

NOTABLE ECCLESIASTICAL LAWYERS: XII

Thomas Bever (1725–1791)

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In past centuries, most of England's notable ecclesiastical lawyers prepared for their professional careers with the study of the civil law at Oxford or Cambridge. Both universities had established faculties where the *ius commune* was taught and, although attendance was by no means obligatory, these faculties provided the normal course of instruction for future civilians. What the students took away from their studies in those faculties is therefore a legitimate subject of inquiry in this series. It is not, however, an easy one. Edward Gibbon's woeful description of his encounters with the fellows of Oxford colleges during his 14-month stay as a student has been often repeated and amplified by historians.¹ They have portrayed the dons as a class of men 'sunk in sloth and drunkenness', who roused themselves only occasionally to 'deliver rare and listless lectures'.² The revisionist scholarship of Dame Lucy Sutherland, among others, has provided a more balanced account of the subject than Gibbon's.³ The life and writings of Dr Thomas Bever, fellow of All Souls College and colleague of Sir William Blackstone, add to it. They provide an instructive example of what can be learned about university education and the law during the eighteenth century, and it is far from all negative.

BEVER'S LIFE AND CAREER

Not a great deal is known about Bever's personal history. He was one of two sons of a Berkshire family which had owned land in Stratfield Mortimer since at least the fifteenth century.⁴ Baptised in the parish church there in 1725, in due course Bever matriculated at Oriel College, Oxford, proceeding BA in 1748. He must quickly have been recognised for the 'good scholar and civilian' later described

1 E Gibbon, *Memoirs of my Life*, ed B Radice (London, 1984), pp 75–91.

2 H Bourguignon, *Sir William Scott, Lord Stowell, Judge of the High Court of Admiralty, 1798–1828* (Cambridge, 1987), p 34; see also J Barton, 'Legal studies', in L Sutherland and L Mitchell (eds), *History of the University of Oxford V: the eighteenth century* (Oxford, 1986), pp 593–605 at p 596, describing the law faculty as 'a comfortable refuge for the idle man'.

3 L Sutherland, *The University of Oxford in the Eighteenth Century: a reconsideration* (Oxford, 1973).

4 The family's record and residence there was said to have been traceable to the Norman Conquest in 'Miscellaneous remarks, etc. – account of Dr. Bever', (1798) 68 *Gentleman's Magazine* 753–754.

by Coote, for he was admitted as a jurist fellow of All Souls the following year.⁵ As such, Bever graduated BCL in 1753 and DCL in 1758. He was admitted to Doctors' Commons in London as an advocate in the latter year.⁶ He kept a house there as well as his rooms at All Souls. Bever was not without experience as a practising lawyer, although Coote would later describe him as a 'better scholar' than he was an advocate. He served as a judge of the Cinque Ports and an advocate in the Court of Admiralty, and he also acted as chancellor and official principal in the dioceses of Lincoln and of Bangor.⁷ However, he devoted the great part of his intellectual life over the following thirty years to his work at Oxford, regularly delivering a course on the civil law to students whom he would later describe as 'many noble and accomplished youths, who have heretofore honoured him with their constant and diligent attendance'.⁸

Bever died in London on 8 November 1791 and was buried in the parish church where he had been baptised. He had not married. He left behind two printed works and several collections of material that have remained in manuscript. Some of the latter are now preserved at All Souls College and others in the British Library and the Law Society in London.⁹ His will directed his executors not to permit publication of any of these papers and at their earliest opportunity to burn those not related to the law. These instructions were apparently carried out. Most of what can be said about Bever's place in and contribution to the history of English ecclesiastical law must be found, therefore, in the contents of his two printed works: the introductory *Discourse* just cited, which laid out and defended the principles on which his lectures were based, and the longer *History of the Legal Polity of the Roman State and of the Rise, Progress and Extent of the Roman Laws*, which was first published in Oxford in 1766.¹⁰

THE AIM AND SCOPE OF BEVER'S LECTURES

The traditional method of instruction in European faculties of civil law required lecturers first to read and then to comment upon the texts found in the *Corpus iuris civilis*, the great compilation of Roman law assembled in the sixth century at the instigation of the Emperor Justinian. This method of exposition had great strengths, strengths which help explain its continuation into the sixteenth

5 C Coote, *Sketches of the Lives and Characters of Eminent English Civilians* (London, 1804), pp 125–126.

6 J Barton, 'Bever, Thomas', *Oxford Dictionary of National Biography* (Oxford, 2004), online edn, <<http://www.oxforddnb.com/view/article/2320>>, accessed 24 March 2016.

7 See 'Obituary of considerable persons; with biographical anecdotes', (1791) 61 *Gentleman's Magazine* 1068.

8 T Bever, *Discourse on the Study of Jurisprudence and the Civil Law; being an introduction to a course of lectures* (Oxford, 1766), p 39.

9 W Prest, *William Blackstone: law and letters in the eighteenth century* (Oxford, 2008), p 115.

10 I have used the edition published in London in 1781. All subsequent references are to that edition. The work was also translated into German and published as *Geschichte des römischen Staats und des römischen Rechts*, trans L Voelkel (Leipzig, 1787).

century and beyond.¹¹ In skilled hands, it not only taught students the basic rules and principles of the civil law but also equipped them to employ the texts to deal with the new problems that arise constantly in legal practice.¹² However, it had weaknesses too, weakness that had become particularly evident by the eighteenth century, quite apart from the obsolete status of some of the material found in the Digest and Codex. The method was time-consuming: typical students spent something like six years or more mastering the craft, as Bever himself had done.¹³ It was also repetitious: the same juristic techniques were applied again and again – useful to some students no doubt, but apt to become obvious or otiose in their long-continued repetition. Bever therefore adopted a different method for the lectures he began with the consent of Edward Jenner, Regius Professor of Civil Law from 1754 to 1767. His intent was to illustrate the great principles of reason and justice found in the Pandects and demonstrate their utility to his students. This method required attention to specific texts and to the meaning drawn from them by learned men of times past. However, it did not require entering all the nooks and crannies of Roman private law. Nor did it entail full exploration of each of the texts covered in traditional lectures.

This left him some freedom of choice. As Blackstone had done, so did Bever. He took his students as they were – most of them ‘gentlemen of independent estate and fortune’.¹⁴ A few of them might become lawyers but most would not. From the latter group, however, would be drawn many of the men who would be counted among the governors of English life and society. For this reason, they should form ‘an accurate and comprehensive notion of those principles whereon the union and harmony of society in general depend’, and in Bever’s view a study of some of the principal features of the civil law provided a proper vehicle for understanding those principles.¹⁵ The Pandects were, he thought, ‘a rich magazine of good sense’.¹⁶ In the law of last wills and testaments, for example, ‘the civil law speaks with good effect, where the common law is silent or deficient’.¹⁷ If students were to understand the law that regulated this part of human life, including limitations on the freedom of testation and instruction in what proper wills required, the approach taken by Bever offered

11 See ‘Odofredus announces his law lectures at Bologna’, in L Thorndike, *University Records and Life in the Middle Ages* (New York, 1944, repr 1971), pp 66–67; see also J Brundage, *The Medieval Origins of the Legal Profession: canonists, civilians, and courts* (Chicago, IL, 2008), pp 249–262.

12 My understanding of this subject is more fully explained in R Helmholz, ‘University education and English ecclesiastical lawyers 1400–1650’, (2011) 13 *Ecc LJ* 132–145.

13 H Rashdall, *The Universities of Europe in the Middle Ages*, ed F Powicke and A Emden (Oxford, 1936), vol III, pp 156–157.

14 W Blackstone, *Commentaries on the Laws of England*, fifteenth edition (London, 1809, repr 1982), vol I, p 7.

15 Bever, *Discourse*, p 2.

16 *Ibid*, p 31.

17 *Ibid*.

them their best chance. Similarly, if they were to understand the dangers of giving way to luxury and extravagance in their own lives, the Roman law's provisions meant to 'restrain the luxury and dissipation of the great and opulent' would provide salutary lessons.¹⁸ In his view, the time spent in attaining an understanding of the civil law's basic rules against prodigality was not wasted.

This approach led Bever to deal at length with jurisprudential principles drawn from the law of nature. Some of what he wrote now seems overly abstract. It may even be right to conclude that 'today his lectures make dull and overly pious reading'.¹⁹ However, this was not necessarily so at the time.²⁰ Legal positivism as found in the works of J L Austin (1790–1859) had not yet come to dominate the working assumptions of lawyers or magistrates. In the eighteenth century, the purpose of devoting attention to principles drawn from Roman and natural laws was, in the perceptive phrase of W H Bryson, 'to anchor the positive law and its study' in the wider world of ideas and justice.²¹ The two worlds – the municipal law and the natural law – were connected.

BEVER'S VIEW OF THE ROMAN AND CANON LAWS

Bever was not an unqualified admirer of either the Roman or the canon law. Of the contents of the *Corpus iuris civilis*, he wrote that within its pages there was 'much to be seen to admire, much to emulate, and much to abhor'.²² It was its intelligent study that he sought to promote, making clear which was which. His estimate of the *Corpus iuris canonici* was similarly mixed. The parts of it that advanced the interests of 'the tyrannical politicians of the Romish communion' he rejected.²³ Yet he found within its contents 'a system of rules prescribed by the divine will of God to regulate our moral conduct'.²⁴ For him, study of both these laws did not carry with it a necessary conclusion that the authority of the texts necessarily rested upon the status of the men in whose name they had been promulgated. For Bever, as for most other civilians of his time, the force of these learned laws was attributable 'merely to their own intrinsic worth'.²⁵

18 Bever, *History*, p 149; see also A Manchester, *Modern Legal History of England and Wales 1750–1950* (London, 1980), p 6.

19 See Bourginon, *Sir William Scott*, p 35; W Holdsworth, *History of English Law* (London, 1922–1966), vol XII, p 645.

20 D Lieberman, *The Province of Legislation Determined: legal theory in eighteenth-century Britain* (Cambridge, 1989), p 39; M Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford, 1991), pp 19–26.

21 See W Bryson, "But I know it when I see it": natural law and formalism', (2016) 50 *University of Richmond Law Review Online* 107.

22 Bever, *History*, p i.

23 Bever, *Dialogue*, p 5.

24 *Ibid.*, p 7.

25 *Ibid.*, p 16.

Like most of his contemporaries, Bever shared the view that principles of religion and morality were necessary parts of the law. He lived before legal positivism had secured its hold on the thought of most lawyers – a time when custom was still a legitimate source of law,²⁶ when desuetude could cause a statute to lose its force and when generations of jurists had interpreted and shaped the ancient texts to conform with the needs of society and the principles of right and wrong. He thus felt no incongruity in citing the opinions of Hugo Grotius (1583–1645), Samuel Pufendorf (1632–1694), Jacques Cujas (1522–1590) and Janus Gravina (1664–1718) as guides to the law to be applied in England.²⁷ Like Bever himself, these European jurists drew upon the *Corpus iuris civilis* but they did not swallow it whole.²⁸ Bever cited their opinions to help promote understanding of the laws of Rome as having a ‘title to universal law, above all others’.²⁹

BEVER’S VIEW OF THE COMMON LAW

Bever’s opinion of the English common law was similar to his view of the civil law – a mixture of praise and criticism. The municipal law of the realm clearly did interest him and he studied its contents more closely than had been the norm among English civilians before the Interregnum. He chose, for example, to explore the contents of Registers of Writs.³⁰ His judgment of what he found was mixed. On the one hand, Bever praised the common law as ‘peculiarly adapted to the temper of the nation’.³¹ He did not propose to displace it with the Pandects. On the other hand, he also reacted as many common lawyers long did at the start of their studies; what they found was a ‘shapeless mass of juridical materials, which often staggers the resolution of the most industrious student’.³² To the tyro, Coke on Littleton offered more discouragement than enlightenment.

For that enlightenment, Bever looked to the work of his colleague William Blackstone. Bever praised him and his *Commentaries* repeatedly. For him, Blackstone was ‘our modern oracle of English jurisprudence’.³³ The contents of his *Commentaries* were ‘a lasting and honourable monument’ to the law of England.³⁴ He saw no incongruity in this with his own high opinion of

26 See R Bursell, ‘What is the place of custom in English canon law?’, (1989) 1 *Eccl LJ* 12–26.

27 Bever, *History*, pp 58, 69; Bever, *Discourse*, p 35.

28 Eg P Stein, *Roman Law in European Legal History* (Cambridge, 1999), pp 64–67; Wolfgang Kunkel, ‘The reception of Roman law in Germany: an interpretation’ in G Strauss (ed), *Pre-Reformation Germany* (New York, 1972), pp 263–281.

29 Bever, *Discourse*, p 24.

30 Bever, *History*, p 70.

31 Bever, *Discourse*, pp 15–16.

32 Bever, *History*, p 484.

33 *Ibid*, pp 70–71.

34 *Ibid*, p 484.

Roman law; his settled opinion was that, fairly considered, 'knowledge of the civil law' would not 'lessen our veneration for the law of England'. He discovered support for his opinion in Blackstone's own work.³⁵ Indeed, perusal of the text of the first Vinerian Professor's introduction to his *Commentaries* produces so many shared opinions about the nature of law that it is easy and natural to imagine the two men working together, comparing notes in harmony.

They were also in accord in believing that the common law had benefited from ideas drawn from the European *ius commune*. This benefit was not the major theme of either of their works, but they agreed that it had occurred from time to time. Blackstone held that Roman laws had sometimes 'been introduced and allowed by our laws ... their authority being wholly founded upon that permission and adoption'.³⁶ Bever made the same point, giving examples to prove it. The dependence on the traditions of the civil law, encouraged by the presence of so many ecclesiastics in the early history of the Court of Chancery, was the obvious and principal example but there were others. In one, he traced the probable origins of the English writ *De ventre inspiciendo* to 'an ancient Praetorian edict, still preserved in the Digest' (*Digest* 25.4.1). It had been 'abridged and accommodated to the practice of an English court of justice' in the course of time, but it was 'evidently founded upon the same natural principle'.³⁷ Some of the examples may have been simple parallels: the similarity between the writ of habeas corpus and the *Lex Valeriana*, for instance.³⁸ But more often it had happened that the civil law had 'insensibly stolen into our own body' of laws.³⁹ For Bever, this silent entry provided another justification for the study of books of the civil law. Not the main reason, of course: the lessons to be derived from familiarity with the 'collection of written reason' in the Pandects were the main reason. It was that lesson that he sought to demonstrate to his students.

CONCLUSION

Study of the life and work of William Blackstone has enjoyed a revival of interest in our time.⁴⁰ Not so Thomas Bever. There is more than one good reason for the latter's neglect among historians of English law. It would be idle to suppose that the works of two men were equal in influence. However, for those of us who are

35 Blackstone, *Commentaries*, vol I, p 5.

36 *Ibid*, p 14.

37 Bever, *History*, p 70. For a parallel, see Blackstone, *Commentaries*, vol I, p 465 (citing *Digest* 25.4.1–9 as the most likely source of the common law's rule for determining paternity).

38 Bever, *History*, p 99.

39 Bever, *Discourse*, p 14.

40 See the essays in W Prest (ed), *Reinterpreting Blackstone's Commentaries: a seminal text in national and international contexts* (Oxford and Portland, OR, 2014); W Prest (ed), *William Blackstone and His Commentaries: biography, law, history* (Oxford and Portland, OR, 2009).

interested in the history of ecclesiastical law in England, Bever does deserve attention. He merits a place among the writers on the law of the English Church. His general attitude towards law – both the civil and the common law – also connects us to a world from which we have wandered, but which we should not entirely forget.

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