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NOTABLE ECCLESIASTICAL LAWYERS: VI

Sir Leoline Jenkins (1625–1685)

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Like many English civilians of his time, Leoline Jenkins came to his profession from Wales. He was born to a Glamorgan family of quite modest means, and lived there until his matriculation at Oxford.[1] Unlike most other civilians of Welsh extraction, however, he became famous enough to be considered worthy of a biography. It was compiled in two volumes by his friend William Wynne, and published almost forty years after Jenkins' death.[2] He also merited inclusion in John Aubrey's *Brief Lives*. There he was described as possessing 'a strong body for study, indefatigable, temperate and virtuous',[3] and indeed his industry, piety, and integrity won him admirers throughout his professional career. They also won him a high place in government during his lifetime. The last of these admirable traits – virtue – was considered particularly noteworthy in his time; he refused requests for special favours even from men who could have done him material good.[4] In longer hindsight, Jenkins also has a special claim on the attention of modern ecclesiastical lawyers: he was one of the first English civilians whose contributions to the growth of English law marked him out as one of those who took a full part in shaping the realm's legal system.

JENKINS' LIFE AND CAREER

Jenkins' early education was at Cowbridge Grammar School near to the place where he was born; it was a school he remembered with a gratitude sufficient to move him to endow it liberally later in his life when his means allowed. In

1 A Marshall, 'Jenkins, Sir Leoline', *Oxford Dictionary of National Biography*, online edition, Jan 2008, available at <http://www.oxforddnb.com/view/article/14732>, accessed 29 April 2014.
2 W Wynne, *The Life of Sir Leoline Jenkins* (London, 1724).
3 O Dick (ed), *Aubrey's Brief Lives* (London, 1949), pp 174–176. See also C Coote, *Sketches of the Lives and Characters of Eminent English Civilians* (London, 1804), pp 88–91.
4 For his reputation, see eg R Latham and W Matthews (eds), *The Diary of Samuel Pepys* (Berkeley and Los Angeles, CA, 1974), vol VIII, p 133.

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June 1641 he went up to Oxford, being admitted to Jesus College, an institution that was to figure largely in his career, but which he was obliged to quit in order to take up arms for the King's cause upon the outbreak of war. Already a royalist and episcopalian in conviction, Jenkins was among the men ousted from his college. Although he did return to live quietly in Oxford for a part of the Interregnum, he spent most the years before the Restoration elsewhere, in a combination of private study and service as tutor to sons of the gentry.

About the first of these, we know little. It certainly included the civil law, however: Aubrey recorded that he purchased a copy of the *Commentary on the Institutes* by Arnold Vinnius in 1653,[5] and in 1658 Sir William Whitmore invited him to live and study that law at Appleby in Shropshire, an invitation he accepted.[6] About the second – how Jenkins supported himself in those lean years – we know only a little more in detail. We know, for example, that with his pupils he travelled to France, Holland and Germany, residing for a time at several 'famous seats of learning' without, however, being overly impressed by the quality of the education provided there. What is clear is that during these years he earned the praise of several admirers and future patrons. As a tutor, Wynne also recorded that he was 'without the severity of a Master'. He became both a friend and an effective teacher to his students; his lessons were said to have been 'gentle and agreeable'.[7] These traits did not change. Some thought Jenkins a little dull,[8] but no one doubted his prudence, his conscientiousness or his knowledge.

At the Restoration, Jenkins returned to Oxford, taking the DCL in 1661 and becoming Principal of Jesus College in succession to Francis Mansell in that same year. As Principal, he was energetic and successful.[9] He supervised the College's re-organization after the hard years of the Interregnum; he 'retrieved [its] credit and discipline'. He saw to the financing of a new library and the completion of a new quadrangle, in large part at his own expense. He continued in that office until 1673, but in 1662 he also became Deputy Professor of Civil Law, acting for Dr Sweit, who was both infirm in body and otherwise occupied as Dean of the Arches. Jenkins' lectures appear not to have survived, but contemporary sources tell us that they were marked by the special attention he paid to the civil law's titles on procedure, including evaluation of its application in the English tribunals where the civil law governed. His biographer recorded that Jenkins even 'occasionally shewed the agreement of the civil and common law

5 Dick, *Aubrey's Brief Lives*, p 175.
6 Marshall, 'Jenkins, Sir Leoline'.
7 Wynne, *Life*, vol I, p vi.
8 See, for example, G Burnet, *History of His Own Time* (London, 1724–1734), vol I, p 481: 'a man of exemplary life, and considerably learned; but he was dull and slow'.
9 E Hardy, *Jesus College* (London, 1899), pp 136–140.

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of England' – surely a sign of his interest in the English legal system as a whole that would later serve him well.[10]

Oxford did not hold him for long. During the Interregnum he had gained the esteem and 'firm and happy friendship' of Gilbert Sheldon, who became Archbishop of Canterbury in succession to William Juxon, who died in 1663. The new archbishop encouraged him to move to the capital to take up the active practice of law. Jenkins duly did so. Admitted at Doctors' Commons at the end of that year, almost as quickly he became deputy to the Dean of the Court of Arches. He then became assistant to Dr John Exton, judge of the Court of Admiralty, and succeeded him in that office upon the latter's death in 1668. He retained it until his death in 1685, winning praise for the sagacity and even-handedness of his maritime judgments.[11] In 1668 Archbishop Sheldon appointed him judge of the Prerogative Court of Canterbury, England's principal court in the exercise of ecclesiastical jurisdiction over last wills and testaments. He sat in Parliament for Oxford University in 1679–1680 and 1680–1681, and was named Secretary of State in 1680, although failing health compelled him to retire from that office a year before his death in 1685. Throughout this time he served frequently on diplomatic missions, most famously in helping to settle a dispute over the disposition of the estate of the Queen Mother, Henrietta Maria, who had died in Paris in 1669. It was a consequence of his achievement in these negotiations that he was knighted upon his return to England.

CONTRIBUTIONS TO MARITIME LAW

Outwardly spectacular as this career was, Jenkins' lasting reputation must rest today upon his substantive contributions to English law and his own profession. The affirmative case for his recognition is a strong one, first for his contributions to maritime law. The learning that stood behind his decisions in admiralty cases, his biographer tells us, 'rendered his name famous in most parts of Europe'.[12] His independence as a judge was itself much remarked upon at the time, and it was one of the reasons for the high repute in which his opinions were held. This is worthy of note. The decision of Admiralty cases was then commonly thought to be subject to interference by the king's ministers.[13] It was tempting for a judge to decide them according to his national interest. Jenkins, however, stood out against the practice. The Dutch War, declared in 1665, tested his resolve, but in 1672 he refused to accept the government's

10 Wynne, *Life*, vol I, p x.
11 W Holdsworth, *History of English Law* (London, 1938), vol XII, pp 659–661.
12 Wynne, *Life*, vol I, p xiii.
13 E Roscoe, *History of the Prize Court* (London, 1924), pp 41–42.

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view on the status of Dutch ships taken before the war's declaration, tendering his resignation as judge rather than bending to political winds.[14] His definition of 'contraband goods' likewise excluded political manipulation of the category to the short-term benefit of his own country.[15]

Probably Jenkins' best work as a judge – certainly the most celebrated – came in prize cases. He had a hand in the formulation of Rules for the Admiralty court in the adjudication of prizes issued in 1664,[16] and as a judge he made advances in dealing with difficult questions of the interpretation of accepted principles of prize law. Notable were cases involving ships and goods captured by the English. Maritime law held that neutral powers were entitled to trade with the enemy except where the goods they carried were used in the prosecution of war. It was not easy to know, however, whether goods and ships operating under neutral cover were enemy or neutral property. False papers and other subterfuges were used to give neutral cover to ships and goods actually under enemy control. One obstacle to a realistic decision in such cases was the doctrine that a ship's papers must be taken as conclusive. Jenkins, however, was not willing to yield to a rule so at variance with the facts. He allowed resort to the law of presumptions where fully satisfactory proof one way or the other was lacking. Students of the subject have shown that this approach to a difficult subject, one which the law later adopted, was first set forth in his early prize law decisions.[17]

CONTRIBUTIONS TO TESTAMENTARY LAW

As judge of the Prerogative Court of Canterbury, Jenkins was a natural 'resource person' to whom English common lawyers might turn for help in dealing with problems arising in the law of last wills and testaments. This remained a major part of the work of civilians, but there were problems.[18] Jenkins took a hand in solving them. One was the status of oral (nuncupative) wills. The ecclesiastical courts, which held primary jurisdiction over succession to chattels in England, had long allowed such wills, even to the point where an oral statement by a man on his deathbed could revoke or vary the terms of an earlier written testament.[19]

14 Wynne, *Life*, vol I, p 702.
15 D Llewelyn Davies, 'The development of prize law under Sir Leoline Jenkins', (1935) 21 *Transactions of the Grotius Society* 149–160.
16 R Marsden, *Documents relating to Law and Custom of the Sea, A.D. 1205–1767* (London, 1915–1916), vol II, pp 53–57.
17 See Llewelyn Davies, 'Development', pp 158–160.
18 R Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge, 2006), pp 33–39.
19 L Bonfield, *Devising, Dying and Dispute: probate litigation in early modern England* (Farnham and Burlington, VT, 2012), pp 109–129. For early confirmation, see the prologue to the Statute of Uses, 27 Hen VIII, c 10 (1536), attributing the problem to 'greedy, covetous persons laying in wait upon them'.

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Defended as the only way of securing the true last wishes of the deceased, this regime resulted in legal uncertainty and even unseemly squabbling at many a testator's deathbed, as friends and relatives sought to induce a dying man to vary the terms of an existing written testament in their own favour.

The Statute of Frauds (1677) dealt with this problem. It was widely said that Jenkins had assisted in its preparation, and certainly the hand of a knowledgeable civilian is evident in several of the careful terms in the Act.[20] Military wills were preserved, and ecclesiastical jurisdiction supported, but testaments made in writing were protected against casual oral change. Unless such declarations 'by word of mouth' by dying men were reduced to writing and read to the testator before his death, then confirmed to him and proved by the testimony of three witnesses, the prior written testament was to stand.[21] With a stroke, this troublesome problem was set right, or at least minimized. Evidence of practice before the Prerogative Court of Canterbury shows that the reform had its intended effect. The percentage of oral wills and revocations offered before the court dropped from 31.8 per cent of the total to 3.6 per cent between 1661–1676 and 1681–1696.[22] No one can suppose that the Statute of Frauds 'solved' all the problems in any of the several areas of the law that it touched, and of course it created new ones too. Even so, this provision was a step forward.

A second major contribution to testamentary law was equally sensible and equally needed: the Statute of Distributions (1670).[23] Jenkins himself prepared a memorandum outlining the case for statutory reform.[24] When a person died intestate, under English customary law going back at least to Magna Carta, the bishops were given control of the choice of the person appointed to administer the assets of the deceased. Their aim was to appoint someone who would know and implement the natural wishes of the intestate. In practice, the choice fell to the bishop's consistory courts, and ordinarily this process required at least the possibility of continued supervision by those courts. However, under what Jenkins regarded as a pretext that the continued process of supervision had led to abuses, from early in the seventeenth century the common law courts had begun issuing writs of prohibition to prevent it.[25] The bishop's power was to end with appointment of the administrator.[26] Thus, if a man died intestate with five children, and administration were granted to the eldest among them, he (or she) would be free to take the whole estate after paying outstanding

20 See, eg, *Ash v Ardy* (1678), 3 Swans 664 (App), 36 Eng Rep 1015.
21 29 Car II, c 3 §21. See also C Withers, *Yorkshire Probate* (fifth edition, Chippenham, 2006), pp 111–112.
22 Bonfield, *Devising, Dying and Dispute*, p 73.
23 22 & 23 Car II, c 10.
24 See Wynne, *Life*, vol II, pp 695–697.
25 C Gray, *The Writ of Prohibition* (New York, 2004), vol IV, pp 1–40.
26 Eg *Tooker v Loane* (1618), Hob 191, 80 Eng Rep 338; *Hughes v Hughes* (1667), 1 Lev 233, 83 Eng Rep 384. The statutory basis for this intervention was 21 Hen VIII, c 5 (1529–1530).

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debts. The prohibition prevented correction by the courts – an obvious injustice to the other four.

The statute restored the power of the bishops to require bonds of faithful administration and to require accounting from administrators, adding guidelines for the division of the assets of intestate estates. Jenkins claimed to regard the statute as simply 'an affirmance of the constant ancient practice', but in fact it proved to be the model for the ubiquitous modern statutes of distribution that define with exactitude how the estates of intestates are to be divided among the next of kin.[27] The statute itself later proved less effective in strengthening the powers of the ecclesiastical courts than Jenkins had envisioned, but in terms of its lasting effect on the future of English (and American) common law it was a success.

CONCLUSION

Jenkins' biographer devoted by far the largest part of his *Life* to his subject's diplomatic career. It was dramatic in the events it included, it brought Jenkins renown among his contemporaries and it led him into participation in court circles. What he did as an emissary made a splash. From the perspective of the longer history of ecclesiastical law, however, Jenkins' substantive contributions to testamentary and maritime law in England deserve pride of place. Earlier civilians had made a difference in the formulation of English statute law, but most of their efforts were to except the ecclesiastical courts from the scope of general legislation. 'Savings clauses' for spiritual jurisdiction were common. Statutes regulating usury, perjury, tithes, marriage and drunkenness all contained savings clauses to preserve ecclesiastical jurisdiction as it had long existed.[28] The contributions of Leoline Jenkins, by contrast, were to the substance of English law. They amounted to a more direct kind of civilian participation in English legal life than had seemed suitable, perhaps even possible, for an ecclesiastical lawyer before his time. This was a choice on his part – a good one.

27 Wynne, *Life*, vol II, p 697.
28 Usury Act 1571 (13 Eliz I, c 8); Perjury Act 1561 (5 Eliz I, c 9); Easter Offering and Tithes Act 1548 (2 & 3 Edw VI, c 13); Bigamy Act 1603 (1 Jas I, c 11); Drunkenness Act 1606 (4 Jas I, c 5).

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