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NOTABLE ECCLESIASTICAL LAWYERS: V

Sir Daniel Dun (*c* 1545–1617)

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Historians habitually assess the importance of members of learned professions by what they wrote. Unless a man or woman took part in a dramatic historical event, what they accomplished seems almost not to count. This approach must come naturally to historians; it is how they themselves are judged. A moment's reflection, however, shows how inadequate a test of a lawyer's importance it is. Most lawyers do not write treatises: they act. They represent clients in court, they give advice, they administer organisations and they serve governments. Lawyers may have a large influence on human affairs even if they leave no treatise behind.[1] For historians to ignore this fact of professional life may cause them to misjudge the importance of ecclesiastical lawyers such as the subject of this article, Sir Daniel Dun. Dun never published a treatise, yet he was responsible for real accomplishments at a critical moment in the history of ecclesiastical law in England. He rose to high office, and he influenced the course of affairs in Church and state. Luckily, the evidence about his career is thick enough to provide a fair means of evaluating his place as an ecclesiastical lawyer.

DUN'S LIFE AND CAREER

The circumstances of Dun's birth are not free from doubt. We do not know its exact date, though 1545 is a likely estimate.[2] Nor are the origins of his family certain. There are indications that he came originally from a Welsh family, as many of the civilians did, but he was the son of Robert Dun of London, a

1 H Thieme, 'Le rôle des *Doctores legum* dans la Société allemande du XVIe siècle', in *Individu et sociétè à la Renaissance* (Brussels, 1967), pp 159–169. The same point is made in an only slightly different context by R Franklin, 'Sir Richard Steward and the crisis of the Caroline regime', in S Green and P Horden (eds), *All Souls under the Ancien Régime* (Oxford, 2007), p 39.

2 R Houlbrooke, 'Dun [Donne], Sir Daniel (1544/5–1617)', in *Oxford Dictionary of National Biography*, available at <http://www.oxforddnb.com/view/article/1817>, accessed 20 December 2013. See also B Levack, *The civil lawyers in England 1603–1641: a political study* (Oxford, 1973), pp 226–227.

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common lawyer of Gray's Inn. Even this is not entirely sure, however. There are also indications that he came from a family of East Anglian bondsmen. Professor Diarmaid MacCulloch discovered a record of a Daniel Dun's manumission in the Patent Rolls for 1576.[3]

By that year, he was already a fellow at All Souls College, having been admitted in 1567.[4] Of his prior schooling and the exact nature of his studies, little is known, but at Oxford he was admitted BCL in 1572 and DCL in 1580. In the latter year he was elected Principal of New Inn Hall, a centre for academic jurists as All Souls then also was. Later that same year he moved to London, where he received a commission from the Archbishop of Canterbury to serve as an advocate in the Court of Arches, and on 22 January 1582 he was admitted to a place in Doctors' Commons.

Thereafter his career took off. He had been named official principal for the Archdeacon of Essex by 1585, and before the end of the decade he had received commissions to serve as auditor of causes in the Archbishop's Court of Audience and then as Dean of the Arches. Think of it – Dean of the Arches at such a young age. After that, professional honours and responsibilities came thick and fast. He was admitted an honorary member of Gray's Inn in 1599. He became a master in the Court of Requests in 1602 and a master in Chancery two years later. He was serving regularly as a judge of the High Court of Admiralty by 1609, and he was MP for Taunton in 1601, then for Oxford University during the Parliaments of 1604 and 1614. Knighted in 1603, in part for his skill in concluding the Treaty of Bremen, he did not cease to serve as a judge in the English courts where the European *ius commune* applied.

Dun died in September 1617, having been active in his profession almost to the end. He was not quickly forgotten, however: a bust was commissioned by the fellows of All Souls College in 1750. It was one of the twenty-four placed high in the gallery of the Codrington Library as one of 'the most eminent members of the College'.[5] It is still there to be seen (at a considerable distance), a fitting memorial to the successful career of an English civilian.

If there can be little doubt about Dun's professional success and contemporary eminence, legitimate doubt could be raised as to his contributions to the history of the ecclesiastical law in England. No one doubts that he was an able practitioner who rose to the top of his profession. But was he anything more? The fellows of All Souls certainly thought so more than one hundred years

3 *Calendar of Patent Rolls, Elizabeth I*, vol 8, nos 705–706; see D MacCulloch, 'Bondmen under the Tudors', in C Cross, D Loades and J Scarisbrick (eds), *Law and Government under the Tudors* (Cambridge, 1988), p 92.

4 See All Souls College, Oxford, MS Statuta collegii Omnium Animarum, folio 178, where he was listed as a jurist of London.

5 A Wood, *History and Antiquities of the Colleges and Halls in the University of Oxford*, ed J Gutch (Oxford, 1786), vol 4, p 284.

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after his death, and their opinion is supported by other evidence. Dun never wrote a treatise. However, he did make significant contributions to the profession of ecclesiastical law in at least three respects: in preserving its learned traditions, in improving practice in the courts of the Church, and in resisting encroachments on ecclesiastical jurisdiction by some aggressive litigants and common lawyers.

PRESERVATION OF THE LAW OF THE CHURCH

The era when Dun grew up was a time of threat to the traditional law of the English Church. The jurisdiction of the Church's courts was not overturned at the Reformation, but a thoroughgoing reformation of its law was promised from the 1530s and at length the Commission appointed to compile a reformed law produced the *Reformatio legum ecclesiasticarum* in 1552.[6] It turned out to be a proper code, and it would have set the ecclesiastical law on a new and different course. This did not happen, however, because it never received the approval of king and Parliament. It stood thereafter as a silent critic of the existing law. Dun resisted that criticism. He was a leader among the ecclesiastical lawyers whose knowledge of the traditional *ius commune* kept its learning alive and even vigorous. In time, the *Reformatio* itself faded from the scene.

Proof of Dun's effort to preserve the learned traditions of his profession is buried in manuscript reports of causes heard in the ecclesiastical courts, but it is impressive when brought to light. An illustrative example appears in his intervention in a dispute between the Archbishop of York and the Dean and Chapter of Durham over their respective rights in the bishop's rights sede vacante.[7] Like many such cases, the outcome depended on the law of proof and the difference between petitory and possessory claims. Dun's analysis of the relationship between these two and the consequences that followed began with the two basic texts from the *Corpus iuris canonici*, one from the Gregorian Decretals (X 2.12.5), the other from the Clementines (Clem. 2.3.1). He gave them a broad reading, extending them beyond their immediate subject (causes involving benefices) to include other rights incident to ecclesiastical offices. This was fully in accord with traditional civilian ways of reasoning *De similibus ad similia*. He buttressed his interpretation with authoritative medieval commentaries by Panormitanus (1386–1445/53), and Joannes ab Imola (*c* 1370–1436). He then added references from the abundant *Consilia* literature, citation to collections of opinions written by Paulus de Castro (d 1441), Jason de Mayno (1435–1519), Joannes Franciscus de

6 Its most recent edition is G Bray (ed), *Tudor Church Reform: the Henrician Canons of 1535 and the Reformatio Legum Ecclesiasticarum*, Church of England Record Society 8 (Woodbridge, 2004), pp 166–743.

7 Taken from R Helmholz (ed), *Three Civilian Notebooks 1580–1640*, Selden Society 127 (London, 2010), no 8, at p 15.

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Ripa (*c* 1480–1535) and Marianus Socinus, Jr (1482–1556). He concluded by citing the most recent specialised treatments of the subject then available – now quite obscure works by Fabius Accorombonus (1502–1559), Ludovicus Bologninus (1447–1508), Berengarius Fernandus (d *c* 1574), Hormanoctius Deti (1464–*c* 1531), Claudius Marmerius (*fl* 1557) and Joannes Antonius Rubeus (1489–1544). These Italian jurists were sixteenth century authors of *Repetitiones* on the subject. Very probably, Dun's references to them came from a collection of scholarly opinions on the subject in which they were published together.[8] Whatever his immediate source was, however, their citation shows that he and his fellows kept abreast of developments in the contemporary *ius commune*. Dun made no mention of arguments based on the English common law. He cited nothing of the comparable differences between common law writs of right and the possessory assizes. For him, the relevant authority came from what was called the *oceanus iuris* of European law. In his determination to preserve the learned traditions of his profession he was not alone, but he was one of its leaders.

IMPROVEMENTS IN THE ECCLESIASTICAL COURTS

The English civilians are sometimes regarded as instinctive defenders of the old order, and Dun's desire to preserve the traditional learning supports that characterisation. However, it is too one-sided a description to capture the complexity of his attitude. He, along with his fellow civilians, recognised that faults existed in the church's courts. Whatever their merits, the actual exercise of ecclesiastical jurisdiction left much to be desired. A manuscript now at Lambeth Palace written in Dun's hand spelled out some of them: overlapping jurisdictions, frivolous appeals, excessive fees and costs, unnecessary delays in litigation, and failures to follow procedural requirements.[9] Most of these complaints were not new, but perennial complaints are not necessarily unjustified complaints, and, in a series of statutes enacted for the courts during Dun's service in the Court of Arches, measures were taken to remedy some of them.[10] It would not be right to attribute these measures to Dun alone, but that he stood behind them and encouraged their enactment seems self-evident from the manuscript evidence.

Dun was a practical man. He carried that characteristic into practice. An early seventeenth-century civilian's notebook records him as saying that in doubtful

8 Probably *Repetitiones in iure civili variae* (Lyon, 1553); see M Lipenus, *Bibliotheca realis iuridica* (Leipzig, 1757), vol 2, pp 264–265, where these authors are listed under this title.

9 For examples of these alleged failings, see 'Statuta omnia et singula', Lambeth Palace Library (LPL), MS 1748 (1590), said to be in Dun's hand, and with Dun's signature at the bottom of folio 1; and LPL, MS Reg Whitgift (1602), folio 135 (letter from the queen dealing with common complaints).

10 D Wilkins (ed), *Concilia Magnae Britanniae et Hiberniae, 446–1718* (London, 1737), vol 4, pp 328–335 (1587), 352–356 (1597), 417–424 (1605).

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cases arbitration was to be preferred to litigation. Even judges would be well advised to serve as arbitrators where doubt about the law or the facts existed.[11] Contemporary accounts confirm that he himself acted on that view.[12] Dun also sought to resolve vexed questions relating to the jurisdiction exercised by the Archbishop of Canterbury, in the end defending the archbishop's courts as 'easy of access and fortified by the expertise of men learned in the law'.[13] Most intriguing of the practical expedients connected with Dun is a collection of reported cases from London's ecclesiastical courts during his tenure as Dean of the Arches. It is now Tanner MS 427 in the Bodleian Library – identified by Sir John Baker as a possibly unique source in its attention to the arguments made in the courts.[14] This useful and practical experiment did not subvert traditional learning. Other reports of arguments and decisions in the spiritual tribunals were compiled during the Stuart era, but it was not until the eighteenth century that they became normal.

INDEPENDENCE OF THE ECCLESIASTICAL COURTS

Dun's career coincided with what most civilians regarded as new and unwarranted interference with their independence by the common lawyers. Writs of prohibition purporting to restrict the scope of ecclesiastical jurisdiction were becoming a familiar part of their life as judges. Dun, like most other civilians, did not resist prohibitions directly, but he did not wish to surrender the Church's right to its independent place in the English legal system. He regarded prohibitions as acts of power, not statements of the law.

Dun's touchiness on the subject was exemplified by an incident that took place while he was sitting as a judge in the Court of Admiralty.[15] Greene, a messenger, sought to deliver a writ of prohibition to him. Not pleased by the intrusion, he told Greene to take it and hand it to the registrar. Greene refused, saying that the writ was directed to Dun as the judge, not to any subordinate. Hard words followed. Dun is reported to have threatened to commit Greene to prison and have his writ thrown after him.[16] He carried out at least the former threat,[17] and when Greene's counsel later had him released by a writ of habeas corpus, the question arose as to whether any action should be taken against Dun himself. The counsel sought a writ of attachment against him.

11 Worcester Record Office, MS 794.093/2470, 'Collectanea B', folio 16.
12 See *Clarke v Blage* (1615), *Acts of the Privy Council 1615–1616* (London, 1925) pp 215–216.
13 All Souls College, Oxford, MS 226, folios 210–217.
14 J Baker, *English Legal Mansucripts*, vol 2 (covering Lincoln's Inn, the Bodleian Library and Gray's Inn) (Zug and London, 1978), p 150.
15 *Bruistone v Baker* (1615), 1 Rolle 315, 81 Eng Rep 511.
16 Ibid: 'Sir Daniel *dit que il fuit pluis sawcie, et dit que s'il nollet issint faire, il voilet luy committer* & throw the prohibition after him'.
17 Ibid: '*et puis il commit le dit Greene al prison*'.

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This, however, was refused. Dun, the report continued, 'was known as a man of good fame', and beyond doubt Greene had behaved 'sawcilie' in delivering the writ. Sir Edward Coke himself reached this conclusion, remarking that it had not been 'bon manners' to act as Greene did.

The full report of this case makes an important but often neglected point about the larger history of the relationship between what we now call Church and state. It took place in a small world. Dun and Coke knew each other: they had sat together as judges by commission.[18] The common law judges sometimes called upon the civilians, Dun among them, to appear and advise them about the contents of foreign and canon law.[19] The history of writs of prohibition undoubtedly includes a clash of ideas, but it took place in a world where personal relations counted. That Sir Daniel Dun was on what we now say turned out to be 'the losing side' should not cause historians to ignore the contemporary importance of that aspect of his career. He may have left no treatise behind, but his 'publication record' makes a poor measure of his place in the history of ecclesiastical jurisdiction in England.

18 *Case of the Spanish Ambassador* (1614), *Acts of the Privy Council 1615–1616*, pp 74–75.
19 Eg, *Penson v Cartwright* (1614), 2 Bulst 207, 80 Eng Rep 1071; *Petition of Beale, Yates, et al* (1616), *Acts of the Privy Council*, pp 611–614.

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