jr, above n 102, 88-9, 94; Francis Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (1909) vol 1, 39-40.

[104] Thorpe, above n 103, 45-6 (emphasis added). There is similarly robust language in Henry VII's patent of 1501 to various merchants ('occupandi possidendi et subjugandi'): Richard Biddle, *A Memoir of Sebastian Cabot* (2nd ed, 1832) 226, 313.

[105] Thorpe, above n 103, 51, 55.

[106] *Earl of Derby's case* (1598) 2 Anderson 115 [123 ER 575].

[107] (1608) 2 State Trials (Cobbett and Howell) 575, 595.

[108] Bruce Galloway and Brian Levack (eds), *The Jacobean Union* (1985) ix-vvvii. For a comprehensive account, see Bruce Galloway, *The Union of England and Scotland 1603-1608* (1986).

[109] *Journals of the House of Commons* (1547-1628) vol 1, 186; Mary Anne E Green (ed), *Calendar of State Papers, Domestic Series, of the Reign of James I 1603-1610* (1857) #63 (26 April 1604).

[110] *Journals of the House of Commons* (1547-1628) vol 1, 188; Green, above n 109, #79 (27 April 1604).

[111] James Spedding, *The Letters and the Life of Francis Bacon* (1868) vol 3 90-9 ('A Brief Discourse Touching the Happy Union of the Kingdoms of England and Scotland'), 218-35 ('Certain Articles or Considerations Touching the Union of the Kingdoms of England and Scotland').

[112] Galloway, above n 108, 30-2, 44-6.

[113] It is reproduced in Galloway and Levack, above n 108, 185ff.

[114] Ibid 189.

[115] Spedding, above n 111, 93, 96.

[116] 2 State Trials (Cobbett and Howell) 562, 571.

[117] *Calvin's case* (1608) 7 Co Rep 1a [77 ER 377]. There is a report at 2 State Trials (Cobbett and Howell) 575 which reproduces Coke's report, and also contains Bacon's speech as counsel for the plaintiff and Lord Ellesmere's reasons for decision which he had to reconstruct at the King's command after the event so that they might be published. A modern edition of that latter publication, with notes, can be found in Louis Knafla, *Law and Politics in Jacobean England. The Tracts of Lord Chancellor Ellesmere* (1977). There is also a contemporary report of the case by John Hawarde of the Inner Temple: John Hawarde, *Les Reports del Cases in Camera Stella 1593 to 1609* (W Paley Baildon ed, 1894) 349-66. Hawarde's editor describes this report as 'in many parts little more than a collection of disconnected quotations and references'. The chief value of the report is its contemporaneity and its notes on the dissenting judgement of Walmsley J. Also, brief anonymous notes of speeches made by the counsel and the judges are preserved at PRO SP 14/34/12-26, but they do not add much to our knowledge. For a general overview of *Calvin's case*, see Galloway, above n 108, 148-57, from which I have gained much assistance.

[118] The preparations for bringing the case can be traced through the state papers of the Earl of Salisbury now transcribed by the Historical Manuscripts Commission: see Montague Giuseppi and D McN Locke (eds), *Calendar of the Documents of the Most Honourable Marquess of Salisbury ... Part XIX (AD 1607)* (1965) 275, 293, 297, 310, 440-1, 452-3.

[119] Galloway, above n 108, 148.

[120] 2 State Trials (Cobbett and Howell) 575, 584.

[121] Galloway, above n 108, 151.

[122] (1608) 7 Co Rep 1a, 17b [77 ER 377, 398].

[123] 'Historicall Collections' in Galloway and Levack, above n 108, 195.

[124] 'Of the Union' in Galloway and Levack, above n 108, 181.

[125] Price notes that Bacon may have taken from Bodin the argument that allegiance to the sovereign is a matter of natural law, not positive law: P J Price, 'Natural Law and Birthright Citizenship in *Calvin's Case* (1608)' (1997) 9 *Yale Journal of Law and the Humanities* 73, 109-10.

[126] (1608) 2 State Trials (Cobbett and Howell) 575, 591-2.

[127] I here rely on the reconstruction of the defence's argument in Galloway, above n 108, 151-2. The surviving notes we have of Hutton's speech for the defence do not in fact mention Ireland: PRO SP 34/14/12. However these notes are very short. Galloway's reconstruction makes sense in light of the surviving documentary evidence of the case and is therefore (I believe) probably reliable.

[128] (1608) 2 State Trials (Cobbett and Howell) 659, 680-1; Knafla, above n 117, 232 ('First, for Ireland, it was gotten by Conquest, and the Conqueror may impose what Lawes hee will upon them ... consider how it was in the *Interim* before king John gaves Lawes to Ireland'). According to Knafla, the major source for Lord Ellesmere's historical precedents in his speech (including Ireland) was a

treatise, 'Unions of states be of different natures', upon which Ellesmere made notes: 231, n 2.

[129] (1608) 7 Co Rep 1a, 17a, 22b-23a [77 ER 377, 398, 404].

[130] For the same tendency in a sophisticated legal treatise, see Sir Matthew Hale's manuscript work on the prerogative. Proceeding on the basis the Norman conquest of England, the conquest of Wales, and the Angevin conquest of Ireland obeyed laws which a lawyer can divine, Hale set out a detailed legal theory of conquest: Sir Matthew Hale, *The Prerogatives of the King* (DEC Yale ed, 1976) (Selden Society vol 92) 4, 8-35.

[131] (1608) 7 Co Rep 1a, 17b [77 ER 377, 397-8].

[132] (1608) 2 State Trials (Cobbett and Howell) 575, 577.

[133] (1608) 7 Co Rep 1a, 17b [77 ER 377, 398].

[134] Bacon here cites scripture: Judges 8:22 and Genesis 10: 8-9. 2 State Trials (Cobbett and Howell) 575, 579-80. Interestingly, he does not cite any civilian sources, a matter to which we shall return. See also the discussion about conquest in Bacon's later *History of the Reign of King Henry the Seventh*, above n 100, 31 (first published in 1622).

[135] (1608) 2 State Trials (Cobbett and Howell) 575, 591.

[136] The Chronicler Roger of Wendover records Henry II calling a council at Lismore, 'where the laws of England were received by all, and confirmed by oath': Roger of Wendover, *Flowers of History* (J A Giles trans, 1849) vol 2, 21. However, Roger was probably writing here of the council of clerics which met in Cashel in 1171-2 and agreed merely to introduce ecclesiastical reforms along English lines: Henry Orpen, *Ireland Under the Normans 1169-1216* (1911) vol 1, 275 n 1; Jocelyn Otway-Ruthven, 'The Native Irish and English Law in Medieval Ireland' (1950) 7 *Irish Historical Studies* 1, 4 5; Brand, above n 17, 95-100, esp n 17.

[137] Goddard Henry Orpen (ed and trans) *The Song of Dermot and the Earl* (1892) lines 2621-2: 'Leynistre lui ad grante / Li riche reis en herite' ('The rich king granted to him Leinster in fee'). This is confirmed by Gerald of Wales: Giraldus Cambrensis, above n 10, 89 [Bk 1, ch 28].

[138] Roger de Hoveden, *The Annals of Roger de Hoveden* (Henry T Riley trans, 1853) vol 1, 354; see also Giraldus Cambrensis, above n 10, 105 [ch 38].

[139] The deed is reproduced in the Gormanston Register, which was compiled in 1397-1398: John Mills and Michael McEnery (eds), *Calendar of the Gormanston Register From the Original in the Possession of the Right Honourable the Viscount of Gormanston* (1916) (hereafter '*Gormanston Register*'). The calendared summary of the grant is at 6 [f.5], the full Latin text 177. Roger of Howden, above n 138, 354 says the service required was 100 knights, not 50; but the Register is the better evidence.

[140] It is reproduced in translation in Curtis and McDowell, above n 13, 24.

[141] Edmund Curtis (ed), *Calendar of Ormond Deeds 1172-1350AD* (1932) #1, #2, #3, #7, #8, #10, #13, #17, #29, #38; *Cal docs Ire, 1171-1251*, #50, #86, #87, #92, #93-99, #103, #104, #121, #122, #124, #126, #136, #137, #139, #260, #263, #382; *Gormanston Register*, 6 [f.5], 129 [f.163d], 142 [f.188d], 143-4 [f.189d], 145 [f.190d], 163 [ff.210-210d]; J T Gilbert (ed), *Facsimiles of the National Manuscripts of Ireland*, part II (1878) plate LXVII.

[142] *Gormanston Register*, 6 [f.5], the full Latin text is at 177. John's confirmatory grant to Hugh's son in 1208 expressly reserves certain jurisdiction to the King, for example in pleas of the Crown, and pleas in default of seignorial jurisdiction: *Cal docs Ireland, 1171-1251,* #382; Sir Thomas Duffus Hardy (ed), *Rotuli Chartum in Turri Londinensi* (1837) vol 1, part 1, 178.

[143] *Gormanston Register*, 142 [f.188d] (c.1190), 143-4 [f.189d] (c.1195), 163 [f.210d] (c.1209). The earliest such grant seems to be a grant in 1185 to William FitzMaurice: Brand, above n 17, 99 n 15.

[144] Curtis and McDowell, above n 13, 24 (1185); Hardy, above n 142, 79; *Gormanston Register*, 145 [f.190d], 163 [f.210]; Curtis, above n 141, #7.

[145] *Gormanston Register*, 143-4 [f.189d], 163 [f.210d]; Gilbert, above n 141, plate LXVII; Curtis, above n 141, #34.

[146] Florence Harmer, *Anglo-Saxon Writs* (1952) 73-6.

[147] *Cal docs Ire*, *1171-1251*, #116 (1199). There is another reference in December 1201, *Cal docs Ire*, *1171-1251*, #164. See also Brand, above n 19, 3-5.

[148] Holt, above n 36, 123-6.

[149] *Cal docs Ire*, *1171-1251*, #89 (1199), #111 (1199).

[150] *Cal docs Ire*, *1171-1251*, #108 (1199), #109 (1199); possibly also #164 (1201).

[151] Berry above n 89, 3. The writ of naifty was the writ by which a lord claimed ownership over a villien.

[152] Brand, above n 17, 98-9.

[153] T F T Plucknett, *Legislation of Edward I* (1949) 25.

[154] Berry above n 89, 3.

[155] See n 86 above.

[156] Goebel Jr, above n 102, 102-7.

[157] *Digest* 41.1.5.7 (‘Again, property taken from the enemy is forthwith the property of the taker under the law of nations’); 41.2.1.1 (‘... things captured in war ... become the property of him who first takes possession of them’); see also 41.2.18.4.

[158] *Institutes* 2.1.17 (‘Again the things that we take from the enemy at once become ours by the law of nations’).

[159] Cicero, *De Officiis* (trans Walter Miller, 1956) 23 [I.vii.21] (‘... property becomes private either through long occupancy ... or through conquest (as in the case of those who took it in war) or by due process of law ...’).

[160] Keen, above n 50, 70, and see also 139-47. There noted, for example, is Bartolus’s statement (followed by subsequent civilians) that in a ‘public war’ (i.e. a war declared by the ‘Roman people, or by the emperor on whom their entire authority has been conferred’; opposed to, for example, a private war between barons) ‘captives can be enslaved, and goods taken in its course become the property of the captors’: *Commentaria In Digestum Novum* 49.15.24. Similarly, notes Keen (70, n.3), in canon law Gratian reserved the spoils taken in a war to the conquering king: Gratian’s *Decretum*, C.23, q.5, c.25.

[161] *Digest* 49.15.20.1 (‘... any field which may be captured from the enemy[’s ownership] is confiscated’). See also Goebel Jr, above n 102, 69.

[162] Keen, above n 50, 139, citing (inter alia) Baldus, *Commentaria in I Decretales*, Tit 34). For

other discussion of the ownership of conquered lands in medieval times see also: A E Prince, 'The Indenture System under Edward III' in J G Edwards *et al* (eds), *Historical Essays in Honour of James Tait* (1933) 283, 295; Giovanni de Legnano, *Tractatus De Bello, De Represaliis et De Duello* (Sir Thomas Erskine Holland trans, 1917, first composed c 1360) 270 [Ch lxi].

[163] Pierino Belli, *A Treatise on Miltiary Matters and Warfare* (first published 1563, Herbert C Nutting trans, 1936) 85 [Part II, XII.1].

[164] Ibid, 97-8 [Part II, XVIII.8].

[165] Balthazar Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* (first published 1582, John Pawley Bate trans, 1912) [trans of *De Jure et Officiis Bellicis et Discliplina Militari*] 35-6 [V.1-3].

[166] For biographical details, there is a useful note on Gentili in the *Dictionary of National Biography*. A fuller treatment can be found in Gesina H J Van Der Molen, *Alberico Gentili and the Development of International Law* (2nd ed, 1968), ch 2.

[167] Alberico Gentili, *The Three Books on the Law of War* (trans John C Rolfe, 1933 being a translation of the 1612 ed) 304; and see also 305 [Bk III, Ch 4, 495-6; 498].

[168] Ibid 308-9 [Bk III, Ch 5, 502].

[169] William Fulbeck, *The Pandects of the Law of Nations* (1602) 50-2. Cf Fulbecke's *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England* (1601) 'To the courteous reader', where he comments that the law of the realm was changed by conquest (viz the Norman conquest), but that reason and consent were responsible for the changes, not sovereignty and command.

[170] Knafla, above n 117, 41, n 2.

[171] See Fulbeck's entry in the *Dictionary of National Biography*.

[172] Gentili, above n 167, 366 [Bk III, Ch 4, 499]. Gentili refers to a passage in Caesar's *Gallic War*, I.36.1, in which the German king Ariovistus tells Caesar that 'it was the recognised custom of war for victors to rule the vanquished in any way they pleased': Julius Caesar, *The Conquest of Gaul* (SA Handford trans, 1982) 46. Gentili comments that 'Ariovistus replied too harshly'.

[173] See note 134 above and the accompanying text.

[174] Gentili, above n 167, 322 [Bk III, Ch 8, 523]: 'It is surely a rule that severity ought not to be shown, a rule to avoid the slaughter of many men'; and see that chapter generally, as well as chapters 2, 7, and 8 of Book III. Cf Walter Ullman, 'Bartolus and English Jurisprudence' who notes that the influential civilian 'Baldus maintained that prisoners of war became res mobiles and could therefore be done to death': *Bartolo da Sassoferrato* (1962) vol 1, 67.

[175] It would be wrong to ascribe to common lawyers complete indifference to the civil law. Abbott, citing a number of primary sources, notes that 'it had been regular practice at least from the time Dyer began compiling his reports to consult with the doctors of canon and civil law on points of difficulty': L W Abbott, *Law Reporting in England 1485-1585* (1973) 191. See also Hans Pawlisch, *Sir John Davies and the Conquest of Ireland* (1985) ch 9.

[176] Frederic Maitland, *English Law and the Renaissance* (1901) 30.

[177] William Hassall, *A Catalogue of the Library of Sir Edward Coke* (1950) 38-41.

[178] Ibid 40, #469: *Institutiones Juris Civilis cum glossis Fr. Accursii* (1559). I have not had the

opportunity to examine this volume. The close study of it, and particularly any glosses concerning things captured in war, may yet throw light on Coke's comments about conquest in *Calvin's case*.

[179] T E Scrutton, 'Roman Law Influence in Chancery, Church Courts, Admiralty and Law Merchant' in *Select Essays in Anglo-American Legal History* (1907) vol I, 208-12. Cf Peter Stein, *Regulae Iuris. From Juristic Rules to Legal Maxims* (1966) 161-2.

[180] Knafla, above n 117, 39-40, 49.

[181] (1608) 2 State Trials (Cobbett and Howell) 575, 673; Knafla, above n 117, 221.

[182] Sir William Holdsworth, *A History of English Law* (1937) vol 4, 240.

[183] (1608) 2 State Trials (Cobbett and Howell) 575, 602 (emphasis added).

[184] Ibid, citing Anthony Fitzherbert, *La Graunde Abridgement*, title 'Protection', plea 56 (although in the edition I consulted, the 1577 edition published by Richard Tottel, the plea in question is in fact plea 59 and the year is 17 H VI rather than 13 H VI).

[185] Sir Frederick Pollock and Sir William Holdsworth (eds), 'Sir Matthew Hale on Hobbes: an unpublished ms' (1921) 47 *Law Quarterly Review* 274, 295.

[186] (1608) 2 State Trials (Cobbett and Howell) 575, 581.

[187] Coke is also reported have expressed a hostility to infidels in *Michelborne v Michelborne* (1609) 2 Brownl and Golds 296 [123 ER 952].

[188] The anonymous notes of Coke's speech have him saying (alone of the judges) that of the various kinds of enemies known to law, one kind is 'perpetual as a Turke because he is Enemy to soule and body': PRO SP 14/34/22. Hawarde records Coke as saying 'A Conqueror may change the law where he had it by conquest and the inhabitants are 'infydlles', but otherwise where they are Christians': above n 117, 359. Hawarde's version is significantly different to the way Coke puts it in his report of the case. However W Paley Baildon, the modern editor of Hawarde's reports, finds them 'inaccurate and careless' in several places: ibid viii.

[189] *William Filow's* case (1520) YB 12 H VIII, f.4.

[190] (1608) 7 Co Rep 1a, 17a-17b [77 ER 377, 397].

[191] Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (1979) 13-6 examines in some detail all of the authorities cited by Coke and finds them wanting. Moreover, it seems that the Crusades do not provide a precedent for Coke's distinction. Upon conquest of the Holy Lands, the practice of the crusaders seems to have been to leave the ('infidel') laws of the conquered Moslem population in place: Joshua Prawler, *The Crusaders' Kingdom* (1972) 140.

[192] Anthony Pagden, *Lords of All the World* (1995) 47-8; Quentin Skinner, *The Foundations of Modern Political Thought* (1978) vol 2, 139-40, 166-71. For the relevance of Wycliff in this context, see also Kenneth Pennington, above n 49, XIII.10.

[193] Lectura quinque decretalium, translated in James Muldoon (ed), *The Expansion of Europe: the First Phase* (1977) 193. Hostiensis position on infidels was foreshadowed by Alanus Anglicus at the beginning of the century: 'Commentary on *Dist.* 96, c.6', translation in Tierney, above n 48, 123.

[194] See n 49 above.

[195] For a specific instance of canon lawyers in the fifteenth century relying on Hostiensis's doctrine on infidels, see Stanlislaw Belch (ed), *Paulus Vladimiri and His Doctrines Concerning*

International Law and Politics (1965) vol 2, 1113, 11184. Vladimiri observed in several places that Hostiensis' doctrine had become widespread in Europe: 854, 1008. See also: Muldoon, above n 49, 17-8; Pennington, above n 49, XIII.6.

[196] Kenneth Pennington, 'Henricus de Segusio (Hostiensis)' in his *Popes, Canonists and Texts, 1150-1550* (1993) XVI.7.

[197] Pennington, above n 49, XIII.5.

[198] Gentili, above n 167, 39 [Bk I, Ch 9, 62], citing Baldus, *Consilia* IV.cxl, and V.ccccxxxix. Gentili also notes, however, that Baldus is inconsistent on this point, for in another place he adopts Innocent IV's position that war is not lawful against the infidels who live at peace with us and do no harm: 39 [Bk I, Ch 9, 61], citing Baldus, *On Digest*, I.i.5.

[199] Pagden, above n 192, 47-8. For a concise summary of the leading Spanish writers, Sir Mark Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) 12-3. For the influence of medieval canon law on Bartolome de Las Casas, the Native Americans' chief advocate in the arguments in Spain, see Pennington, above n 49, XIII. Note also that the position of Bartolus was apparently that a lawful ground of war was necessary even against the Saracens: Cecil Woolf, *Bartolus of Sassoferrato* (1913) 202 n 3; see also 199.

[200] Ayala, above n 165, 20.

[201] *Code*, 1.11.6

[202] Gentili, above n 167, 39 [Bk I, Ch 9, 61-2].

[203] Robert Williams is incorrect in asserting a congruity between Gentili's writings and Coke's remarks in *Calvin's case*: *The American Indian in Western Legal Thought* (1990) 200. Gentili accepts the justice of war against cannibals, people who have sexual intercourse with animals, idolators who slaughter innocents, and people with no kind of religion at all; but he denies the justice of war against infidels, even where they refuse to hear the preaching of the gospels: Gentili, above n 167, 122-3 [Bk I, Ch 25, 198-200]; and see also 39 [Bk I, Ch 9, 61-62]. Similar comments apply to Richard Tuck, *The Rights of War and Peace. Political Thought and International Order From Grotius to Kant* (1999), 122-3.

[204] Hassall, above n 177, 38-41. It would be a useful for a specialist to examine the volumes listed in the catalogue with a view to attempting to throw some light on the question of Coke's familiarity with canon law's arguments about infidels.

[205] See the preface to part 10 of Coke's reports (xxx of the 1826 edition).

[206] And perhaps not only lawyers. The antiquarian and friend of Edward Coke, Sir George Buck, in his history of Richard III (composed before 1622) has the barons opposing Henry VII's proposal to give himself the title 'de jure belli' on the purported ground that 'the names both of conqueror and of co[nquest were] very harsh and hateful words to all the English, and reputed as barbarous and heathenish tyra[nnical titles.] And by good reason, for the work and end of them is to all the people of the land sla[ves, to] possess all their goods and fortunes at their pleasures, and in brief to do anything': above n 100, 87 [f.88].

[207] Robert Callis, *The Reading ... Upon the State of 23 H.8 Cap 5 of Sewers* (1647) 23 (First lecture, section entitled 'Of Islands').

[208] William Fitzhugh, *William Fitzhugh and His Chesapeake World 1676-1701: the Fitzhugh Letters and Other Documents* (Richard Davis ed, 1963) 158.

[209] *Craw v Ramsey* (1670) 2 Ventris 1, 4 [86 ER 273, 275]. The report actually reads 'being a

Christian King they remained governed by their own laws'. I take the word 'King' here to be an error or abbreviation. The correct word must be 'Kingdom', or the sentence makes no sense.

[210] *Craw v Ramsey* (1670) Vaughan 274, 293-9 [124 ER 1072, 1081-4].

[211] *Dawes v Painter* (1674) 1 Freeman 175 [89 ER 126].

[212] *Witrong v Blany* (1674) 3 Keble 401, 402 [84 ER 789].

[213] *Blankard v Galdy* (1693) 4 Mod 222, 225 [87 ER 359, 361-2].

[214] It follows from what I have said that I cannot fully agree with those writers such as Williams, above n 203, 194-9 who suggest that the conquest rule was simply lifted from contemporary texts on international law. That said, it is true that international law texts may have played some part, for there are a few references in the cases to what the law of nations purportedly says about conquest: *Craw v Ramsey* (1670) Vaughan 274, 291 [124 ER 1072, 1080]; and see also *The Case of Tanistry* (1608) Davies 28 [80 ER 516]. (The latter report is in law French. I have relied upon the translation in Davies, *A Report of Cases and Matters in Law Resolved and Adjudged in the King's Courts in Ireland* (1762). The relevant passage is at page 84).

[215] There is a survey of the arguments in Slattery, above n 191, 16-9. By way of summary, against Coke's exception as to infidels: *East-India Company v Sandys* (1684) 10 State Trials (Cobbett and Howell) 371, 392 ('absurd, monkish, fantastical and fanatical') 442-5 ('as irreligious as can be'); Skinner 165, 172 [90 ER 76, 79]; *Wells v Williams* (1697) 1 Salkeld 46 [91 ER 46] ('Turks and Infidels are not perpetui inimici ... they are Creatures of God and of the same kind as we are, and it would be a Sin in us to hurt their Persons', citing a criticism by a contemporary of Coke's); *Omichund v Barker* (1744) Willes 538, 542-3 [125 ER 1310, 1312] ('contrary nor only to the scripture but to common sense and common humanity'). In support of the exception: *Witrong v Blany* (1674) 3 Keeble 401, 402 [84 ER 789]; *East-India Company and Sandys* (1684) 10 State Trials (Cobbett and Howell) 371, 373-5, 409; Skinner 165, 166 [90 ER 76, 77]; *Merchant Adventurers v Rebow* (1687) Comberbach 53, 55 [90 ER 338, 340]; *Dutton v Howell* (1694) Shower 24, 31 [1 ER 17, 21].

[216] (1722) 2 Peere Williams 75 [24 ER 646]. The Privy Council is reported as deciding that the laws of infidel countries actually remain in place after conquest, excepting only such of their laws as are 'contrary to our religion, or enact anything that is *malum in se*, or are silent'. In those cases, the law of the conquering country prevails. Support for this modification can be found in Salkeld's report of *Blankard v Galdy* (1693) 2 Salkeld 411, 412 [91 ER 356, 357] but not in any other report of the case.

[217] *Campbell v Hall* (1774) 1 Cowp 204, 209 [98 ER 1045, 1047-8].

[218] *R v Picton* (1804-1812) 30 State Trials (Cobbett and Howell) 225, 904-6, 932-5, 944-6.

[219] It is discussed in the Malaysian case of *R v Willans* (1858) 3 Kyshe 16, 21-2.