

## THE SAXON CONSTITUTION AND EARLY-MODERN LAW

Early-modern lawyers frequently asserted the historical pedigree and longevity of the common law. Some of the specific historical claims, such as the first king of England being Brutus of Troy, were at best implausible, something recognised by some contemporaries.<sup>1</sup> However, the overall historical claim could survive such challenges. Many common lawyers stressed the continuity of the common law as a whole over time, with no significant breaks in the history of the law, especially no breaks imposed by the Norman Conquest.<sup>2</sup> In this lecture, I take seriously the proposition that if the common law was understood as a continuous tradition over time, then it would have been possible for early-modern common lawyers to make reference to law from before the Norman Conquest.<sup>3</sup>

This possibility existed in the late-sixteenth and early-seventeenth centuries, a time when knowledge of pre-Conquest law, or, more accurately, what was believed to be pre-Conquest law, was becoming more widespread.<sup>4</sup> The flourishing of interest in legal history which led to the foundation of this Society was not the first occasion on which serious, and

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<sup>1</sup> George Garnett, “‘The ould fields’”: Law and History in the Prefaces to Sir Edward Coke’s Reports’, *Journal of Legal History* 34 (2013), pp. 245-284, at pp. 260-261.

<sup>2</sup> The classic exposition of this mindset is J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century. A Reissue with a Retrospect* (Cambridge, 1987), pp. 30-69 and 261-305. Examples of early-modern common lawyers identifying particular aspects of the common law as antedating the Norman Conquest are in Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, 2008), pp.334-336 and 339-340.

<sup>3</sup> As Goldie has observed, if someone accepted the premise of the common law as truly immemorial, then ‘identifying a Saxon polity in specific time was superfluous and contradictory’, Mark Goldie, ‘Retrospect: The Ancient Constitution and the Languages of Political Thought’, *Historical Journal* 62 (2019), pp. 3-34, at p. 22. This is clearly correct, but from the perspective of legal practice, the absence of any break in continuity did mean it should have been open to lawyers to make reference to the Saxon past when identifying a specific aspect of that immemorial common law.

<sup>4</sup> This study is concerned with the use lawyers made of the Saxon past and how they acquired their knowledge of it. Some of that knowledge was mistaken, but I do not distinguish between correct and incorrect knowledge in the discussion. Early-modern lawyers believed various sources to be pre-Conquest which it is now known are not. These included the Laws of Edward the Confessor (on the writing of the Laws in the twelfth century see Bruce R. O’Brien, *God’s Peace and King’s Peace: the Laws of Edward the Confessor* (Philadelphia, 1999), pp. 31-36, and the *Modus Tenendi Parliamentum* (for the fourteenth-century origin of the *Modus*, see William A. Morris, ‘The Date of the “Modus Tenendi Parliamentum”’, *English Historical Review* 49 (1934), pp. 407-422). John Selden accepted the Saxon age of the former (John Selden, *The Historie of Tithes* (1618), p. 482) but was sceptical of the antiquity of the latter (John Selden, *Titles of Honor* (1614), p. 274). For an example of a twelfth-century source which was understood to be Saxon, see below, **text at n. 144**. References simply to ‘ancient’ law cannot be assumed to be references to the pre-Conquest past; Edward Coke often describes law as ‘ancient’ but only cites material such as *Glanvill* and *Bracton* (e.g., *Ratcliff’s Case* (1592) 3 Co. Rep. 37a, at 40b). Occasional references to pre-Conquest grants were made in earlier periods, but lawyers do not seem to have referred to pre-Conquest law (on such grants, see Anthony Musson, ‘Appealing to the Past: Perceptions of Law in Late-Medieval England’, in Anthony Musson ed., *Expectations of the Law in the Middle Ages* (Woodbridge, 2001), pp.165-179, at p.167). In *Pusey v Pusey* (1684) Vern. 272, the lord keeper seems to have accepted that if land were held by cornage, then the Saxon horn establishing that grant would be an heirloom, suggesting a later-seventeenth century acceptance of Saxon rights.

sometimes even scholarly, interest in the legal past emerged. The reign of Elizabeth I saw significant interest in the Saxon past,<sup>5</sup> a trend usually associated with Archbishop Matthew Parker and his concern to legitimise the Anglican church.<sup>6</sup> The collection, study and printing of Saxon law was a major focus of these studies, leading to the printing of William Lambarde's *Archaionomia* in 1568, a book which printed the then known Saxon law 'codes' in regnal order.<sup>7</sup> Slightly later in the sixteenth century, the legal past was a major focus of the work of the members of the Society of Antiquaries.<sup>8</sup> In the seventeenth century, John Selden and Henry Spelman were serious historical scholars whose interests included the history of English law.<sup>9</sup> Lawyers before the middle of the sixteenth century had referred to the antiquity of the common law<sup>10</sup> and even pre-Conquest grants of land,<sup>11</sup> but it was from the 1560s that earlier sources became much more accessible, and it is only from then that we would expect to find much in the way of reference to pre-Conquest history and material.

In this lecture I shall investigate whether these claims of historical continuity in the common law, combined with a greater availability of sources in relation to that past, affected the work that early-modern common lawyers did. Looking beyond the prefaces to volumes of law reports and parliamentary speeches, did common lawyers refer to what they believed was the pre-Conquest past when discussing the law and was Saxon law a source for early-modern English law? If it was, how did common lawyers acquire their knowledge of this past legal system?

The Saxon past became a feature of speeches by common lawyers as justices of the peace and assize, in readings in the inns of court and even when elaborating and then applying

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<sup>5</sup> Early-modern writers seem to universally refer to this past simply as 'Saxon', rather than 'Anglo-Saxon', and that usage is adopted in this lecture.

<sup>6</sup> See Rebecca Brackmann, *The Elizabethan Invention of Anglo-Saxon England: Laurence Nowell, William Lambarde, and the Study of Old English* (Woodbridge, 2012), p. 8.

<sup>7</sup> William Lambarde, *Archaionomia* (1568). For some of the difficulties with the texts produced by early scholarship on the Saxons, see Patrick Wormald, 'The Lambarde Problem: Eighty Years On', in Patrick Wormald, *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (London, 1999), pp. 139-178.

<sup>8</sup> Christina DeCoursey, 'Society of Antiquaries (act. 1586 – 1607)', *Oxford Dictionary of National Biography* (ODNB), < <https://doi.org/10.1093/ref:odnb/72906> > (accessed 2 August 2023).

<sup>9</sup> For Selden generally, see G. J. Toomer, *John Selden: A Life in Scholarship* (Oxford, 2009). Spelman still lacks a full modern biography or study of his scholarship, but see Stuart Handley, 'Spelman, Sir Henry (1563/4 – 1641)', *ODNB*, < <https://doi.org/10.1093/ref:odnb/26104> > (accessed 2 August 2023).

<sup>10</sup> For such references in readings in the early sixteenth century, see Sir John Baker, *Oxford History of the Laws of England*, vol. 6, *1483-1558* (Oxford, 2003), pp. 19-21. Broke Sjt's remarks at Hales's reading in 1514 suggest he had read the Laws of Edward the Confessor (ibid. 21). An anonymous text, which is probably an early prefatory speech to a reading from 1530 or 1535, seems to show the author had read the laws of Cnut, BL MS. Harl. 4990, fos. 146-148v, at fo. 147v, but this is unique in the early sixteenth-century sources.

<sup>11</sup> On pre-Conquest grants of land, see Anthony Musson, 'Appealing to the Past: Perceptions of Law in Late-Medieval England', in Anthony Musson ed., *Expectations of the Law in the Middle Ages* (Woodbridge, 2001), pp. 165-179, at p. 167.

the law in cases. The Saxon past appears in fields as diverse as criminal law and the appointment of clergymen to benefices, through to major constitutional matters.

In considering lawyers' use of the Saxon past, we can see that the focus on rights and liberties usually associated with the ancient constitution, and the idea of Anglo-Saxon liberty found in the later seventeenth and eighteenth centuries, did not reflect the uses to which the Saxon past was put by lawyers before the Civil War,<sup>12</sup> at least in more technical legal contexts. Any idea that an 'ancient constitution' in England was a challenge to royal power is not correct for the use early-modern lawyers made of that past in regular legal activities. The idea of the unbroken continuity of English law and the English constitution was not limited to such broad generalities. The continuity of the English legal tradition could, and did, have direct and specific consequences in specific cases.

A subtext of this lecture is that we should see 'ancient constitutionalism' as a legal idea which extended beyond the political.<sup>13</sup> To some extent this brings the ancient constitution back more closely to Pocock's original presentation of it as a '*mentalité*' shaping the thought of sixteenth- and seventeenth-century common lawyers as a set of unspoken assumptions and habits of mind.<sup>14</sup> While some attempt to view the ancient constitution as a legal theory has been made at times, such attempts have not tried to link this approach to the use of the past made by lawyers in their regular activities.<sup>15</sup> The theory has been divorced from the practice of law, in a manner that would have been alien to early-modern lawyers, but perhaps rather less so to modern academics. References to the pre-Conquest past were never widespread, but they were made.<sup>16</sup> Such references were never rejected simply on the basis that it was illegitimate to refer to the time before the Conquest; they were made in a range of contexts and for a variety of

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<sup>12</sup> For the focus in the ancient constitution thinking on the rights and liberties of subjects, see, e.g., Corrine C. Weston, 'England: ancient constitution and common law', in J. H. Burns ed., *The Cambridge History of Political Thought 1450-1700* (Cambridge, 1991), pp. 374-411, especially at pp. 374-395. On Anglo-Saxon liberty and the 'Gothic' approach to the English constitution, see R. J. Smith, *The Gothic Bequest: Medieval Institutions in British Thought, 1688-1863* (Cambridge, 1987), which contains a useful summary of pre-1688 material at pp. 6-7.

<sup>13</sup> There is now a very substantial literature on the ancient constitution, mostly from the perspective of the history of political thought. For a non-exhaustive list, see Janelle Greenberg, *The Radical Face of the Ancient Constitution: St. Edward's 'Laws' in Early Modern Political Thought* (Cambridge, 2001), p. 2 n. 2. Tellingly, almost all of the listed works use the word 'political' in either their title, or the title of the volume or journal in which they are published.

<sup>14</sup> Pocock, *The Ancient Constitution*, clearly stated in the 1987 retrospect at pp. 279-80.

<sup>15</sup> E.g. J. W. Tubbs, *The Common Law Mind: Medieval and Early-Modern Conceptions* (Baltimore, MD, 2000).

<sup>16</sup> The scarcity of references to the Saxon past suggest that it is not safe to infer from the high proportion of lawyers in the membership of the Society of Antiquaries that 'the activity of the members of the society in Anglo-Saxon, and later Anglo-Norman, language, history and literature was an outgrowth or by-product of their legal interests', R. J. Schoeck, 'The Elizabethan Society of Antiquaries and Men of Law', *Notes and Queries* 199 (1954), pp. 417-421, at p. 421.

purposes. For lawyers before the Civil War, the common law did exist before the Conquest, and that pre-Conquest law was a legitimate, if unusual, source of early-modern law.

### ESTABLISHING THE LEARNING OF A LAWYER

For all lawyers who made them, references to the pre-Conquest legal past served as a way to establish their learning and scholarship. In this way, the lawyer stressed that he was someone to whom his audience should pay attention. Some references to the past seem to serve no other purpose than this. For example, in his 1640 Lincoln's Inn reading about the Exchequer, Thomas Tempest explained that the Exchequer existed before the Norman Conquest, citing 'severall ancient Saxon Charters'.<sup>17</sup> Having made his references to the pre-Conquest history, Tempest moved on, and the Saxon material did not reappear in his discussion.

### HISTORICAL EXAMPLES

On other occasions, the Saxon past was a point of reference in providing historical examples, examples which could provide guidance for the present. These examples occurred where issues of wider policy and public benefit emerged in legal discussion.

In his charge at the beginning of the Thetford assizes in 1658, Oliver St John used the example of the Saxon heptarchy to explain to his audience why proposals to decentralise English law to work within counties, rather than focus on Westminster Hall, were mistaken. He explained that under the heptarchy law was divided between the Saxon kingdoms, and it was only when the laws of the Saxons were unified that there was peace in England. When the law was not unified, 'the histories during ye heptarchie spoake of little else save the battayles and bloodshed amongst themselves'.<sup>18</sup> Returning English law to a position similar to that of the Saxon past would also restore other, less welcome, aspects of the past. Speaking in the Interregnum, St John's historically-based warning to his countrymen was clear.

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<sup>17</sup> BL MS. Add. 27830, fos. 6v-7.

<sup>18</sup> Cornelia D. Smith, 'A Seventeenth-Century Judge Views the Law: Oliver St John's Introduction to His Charge at the Thetford Assizes in 1658', *Proceedings of the American Philosophical Society*, 130(1) (1986), pp. 37-78, at p. 60. St John's charge is reproduced at pp. 47-75, with the historical material at pp. 52-65.

A similar use of the Saxon past to provide a historical warning occurred in the *Case of Ship-Money* (1637). In his dissenting judgment, Croke J.K.B. argued that one of the reasons not to accept the legality of Charles I's levying of a non-parliamentary tax was because of its uncertainty, explaining that 'then no man knoweth what his charge may be; for they may be charged as often as the king pleaseth ... That this inconveniency may be, appeareth by the Danegelt ... which often changed, and still increased'.<sup>19</sup> Not only would the tax be uncertain, but the absence of parliamentary control would lead to a constant increase in the sums levied, with the subtext that the property of subjects would then be owned subject to the whims of the Crown. To give credence to his warning, Croke even set out the sums raised by Danegeld, describing the increase from an initial levy of £10,000 in 991 to £48,000 in 1012. While those figures may have enhanced the credibility of Croke's warning, they should also have warned his audience of Croke's very selective use of his sources. The figures seem to have been taken from the entry on Danegeld in Spelman's *Archaeologus*, and Croke omitted the significant reduction in the amount of Danegeld Spelman reported as levied in 1014, when £30,000 was collected.<sup>20</sup>

Other historical examples were more positive. In the *Case of Ship-Money*, Berkley J.K.B. drew a very different lesson from the history of Danegeld, explaining that Ethelred

shewed himself weak and improvident, in that he looked not to raise means for defence of his realm against the Danes in time; but when the Danes were masters, then he began to provide against them. And for that cause divers of our historians write, that he was called by a nickname, Ethelred the Unready. But, on the other side, we the subjects of England, who enjoy ourselves and what we have in peace, through his majesty's royal care and providence, have cause to yield to our sovereign k[ing] Charles, the honourable name of Charles the Ready, or Charles the Provident.<sup>21</sup>

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<sup>19</sup> *The Case of Ship-Money* (1637) 3 St Tr. 825, at 1151; similarly in the alternative account of Croke's speech at 1132.

<sup>20</sup> Henry Spelman, *Archaeologus in modum Glosarii* (1626), p. 200. The figures are repeated, with the same omissions, in an account of Croke's argument which he personally corrected (in this case, Croke inserted the figure of £48,000), Samuel R. Gardiner ed., *Notes of the Judgment delivered by Sir George Croke in the Case of Ship-Money* (Camden Soc. new series 14, p. 5) (1875), p. 5.

<sup>21</sup> *The Case of Ship-Money*, 1093. For a similar example, drawing an explicit parallel between Charles I and the Saxon King Alfred, see the work of the Somerset solicitor and member of New Inn, Robert Powell, *The Life of King Alfred, or Alured* (1634), pp.147-149.

For Berkley, history cast the contemporary monarch in a positive light, even if his attempt to draw a favourable comparison for Charles I saw no success. Crucially, for Berkley history also explained why levying ship money was a necessary and legitimate action.

## LEGITIMACY

A key part of ancient constitution thinking, at least for some, was to legitimise the law based on its age.<sup>22</sup> John Davies is probably the paradigmatic example, as he explained that the common law was old custom, ‘And this Customary lawe is the most perfect, & most excellent, and without comparison the best, to make & preserve a commonwealth.’<sup>23</sup> For lawyers who adopted this understanding of old law, any demonstration of historical continuity for particular laws would demonstrate that law’s quality and legitimise its use.

However, the underpinning of references to the legal past may in fact have been much simpler than that. When setting out his plans for the text which would become the hybrid law report and treatise of *Caudrey’s Case* (1591), also titled as *Of the Kings Ecclesiasticall Law*, Edward Coke explained to the secretary of state, Robert Cecil, that on being shown the ‘ancient laws’ Catholics and Presbyterians ‘being English menne may the sooner be perswaded to yeld there obedience to the auncient Englishe lawes and the kings proceedings appeare to be honorable & iust’.<sup>24</sup> Coke’s explanation of the role of ancient law in the context of the church was less concerned with the quality of the English laws, but simply with their age as something which would persuade the English. This view of the persuasive role of age was acknowledged in the religious context by the divine, Matthew Sutcliffe, who commented upon ‘[t]he shew of antiquity...being so plausible to the multitude, and so forcible to perswade the simple’.<sup>25</sup>

Using old law in this way in *The Kings Ecclesiasticall Law*, Coke therefore explained that the statutory abolition of papal jurisdiction and the creation of the royal supremacy over the church in the reigns of Henry VIII and Elizabeth I were not innovations, but restorations of

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<sup>22</sup> As a tool of legitimising the law, this aspect of using the Saxon past falls squarely within the idea of the ‘political language’ of the ancient constitution, Goldie, ‘The Ancient Constitution’, p. 4.

<sup>23</sup> John Davies, *Le primer report des cases & matters en ley resolves & adjudges en les courts del Roy en Ireland* (Dublin, 1615), sig.\*2.

<sup>24</sup> The National Archives (TNA) SP 14/13/61, fo. 116.

<sup>25</sup> Matthew Sutcliffe, *The subversion of Robert Parsons his confused and worthlesse worke, entituled, A treatise of three conversions of England from paganisme to Christian religion* (1606), sig. A2. Although more theologically directed, Sutcliffe and Coke both engaged with Robert Parsons. Sutcliffe’s work was a response to Parsons’s, while Parsons responded to Coke’s *De Iure Regis*.

the old law, with evidence from Saxon and other sources to prove this.<sup>26</sup> Such an approach had a long pedigree, appearing in the preamble to the Act in Restraint of Appeals 1533 with a reference to ‘dyvers sundrie old autentik histories and cronicles’.<sup>27</sup>

Such references to old law as legitimising the current law were not peculiar to the reformation church. In the highly controversial *Calvin’s Case* (1608), both Edward Coke and (more unusually) Thomas Egerton, Lord Chancellor Ellesmere, made reference to the pre-Conquest legal past. *Calvin’s Case* concerned the status of James I’s Scottish subjects in England, and one of the key approaches concerned the allegiance subjects owed to their monarch.<sup>28</sup> Coke stressed the historical importance of the oath of allegiance, relying upon the laws of Edward the Confessor.<sup>29</sup> For Lord Ellesmere, the Saxon past was a small part of his explanation of the legitimacy of using prior decisions to reach decisions in unprecedented cases such as *Calvin’s Case*, explaining that judgments had been collected by Ethelbert and Alured to form the basis of their law books.<sup>30</sup> For both Coke and Ellesmere, the Saxon past could be used as part of arguments and texts intended to legitimise a controversial decision to the wider public.<sup>31</sup>

The Saxon law considered in the *Case of Ship-Money* may also have served such a legitimising function.<sup>32</sup> Lawyers were not unique in referring to the Saxon past in relation to Charles I’s naval ambitions. When the pride of Charles I’s navy was launched in 1637, the year of the case, the *Sovereign of the Seas* bore a figurehead depicting the Saxon king Edgar.<sup>33</sup> In an accompanying printed description of the ship, the size of Edgar’s navy and Charles I’s status as Edgar’s heir, from whom he inherited sovereignty over the seas surrounding Britain, were stressed.<sup>34</sup>

This role of the past in legitimising the law to the public had two important aspects. One, as found in Coke’s explanation to Robert Cecil, was that if subjects perceived the law to

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<sup>26</sup> Coke, *De Iure Regis Ecclesiastico/Of the King’s Ecclesiasticall Law (Caudrey’s Case)* (1591) 5 Co. Rep. 1-41. See similarly the *Case of Praemunire* (1607) Davis 84, at 88-89.

<sup>27</sup> 24 Hen. VIII, c.12 (SR, iii. 427).

<sup>28</sup> On the centrality of allegiance in the case, see Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge, 2000), pp. 177-182.

<sup>29</sup> *Calvin’s Case* (1608) 7 Co. Rep. 1-29.

<sup>30</sup> Thomas Egerton, *The Speech of the Lord Chancellor of England, in the Eschequer Chamber, touching the post-nati* (1609), pp. 37 and 53.

<sup>31</sup> On the controversy surrounding the case, see James S. Hart, *The Rule of Law, 1603-1660: Crowns, Courts and Judges* (Harlow, 2003), pp. 82-89.

<sup>32</sup> On these references, **see above, text at n. 19-21 and below, text at nn. 86-93 and nn. 153-183.**

<sup>33</sup> Thomas Heywood, *A True Description of His Majesties Royal Ship, Built This year 1637* (1637), p. 29.

<sup>34</sup> Heywood, *A True Description*, pp. 32-33 and 39.

be legitimate, they would obey it.<sup>35</sup> This was important in matters of major controversy and public interest, such as the church and the union of the Crowns of England and Scotland. But it could also apply to less significant matters. In 1596, the lord keeper, Thomas Egerton, referred to the laws of Cnut and Edgar, as well as the laws of the Lydians, as punishing slander. The particular slander was the losing party's complaints about a decision reached in a Star Chamber case in which various documents were held to be forgeries. Egerton explained that '[c]ommon custom holds this no offence', suggesting that the reference to other laws was to legitimise the punishment of slander in the Star Chamber to the wider populace who considered such slanderous complaints acceptable.<sup>36</sup>

An important aspect of this legitimisation was to legitimise the law to the lay people because they would, ultimately, apply it. Lay people were involved in the application of the law in various ways. If a law were perceived as illegitimate, that law might not be properly applied. This concern is visible in the work of William Lambarde who, in addition to his scholarly activity, was also a committed and hard-working justice of the peace in Kent.<sup>37</sup> Presiding over an inquisition post-mortem in 1595, Lambarde faced the challenge of persuading jurors to perform their duties properly, despite a possible reluctance to do so. In this case, the question was about the queen's right in relation to the deceased's land. The jurors were being asked to identify the landholdings of the deceased so that the Crown would receive its feudal dues. In effect, the jurors were asked to subject their neighbours to financial impositions by the Crown. Lambarde seemed to have anticipated reluctance on the part of the jury to carry out their role, so highlighted that the law of feudal tenure had been introduced with the 'first government of the Germans here, from whom both we and the Norman conquerors are descended and who be the first authors of the laws *de feodis*'.<sup>38</sup> The antiquity

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<sup>35</sup> In the context of legitimising the king's role in the church, this would necessarily have had the consequence of bringing both Catholics and dissenting Protestants into Church of England structures, probably with the implication of conversion.

<sup>36</sup> *Attorney-General v. Boothe, Markham et al.* (1596), pp. 64-66, in William Paley Baildon ed., *Les Reportes del Cases in Camera Stellata 1593-1609* (1894). This may also explain Thomas Egerton's references to the same laws in the case reported by Edward Coke as *De Libellis Famosis*, 5 Co. Rep. 125a, another case concerning the defamation of a clergyman. After announcing his sentence, Egerton referred to Saxon laws, as well as the laws of the Lydians and Indians and various decisions in England, *Attorney-General v. Pickeringe* (1605), in Baildon ed., *Les Reportes del Cases*, pp. 222-230, at pp. 229-230. However, the report is not very clear, consisting mostly of isolated sentences. On the belief of judges in the Star Chamber that proceedings in the court could influence the behaviour of the wider public, see Ian Williams, 'Contemporary knowledge of the Star Chamber and the abolition of the court', in K. J. Kesselring and Natalie Mears eds., *Star Chamber Matters: An Early Modern Court and Its Records* (2021), pp. 195-215, at p. 200.

<sup>37</sup> J. D. Alsop, 'Lambarde, William (1536 – 1601)', in *ODNB* < <https://doi.org/10.1093/ref:odnb/15921> > (accessed 2 August 2023).

<sup>38</sup> Conyers Read ed., *William Lambarde and Local Government: His 'Ephemeris' and Twenty-nine Charges to Juries and Commissions* (New York, 1962), pp. 176-177.

of the current law was used to legitimise the demands made by the Crown, to encourage the jury to perform their role properly.<sup>39</sup>

A similar concern with local reluctance to apply the law can also be seen in Lambarde's work in March 1582. At a special session of the peace, Lambarde presided over the trial of a particularly egregious offence. One night, a Protestant mob tried to demolish the house of a Catholic family, while the family were still inside. The family managed to escape unhurt, precluding any felony prosecutions. Lambarde clearly thought he needed to stress the seriousness of the offence, presumably because of the victims' membership of an often unpopular minority.<sup>40</sup> Aside from stressing the status of the victims simply as 'Christian', he also explained that the acts of the defendants were worse than the nearest analogy he could find anywhere in English legal history, in this case in the laws of Cnut.<sup>41</sup> A recourse to history was a means to show the local jury that this conduct had never been acceptable and that they were therefore bound to follow the law and convict those they found to be involved in the attack.

The Saxon past could also be a means to legitimise the law to another important group involved in applying the law: the legal profession itself. In 1596 the Star Chamber punished the plaintiff in a case for a slanderous bill against the dean of Worcester and others who had convicted him of sexual impropriety in the ecclesiastical court of High Commission.<sup>42</sup> After announcing the sentence against the plaintiff, the lord keeper, Thomas Egerton, stated that if the barrister whose name was on the plaintiff's bill had in fact signed the bill (rather than his signature having been forged), the barrister was to be disbarred. Immediately following that announcement was a reference to the laws of Cnut and Edgar, according to which a slanderer would lose his tongue, which Egerton referred to as 'a very iuste lawe, & I doe wishe it might be executed in these dayes'.<sup>43</sup> This suggests that Egerton referred to the Saxon laws both to warn other barristers about this conduct, and to explain why it was appropriate to punish it. This may have been particularly important in a decade when at least some lawyers were

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<sup>39</sup> Lambarde's approach here is not like that visible in the seventeenth century, where pressure was applied to ensure jurors did not recognise long leases of land so as to deprive the Crown of wardship, see N. G. Jones, 'Long Leases and the Feudal Revenue in the Court of Wards, 1540-1645', *Journal of Legal History* 19 (1999), pp. 1-22, at pp. 13-15. Lambarde seems only to have been trying to persuade jurors to do their duty, but the fact that he thought he needed to do so may indicate a longer term problem with juror performance as an additional explanation for the movement to more stringent measures two decades or so later.

<sup>40</sup> For physical attacks on religious minorities in the early-modern period, see Alexandra Walsham, *Charitable Hatred: Tolerance and Intolerance in England, 1500-1700* (Manchester, 2006), pp. 112-115.

<sup>41</sup> Conyers Read ed., *William Lambarde and Local Government*, p. 155.

<sup>42</sup> *Wheeler v. Dean of Worcester* (1596), in Baildon ed., *Les Reportes del Cases*, pp. 52 and 54-56.

<sup>43</sup> *Ibid.* 55-56.

involved in contentious and high-profile litigation and advice about proceedings in church courts, especially the High Commission.<sup>44</sup>

At a more general level, in his widely-circulated prefatory speech to his 1568 Inner Temple reading on Edward VI's statute on tithes,<sup>45</sup> Robert Gynes began by stressing the king's general power over the church and churchmen, especially the Saxon laws made by monarchs in relation to the church.<sup>46</sup> There was official concern about recusancy at the inns of court from the end of the 1560s onwards, so an introduction to a reading which established the historical pedigree of the royal supremacy may have been an attempt to convince colleagues of the legitimacy of the supremacy, or at least of the legislation enacted under it.

A similar purpose, but much more complicated execution, is found in the 1622 Middle Temple reading of Ægremond Thynne, concerning Elizabeth I's statute which authorised interest rates of up to ten per cent.<sup>47</sup> Usury was a controversial topic in early-modern England,<sup>48</sup> and in his discussion Thynne referred to the Saxon past. He explained that there had been no need for legislation about usury before the reign of Edward the Confessor because 'the common law was so severe and strict on this point'.<sup>49</sup> For Thynne, usury had been created by the Romans and brought to England by foreigners: Jews and 'certain Italian beggars' sent by the pope in the reign of Henry III.<sup>50</sup> He also explained how the clergy in the reign of Protestant Edward VI had identified the authorisation of (limited) interest in the reign of Henry VIII as contrary to the law of God. Thynne seems to link the pre-Conquest law to the law of God, suggesting that the pre-Conquest law was good law.

Thynne's discussion of the Saxon law as normatively good may have been an attempt to recognise the views of lawyers unhappy with the Elizabethan tolerance of lending at interest, but if so it was as part of a larger narrative showing the unsuitability of the old laws for modern times. In Thynne's reading, the English example becomes a historical parallel to Tacitus's account of money-lending in Roman history, as Thynne explained that in sixteenth-century

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<sup>44</sup> Brooks, *Law, Politics and Society*, pp. 102-112. On litigation concerning the High Commission before the 1590s, see Sir John Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge, 2017), pp. 138-143.

<sup>45</sup> 2 Edw. VI, c. 13 (*SR*, iv. 55).

<sup>46</sup> BL MS. Add. 11405, fos. 5-13v, at fos. 7 and 11-11v. For the circulation of the prefatory speech to Gynes's reading see J. H. Baker, *Readers and Readings in the Inns of Court and Chancery* (Selden Soc. suppl. Ser. 13) (2000), p. 86. Brooks, 'Religion and Law', p. 336 n. 24 notes that one copy (UCL MS. Ogden 29) is a commercial copy belonging to an early seventeenth-century barrister. Unfortunately no texts or notes of the substance of Gynes's reading are known.

<sup>47</sup> 13 Eliz. I, c. 8 (*SR*, iv. 542).

<sup>48</sup> Norman Jones, *God and the Moneylenders: Usury and the Law in Early Modern England* (Oxford, 1989).

<sup>49</sup> BL MS. Harl. 91, fo. 320.

<sup>50</sup> BL MS. Harl. 91, fo. 320.

England, the total prohibition of usury was a cure worse than the disease.<sup>51</sup> Just as in Rome, in the absence of regulation, usurers were simply unrestrained, leading to excessive debts. Thynne explained that these large debts led to the creation of that particular early-modern legal bugbear, perpetuities, as fathers sought to arrange matters so sons could not sell the land they inherited to pay off the usurious debts they had incurred in their youth.<sup>52</sup> Better, in Thynne's view, to have legislation permitting a rate of interest which would prevent the accumulation of such large debts. Thynne's reading is unusual, but shows that by the 1620s the simple analysis of old law as being seen as legitimate was not necessarily sufficient. The old law was good law, but good law, even God's law, was not always suitable for early-modern England.<sup>53</sup>

The Saxon past could also be used not just to legitimise the law, but to reject criticism of the legal profession. In the proposed text of his suppressed 1640 Middle Temple reading, Edward Bagshaw sought to undermine a criticism of common lawyers which was made by some churchmen. Apparently, there was an 'aspersion cast by some Prelates upon us Lawyers that in our pleadings call it Sabath as if we were Jewish'. Bagshaw defended the common lawyers' practice by stating that '[i]t appears by the Saxon lawes before the Conquest that Dies Dominicus in Latin, is called in the Saxon tongue only by the name of rest: Daye the resting day or Sabbath daye as that word originally signifies'.<sup>54</sup> In doing so, not only did Bagshaw defend contemporary common lawyers, but he also implied a criticism of contemporary bishops, whose linguistic attack on the common lawyers was revealed to be an un-English innovation.<sup>55</sup>

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<sup>51</sup> Ibid. fo. 320v. Thynne cites 'les annalls de Tacitus le 6.lib. 4. cap.', almost certainly a reference to Tac. Ann. 6.16-17, John Jackson trans., Tacitus, *The Annals, Books IV – VI, XI – XII* (Cambridge, MA, 1937) pp. 179-183.

<sup>52</sup> BL MS. Harl. 91, fo. 320v-321. Thynne's remarks about the effect of usury on landed property appear to be a deliberate allusion to Tacitus's discussion of the effect of usury in Rome. On the Chancery's response to heirs incurring debts, see Helen Saunders, 'Lambe v Finch (1626): An Early Seventeenth-Century Expectant Heir Chancery Suit in Context', *Journal of Legal History* 40 (2019), pp. 253-269.

<sup>53</sup> Thynne almost appears to be echoing Hotman's argument in *Antitribonian* that 'the laws should be accommodated to the form and condition of the commonwealth, not the commonwealth to the laws', François Hotman, *Antitribonian ou Discours d'un grand et renommé jurisconsulte de nostre temps* (Paris, 1603), p. 6, although more radically by suggesting even divine law might be unsuitable for England. Whether Thynne knew the *Antitribonian* is unknown. Thynne's position parallels the development in English thinking charted by Jones, as debates about usury moved from an early-Elizabethan assumption that the secular law must follow the law of God to a separation of economic issues from religious ones (e.g., Jones, *God and the Moneylenders*, pp. 1, 196-197 and 199).

<sup>54</sup> BL MS. Stowe 424, fo. 35.

<sup>55</sup> Bagshaw's reading as he wrote it (BL MS. Stowe 424, fos. 3-38) is full of criticisms of the role of the church and its bishops, being suppressed for that reason. On Bagshaw's reading, see Brooks, *Law, Politics and Society*, pp. 218-20 and Christopher W. Brooks, 'Religion and Law in Early Modern England', in Michael Lobban, Joanne Begiato and Adrian Green eds., *Law, Lawyers and Litigants in Early Modern England: Essays in Memory of Christopher W. Brooks* (Cambridge, 2019), pp. 327-365, at pp. 344-346.

Even when knowledge of the Saxon past was available, it was not always used to legitimise current practice and law. The *Case of Ship-Money* saw considerable use of Saxon material.<sup>56</sup> However, attempts to justify the government's actions to the wider public made no reference to the Saxon past. Coventry L.K.'s 1635 and 1636 instructions to the assize judges as to how ship money was to be justified on circuit made no reference to the Saxon past.<sup>57</sup> Similarly, Jones J.K.B.'s speech at the Oxford assizes in February 1637 did not refer to Saxon material. As Jones did not refer to Saxon material in the case itself this may be less surprising,<sup>58</sup> but the account of Jones's speech reported that he 'did runne over the heads of my L[ord] Keepers speech and make diverse additions of his owne'.<sup>59</sup> Jones's speech was therefore seen as echoing Coventry's own, and it is very similar to the remarks of Coventry from 1635 and 1636. Whatever its importance to the legal arguments, the Saxon material was not seen as key to wider public acceptance of the levy.

## JURISDICTION AND THE SAXON PAST

Use of the Saxon past to establish legitimacy shaded into a more specifically legal use of that past, moving beyond legitimacy to jurisdiction. Claims of the legitimacy of the royal supremacy by reference to the legal past could become legal assertions of the king's specifically legal jurisdiction to act in the ecclesiastical sphere.

This was, in fact, one of the earliest uses of a supposedly Saxon source by a common lawyer. In his 1568 reading, Gynes moved from the general claims of royal power legitimising the royal supremacy to specific examples of royal legislation about tithes in Saxon England. In doing so, he demonstrated that the legislation on which he was to read was part of a longer tradition, and thereby that Parliament had the power to enact the legislation on what was traditionally seen as an ecclesiastical matter.<sup>60</sup> Given the growth in jurisdictional conflict from

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<sup>56</sup> See below, text at **nn. 86-93 and nn. 153-183**.

<sup>57</sup> *The Case of Ship-Money*, 837-838 and 841-842.

<sup>58</sup> See below, **n. 76**.

<sup>59</sup> Nottingham University MS. Cl C 77.

<sup>60</sup> Helmholz notes a longer medieval tradition of parliamentary legislation on tithes, so the Edwardian statute was not a novelty, R. H. Helmholz, *Oxford History of the Laws of England*, vol. 1, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford, 2004), pp.176-177. However, the clergy regarded some of that legislation 'as "aggression" by the lay sphere', and it did cause 'friction' (ibid.). In the context of the break, reunion and break again from Rome in the sixteenth century, contemporary legislation may have been even more controversial. The issue of whether tithes were due *iure divino* or only under secular law (with the consequence of possible secular judicial control of tithes disputes) remained controversial into the seventeenth century, see Toomer, *John Selden*, vol. 1, pp. 257-267 and 304-310.

the middle of the sixteenth century, Gynes may have thought it important to establish the lay power to legislate in this field.<sup>61</sup>

This use of Saxon law to negotiate issues of jurisdiction also appeared outside the ecclesiastical context. In *Watts v. Braynes* (1600), there was a question about whether an appeal of felony from the Cinque Ports could be heard in the King's Bench. Edward Coke relied upon the long-established liberties of the Cinque Ports that cases from the ports could not be heard in the central courts in Westminster Hall. Coke asserted the antiquity of those liberties, that 'it is clear that they had their liberties before the Conquest of William the Conqueror, for he confirmed them and so did William Rufus his son ... and for this inasmuch that their liberties are such, no writ must be brought here for some thing done there'.<sup>62</sup> Stressing the age and importance of these pre-Conquest liberties was part of Coke's key jurisdictional argument in the case. Popham C.J.K.B. rejected the conclusion of Coke's argument, but did not dismiss the historical aspects of it. Popham showed that the King's Bench had jurisdiction to provide justice even when statute allocated justice elsewhere, if the allocated court could not do justice in the particular case. As the liberty of the Cinque Ports was only based on prescription, and 'no prescription is of greater force than an act of parliament', his conclusion on statute would apply more strongly to such a prescriptive right. As justice could not be provided within the Cinque Ports in this case, the King's Bench had jurisdiction despite the pre-Conquest liberties of the ports.<sup>63</sup> Although Coke's argument based on claimed Saxon law failed, for Coke and Popham it was possible and acceptable to refer to the pre-Conquest law to determine jurisdiction in an Elizabethan case.<sup>64</sup>

## ESTABLISHMENT

Coke's jurisdictional argument in *Watts v. Braynes* serves as an example of where pre-Conquest law could appear in legal argument. Such an approach could go beyond questions of

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<sup>61</sup> On the growth of jurisdictional conflict see Helmholz, *Oxford History*, pp. 460-465 and Baker, *Oxford History*, pp. 249-51. Baker notes that tithes were at the centre of jurisdictional conflicts and that provisions of the Edwardian legislation were relied upon.

<sup>62</sup> *Watts v. Braynes* (1600), Harvard Law School (HLS) MS. 1199, fos. 12-18, at fos. 13v-14.

<sup>63</sup> *Watts v. Braynes* (1600), *ibid.* fos. 15-15v.

<sup>64</sup> This particular use of the Saxon past was not peculiar to the early-modern period. In a jurisdictional dispute in the 1460s, reference was made to an eleventh-century document which itself referred to the situation in the time of Edward the Confessor (see Tom Johnson, 'The Tree and the Rod: Jurisdiction in Late Medieval England', *Past and Present* 237 (2017), pp. 14-51, at p. 38).

jurisdiction to the substance of early-modern law itself. In these situations, Saxon law was a source for early-modern law.

In the *Case of Commenda* (1611) in John Davies's Irish reports the issue was whether there existed a power to dispense with a rule of canon law.<sup>65</sup> The argument for the king in the case was that the king had an inherent prerogative power to dispense from rules of English law, which included the canon law. This point was argued, in part, by showing that Saxon monarchs had legislated for the church and clergy, thereby demonstrating that canon law was simply part of English royal law.<sup>66</sup> This dispensing power would then be a part of the general royal dispensing power, with the usual common-law limits on its use. Establishing the extent of the king's powers, in part through consideration of the Saxon position, would then determine whether a benefice was vacant. If it were, then the king would have been entitled to appoint a clergyman to it.<sup>67</sup>

William Lambarde's challenge when faced with a Protestant attack on a Catholic family has been mentioned before.<sup>68</sup> In addition to the problem of convincing a Protestant jury to convict co-religionists for an attack on Catholics, Lambarde also faced another problem. As he observed, the offence was 'a thing, so far as I know, not only not read of in our histories but also unthought of in our laws ... because our lawmakers not hearing that it had happened before their time did not think that any should be afterward found of so beastly and savage mind as to commit it'.<sup>69</sup> Lambarde then identified what he thought was the closest historical parallel, in the laws of Cnut which he had included in his *Archaionomia*. As Lambarde explained to the jury, Cnut had specified that a 'violent breaking into a house, though it were by day', could only be punished by death.<sup>70</sup> As a justice of the peace, Lambarde could not try a case leading to the imposition of the death penalty, but his recourse to the fairly stretched historical parallel was a means to show that as similar, but less serious, conduct was criminal, this more serious

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<sup>65</sup> *Le Case de Commenda* (1611) Davis 68.

<sup>66</sup> *Le Case de Commenda* Davis 68, at 88-89. There was also a particular statutory power under Henrician legislation. The treating of canon law as part of English law, linked to Saxon practice in relation to the Church, is also visible in Henry Rolle, *Un Abridgment des Plusiers Cases et Resolutions del Common Ley* (1658), pt 2, p. 216 (tit. Prerogative le Roy, subtit. Ecclesiastical Leys (I) L'antiquitie) and a reference to 'ancient law' pt 2, p. 230 (tit. Prerogative le Roy, subtit. Evesque & Temporalities (E) Quel person visitera).

<sup>67</sup> Somewhat paradoxically, counsel for the king had to argue that both of these powers of dispensation were limited, and that the particular dispensation at issue was outside of those limits and so void. This then meant an appointment to the benefice was void. The benefice would then have been vacant for so long that the king would be entitled to appoint to it. The *Case de Commenda* is therefore a classic example of the king willingly limiting royal power for a short-term advantage. The case was reported before any decision was reached.

<sup>68</sup> See above, **text at nn. 40-41**.

<sup>69</sup> Conyers Read ed., *William Lambarde and Local Government: His 'Ephemeris' and Twenty-nine Charges to Juries and Commissions* (New York, 1962), p. 155.

<sup>70</sup> *Ibid.*

conduct must also be criminal. The pre-Conquest law was a means to identify the existence of a hitherto unrecognised misdemeanour in English law.<sup>71</sup>

The Saxon past could also be used in more complex ways. Returning to *Calvin's Case* and the issue of allegiance, to develop his argument Coke used Saxon law to explain post-Conquest law. Coke claimed that allegiance was reciprocal: subjects gave allegiance to their monarch and received protection in return. If that protection came from a monarch's laws, that showed the subjects had the benefit of those laws, which was the key issue in *Calvin's Case* itself, albeit not in relation to protection. One aspect of Coke's argument based on allegiance and protection was that this protection extended to subjects of a monarch who were living in a different kingdom to their kingdom of birth, but one ruled by the same monarch. To show this, Coke referred to the post-Conquest law of Englishry, by which a hundred was fined if a Frenchman was killed and the killer not produced by the hundred, but not if it was shown that the victim was English.<sup>72</sup>

Coke relied upon *Bracton*, which refers to Englishry and provides a reason for the rule from the reign of King Cnut, itself taken from the Laws of Edward the Confessor, that if any of the English 'should slay any of the men whom the king kept with him' and the killer was not found, the place where the victim was killed would pay a fine.<sup>73</sup> Coke pointed out that this cannot have referred to protecting specifically French people, as it was likely that companions of Cnut were Danish. From that position, Coke was then able to interpret the laws of William I presenting a post-Conquest law of Englishry referring to the French as simply being another application of the same principle. The focus on the French in the post-Conquest law of Englishry was therefore only an 'example' of a longer-standing, pre-Conquest, law of protection being provided to any alien subject of the monarch.<sup>74</sup> The Saxon past provided a means to interpret the post-Conquest sources to make a general point about the law of allegiance: protection was provided to any subject of a monarch, whatever their origin. From that position, on Coke's terms it was an easy step to show that subjects of a monarch, such as James I's Scottish subjects, had the benefit of English law when in England.

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<sup>71</sup> I shall address the methods by which new misdemeanours were identified in the period in forthcoming work on the court of Star Chamber. Lambarde's extension from another offence was not unusual, although the reference to a pre-Conquest law was.

<sup>72</sup> The law of Englishry was abolished by statute in 1340 (14 Edw. III, st. 1, c. 4), but this was not considered an objection to Coke's point of principle.

<sup>73</sup> Samuel E. Thorne ed., *Bracton on the Laws and Customs of England*, vol. 2 (Cambridge, MA, 1968), p. 379. Coke chooses to present *Bracton's* 'aliquem hominum quos rex secum adduxit' as 'an alien' to better suit his argument, *Calvin's Case* (1607) 7 Co. Rep. 1, 16b.

<sup>74</sup> *Calvin's Case* (1607) 7 Co. Rep. 1, 16b-17.

The most extensive use of Saxon law in establishing early-modern substantive law occurred in one of the most controversial cases of the period, *R v. Hampden*, the *Case of Ship-Money*, in 1637.<sup>75</sup> All counsel in the case made reference to Saxon material, as did six of the twelve judges.<sup>76</sup>

*Ship-Money* concerned the king's claimed power to raise money for defence without Parliament.<sup>77</sup> There was a well-established principle that, in an emergency, coastal communities could be required to provide the monarch with a ship to contribute to naval defence without parliamentary authorisation. During the personal rule of Charles I, this practice was altered in several significant ways. The first step was the replacement of the provision of a ship with the payment of money.<sup>78</sup> From 1634 this financial levy was made compulsory and enforced by distraint.<sup>79</sup> In 1635, the levy was extended to all inland counties too.<sup>80</sup> As was noted in the litigation, while there were some precedents of particular inland towns being required to provide ships, there was no precedent of a general inland levy to support naval defence.<sup>81</sup> Instructions for such a general levy were issued and rapidly withdrawn in 1628.<sup>82</sup> The most politically controversial issue in *Ship-Money* was whether the king's claim of there being a genuine emergency justifying an obligation of service or a financial levy was genuine.

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<sup>75</sup> The discussion here is based upon the version of the case as presented in the *State Trials*. There is a very extensive survival of manuscript accounts of the case, see Noah Millstone, *Manuscript Circulation and the Invention of Politics in Early Modern England* (Cambridge, 2016), pp. 264, 267 and 269. The accounts do not seem to reflect the full discussions in the case, as the notes of Littleton S.-G. show him responding to comments made by Croke J.K.B., which suggests interaction which is not visible in the printed or circulating manuscript accounts (CUL MS. Mm.6.63, fo. 62v).

<sup>76</sup> Of the judges who did not refer to Saxon material, Vernon J. and Denham B. gave no reasons (*The Case of Ship-Money*, 1125 and 1201), while Jones J.K.B. was clear that he was not arguing from precedents as he 'had not time to peruse them' (*The Case of Ship-Money*, 1190). The other judges who did not refer to Saxon material were Trevor and Weston B.B. and Brampton C.J.K.B. There is some discussion of the Saxon material in Greenberg, *The Radical Face of the Ancient Constitution*, pp. 172-178, but this is limited to the references to a few selected sources (the Laws of Edward the Confessor, the *Modus Tenendi Parliamentum* and the *Mirror of Justices*).

<sup>77</sup> For the background and context, see Michael J. Braddick, 'Case of Ship-Money (*R v Hampden*) (1637): Prerogative Discretion in Emergency Conditions', in John Snape and Dominic de Cogan eds., *Landmark Cases in Revenue Law* (Oxford, 2019), pp. 27-48, at pp. 29-33. For a useful introduction to the political context see Millstone, *Manuscript Circulation*, pp. 250-262.

<sup>78</sup> See Andrew Thrush, 'Naval finance and the origins and development of ship money', in Mark Charles Fissel, *War and Government in Britain, 1598-1650* (Manchester, 1991), pp. 133-162, at pp. 133-134. Braddick describes this as 'a plausible expedient' given the changing nature of naval warfare, Braddick, 'Case of Ship-Money', p. 30, but it clearly was novel.

<sup>79</sup> Braddick, 'Case of Ship-Money', p. 31. As Braddick notes, issues of enforcement were particularly problematic in the case (*ibid.* 41-42).

<sup>80</sup> Braddick, 'Case of Ship-Money', p. 31.

<sup>81</sup> *The Case of Ship-Money*, 1137, per Croke J.K.B.

<sup>82</sup> Robin J. W. Swales, 'The Ship Money Levy of 1628', *Bulletin of the Institute of Historical Research* 50 (1977), pp. 133-162, at pp. 164-176. The claim by Keir and others, e.g. D. L. Keir, 'The Case of Ship Money', *Law Quarterly Review* 52 (1936), pp. 546-574, at p.553, that this proposal was withdrawn in the face of opposition is rejected by Swales, Swales, 'The Ship Money Levy', pp. 171-173.

As Weston B. observed ‘The subject suspects this is only a pretence and that the kingdom is not really in danger.’<sup>83</sup> However, this was not at issue in the litigation itself.<sup>84</sup>

Saxon material played no part in the more technical, and extremely important, issues of enforcement raised in the *Case of Ship-Money*.<sup>85</sup> However, the levying of Danegeld in Saxon England did have a central role in the argument of underlying constitutional principle. No one in the case was arguing for a direct revival of Danegeld itself; the possibility of Charles I’s maternal countrymen looting Lindisfarne was remote. But the Saxon material was important for two of the issues in the case. First, whether the king could impose a recurring financial levy for the defence of the realm without parliamentary authorisation, and second whether that levy could be extended nation-wide. Saxon law and practice were therefore central to discussions of the key issues of constitutional principle.<sup>86</sup> Danegeld was particularly useful because it was recognised by both counsel and judges that there was evidence of it being levied both before and after the Norman Conquest.<sup>87</sup> Danegeld was therefore an example of the continuity of the English constitution and government which could be used in early-modern legal argument. References to this aspect of Saxon government were one of the principal means by which it was established that the king did have the power to impose, and impose repeatedly, a nationwide financial levy for the defence of the realm.<sup>88</sup>

The Saxon power to raise money was also integrated into other modes of analysis of the issues in *Ship-Money*. For example, Crawley J.C.P. began his discussion of the king’s power to levy financial impositions in an emergency in terms of what he called the ‘law of

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<sup>83</sup> *The Case of Ship-Money*, 1067.

<sup>84</sup> Braddick, ‘*Case of Ship-Money*’, pp. 42-43.

<sup>85</sup> As Russell observed, on this point Charles I ‘was caught in a procedural tangle made inevitable by his own dishonesty’, Conrad Russell, ‘The Ship Money Judgments of Bramston and Davenport’, *English Historical Review* 77 (1962), pp. 312-318, especially at pp. 315-316.

<sup>86</sup> There is no evidence of this Saxon material being relevant in the governmental discussions leading to the decision to levy ship money nationwide. None of the state papers suggest any consideration of the point of constitutional principle, instead being concerned with the mechanisms for implementation and enforcement, TNA SP 16/270/55, SP 16/272/36, SP 16/275/38 and SP 16/276/64. Even the keeper of the records in the Tower of London, John Burroughs, in his ‘Briefe of the Precedents’ was concerned only with Plantagenet material, TNA SP 16/275/65. Burroughs’s 1633 *Dominium Maris Britannici* does not refer to Danegeld, although it does mention a Saxon obligation to provide ships in kind, BL MS. Harl. 4314, fo. 33v.

<sup>87</sup> *The Case of Ship-Money*, 1010 (Holborne for Hampden), 1039-40 (Banks A.-G.), 1085 (Crawley J.C.P.), 1092 (Berkeley J.K.B.), 1196 (Hutton J.C.P.) and 1228 (Finch C.J.C.P.).

<sup>88</sup> From another perspective on *Ship-Money*, the use of Danegeld was a means to show the extent to which a claim based on ‘necessity’ could justify financial impositions beyond situations of dire emergency (for this perspective on the case, not considering the Saxon material, see David Chan Smith, ‘Hannibal *ad portas*: necessity, public law and the common law emergency in the *Case of Ship Money*’, in Paul D. Halliday, Eleanor Hubbard and Scott Sowerby eds., *Revolutionising Politics: Culture and Conflict in England, 1620-1660* (Manchester, 2021), pp. 31-54, at pp. 39-45).

reason', relying upon Philippe de Commines and Bodin.<sup>89</sup> Crawley's discussion of the Saxon precedent could then be presented as a particular English manifestation of this wider principle.<sup>90</sup> Crawley could then also use the ideas taken from de Commines and Bodin to inform his understanding of the Saxon material, which seems to explain his otherwise brief assertion that no parliamentary consent was necessary for Danegeld, a point which conforms to the 'law of reason' Crawley had identified from Bodin.<sup>91</sup> Ideas and material from Bodin and de Commines are also found in a document about the King's power in the papers of Bankes A.-G.<sup>92</sup> Some of this material was incorporated into Bankes's draft argument, and from there it can be found in the printed account of his argument.<sup>93</sup> *The Case of Ship-Money* is another reminder that common lawyers were never limited simply to an 'ancient constitution' mode of thinking. The antiquity of the law could be combined with ideas about the law of reason drawn from more recent political writers. These different ways of thinking were not necessarily alternatives but could be complementary to one another.<sup>94</sup>

#### THE RELATIVE UNIMPORTANCE OF THE SAXON PAST

*Ship-Money* shows that the Saxon past could be of vital importance to early-modern English law. However, its appearance in that case, and the amount of discussion the Saxon material engendered, was highly unusual. It probably reflects an issue acknowledged by the author of

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<sup>89</sup> *The Case of Ship-Money*, 1083-84. The reference to 'Commines, fol. 179' is to Phillippe de Commines, *The historie of Philip de Commines Knight, Lord of Argenton* (1596), p. 197. Oliver St John also made reference to Bodin in *Ship-Money*, but not in relation to the power to levy impositions, *The Case of Ship-Money*, 901.

<sup>90</sup> *The Case of Ship-Money*, 1085.

<sup>91</sup> *The Case of Ship-Money*, 1083-84.

<sup>92</sup> Dorset History Centre (DHC) D-BKL/H/A/44, 'Touching the Kings Power', pp. 5-7 and 14.

<sup>93</sup> For example, the definition of the law of nature found in *The Case of Ship-Money*, 1019, is the same as that in DHC D-BKL/H/A/45, p. 6, itself the same as DHC D-BKL/H/A/44, 'Touching the Kings Power', p. 5. The printed account of Bankes's argument excludes much of the material in his draft on the laws of God, nature and nations, as well as the civil law, DHC D-BKL/H/A/45, pp. 6-9. This was taken from DHC D-BKL/H/A/44, 'Touching the Kings Power', pp. 1-11. The only evidence suggesting that the printed account of Bankes's argument omitted some of Bankes's argument is that Crawley J.C.P.'s use of Phillippe de Commines (above **text at n. 89**) cited a passage which is also included in DHC D-BKL/H/A/44, 'Touching the Kings Power', p. 14. However, this text was not included in Bankes's draft argument, DHC DHC D-BKL/H/A/45, presumably because it was an historical example of the impracticality of using parliament to raise revenue in an emergency, rather than Bankes's preferred approach of denying any requirement to use parliament at all.

<sup>94</sup> See more generally, Brooks, *Law, Politics and Society*, pp. 66-92, 140-144, 153-154 and 190-193. Using Saxon material was clearly a choice. While Robert Gynes made the Saxon past a key part of his elaboration of the king's ecclesiastical powers in 1568 (above, **text at nn. 46 and 60**), James Morice's 1578 elaboration of royal powers only touched on the pre-Conquest past briefly when considering the king's powers in relation to the church, BL MS. Egerton 3376, fos. 46-61. Morice made no use of Saxon sources, referring only to Polydore Vergil and an observation from Fortescue that the common law had been used from the time of the Britons, BL MS. Egerton 3376, fo. 47.

an outline of a discussion of the prerogative from late in the reign of Elizabeth, that ‘their ar no more Prerogatives Royall medled with all by the said Lawes but sutche onlye as tyme gave occation to debate and call into question whiche althoughe they be manye yeat in deede ar they but somme fewe of a greater nommber’. That paucity of sources in the established legal canon for issues of public law meant that a discussion of the prerogative would need to refer to a wider range of sources.<sup>95</sup>

The same could be said about issues concerning the church. Where they could, common lawyers were content to rely upon the post-Conquest law and practice of the church. As Coke put it in the *Dean and Chapter of Norwich’s Case* (1596), to resolve a question ‘is to bee Considered what the Pope in time of popery might lawfullye doe concerning the same, for what the Pope alone used lawfullye to doe, that the kinge by the statute of 26.h.8. cap: [ ... ] might lykewise do’.<sup>96</sup> The Saxon past appeared when the papal past was insufficient, such as justifying the royal supremacy itself,<sup>97</sup> or considering specifically royal powers in relation to the church,<sup>98</sup> or increased secular regulation of an ecclesiastical issue such as tithes.<sup>99</sup> Coke’s account of *Caudrey’s Case*, and his letter to Robert Cecil, suggests another reason to refer to the Saxon past: when seeking to convince discontented Protestants, discussion of papal precedent would have exacerbated their dissatisfaction, provoking rather than persuading.<sup>100</sup> At that point another source of argument would have been needed and the Saxon past provided it.

For most legal issues in early-modern England, a shortage of sources was not the issue. Furthermore, the surviving Saxon material was simply not relevant for many early-modern legal questions. As Coke himself observed, the Saxon law ‘codes’ did not contain much of relevance to the common law, but were only ‘the fragments of such acts and ordinances as are published under the title of the Laws’.<sup>101</sup> Much early-modern litigation concerned issues of real property law, the effect of more recent legislation (the ‘divers intricate and prolix Acts’ criticised by Coke) or a combination of the two.<sup>102</sup> For these, Saxon material would provide

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<sup>95</sup> BL MS Harl. 5220, fo. 4v. The range of sources is listed at fos. 5-7, and includes ‘The historiographers and Croniclors of England’. The text is usually attributed to John Dodderidge, and he is a plausible candidate for authorship.

<sup>96</sup> *Dean and Chapter of Norwich* (1596) BL Add. MS. 25206, fos. 98-102, fo. 98v, referring to 26. Hen. 8, c. 1 (SR, iii. 492).

<sup>97</sup> Such as Coke’s account of *Caudrey’s Case* (above, **text at n. 26**).

<sup>98</sup> See above, **text at nn. 65-67**.

<sup>99</sup> See above, **text at nn. 60-61**.

<sup>100</sup> See above, **text at nn. 24-25**.

<sup>101</sup> Edward Coke, ‘To the reader’, in *La Huictme Part des Reports de Sir Edward Coke* (London, 1611), sig. Ai.

<sup>102</sup> *Leonard Lovie’s Case* (1613) 10 Co. Rep. 78a, at 82a.

little assistance. Even when relevant Saxon material could be found, it was possible to argue that the law had in fact changed. Hutton J.K.B. did just this in *Ship-Money*, accepting that the Saxon material did show the common law that ‘might now be put in use as formerly’, but that the statute *De Tallagio non concedendo* of 1297 had changed the law.<sup>103</sup>

However, for other lawyers there may also have been difficulties in using Saxon material. In his assize charge at York in 1648, serjeant Francis Thorpe explained to the jurors that ‘[t]he Times and Transactions before the Norman William got the Crown, and which past among the Brittaines, Romans, Danes, and Saxons, being dark and obscure, I passe by’.<sup>104</sup> It is not clear whether the pre-Conquest past was obscure to Thorpe himself, or he thought his audience would be unfamiliar with it, and therefore considered that its usage in a set-piece oration would be unhelpful.

With typical modesty, William Prynne in 1662 explained that previous readings had not included much discussion of antiquities because of ‘the method of other Readers, who were meare Common Lawyers, and not much versed in antiquities, Histories, and other sorts of Lawes, and Learneing’.<sup>105</sup> While this might explain a reluctance on the part of some lawyers to make use of the Saxon past, it was not the case that lawyers were unable to access or use those sources. In fact, in the *Case of Ship-Money* there are some attempts at genuinely historical discussion by the lawyers of the Saxon sources. When faced with a disagreement between sources, Holborne explained that he preferred the evidence of Ingulphus over that of Gervase of Tilbury, because he believed Ingulphus to have been a courtier to William I and closer in time to the relevant events.<sup>106</sup> When interpreting sources in Latin, both Littleton S.-G. and Finch C.J.C.P. explained that they had to interpret the words as used in ‘those times’, rather than in contemporary usage.<sup>107</sup> This attempt at establishing the historical meaning of words becomes rather less impressive, at least in relation to Littleton S.-G., when he seems to suggest that the Saxon meaning of ‘statutum’ can be understood by interpreting the word as it was used in Cicero.<sup>108</sup> With such classically Latinate Saxons, the ‘dark ages’ decried by humanists disappear.

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<sup>103</sup> *The Case of Ship-Money*, at 1196, referring to 25 Edw. I (SR, i. 125).

<sup>104</sup> Francis Thorpe, *Sergeant Thorpe Judge of Assize for the Northern Circuit, His Charge, As it was delivered to the Grand-Jury at York Assizes the twentieth of March, 1648* (York, 1648), p. 8.

<sup>105</sup> BL MS. Harg. 98, fo. 33. Prynne’s reading was delivered at Lincoln’s Inn and includes some Saxon material at fos. 46-47.

<sup>106</sup> *The Case of Ship-Money*, 918.

<sup>107</sup> *The Case of Ship-Money*, 931 and 1228. Holborne, by contrast, was instead willing to rely upon the expertise of William Lambarde, and that his choice of word when translating the Saxon texts into modern Latin revealed the meaning of the original source, *The Case of Ship-Money*, 1001.

<sup>108</sup> *The Case of Ship-Money*, 931.

## SOURCES FOR THE SAXON PAST

When lawyers did choose to make use of the Saxon past, from where did they acquire their knowledge? Sources are often frustratingly missing from early-modern texts, and those that are given are not always correct.<sup>109</sup> However, it is possible to reconstruct a significant part of the sources used by early-modern lawyers when discussing Saxon England and its law. Doing so is suggestive as to the place these lawyers thought Saxon law had early-modern English law, as well as the seriousness with which lawyers took the search for Saxon sources.

An important group of texts which were used to identify pre-Conquest law were the traditional printed sources of the common law, all of them from after the Conquest. George Garnett has already identified this as a feature of Edward Coke's inquiries into the legal past in the prefaces to his *Reports*, but the practice goes further than that. Coke made use of the thirteenth-century *Bracton* to understand the law of allegiance in the time of Cnut.<sup>110</sup> In *Caudrey's Case* his reference to the pre-Conquest Charter of Abingdon was taken from William Staunford's *Plees del Coron*, itself referring to a late fifteenth-century year book case where the charter was raised.<sup>111</sup>

This focus on printed books within the legal canon was not peculiar to Coke.<sup>112</sup> In the *Case of Ship-Money*, Croke J.K.B. referred to a pre-Conquest law to hold semi-annual parliaments.<sup>113</sup> As Janelle Greenberg has observed, this is 'an obvious reference to the *Mirror of Justices*'.<sup>114</sup> But Croke makes no reference to that work, which was at the time believed to be a (mostly) Saxon document.<sup>115</sup> According to one of the accounts of Croke's speech, his only citation was to Coke's own ninth volume of reports.<sup>116</sup> In fact, the reference is to Coke's preface

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<sup>109</sup> See, e.g., Garnett, "The ould fields", pp. 271-272 for some of Coke's citations.

<sup>110</sup> See above, **text at nn. 73-74**. For the role of *Bracton* in developing Coke's historical thought, see Ian Williams, 'The Tudor Genesis of Edward Coke's Immemorial Common Law', *Sixteenth Century Journal* 43 (2012), pp. 103-123, especially pp. 118-123.

<sup>111</sup> Coke, *De Iure Regis Ecclesiastico*, fo. 10, citing Staunford, lib. 3, fo. 121. The correct citation is Staunford's *Plees del Coron* (1557), lib. 2, fos. 111v-112. The yearbook case is YB Pas. 1 Hen. VII, fo. 22b, pl. 15, at fo. 23a (1486).

<sup>112</sup> Other examples of a reliance on legal sources to evidence the past (but not the Saxon past) can be found in the commonplace books of John Dodderidge, BL MS. Harg. 407, fo. 449v, and Thomas Egerton, Henry E. Huntington Library MS. Ellesmere 496, fo. 162v.

<sup>113</sup> *The Case of Ship-Money*, 1135 and 1159.

<sup>114</sup> Greenberg, *The Radical Face of the Ancient Constitution*, p. 177.

<sup>115</sup> E.g. Edward Coke, 'To the reader', in Edward Coke, *La Dixme Parts des Reports de Sir Edward Coke* (1614), sig. D.iii-iiiiv.

<sup>116</sup> *The Case of Ship-Money*, 1159.

to that volume, an unusual citation of Coke's prefaces in curial argument.<sup>117</sup> Coke's text does refer to the *Mirror*, so as presented in the report Croke chose to limit his citation to Coke. This might reflect the general movement in common law argument to rely upon printed sources,<sup>118</sup> or Croke relying upon the high prestige which Coke then enjoyed.<sup>119</sup> However, using traditional legal sources to establish Saxon law also highlights the underlying assumption of an unbroken common law tradition, that pre-Conquest law was part of familiar post-Conquest legal works.

Some caution is warranted here. It may be that there was a stronger tradition of citing legal texts, even if there was a practice of using other texts. For example, Robert Gynes's reading will be shown to have made use of a non-legal text for its Saxon material.<sup>120</sup> However, the only cited texts in accounts of his speech are statutes, cases and common-law books. Gynes used a wider range of material than is cited.<sup>121</sup>

A reliance on the printed legal canon would also have had an important limiting effect on the use of Saxon material in legal argument. Until the publication of Dyer's reports in 1585, almost all common-law printed works antedated the Elizabethan interest in the Saxon past. In Dyer's reports, around seventy per cent of the volume covers cases from before 1568, the year in which *Archaionomia* was published.<sup>122</sup> It was only with the publication of Coke's reports that sufficiently recent legal material was being published, in which there was a possibility of the printed law books including references to Elizabethan scholarship on Saxon England. Once printed, Coke's Saxon material was then used by other lawyers, with John Davies referring to a charter discussed by Coke in *Caudrey's Case*, citing Coke's account.<sup>123</sup>

Even within Coke's reports, Saxon material did not appear immediately. Aside from the unusual texts of *Caudrey's Case* and *Calvin's Case*, the first volume to include references to Saxon material in the main body of the reports, rather than the prefaces, was the ninth volume from 1613, although it is not clear whether the material was actually cited in the cases or only

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<sup>117</sup> Edward Coke, 'To the Reader', in *La Neufme Part des Reports de Sir Edward Coke* (London, 1613), sig. bv r-v.

<sup>118</sup> Ian Williams, "'He Creditted More the Printed Booke': Common Lawyers' Receptivity to Print, c.1550 – 1640", *Law and History Review* 28 (2010), pp. 39-70.

<sup>119</sup> For Coke's prestige by the 1620s, see Robert Zaller, *The Parliament of 1621: A Study in Constitutional Conflict* (Berkeley, CA, 1971), p. 69, and John Bruce ed., *Calendar of State Papers, Domestic Series, of the Reign of Charles I. 1629-1631* (1860), p. 490.

<sup>120</sup> See below, **text at nn. 145-147**.

<sup>121</sup> BL MS. Add. 11405, fos. 5-13v; the marginalia in this copy are clearly a later addition, but common-law citations are incorporated into the main text throughout. Gynes's original does not survive, so it is possible that the citations in the main text were inserted by a copyist. If so, this shows that the copyist either could only identify the common law texts or only considered the common law texts appropriate for inclusion.

<sup>122</sup> James Dyer, *Cy ensuont ascuns novel cases collectes per le iades tresreverend judge, Mounsieur Jasques Dyer* (1585). Cases from 1568 onwards begin on fo. 269v; the volume ends on fo. 377v.

<sup>123</sup> *Le Case de Commenda* Davis 68, at 73.

included in the reports by Coke.<sup>124</sup> The only reported case where Coke reports the use of Saxon material in language suggesting the use was made in the case itself is the *Earl of Shrewsbury's Case* (1610), where the Saxon etymology of the word 'steward' was discussed without any citations.<sup>125</sup>

A major change, which may have encouraged references to the Saxon past by lawyers more generally, was the printing of Coke's *Commentary on Littleton* in 1628.<sup>126</sup> The *Commentary* was read and cited by lawyers soon after its appearance, and its publication was reported as news even by non-lawyers.<sup>127</sup> References to the pre-Conquest past are pervasive in the first two hundred folios of the *Commentary*. Often the focus is on the Saxon etymology of a word still in use by English lawyers,<sup>128</sup> but Coke also identifies contemporary legal institutions as existing in the Saxon past.<sup>129</sup> There are even occasional references to pre-Conquest law to demonstrate contemporary law, typically taken from Coke's own reports and changing Coke's authorial insertions in his reports to statements of the correct law in the *Commentary*.<sup>130</sup> The overall impression for the contemporary law set out in the *Commentary on Littleton*, much more than in earlier work by Coke, was that early-modern English law was a continuation of the Saxon past and that lawyers could, perhaps even should, make reference to that past to understand and expound their contemporary law. It is notable that Henry Rolle's *Abridgment*, the first major common-law reference work produced after the *Commentary on Littleton*, also identifies English institutions as existing in the Saxon past, albeit not to the same extent as Coke.<sup>131</sup> It is unprovable, but it may have been the example of Coke, especially in the

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<sup>124</sup> Edward Coke, *La neufme part des reports de Sir Edw. Coke* (1613). In the *Abbot of Strata Marcella's Case* (1591) 9 Co. Rep. 24a, at 28, the Saxon charters are clearly in Coke's note to the reader and may therefore have been added significantly later than the date of the case itself. In *Sir Anthony Lowe's Case* (1609) 9 Co. Rep. 122b, at 124a, Coke makes a reference to the *Modus tenendi Parliamentum* as to the value of a knight's fee, but this may be a reporter's insertion.

<sup>125</sup> *Earl of Shrewsbury's Case* (1610) 9 Co. Rep. 46b, at 48b. Coke's citation of 'History of Ingulphus, 463' is probably to the printed version of the Croyland Chronicle in Henry Saville, *Rerum Anglicarum Scriptores post Bedam* (1596), fo. 492v.

<sup>126</sup> Edward Coke, *The first part of the Institutes of the lawes of England. Or, a commentarie upon Littleton* (1628). For Coke's use of the past in his *Institutes* generally, see Anthony Musson, 'Sir Edward Coke and his Institutes of the Laws of England: An exercise in legal history?', *Archives* 31 (2006), pp. 95-107.

<sup>127</sup> For an early citation of the *Commentary*, see *Pope v. Tinker* (1629) CUL MS. Gg.2.19, fo. 47v, at fos. 49-50. For a non-lawyer reporting the publication of the work, see a letter from Joseph Mead in BL MS. Harl. 390, fo. 456.

<sup>128</sup> Co. Litt., fos. 43v, 58, 61v, 65v, 71, 71v, 106v, 109v, 116, 127, 168, 175v, 260v and 287v. References to Saxon etymology had earlier been made by Abraham Fraunce, *The Lawiers Logike* (1588), fo. 53.

<sup>129</sup> Co.Litt., fos.7 (the sealing of charters), 58 (courts baron), 71 (musters), 74 (the marshal), 110 (Parliament), 155v (jury trial) and 185v (heriot).

<sup>130</sup> Co. Litt., fos. 61-61v (as the *Earl of Shrewsbury's Case* above **n. 125**), 68v (as in *Calvin's Case*, 7 Co. Rep. 1, at 7), 69 (as *Sir Anthony Lowe's Case* above **n. 124**).

<sup>131</sup> Rolle, *Un Abridgment*, pt 1, pp. 384 (tit. Chancellor), 528 (tit. Court de Admiraltie), pt 2, pp. 180-181 (tit. Prerogative le Roy, subtit. Seals l'Antiquite).

*Commentary on Littleton*, which legitimised the use of the Saxon sources in *The Case of Ship-Money*.

Even if Coke did legitimise the use of Saxon material, he did not provide much of it to his readers. If they were minded to look for Saxon material outside the printed common law canon, to what sources did common lawyers turn? A possible source would have been the various medieval chronicles which recounted (with more or less accuracy) the Saxon past. With the exception of the *Case of Ship-Money*, chronicles appear only rarely in reported cases.<sup>132</sup> Unlike in the prefaces to his reports, Coke only refers to a chronicle once, in *Watts v. Braynes*, and the chronicle is not identified in the report.<sup>133</sup> *Watts v. Braynes* was argued in 1600, before Coke warned lawyers about the use of chronicles in the 1602 preface to his third volume of reports, ‘beware of Chronicle Law reported in our Annales, for that will undoubtedly lead thee to error’.<sup>134</sup> John Davies similarly only makes one reference to a medieval historical text for a point of pre-Conquest history, Bede’s *Ecclesiastical History*, in the *Case of Praemunire* (1607).<sup>135</sup>

The *Case of Praemunire* was a show trial of an important Irish Catholic priest, and the report was probably intended for publication as a separate text to the rest of Davies’s *Reports*.<sup>136</sup> Davies used Bede to reject an anticipated objection that the legal sources relied upon were English rather than Irish by citing a seventh-century convocation of the Irish and English churches. At that meeting both the churches disagreed with the Roman church.<sup>137</sup> In the context of a case concerning the royal supremacy over the church, the citation of Bede also carried with it a deliberate subtext. Bede’s *Ecclesiastical History* had first been printed in English by Elizabethan recusants in Europe and was a touchstone for recusant history of the church in the sixteenth and early-seventeenth centuries.<sup>138</sup> Davies sought to turn that historical source against the recusants, just as he chose to prosecute under statutes enacted by Catholic Englishmen,

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<sup>132</sup> On chronicles in *Ship-Money*, see below **text at n. 180**.

<sup>133</sup> HLS MS. 1199, fo. 13v.

<sup>134</sup> Edward Coke, ‘To the Reader’, in Edward Coke, *Les Tierce Part des Reportes del Edward Coke* (1602), sig. Ciii.

<sup>135</sup> *Case of Praemunire*, Davis 84, 88. Technically this reference was not about the Saxon past, as it was about Irish history. Davies cited a chronicle for post-Conquest history in *Le Case de Commenda*, Davis 68, at 72 (Gerald of Wales’s *Conquest of Ireland*, bk 1 (erroneously cited as bk 2 in Davies), c. 34).

<sup>136</sup> On the case itself, see Hans S. Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge, 1985), pp. 115-119. For the likely intended separate publication, see Paul Brand, ‘Sir John Davies: Law Reporter or Self-Publicist?’ [2008] 43 *Irish Jurist*, pp. 1-21, at pp. 8-9.

<sup>137</sup> *Case of Praemunire*, Davis 84, at 87-88.

<sup>138</sup> See David Rogers, ‘The English Recusants: some medieval literary links’, *British Catholic History* 23 (1997), pp. 483-507, at pp. 484-485, and Rosamund Oates, ‘Elizabethan Histories of English Christian Origins’, in Katherine van Liere, Simon Ditchfield and Howard Louthan eds., *Sacred History: Uses of the Christian Past in the Renaissance World* (Oxford, 2012), pp. 165-185, at pp. 171-175 and 183.

rather than arguably more appropriate Henrician and Elizabethan legislation.<sup>139</sup> Here the source for the Saxon material was selected not just for the establishment of a legal point, but as a means to reject an anticipated counter to Davies's argument and perhaps encourage the acceptance of the decision by Catholics.

Moving beyond the chronicles, evidence of significant engagement with manuscripts is difficult to identify. Edward Coke did do so.<sup>140</sup> John Davies made use of Robert Cotton's library in his report of the *Case of Praemunire*<sup>141</sup> and refers to a charter in the Tower of London in the *Case of Commenda*.<sup>142</sup> Evidence of more widespread engagement with unprinted sources is almost non-existent. One possibility is Robert Gynes's 1568 reading. Gynes made reference to Saxon law codes in the year that *Archaionomia* was printed, so could have used Lambarde's work. However, the reading also includes a speech by King Edgar to the assembled clergy which was not part of *Archaionomia*.<sup>143</sup> The speech is in fact a twelfth-century fabrication of a Saxon event, part of Aelred of Rievelaux's *De genealogia regum Anglorum*, a work which was not printed until 1652.<sup>144</sup> But Gynes almost certainly was not using a manuscript. The speech by Edgar had been printed, independently of the rest of Aelred's *Genealogia*, in Edward Foxe's *De vera differentia regiae potestatis & Ecclesiasticae* in 1534 and 1538, with an English translation in 1548.<sup>145</sup> Gynes's references to Saxon lawgivers are in an almost identical non-chronological order to their appearance in Foxe's work and very different to that in *Archaionomia*,<sup>146</sup> and Gynes's Saxon laws on tithes also appear in Foxe.<sup>147</sup>

From the perspective of the relationship between the common lawyers and the church, Gynes's source shows that his exposition of the legal past had the same purpose as Coke:

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<sup>139</sup> *Case of Praemunire*, Davis 84, at 85 and 87.

<sup>140</sup> Garnett, "The ould fields", pp. 270-272 and Anthony Musson, 'Myth, Mistake, Invention? Excavating the Foundations of the English Legal Tradition', in Andrew Lewis and Michael Lobban eds., *Law and History* (Oxford, 2004), pp. 63-81, at p. 68.

<sup>141</sup> *The Case of Praemunire*, Davis 84, at 89 (the marginal note demonstrating this use is not included in the English Reports version of the text, 80 ER 567, at 573, but is in Davies, *Le primer report*, fo. 89). The reference to Edgar's oration in *The Case of Praemunire*, Davis 84, at 89, may also have been from a manuscript, but could have been taken from the same source as Robert Gynes (see below, **text at nn. 145-147**). Davies does not quote the same material as Gynes, so Gynes cannot have been the source of Davies's text.

<sup>142</sup> *Le Case de Commenda*, Davis 68, at 72. It may be significant that charters were in Latin, rather than the pre-Conquest vernacular.

<sup>143</sup> BL MS. Add. 11405, fo. 7.

<sup>144</sup> Roger Twysden, *Historiae Anglicanae Scriptores Decem* (1652), cols. 347-370; the speech is at cols. 360-362.

<sup>145</sup> Edward Foxe, *De vera differentia regiae potestatis & Ecclesiasticae* (1538), fos. 81v-85v. Henry, Lord Strafford trans., Edward Foxe, *The true dyfferenes between the regall power nad the ecclesiasticall power* (1548). Gynes quotes from the speech in Latin.

<sup>146</sup> BL MS. Add. 11405, fo. 11 (Æthelred, Edgar, Edmund, Æthelstan, Ine, Alfred and Cnut) and Foxe, *De vera differentia*, fos. 71v-74 (Cnut, Æthelred, Edgar, Edmund, Æthelstan, Ine, Alfred). In *Archaionomia* the monarchs are presented chronologically (Ine, Alfred, Edward, Æthelstan, Edmund, Edgar, Æthelred, Cnut), Lambarde, *Archaionomia*, title page verso.

<sup>147</sup> BL MS. Add. 11405, fo.12, and Foxe, *De vera differentia*, fos. 72-72v.

defending the royal supremacy and Elizabethan settlement. He was not alone in using these texts to serve this purpose. Edward Foxe's book itself was a collection of material from the important Henrician reformation document, the *Collectanea Satis Copiosa*, a document with which Edward Foxe was closely connected.<sup>148</sup> At the same time as Gynes quoted from Edgar's oration in his reading, it was being incorporated (in an English translation) into the massively expanded second edition of John Foxe's *Acts and Monuments*. John Foxe, like Gyne, used Edgar's oration to demonstrate the pre-Conquest power of the monarch over the clergy and church.<sup>149</sup>

Lawyers who referred to the Saxon past also made use of other printed sources. An obvious likely source is William Lambarde's *Archaionomia*, the 1568 printed collection of Saxon laws. In his **1575 Gray's Inn reading**, Francis Rhodes set out a list of lawgivers, beginning with Moses and Solon, before moving on to specifically English law givers. Rhodes's list was of the Saxon kings whose laws were included in *Archaionomia*, followed by William I (also in *Archaionomia*) and Henry I. Rhodes was even helpful to historians by being clear that he had used the work of 'mr William Lambert'.<sup>150</sup> Lambarde's *Archaionomia* also appeared in both *Calvin's Case*<sup>151</sup> and *Ship-Money*.<sup>152</sup>

In *Ship-Money*, however, the Saxon past was more frequently reached through other works than Elizabethan scholarship. The work most frequently cited was John Selden's *Mare Clausum*, recently printed for the first time in 1635.<sup>153</sup> Some contemporaries thought that Selden had printed the work as a justification for ship money, as the price for his freedom from imprisonment by the Crown.<sup>154</sup> It is perhaps telling that overt citation from *Mare Clausum* was

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<sup>148</sup> Oates, 'Elizabethan Histories of English Christian Origins', pp. 165 and 168.

<sup>149</sup> John Foxe, *The first volume of the ecclesiasticall history contaynyng the actes and monumentes of thynges passed in every kynges tyme in this realme, especially in the Church of England* (1570), pp. 220-221. It is not clear whether John Foxe used the same printed source as Gynes, or had in fact seen a manuscript version of the text.

<sup>150</sup> London Metropolitan Archives MS. CLC/270/MS00086, fos. 162-164v, at fo. 164. Rhodes's reading was on *De visu franciplegii*, a short tract in French which was printed as a statute in the sixteenth century (SR i. 246).

<sup>151</sup> *Calvin's Case*, 7 Co. Rep. 1, at 7. The citation is not present in the English Reports version of the case (77 ER 377, at 385), but is present in the original.

<sup>152</sup> *The Case of Ship-Money*, pp. 907-908, 981, 1040 and 1047.

<sup>153</sup> John Selden, *Mare Clausum seu de Dominio Maris* (1635).

<sup>154</sup> See Toomer, *John Selden*, vol. 1, p. 433. For discussion of *Mare Clausum* generally, see *ibid.* 388-434. It is possible that the book was printed as part of the campaign to legitimise the nation-wide imposition of ship money which was introduced in 1635. The lord keeper, Thomas Coventry, had instructed the assize justices to stress the importance of collecting ship money in his charge in June 1635 (*The Case of Ship-Money*, 837-838) and *Mare Clausum* was entered into the Stationers' Company register on 18 September 1635, Edward Arber ed., *A Transcript of the Registers of the Company of Stationers of London: 1554-1640 A.D.* (1877), vol. 4. Chronologically, the production of *Mare Clausum* fits with government attempts to justify the levy in the summer of 1635, but this would mean it was not produced to provide legal justifications for ship money for use in a test case, which at that time does not seem to have been envisaged.

made by both lawyers for the Crown, the chief baron and the two chief justices.<sup>155</sup> However, *Mare Clausum* seems also to have been used, without citation, by a lawyer arguing for Hampden in *Ship-Money*: when Holborne had to choose between two different sources, he appears to have done so for the reasons provided by Selden in *Mare Clausum*, albeit without citation.<sup>156</sup>

The other work to which reference was made in *Ship-Money* was Henry Spelman's *Archaeologus*, a dictionary of words found in historical texts. The *Archaeologus* is cited by Holborne and Banks A.-G.<sup>157</sup> Berkley and Hutton J.J.K.B. agreed with Spelman that there were two kinds of Danegeld, which must be a reference to the *Archaeologus*.<sup>158</sup> Croke J.K.B.'s list of sums levied for Danegeld appears to have been taken from that text too.<sup>159</sup>

For the lawyers and judges in *Ship-Money*, their arguments were therefore strongly influenced by the work of England's leading contemporary historians, even if in the case of Selden, *Mare Clausum* was far from being his best work. The same can be said of the use of Saxon material in the more mundane case of *Watts v. Braynes*, when Edward Coke discussed the jurisdiction of the Cinque Ports. Coke there referred to an unspecified chronicle and William Lambarde's *Perambulation of Kent*, making use of the work of sixteenth-century England's pre-eminent Saxon scholar.<sup>160</sup> In this regard, claims about the unhistorical nature of 'ancient constitution' ideas should be qualified. While early-modern common lawyers' use of Saxon sources does not suggest the lawyers had developed historical expertise, the lawyers did recognise where that expertise could be found and sought it out. The Saxon past does seem to have been sufficiently important for lawyers' work that those lawyers were concerned to understand it correctly, at least in early-modern terms.

The sources to which lawyers turned are revealing. Even when arguing a major test case like *Ship-Money*, lawyers do not seem to have pored through works of Saxon scholarship cover to cover, nor delved into manuscripts. Instead, lawyers turned to books which were directed to the legal issues they intended to discuss.<sup>161</sup> When considering the king's power over the

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<sup>155</sup> *The Case of Ship-Money*, 928 (Littleton S.-G.), 1023 (Banks A.-G.), 1210 (Davenport C.B.), 1226 (Finch C.J.C.P.) and Bramston C.J.K.B. (1247).

<sup>156</sup> *The Case of Ship-Money*, 918; cf. Selden, *Mare Clausum*, pp. 172 and 172-173.

<sup>157</sup> *The Case of Ship-Money*, 1010 and 1021. For a possible intervening source, see below **text at n. 175**.

<sup>158</sup> *The Case of Ship-Money*, 1092 and 1096, referring to Spelman, *Archaeologus*, pp. 199-200. Selden also identified two different kinds of Danegeld (*Mare Clausum*, p. 170), but Spelman's analysis was different to that of Spelman and in *Ship-Money*.

<sup>159</sup> See above, **text at nn. 19-20**.

<sup>160</sup> *Watts v. Braynes*, HLS MS. 1199, fo. 13v.

<sup>161</sup> The only exception to relying upon works with particularly topical titles and subject-matter appears to be *Calvin's Case*, where Coke may have engaged carefully with *Archaeionomia*. Garnett has shown that Coke's copy of that text was heavily annotated (Garnett, "The ould fields", p. 257), and *Calvin's Case* 7 Co. Rep. 1, at 7,

Church, Gynes looked to a book, the title of which explained that it was about the true power of the king and church. When Coke wanted to make an argument about the Cinque Ports he turned to a book about the county in which they were located. When discussing the defence of the realm and shipping, lawyers used Selden's *Mare Clausum*.

Lawyers, in other words, looked to texts which made the Saxon past, and scholarship about that past, accessible to them by highlighting the relevant sources. This is corroborated by the use of Spelman's *Archaeologus* in *Ship-Money*. While a wide-ranging general reference work, the key part of the title was not the first word, but those which followed: 'in modum glossarii'. The *Archaeologus* arranged its material alphabetically. It appears that the material from Spelman which was used in *Ship-Money* was taken from the entry on Danegeld.<sup>162</sup> It is likely that the lawyers and judges were first alerted to the possibility of referring to Danegeld in their arguments by other sources, probably *Mare Clausum*, and then turned to the *Archaeologus* as another work in which more might be found. There is a parallel here with the use of civilian material by early-modern common lawyers. The extensive range of civilian sources which appear in some texts by early-modern common lawyers were derived not from extensive engagement with the full body of *ius commune* scholarship, but instead taken from introductory works and civilian dictionaries.<sup>163</sup>

Such a focus on easy to use reference works should not be especially surprising. Historians of reading have stressed that early-modern readers 'studied for action' and their reading was 'goal-directed'.<sup>164</sup> Their approach to reading was to read their texts with an eye to how those texts could be used for contemporary purposes. Similarly, at least some collectors of historical texts in early-modern England collected with a clear contemporary objective. Archbishop Matthew Parker is an excellent example.<sup>165</sup> It is a short stretch from this focus on

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appears to be the first occasion on which Coke cited *Archaionomia*, suggesting it was around this time that he first engaged with the book directly.

<sup>162</sup> Spelman, *Archaeologus*, pp. 199-201. The only exception is Banks A.-G. in *The Case of Ship-Money*, 1021, where he quotes Spelman's entry on 'Hida' for the meaning of a 'hide' of land, Spelman, *Archaeologus*, p. 352, but this likely derived from an intermediate source (see below, **text at n. 176**).

<sup>163</sup> E.g. in the cases of William West, discussed in David Ibbetson, 'A House Built on Sand: Equity in Early Modern English Law', in E. Koops and W. J. Zwalve eds., *Law & Equity: Approaches in Roman Law and Common Law* (Lieden, 2014), pp. 55-78, at pp. 66-67, and Edward Coke's adoption of a phrase from the *Vocabularius perutilis utriusque iuris tam civilis quam canonici* in his report *De Libellis Famosis*, David Ibbetson, 'Edward Coke, Roman Law, and the Law of Libel', in Lorna Hutson ed., *The Oxford Handbook of Law and Literature, 1500-1700* (Oxford, 2017), pp. 487-506, at p. 497. The same can be seen in the notes on the civil law in John Bankes's papers on ship money. The notes include references to Bartolus and Panormitaus, but both medieval civilians were in fact cited through the sixteenth-century work of Covarruvias, DHC D-BKL/H/A/44 'Touching the King's Power', p. 9.

<sup>164</sup> The classic exposition is Lisa Jardine and Anthony Grafton, "'Studied for Action": How Gabriel Harvey Read his Livy', *Past and Present* 129 (1990), pp. 30-78, at p. 31.

<sup>165</sup> Anthony Grafton, *Inky Fingers: The Making of Books in Early Modern Europe* (Cambridge, MA, 2020), pp. 131-135.

contemporary uses for reading and collecting to influencing what was read and used in a specific case. Relevant books, clearly directed to the field that lawyers were considering, were more likely to be an efficient route to relevant knowledge, which could then be applied.<sup>166</sup>

When seeking such expertise in accessing and using historical materials, some lawyers may have gone further than relying solely on printed texts, instead benefiting from assistance from more expert third parties. In 1643, William Prynne claimed that he had written an argument against ship money which began to circulate in manuscript in 1635/6 and that it was this text which ‘brought this Imposition to a publique debate before all the Judges of England’.<sup>167</sup> As printed, the text contains a section on Danegeld including much of the material which also appears in the arguments in *The Case of Ship-Money*.<sup>168</sup> In the 1643 printing, the words ‘statutum est’ in Lambarde’s edition of the Laws of Edward the Confessor are emphasised in capitals.<sup>169</sup> These words were also stressed by Holborne in *Ship-Money* itself to argue that Danegeld was imposed by Parliament, and so the king did not have a prerogative power to levy money for defence.<sup>170</sup> Prynne may have been the inspiration for this particular argument, but the evidence is equivocal.<sup>171</sup>

More convincing evidence for the role of third party expertise is in John Bankes A.-G.’s papers about ship money. In the printed account of his argument, Bankes apparently read a passage from an ‘old book in Cambridge’, a likely reference to a manuscript source.<sup>172</sup> In Bankes’s draft argument in *Ship-Money*, it is made clear that this is a reference to the early-eleventh century Council of Eanham, and that Bankes used ‘the transcript thereof...remaining

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<sup>166</sup> It is tempting to suggest that this history of reading approach might provide another explanation for the emergence of the one of the identifying features of the European *usus modernus*, ‘the progressive re-organisation of the law *ratione materiae* – that is, on the basis of specific, discrete subjects’, Guido Rossi, in Guido Rossi ed., *Authorities in Early Modern Law Courts* (Edinburgh, 2021), preface, p.viii. As much as being a choice by authors, the reorganisation of civilian learning around particular topics may have been a response to the needs of readers.

<sup>167</sup> William Prynne, *An Humble Remonstrance Against the Tax of Ship-Money* (1643), sig. A1v. A manuscript version of the text was brought to Laud’s attention in August 1637 (Millstone, *Manuscript Circulation*, p. 238), only a few months before the hearings in *The Case of Ship-Money*.

<sup>168</sup> Prynne, *An Humble Remonstrance*, pp. 19-25.

<sup>169</sup> *Ibid.* 21.

<sup>170</sup> *The Case of Ship-Money*, 1001. Croke J.K.B.’s figures for the amounts raised by Danegeld (see above, **text at n. 20**) are also included in Prynne’s text, raising the possibility of Prynne as a source for Croke’s argument. Prynne (unlike Croke) includes all of the figures from Spelman (Prynne, *An Humble Remonstrance*, p. 19).

<sup>171</sup> The same passage is not emphasised in the anonymous and unauthorised 1641 printing of the text, William Prynne, *An Humble Remonstrance to his Majesty Against the Tax of Ship-Money* (1641), p. 37, nor in the known manuscripts, BL MS. Harl. 737, fos. 252-315v, at fo. 288v; TNA SP 16/536/77, fos. 113-176, at fo. 147v; TNA SP 16/536/78, fos. 177-220, at fo. 201-201v. Relying upon a typographical (non-)feature in an unauthorised printing, and on the absence of emphasis in scribally produced manuscripts texts, to prove (or disprove) influence is weak evidence at best, but the only evidence available. It is conceivable that Prynne updated his text, adding the emphasis in print to align it with an argument used in the case and present himself as its origin.

<sup>172</sup> *The Case of Ship-Money*, 1021. The printed text is that ‘Mr Solicitor’ caused the text to be read in court, but as the passage occurs during Bankes A.-G.’s argument it seems likely that the reference to the solicitor-general is an error.

in the hands of Sir Henrie Spelman'.<sup>173</sup> Included in Bankes's papers is a transcript of the relevant text in Anglo-Saxon and English, and an expanded Latin version of the text.<sup>174</sup> Bankes's papers also include a text entitled 'Shipping before the Conquest', which also makes reference to the Council of Eanham.<sup>175</sup>

Material from 'Shipping before the Conquest' made its way into Bankes' argument in *Ship-Money* itself. Spelman identified himself as the author of the text in a discussion about the number of hides of land in England within it. Bankes attributes the material on that issue in *Ship-Money* to Spelman's *Archaeologus*, but all of it is present in 'Shipping before the Conquest', where the author refers to the issue as having been discussed by 'my self in my Glossarium', a reference to Spelman's *Archaeologus*.<sup>176</sup> Spelman also seems to have provided Bankes with material from his *Concilia, Decreta, Leges, Constitutiones, in Re Ecclesiarum Orbis Britannici*.<sup>177</sup> Bankes's draft argument in the 1637 *Case of Ship-Money* includes these extracts, complete with correct pagination to the *Concilia*.<sup>178</sup> The extracts are also included, without attribution, in the printed account of Bankes's argument.<sup>179</sup> Bankes's reliance on Spelman's text also explains the wide range of chronicle sources on which he appeared to rely. His discussion of Saxon shipping featured chronicle sources not included in Selden's *Mare Clausum*, such as Florence of Worcester and William of Malmesbury, but all of those chronicles are included in 'Shipping before the Conquest'.<sup>180</sup>

Spelman's text provided more assistance than simply providing Bankes with convenient access to printed and manuscript material. In a discussion about the number of ships in the Saxon navy, Spelman seems to have been slightly sceptical about the claims in the chronicle sources on which he relied. While there was some disagreement, the chronicles described a Saxon navy that contained between three and four thousand vessels. Spelman

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<sup>173</sup> DHC D-BKL/H/A/45 p. 12.

<sup>174</sup> DHC D-BKL/H/A/44.

<sup>175</sup> DHC D-BKL/H/A/44 'Shipping before the Conquest', [p. 7]. The text is unpaginated and appears not to be otherwise listed as a work by Spelman. For some discussion by Spelman of Saxon military service, including contributions to naval expeditions, see Edmund Gibson ed., Henry Spelman, *Reliquiae Spelmannianae: The Posthumous Works of Sir Henry Spelman Knt* (Oxford, 1698), pp. 17-18. Spelman links these Saxon practices to 'the Naval Expedition lately now reviv'd' (p. 18). The work is dated 1639 according to Gibson (*ibid.* 3), so this appears to be a reference to ship money.

<sup>176</sup> *The Case of Ship-Money*, 1021; DHC D-BKL/H/A/44 'Shipping before the Conquest', [p. 6].

<sup>177</sup> Henry Spelman, *Concilia, Decreta, Leges, Constitutiones, in Re Ecclesiarum Orbis Britannici* (1639). DHC D-BKL/H/A/44 includes a separate page with extracts.

<sup>178</sup> DHC D-BKL/H/A/45 p. 10. The chronological difficulty of the citation of a work apparently printed in 1639 in a case during 1637 is overcome by the fact that Spelman had been long at work on the *Concilia* and the printing process appears to have begun by 1637 when there is a reference to errata, F. M. Powicke, 'Sir Henry Spelman and the Concilia', *Proceedings of the British Academy* 16 (1931), pp. 345-379, at pp. 355-358 and 361.

<sup>179</sup> *The Case of Ship-Money*, 1019.

<sup>180</sup> *The Case of Ship-Money*, 1020; DHC D-BKL/H/A/44 'Shipping before the Conquest', [pp. 1-3].

observed that the highest figure, of 4,080 vessels ‘semeth uncredible’.<sup>181</sup> His conclusion was not to dismiss the figures entirely, but to suggest that ‘the multitude implieth that they were very smale’.<sup>182</sup> Spelman’s suggestion was then incorporated into Bankes’s argument, albeit without the scepticism about any of the figures and less of a reduction in the significance of the vessels: ‘the ships in those times were not so great as now they be’, rather than being very small.<sup>183</sup> Bankes’s argument, albeit on a limited point, was directly derived from the historical analysis of one of England’s premier antiquarian scholars, seemingly provided directly to him in connection with the case. For Bankes, the Saxon past was sufficiently important as a source of the law in the *Case of Ship-Money* as to justify direct engagement with an expert, whose expert views were then incorporated into Bankes’ argument for the king.

## CONCLUDING REMARKS

### *1. The Saxon past and the ancient constitution*

While there is therefore no evidence of a widespread use of early-modern legal historical scholarship in legal practice, there is good evidence of that scholarship having a central role on some of the most important issues of the age, as well as in more mundane contexts. Knowledge of the Saxon past could be sufficiently important for the attorney-general to obtain assistance from one of England’s premier scholars before using the Saxon past in his arguments.

The idea that English lawyers identified their law with an ancient constitution, with an unbroken continuity of law over time, is visible in lawyers’ willingness to turn to the Saxon past. The field in which such references to the Saxon past are most common is in relation to the church, an institution for which long-term continuity was an important part of wider English thought.<sup>184</sup> Such uses of the past could be challenged on the basis that the law had changed

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<sup>181</sup> DHC D-BKL/H/A/44 ‘Shipping before the Conquest’, [p. 2].

<sup>182</sup> DHC D-BKL/H/A/44 ‘Shipping before the Conquest’, [p. 3].

<sup>183</sup> *The Case of Ship-Money*, 1020.

<sup>184</sup> See, e.g., Oates, ‘Elizabethan Histories of English Christian Origins’. Lawyers’ focus on the church in this context would encourage a sense of continuity, rather than the concern with feudalism and the effect of the Norman Conquest which was discussed by Pocock. A particular critique of Pocock’s analysis which can be made from this research is the overlap between writing about the legal past and writing about the history of the church. Gynes’s reading using the same source in a similar fashion to the almost contemporaneous work of John Foxe is a good example (see above, **text at nn. 145-149**). So is the preface to Coke’s sixth volume of reports, which was one of Pocock’s key sources and a response to the writings of the Jesuit Robert Parsons, who was himself engaging with the claims about the royal supremacy that Coke made in *Caudrey’s Case*. This overlap and similarity suggests that the *mentalité* of the common lawyers was part of a wider early-modern understanding of the English past.

since that time.<sup>185</sup> While such challenges prevented the application of old law in a contemporary case, in isolation they were not fatal to the overall idea of the ancient constitution. A more fundamental challenge to ancient constitution ideas is visible in Thynne's reading in 1622, where Thynne explained why some old law was simply not suitable for use in early-modern England.<sup>186</sup> For Thynne, old law could not be accepted where its application would be unsuitable for contemporary society.

## 2. *The Saxon constitution and constitutional change*

References to the Saxon past are most common in relation to issues which we would see as constitutional: the interaction between the church and secular authorities following the break from Rome; the accession of a foreign monarch seeking to unify his kingdoms; innovations by Charles I's government to meet financial needs in the changing context of early-modern warfare.

There is an irony that it was in relation to these unprecedented situations that there was a significant turn to the more distant past. Because the English constitution was seen as an ancient constitution, but was experiencing significant constitutional change, lawyers were faced with situations which the traditional legal canon could not resolve. The Saxon past helped lawyers find answers, identifying and applying a Saxon constitution in early-modern England.

In a time of religious, legal and constitutional controversy, the answers reached were not always acceptable. The Saxon constitution of early-modern England was one which seemed to grant the king very significant powers over both religion and, through taxation, people's property. As James I said of the common law, which some were tracing back to Saxon England, 'no Law can bee more fauourable and aduantageous for a King, and extendeth further his Prerogatiue, then it doeth'.<sup>187</sup> But significant numbers of people did not accept the religious settlement decided upon by monarchs using the royal supremacy. Other people rejected the conclusion in *Ship-Money*.<sup>188</sup> When applied in practice, the Saxon constitution was not the constitution such people wanted. The Long Parliament overturned the *Ship-*

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<sup>185</sup> E.g. Hutton's rejection of pre-1297 material in *Ship-Money* (see above, **text at n. 103**).

<sup>186</sup> See above, **text at nn. 47-53**.

<sup>187</sup> James VI and I, 'A Speech to the Lords and Commons of the Parliament at White-Hall on Wednesday the XXII of March. Anno 1609', in Johann P. Sommerville, *King James VI and I: Political Writings* (Cambridge, 1995), pp.v179-203, at p. 184.

<sup>188</sup> The historiography on ship money is contested. See Henrik Langelüddecke, "'I finde all men & my officers all soe unwilling": The Collection of Ship Money, 1635–1640', *Journal of British Studies* 46 (2007), for a recent account of the debates. Langelüddecke argues that there was significant dissatisfaction with ship money.

*Money* decision,<sup>189</sup> and in the 1640s both the ancient and the seventeenth-century constitutions took a decidedly radical turn.<sup>190</sup>

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<sup>189</sup> 16 Car. I, c. 14 (SR, v. 116).

<sup>190</sup> For the Stuart period from the 1640s, see Greenberg, *The Radical Face of the Ancient Constitution*, pp. 182-296.