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NOTABLE ECCLESIASTICAL LAWYERS: VIII

Arthur Duck (1580–1648)

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In the long history of the ecclesiastical law in England, Dr Arthur Duck is one of the better-known civilians. He makes an appearance in most accounts of the Church's history during the reigns of the early Stuart monarchs.[1] Chancellor of the Diocese of Bath and Wells and later of London, Master in Chancery, King's advocate in the Court of Chivalry and Member of Parliament, Duck has long enjoyed the reputation of an effective administrator in troubled times. The extent of his enthusiasm for Archbishop Laud's plans to strengthen the Church has been a matter of occasional dispute,[2] but his integrity and the quality of his services to Crown and Church have not been doubted. Duck can claim an entry in the *Oxford Dictionary of National Biography* and he is mentioned in works that discuss the civil law's place in English life.[3] His career and character are noted in most standard works of reference.[4]

Despite the attention paid to him, it remains true that Duck has not been sufficiently appreciated for the great work of scholarship that put him in the front ranks of English civilians. This is his account of the comparative history and contemporary status of the Roman and canon laws in European lands: *De usu et authoritate iuris civilis in dominiis principum Christianorum* (first edition 1653).

1 C Carlton, *Archbishop William Laud* (London, 1987), pp 106–107; J Davies, *The Caroline Captivity of the Church: Charles I and the remoulding of Anglicanism 1625–1641* (Oxford, 1992), pp 181, 229, 279; K Fincham, *Prelate as Pastor: the episcopate of James I* (Oxford, 1990), p 180; M Stieg, *Laud's Laboratory: the Diocese of Bath and Wells in the early seventeenth century* (Lewisburg, PA, 1982), pp 171–173; G Aylmer, *The King's Servants: the civil service of Charles I, 1625–1642* (New York, 1961), p 386; C Hill, *Economic Problems of the Church* (Oxford, 1956), p 180.

2 Compare H Trevor-Roper, *Archbishop Laud 1573–1645* (London, 1963), p 355 ('strong supporter of the Archbishop'), with T Webster, *Godly Clergy in Early Stuart England* (Cambridge, 1997), pp 206–207 ('incomplete commitment to Laudianism'). See also D Cressy, *Travesties and Transgressions in Tudor and Stuart England* (Oxford, 2000), pp 193, 326.

3 T Scrutton, 'Roman law influence in Chancery, Church courts, Admiralty, and Law Merchant' in *Select Essays in Anglo-American Legal History* (Boston, MA, 1907), vol 1, pp 215–216.

4 P Stein, 'Duck, Arthur (1580–1648)', in *Oxford Dictionary of National Biography*, available at <http://oxforddnb.com/view/article/8128>, accessed 27 August 2014. See also E Heward, *Masters in Ordinary* (Chichester, 1990), pp 124–125; G Squibb, *Doctors' Commons: a history of the College of Advocates and Doctors of Law* (Oxford, 1977), p 170; B Levack, *The Civil Lawyers in England 1603–1641: a political study* (Oxford, 1973), pp 225–226; C Coote, *Sketches of the Lives and Characters of Eminent English Civilians* (London, 1804), p 72.

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Often reprinted, and translated into more than one language,[5] it was an impressive work of legal scholarship when it was published, and it remains impressive to this day.

DUCK'S LIFE AND CAREER

Born and brought up in Devon, Duck first followed a path laid out by his elder brother, Nicholas, entering Exeter College, Oxford, in 1595. By then his brother had left the university without taking a degree; he became a common lawyer at Lincoln's Inn. Arthur made a different choice, and his academic career was not a short one. In this respect it was similar to that of many prominent civilians. He migrated to Hart Hall, proceeding MA in 1602. In 1604 he was elected a fellow of All Souls, taking the BCL in 1607 and the DCL five years later, the second after having completed an extended trip to European centres of learning. He became sub-warden of All Souls in 1610, later writing a life of the college's founder, Archbishop Henry Chichele.[6]

Like most English civilians, Duck moved away from academic life even while he retained a toehold in it. In 1614, he was admitted as an advocate at Doctors' Commons in London. Already a favourite of the Bishop of Bath and Wells, Arthur Lake, Duck became his chancellor in 1616. The bishop paid him the compliment of solemnising his marriage with Margaret, daughter of Henry Southworth, a London merchant. It was a happy union, producing nine children, of whom unfortunately only two girls survived to maturity. Margaret's life was itself celebrated in Samuel Clarke's *Collection of the Lives of Ten Eminent Divines*, published in 1662.[7]

Once begun on this sound footing, Duck's career was marked by success, including the accumulation of offices in Church and state. Besides those already mentioned, he served on one of the courts of High Commission, he acted as a commissioner for the Admiralty in Dorset and Middlesex, and he served as visitor for schools and poorhouses in the Diocese of Canterbury. He was also regularly consulted on public questions of moment.

Of course, most of this edifice came tumbling down with the advent of the Civil Wars. The ecclesiastical courts over which he presided ceased to exist in anything but name. Duck was not excluded from all of public life, however. In fact he was made a Master in Chancery in 1645, but even so, it was a time of limited horizons for civilians, and with the assistance of Gerard Langbaine,

5 The English translation of 1699 in its second section included only the author's account of the Roman law in England, omitting treatment of Continental lands.

6 A Duck, *Vita Henrici Chichele archiepiscopi Cantuariensis sub regibus Henrici V et VI* (Oxford, 1617); the work was translated into English in 1699.

7 She was not one of the ten divines; the entry devoted to her life followed in the second part of Clarke's work, which described the lives of four women.

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Provost of Queen's College, Oxford, he turned his attention to the work that was to stand as his great contribution to comparative law and legal history. Duck therefore put to good use what might have been years of enforced idleness.

DUCK'S GREAT WORK

De usu et authoritate iuris civilis is not a huge volume – 478 octavo pages of text, plus a short list of its contents and an index in the pocketbook edition published at Leiden in 1654.[8] By the standards of other civilian treatises from the era, it is quite modest in size. The footnotes to the edition, which are extensive, appear in tiny print and in the highly abbreviated form of citation used at the time. The text itself is divided into two separate books. The first, much shorter than the second, opens by describing the origins, the separate parts and the nature of the *corpus iuris civilis*. It then adds chapters devoted to post-Justinianic developments – to the feudal law and the *libri feodorum*, to the contributions of the canon law and finally to a general analysis of legal reasoning and decision-making within the *ius commune*. All this information was well worth knowing then, just as it remains worth knowing today that the author believed that the Roman law was a permanent gift of God to all peoples.[9] That understanding, not unusual among civil lawyers of the time, opens a window onto their approach to legal problems.

It is the second book, however, that contains Duck's most valuable contribution to legal literature. He followed a regular method, first providing a description of the broad course of legal development in the several European kingdoms, principalities and cities, and then adding examples. The range of the sources from which he drew conclusions in this second book is impressive, even astonishing. He began with Germany, noting that the seat of Roman empire had been translated there.[10] He covered the law of the Germans in detail and with a grasp of the relevant literature. To take only one example, in discussing the law and practice of inheritance in cases of intestacy in Saxony, he devoted two subsections to the comparative authority of Saxon and Roman laws as they had been worked out in practice. Here Duck drew upon nine separate learned works, few if any of which will be familiar to modern students of legal history.[11] They were Johannes Schneidewein (Ointomos), *Commentarii in Institutiones* (1595), Johannes Sichard, *Commentarius ad Codicem* (1586), Ernst Cothmann, *Consilia et responsa iuris* (1609), Dominicus Arumaeus, *Discursus academicus ad*

8 I have used A Duck, *De usu et authoritate iuris civilis Romanorum in dominiis principum Christianorum* (Leipzig, 1654). An Elsevier book, its modern technical description is: 13 cm (24mo in half-sheets). All subsequent references to it are made to book, chapter and section.

9 Ibid, Lib I, ch 2, § 4: 'leges autem condere orbi terrarum proprie Romanis a Deo concessum est'.

10 Ibid, Lib II, ch 2, § 3.

11 Ibid, Lib II, ch 2, §§ 15–16.

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Auream Bullam (1617), Anton Coler, *Sectiones de iure imperii Germanici* (1613), Matthias Stephani, *Constitutiones publicorum iudiciorum Caroli VI* (1616), Albert Krantz, *Viri in theologia et iure pontificio celeberrimi* … [*de*] *Wandalia* (1575), Anon, *Ius provinciale ducatus Prussiae* (1624), and one more which I have so far been unsuccessful in identifying.[12] Particularly noteworthy are the number and breadth of these treatises: it is typical of the learning characteristic of Duck's approach. Further subsections followed – with different though equally learned sources.

What did Duck use the information in these references to accomplish? Roughly speaking, they allowed him to investigate the German legal development we now call 'the Reception' of Roman law. As Duck portrayed it, 'Reception' was far from a mechanical process and it was not accomplished at a stroke. He recounted, for example, both its successes and the resistance to it in Saxony. The old law still governed many questions of succession. As the passage from Schneidewein's commentary on the *Institutes* cited by Duck described it, the requirement of Saxon law that a nephew be of the blood of an intestate in order to inherit from him had been retained in contemporary practice. By contrast, on the subject of inheritance by illegitimate children, the Roman law had won out. Here he recorded that 'Saxon law' had been superseded. Because of its 'wickedness', it had been displaced by the *ius commune*.[13] Tellingly, Duck noted that even in many of the situations where the Saxon law had been retained, it was being interpreted according to principles drawn from the learned laws. This process of interpretation meant a great deal in fact. Some of the cities in northern Germany had all but abandoned the letter of their old laws by means of applying rules of interpretation drawn from civilian traditions.[14] The picture was not uniform, however: there was variety and many areas had gone only part-way in the process of 'Reception'. Duck dealt with both.

Something of the same patience with diversity animated Duck's treatment of the law applied to Italian cities and principalities, the subject that followed. Here he was faced with a mass of statutes, *consilia* and *decisiones*, and other works of local *praxis*. He mastered this literature, drawing upon it selectively to describe the laws of Rome, Venice, Florence, Milan, Lucca, Genoa, Urbino and Mantua,[15] and also larger areas such as Piedmont, Savoy and the kingdom of Naples. Duck tells us that in all these places the strength of the *ius commune* had been tested and sometimes overtaken by the enactment of local statutes. Unlike Germany,

12 This was a commentary on the Digest by 'Brust.'.

13 J Schneidewein, *Commentarii*, tit *De haereditibus ab intestato*, ch 1, § 20, 'Sed in hoc casu sicut in multis aliis, jus saxonicum propter eius iniquitatem non observatur sed restringitur secundum ius commune', also citing a case from a German court in support.

14 Duck, *De usu*, Lib II, ch 2, § 17: 'Ista vero statuta Saxonica, Lubecensia, Culmensia et alia quaecunque Germanica, secundum jus civile Romanorum intelliguntur et ab eo interpretationem recipiunt'.

15 Ibid, ch 3, §§ 1–33.

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the starting point in Italy had been the inherited Roman law, but it too had been subject to change. In describing the resulting situation, Duck again had a mass of literature at his disposal – for example, the *Decreta seu statuta vetera Sabaudiae ducum et Pedemontii principum* (1586) by Giovanni Nevizzano, the various descriptive works by Pierre d'Avity (1573–1635) and many legal works such as the one devoted to practice in the Milanese courts compiled by Giulio Cesare Ruginelli (d 1628).[16]

By the time that Duck was writing, the production of such works – perfectly suited for the interests of a comparative lawyer – had grown to the point where one or more of them existed for almost every legal centre in Europe. They contained a kind of balance between municipal law and the *ius commune*, and Duck assessed the relative importance of both in each geographical area he discussed. His principal theme throughout, however, was the enduring strength of the civilian heritage shared by virtually all European cities and provinces. Local statutes were rightly interpreted according to principles found within Roman law; if a city's statutes punished an action without qualification, for example, they would nonetheless be read to require malicious intent in accordance with requirements supplied by the *ius commune*.[17] Italy was not the sea of undifferentiated Romanism we sometimes imagine it to have been, but its many parts were united by the common heritage of Roman law that it was Duck's aim to describe.

Duck's discussion of French law followed.[18] As he described its history, the reign of Roman law there had been impeded by several obstacles: the French kings' traditional insistence that they were sovereign in their realm, the division of the kingdom into the *pays de droit écrit* and the *pays des coutumes*, and the lasting prestige of the Salic law. These forces never meant, however, that Roman law was confined to a small corner of French legal life. Even in the north, it had influenced customary law; parts of that law were in fact of Roman origin; Roman law supplied the relevant law where the customs were silent or ambiguous, and it had inspired royal interventions to improve the administration of justice throughout the realm. The French law of restitution, for example, had arisen from royal and professorial efforts – a product ultimately of the *ius commune*.[19] 'And thus', Duck concluded, 'the Roman law became the Gallic law'.[20] It is probably superfluous to add that his treatment of this subject was based upon a full (and fully referenced) familiarity with the works of French jurists, the finding of which requires an effort for modern readers. To support

16 Ibid, ch 3, § 25. The second work was *Le monde, ou la description générale de ses quatre parties* (1637); the third was *Liber singularis practicarum quaestionum rerumque iudicatarum* (1610).
17 Ibid, Lib II, ch 3, § 29: 'puta si de homicidio agat statutum, intelligendum est secundum ius commune, modo cum dolo commissum sit'.
18 Ibid, Lib II, ch 5, §§ 1–43.
19 See ibid, Lib II, ch 5, § 35.
20 Ibid, Lib II, ch 5, § 35: 'Atque ita ius Romanum factum est ius Gallicum ex consuetudine Galliae, quae illud recepit, et ex consensu regum Galliae, qui ei iuris authoritatem tribuerunt'.

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the conclusion just stated, for instance, he cited Bernard Automne, *Conference du droit françois avec le droit romain* (1629), Étienne Pasquier, *Les Recherches de la France* (1596), and Guillaume Ranchin, *Variae lectiones* (1597).

A note such as this one can only illustrate a few of the details; it cannot do justice to the scope of Duck's research into the history of European legal systems and it does not reach most English developments. It must be enough to add only that the chapters that followed took up the laws of Spain, Portugal, England, Ireland, Scotland, Poland, Sweden and Denmark, and Bohemia. To all of them he applied the same method that he had used for the more familiar lands of western Europe. In all of them, he mined the relevant local legal literature. Who would have supposed that an English lawyer in 1650 should have interested himself in the details of the laws of Poland or of the Commune of Genoa? But Duck did, and he had a fair selection of works on the subject upon which to draw.[21]

The entry for Dr Duck in the *Oxford DNB* rightly praises the *De usu iuris civilis* as Duck's 'great work'. The entry's coverage of the book's contents is quite brief, however – at least in comparison with its treatment of the various offices that Duck held – and it ends rather blandly by describing the book as 'based on the best authorities'. That statement is true enough, but it does not convey either the magnitude of Duck's accomplishment or the amplitude of his learning.

21 See M Lipenus, *Bibliotheca realis iuridica* (Leipzig, 1757), vol 2, pp 164–167.

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