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Henry Swinburne and Devise of Land: The Textual Evolution of A briefe treatise of Testaments and last Willes and its Reflection on the Law, 1590-1803

Abstract: Henry Swinburne was the first Englishman to write on canon law in English and produce a treatise on testaments and wills, which became the defining jurisprudential source for over two hundred years, from the late sixteenth century to the early nineteenth century. During this period, Swinburne's treatise was reprinted nine times and received various additions, alterations, and deletions of material. To date, Swinburne's treatise is often referred to as a singular text rather than a series of versions constantly being adapted to the purposes and characteristics of the times in which they were published. This article provides the first treatment of the textual evolution of Swinburne's treatise, with particular reference to the section on the devise of land. This article employs a comparative textual analysis of the nine versions of Swinburne's treatise with brief notes on

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the devise of land instances in wills and court cases. Further, the current numbering of the editions of Swinburne's treatise is incorrect, and this article will provide a nuanced treatment of the misconceptions within the common understanding of the documents.

Key Words: Henry Swinburne; devise of land; uses; treatise; wills and testaments; law book; ecclesiastical law

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1 For over two hundred years, one of the primary texts on real and personal property in English law was Henry Swinburne's treatise, *A Briefe Treatise of Testaments and last Willes*. While his importance to the English understanding of inheritance has been noted by others, mainly Ronald A. Marchant (1969), J. D. M. Derrett (1973), John Baker (1993, 1998), and Richard Helmholz (most recently in 2022), the textual evolution of his treatise has not received formal recognition. Swinburne's text was continuously used and reproduced, with nine editions from 1590 to 1803;¹ this article outlines the evolution of the various editions, noting the changes that occurred and their relation to the law. Swinburne's first treatise »was to pass through several editions and—like a modern textbook—evolve in the hands of successive editors during an active lifetime of some two centuries.«² While references are often made to the existence of various editions of the treatise, very little is known about the specific changes, alterations, removals, and inclusions that occurred in the evolution of these editions. As will be discussed, the evolution of the versions was not always successive, and some editions were better than others in this respect.

2 The changes in the editions of Swinburne's treatise reflect more than simple changes in literary styles—they denote changing principles in the law, particularly focused on how wills could and could not be used. The aim of this article is twofold: firstly, to demonstrate that the 1635 and 1640 versions of the treatise are distinct and should be counted as separate editions. There is a misconception about these two versions being a singular edition. This, in turn, alters the perceived number of editions produced in the approximately two-hundred-year period while Swinburne's treatise was considered the dominant source on English wills and testaments. To date, what little research has been done on Swinburne surmises that the treatise was reprinted at least eight times; this is an oversimplification that this article seeks to address. Secondly, the subsequent editions were not just reiterations but had distinct elements that conflicted with prior and subsequent versions. The treatise was not merely reprinted, as the inclusion of material goes beyond the addition of relevant statutes in the Stuart and Georgian period; rather, whole components were refashioned or removed to suit the aims of the times.

1 It is notoriously difficult to determine how many versions or editions of Swinburne's treatise exist due to differences in numbering. For instance, the 1635 and 1640 versions are usually counted as a singular version. The second-last version was printed in Dublin in 1793, and as such is occasionally included or excluded in the numbering.

2 John Baker, *Monuments of Endlesse Labours: English Canonists and their Work, 1300-1900*, London, 1998, 60.

3 J. D. M. Derrett, *Henry Swinburne (?1551-1624): Civil Lawyer of York*, York, 1973, 7; In 1576 he attended Oxford, already in his early twenties. Derrett estimates Swinburne's birth to have occurred in 1551, but the exact date is unclear. Previous scholarship believed he was born c. 1560, but this would make him too young to have held educated positions in the late 1560s and early 1570s. Swinburne is now generally believed to have been born in 1551 (or at the very least before 1553), based on his work in the Consistory Court in the early 1570s before attending Oxford. For more on this debate, see Derrett, *Henry Swinburne*, 7-8 and Ronald A. Marchant, *The Church under the Law: Justice, Administration and Discipline in the Diocese of York, 1560-1640*, London, 1969, 249.

1. Early Life

³ Henry Swinburne was born in Micklegate Ward, York, in the early 1550s³ and went on to practice »as an advocate at York from 1581 until his death in 1624,« at the age of seventy-three.⁴ Swinburne received a Bachelor of Civil Law⁵ at Oxford in 1579⁶ and gained a reputation as an influential ecclesiastical lawyer, holding several judicial deputising roles in the deanery courts from the 1590s on.⁷ His work as a Commissary of the Exchequer Court of York (1604-24) and Commissary of the Dean and Chapter of York (1613-24) brought his focus onto testamentary business, which was the chief concern of the Exchequer Court.⁸ In the post-Reformation period, common-law judges began to increase their control over the abilities »of the ecclesiastical and other civil-law courts.«⁹ His first of two treatises was entitled *A Briefe Treatise of Testaments and last Willes, Very profitable to be understoode of all the Subjects of this Realme of England, (desirous to know, Whether, Whereof, and How, they may make their Testaments: and by what meanes the same may be effected or hindered,) and no lesse delightfull, aswellfor the rarenes of the worke, as of the easines of the stile, and method: Compiled of such lawes Ecclesiasticall and Civill, as be not repugnant to the lawes, customes, or statutes of this Realme, nor derogatorie to*

4 John Baker, 'Famous English canon lawyers: Part 5: Henry Swinburne B.L.C. (1624),' 3 (12) *Ecclesiastical Law Journal* (1993), 5; thereafter cited as Baker, 'Famous English canon lawyers' to differentiate from Baker, *Monuments of Endlesse Labours*.

5 Baker, *Monuments of Endlesse Labours*, 58: 'The formal study of canon law had been ended at both universities forty years earlier, by order of Henry VIII's commissioners, and since then Oxford and Cambridge had possessed only unitary faculties of civil law. As a result, degrees in civil law were now the only recognised academical qualification for practising in the ecclesiastical courts, though it seems very likely that the instruction included frequent reference to canon law.'

6 Derrett, *Henry Swinburne*, 8; The 1728 edition states his age upon attending Oxford as sixteen; however, he started as a mature student aged c. twenty-five in 1576; Some sources have listed Swinburne's birth as 1521 due to an incorrect assertion in the *Oxford Antiquary*. The editors, when discussing the various versions, state in the 1728, 1743, and 1793 version: 'As for his *Treatise of Testaments and Last Wills*, the first Edition thereof was published above *150 Years since, and probably it was written by him a little before it was published; it could never be in that Year in which our *Oxford Antiquary* hath placed him, (viz. Anno 1520) because that was 70 Years before the first Edition was printed; but rather about the latter End of the Reign of Queen Elizabeth; for the Stile in which it is written shews that it was the Language of that Age, which might easily be evinced by comparing it with other Books published about that Time.' Swinburne, 1793, B1; One such example of Swinburne being incorrectly dated can be seen in the following http://lawlibrary.wm.edu/wythepedia/index.php/Treatise_of_Testaments_and_Last_Wills.

7 Baker, *Monuments of Endlesse Labours*, 60.

8 Derrett, *Henry Swinburne*, 8.

9 Derrett, *Henry Swinburne*, 7.

*the Prerogative Royall ... By the Industrie of Henrie Swinburn, 11 Bachelor of the Civill Lawe.*¹⁰ This treatise discussed essential civil, ecclesiastical, and common-law elements of testaments and wills. His second treatise, which is not the focus of this article, *A treatise of Spousals, or Matrimonial Contracts: Wherein All the Questions Relating to that Subject are Ingeniously Debated and Resolved* (1686),¹¹ was published posthumously based upon »an incomplete manuscript that now resides in Lincoln’s Inn.«¹² *Spousals* received one reprint as a second edition in 1711 but did not hold as much influence as his first treatise due to its unfinished nature.

13

4 As John Baker notes, Swinburne’s first treatise »represents a landmark in jurisprudence,« and »[a]s a result, Swinburne remained the first recourse on the subject for over two hundred years.«¹⁴ Swinburne intended the treatise to be utilised by practitioners and students alike, which differentiated his work from others. The treatise was »on the learned laws in English while at the

10 Swinburne’s text is referred to as *A Briefe Treatise of Testaments and last Willes* (other editions have slight variations on the title); The title alludes to the Submission of the Clergy 1534, 25 Hen. VIII, c.19, s.3; ‘No Cannons, &c. shall be enforced contrary to the King’s Prerogative. Provided alway that no canons constitucions or ordynance shalbe made or put in execucion within this Realme by auorytie of the convocacion of the clergie, which shalbe contraryaunt or repugnant to the Kynges prerogatyve Royall or the customes lawes or statutes of this Realme; any thyng conteyned in this acte to the contrarye herof notwithstondyng.’ (Statute renewed in 27 Hen. VIII, c.15. and 35 Hen. VIII, c.16. and remains in force today). The statute stipulated that the old canon law was to remain in force until a new revised canon law was made (a panel of canonists created a draft code in 1535 but it was rejected by the common lawyers. Another failed attempt was made in 1552). For more on these attempts, see R.H. Helmholz, *Roman Canon Law in Reformation England*, Cambridge, 1990, 68, 143, 145, as well as Baker, *Monuments of Endlesse Labours*, 54.

11 *A treatise of Spousals, or Matrimonial Contracts* (1686) was published in London by Samuel Roycroft, on behalf of Robert Clavell, at the Peacock in St Paul’s Churchyard. References are made to possibly an additional two treatises on marriage and divorce that Swinburne aimed to write. These treatises were meant to be utilised together covering many aspects relating to matrimony. For more see Sheila Doyle, ‘An Uncompleted Work by Henry Swinburne on Matrimony,’ 19, n. 2 *Journal of Legal History* (1998), 162–72.

12 Lincoln’s Inn, MS. Misc. 577; Baker, ‘Famous English canon lawyers’, 6; There are several differences between the Lincoln’s Inn MS and the printed edition of *Spousals*: One such example is on the subject of children, ‘(that is in the printed edition of *Spousals* though not in the Lincoln’s Inn MS) »In Dock out Nettle, until they come to years of discretion.« They would sometimes get engaged without their parents’ consent. Our author noted (Sp., 3): the wicked examples of cursed children in these days, thereby dishonouring their parents, and breaking the commandment of the Almighty.’ Derrett, *Henry Swinburne*, 23; For more discussion on the production of *Spousals*, see J. D. M. Derrett, ‘A Manuscript of Henry Swinburn’s Treatise On Spousals (c. 1620-3).’ 47, n. 3 *Tijdschrift Voor Rechtsgeschiedenis* (1979), 269–273.

13 Derrett, *Henry Swinburne*, 2.

14 Baker, ‘Famous English canon lawyers’, 9; Swinburne’s influence was felt outside legal scholarship, examples include Shakespeare taking literary phrases from Swinburne’s text. Kenneth Muir, ‘Henry Swinburne and Shakespeare,’ vol. 202 (7) *Notes and queries* (1957), 285-286; Derrett, *Henry Swinburne*, 23: ‘Swinburne’s two works seem at first sight to be mainly catenae of statements of law, compact, condensed and professedly brief, indicating contrasting opinions of the Doctors without allowing them a free run of his pages. But there appear, on the way, numerous glimpses of the social and religious opinions of the time’; Derrett writes ‘His claim to fame rests upon his enterprise; the scope of law he under took to master; the beauty and freshness of the style in which he expounded it, making no improper concession to the lay mind; the discretion with which he approached matters in controversy between canon and common lawyers; the skill with which he utilised his sources to produce clear and practical solutions to doubtful questions; the regularity with which he disclosed his sources for all to consult; and the spirit of an authorship founded upon years of practical experience and intimate knowledge of the courts in which he had worked. These courts then served, with all their limitations, as part of the administration of England.’ Derrett, *Henry Swinburne*, 27.

same time ... [was] sufficiently versed in the common law to utilise case law.«¹⁵ Indeed, until the versions following the 1677 edition, the title page included some variation of a statement that the text was »fit to be understood by all men, that they may know, Whether, Whereof, and How, to make them.«¹⁶ Swinburne's treatise remained relevant for two main reasons; firstly, he wrote treatises on the learned laws in English with common-law elements, including case law. By combining civil, canon, and common law, his treatise encompasses the various legal approaches to wills, testaments, and hereditaments in a coherent, logical approach. He also included footnotes directing readers to the appropriate Latin and case material, to provide references for students of the law. Swinburne also addressed a wide range of topics, from the more mundane to the complex of married women's will, which helped to ensure the utility of his work.¹⁷ Swinburne was the first prominent author to write on the canon law in English,¹⁸ and his work »adopted a felicitous informal style designed to be understood by laymen as well as experts.«¹⁹ As the first prominent author to write on the canon law in English, Swinburne is entrenched among English jurists as the author of the most comprehensive treatise on wills and testaments;²⁰ he described the aim of the project as the creation of »this one litle booke may serve in steed of many great volumes.«²¹ Indeed, while several minor treatises on elements of ecclesiastical administration appeared, they did not match the breadth of Swinburne's coverage.²²

15 Lindsay Breach, 'The Development of the Use and the Origins of the Modern Trust: Maitland's Thesis, the Crusades, and Beyond,' thesis submitted for the degree of Doctor of Philosophy, University of Canterbury, 2018, 53; 'The practice of civil law in England, like other continental jurisdictions, had the opposite problem to the common law as a system rich with literature but meagre access to case law.' This quotation is responding to Maitland, *Why the History of English Law is not Written*, p. 4.

16 Swinburne, 1677, 1; The 1590, 1611, 1635, and 1640 editions state: 'Very profitable to be understood of all the subjects of this Realme of England, (desirous to know, Whether, Whereof, and How, they may make their Testaments: and by what means the same may be effected or hindered,).' All subsequent editions held no mention of this desire for all subjects of the realm to be able to understand the text.

17 R. H. Helmholz, "English Common Law and the *Ius Commune*: The Contributions of an English Civilian" *Tulane European and Civil Law Forum* 37 (2022): 121.

18 Derrett, *Henry Swinburne*, 1.

19 Baker, 'Famous English canon lawyers', 6.

20 'Swinburne was one of the last major English legal writers in the European *ius commune* tradition, if not the last. His bold decision to write in plain English carried much of that learning effortlessly into the nineteenth-century ...' Baker, *Monuments of Endlesse Labours*, 69.

21 Swinburne, 1590, B1r; Swinburne aimed to remedy the issues of the scarcity and complex nature of other works on this subject that were often in other countries and languages, for individuals versed in the learned laws. Baker, *Monuments of Endlesse Labours*, 62.

22 Derrett, *Henry Swinburne*, 2; Derrett notes such examples including John Goodale's *Lyberties of the Cleargy* (1540), which 'was primarily concerned with the functions of the common-law and chancery courts as guardians of the ecclesiastical judge's proceedings, keeping them to their rather restricted paths.' However, pre-Swinburne, English production of civil and canon law treatise was underwhelming compared to the continent. Such treatises rarely circulated in England and were seldom published more than once, meaning material had to be obtained from foreign presses.

5 In terms of content, Swinburne's treatise covers a variety of topics, including definitions of what constitutes a will, codicil, legacy, written and unwritten testaments, what can and cannot be left to others in a will or testament, and a variety of other related topics.²³ One topic of particular interest is entitled *What things may be divided by will*, wherein two parts are essential: land, and goods and chattels. Swinburne explains what occurred when a testator bequeathed more lands or goods and chattels than they were able to, including in which instances legacies were to be preferred and to which courts such matters should be brought.²⁴ These practical elements helped entrench Swinburne's treatise as an essential text, especially compared to the work of common lawyers whose writing could be overly technical and usually lacked practical examples. The closest equivalent to Swinburne's treatise by a common lawyer is the readings on the Statute of Wills (1540) by people such as James Dyer (1552) and Ambrose Gilbert (1556), »[which] consisted principally of lists of cases connected by a few disjointed generalisations.«²⁵ However, for this paper, the focus shall remain on the matter of devising land, with limited exceptions when relevant to goods and chattels. The detailed treatment of the subject reveals a unique dichotomy; while Swinburne possessed extensive practical experience spanning decades and various roles, subsequent editors and scholars questioned how well his treatment reflected English practice.²⁶

2. Number of Editions

6 Nine editions were produced between 1591 and 1803, with several reprints and reissues. The nine editions are as follows, with relevant information included about the printing or involvement of Swinburne as applicable. The first edition was published as a quarto by John Windet in 1590, but the colophon is dated 1591. A quarto is a twice-folded sheet that creates four leaves, or eight pages, which results in a book of medium size.²⁷ Swinburne was actively involved with the production of this edition and his extensive comments can be found on several copies. The second edition was published as a quarto in 1611 by the Company of Stationers, who acquired the copyright in 1607. No printer name was recorded, only »the Companie of Stationers.« The

23 Other such aspects he considers include interpretation, the appointment and duties of executors, and what factors might invalidate or partially invalidate a testament or will.

24 Swinburne, 1611, 72v.

25 Baker, 'Famous English canon lawyers', 7; For a full discussion on these readings see Matthew Mirow, 'Readings on wills in the Inns of Court, 1552-1631,' thesis submitted for the degree of Doctor of Philosophy, University of Cambridge, 1993, 33-62.

26 Baker, 'Famous English canon lawyers', 7; Baker notes how several of Swinburne's comments were not based on practical experience from the Exchequer Court of York but found in the continental writings of the jurists, including 'Baldus (d. 1400?), Corneus (d. 1492), Decius (d. 1536), Mascardus (d. 1588), and Mantica (d. 1614).' Baker notes several instances of Swinburne citing continental jurists over English sources, including disqualifications for testatorship. Baker writes 'For instance, he treats heresy, apostasy, manifest usury, incest, and sodomy, as disqualifications from testatorship, although he concedes that English law departed from the general Canon law in not recognising prodigality as a disqualification; for none of these propositions, though supported by an impressive array of continental learning, is any English authority or example cited.' For more on the utility of Swinburne's work before the royal courts, as a case example for wider use of his treatise, see Helmholz, "English Common Law and the *Ius Commune*: The Contributions of an English Civilian", 122-137.

27 Sarah Werner, *Studying Early Printed Books, 1450-1800: A Practical Guide*, Newark, 2019, 48.

foreword of this edition describes it as a »newly corrected and augmented with sundry principall additions, by the industrie of Henry Swinburn.«²⁸ The 1611 edition was printed during Swinburne's life and comments in several surviving manuscripts appear to be in his own hand, or the printer's hand upon the direction of Swinburne. The Company of Stationers maintained their copyright of Swinburne's treatise and printed the 1635 and 1640 editions. The third edition in 1635 was printed in two quartos by William Stansby and Thomas Harper.²⁹ John Legat, Felix Kingston, Richard Bishop and John Dawson printed the fourth edition in 1640 as two quartos. The fifth edition in 1677 was printed in a single quarto by George Sawbridge, Thomas Roycroft, and William Rawlins, assigns of Richard Atkins and Edward Atkins Esquires. E. and R. Nutt printed the sixth edition in 1728. Departing from the previous practice of printing the books as a quarto, folio editions were published in 1728 and 1743. When a single large sheet is folded once and sewn together, creating two leaves or four pages, and then bound together, the resulting text is called a 'folio.'³⁰ Folios are twice the size of a quarto and four times the size of an octavo printing.

7 The seventh edition was printed by Henry Lintot, assignee of Edw. Sayer, Esq., in 1743 and sold by S. Birt, D. Browne, and J. Shuckburgh. The eighth edition was printed in 1793 in two octavo volumes: an octavo is a sheet of paper composed of 16 pages or eight leaves,³¹ by Elizabeth Lynch in Dublin, Ireland (the only known edition printed outside London). Little is known about Lynch's early life. The earliest known records of her are from when she succeeded her first husband (Richard Watts) as printer and bookseller after his death in November 1762. It is likely that she was involved in the printer process for years but was uncredited as Richard's spouse.³² In 1768, Elizabeth »married the curate of St Werburgh's, Dublin and bookseller, the Reverend Stewart Lynch (died June 1788).«³³ Elizabeth Lynch maintained her bookselling and lending business from 6 Skinner Row. Starting in 1762, Elizabeth was granted the exclusive privilege of selling law books at court by the Society of the King's Inn of Dublin, attesting to her expertise in printing law books. She has been noted as »one of the most prolific early woman printers.«³⁴ She focused on legal publications, which included an edition of Blackstone's *Law Tracts* (1767), as

28 Swinburne, 1611, A2; Swinburne's name is written in several variations, but Swinburne is the generally accepted version (originally spelt Swinburn).

29 Only W.S. is noted on the title page.

30 Werner, *Studying Early Printed Books*, 46.

31 Werner, *Studying Early Printed Books*, 48.

32 Richard and Elizabeth Watts had four sons and a daughter: Mary Pollard, *A dictionary of members of the Dublin book trade, 1550-1800: based on the records of the Guild of St. Luke the Evangelist, Dublin*, London, 2000, 597–598.

33 Turlough O'Riordan, 'Watts (Lynch), Elizabeth', in James McGuire and James Quinn (eds.), *Dictionary of Irish Biography*, Cambridge, 2009, 374.

34 W. B. Kelly, 3, n. 9 *The Irish Quarterly Review* (1914), 1853.

well as a range of Irish and English legal texts.³⁵ Lynch died in January 1794 and was succeeded by her son, Henry Watts. The ninth and final version of Swinburne's treatise was printed as three octavo volumes in 1803 and »was heavily edited by the conveyancer John Joseph Powell of the Middle Temple (d. 1801), prepared for the press by James Wake of Lincoln's Inn, and published in three volumes by William Clarke and Sons in 1803.«³⁶

8 Shifting now to the content of each edition, what follows outlines the evolution of the treatise's arguments about the devise of land, including the controversy and issues arising from the previous numbering of the nine editions. First, a brief summary of the editions of Swinburne's text: the first edition was printed by John Windet in 1590,³⁷ and the second edition was published in 1611 during Swinburne's life and is noted as such in the title, »newly corrected and augmented with sundry principall additions,« by the initiative of Swinburne.³⁸ The third and fourth editions were reprinted by the same publishing company in 1635 and 1640. Perhaps due to the relatively close period in which these two versions were printed, they are often treated as a singular edition.³⁹ However, essential differences exist between the two texts despite only five years separating their reprinting.⁴⁰ Further, other texts reference the 1635 and 1640 publications as separate versions. The introduction to the 1793 version, entitled »Some Account of the Author, and of the Several Editions of His Treatise of Testaments and Last Wills« states:

9 *For there was a third Edition [1635] of this Treatise about 24 Years after the Second, in which there was a Multitude of Common Law Cases inserted; and if we believe the Oxford Antiquary, that Impression was sold in a very little Time; for he tells us there was a fourth Edition in the Year 1640, which was about 5 Years after the Third.*⁴¹

35 James W. Phillips, *Printing and bookselling in Dublin 1670–1800*, Dublin, 1998, 87.

36 Baker, 'Famous English canon lawyers', 8.

37 There is some discrepancy as to the date; some scholars list the treatise as 1590 while others list it as 1591. This is due to the date on the title page being 1590, but the colophon is dated 1591. Baker, 'Famous English canon lawyers', 9. This is a continually recurring issue throughout contemporary and secondary sources.

38 Swinburne, 1611, A2.

39 Baker, 'Famous English canon lawyers', 8: This has led others to incorrectly denote that there are only seven editions in total. The 1635 version has several faults not present in the 1640 version. As will be discussed later, editors in the eighteenth century readily attributed them as two separate editions; however, the issues around the number of editions are varied.

40 'The following two editions seem to have been treated as one by the trade, for the »very much enlarged« version which appeared in 1677 ... was described as the fourth edition.' Baker, *Monuments of Endlesse Labours*, 65. Later editions in the seventeenth century treat them as separate and the differences between the two versions are striking. While the content remains largely the same, the quality is considerably different. In fact, the difference in quality is most likely why the 1635 version was combined with the much-improved 1640 version. However, it is not necessarily correct to put them together as a singular version. Seventeenth century editors, when reprinting the texts, did not treat them as the same version.

41 Swinburne, 1793, B1.

- 10 This passage conflicts with many sources which number the treatise under the assumption that the 1635 and 1640 versions are the same. Modern scholars have worked under this same assumption, based primarily on the numbering of later editions. However, as will be demonstrated, the conventional numbering is flawed and unreliable.
- 11 The most widely referenced edition is the fifth, released in 1677 by George Sawbridge and several others.⁴² This version became »the largest and most popular edition.«⁴³ Contemporaries referred to this as the fourth edition, due to the treatment of the 1635 and 1640 versions as a single version.⁴⁴ The sixth edition was published in 1728 by E. and R. Nutt.⁴⁵ The seventh version was published in 1743 by Henry Lintot and claims to be a »corrected and very much enlarged version with all the statutes to 16 *Geo. 2.*«⁴⁶ In this edition, material was added and amended to reflect changes in the law.⁴⁷ The eighth version, printed by Elizabeth Lynch in Dublin in 1793, and is usually called the Irish version.⁴⁸ This edition includes all relevant statutes up to the 32 *Geo. III* and also »all Decrees in Chancery and Resolutions of Common Law.«⁴⁹ The final version was printed in 1803 and was thoroughly edited and expanded to produce three volumes in 1803.⁵⁰ Depending on chronology, this was either the eighth or ninth English version (including the Dublin edition); regardless, this was the final version of the treatise. This complex history of editions has remained unclear in the literature. For example, in his entry in the Dictionary of

42 Printers for the 1677 are listed in section 2. Number of Editions, first paragraph.

43 Baker, 'Famous English canon lawyers', 8.

44 Moving forward, the numbering will be based on the argument that the 1635 and 1640 versions are distinct.

45 1728 edition, Publisher: In the Savoy: printed by E. and R. Nutt, and R. Gosling, (assigns of Edw. Sayer, Esq;) and are to be sold by J. Knapton, A. Bettesworth, R. Gosling, W. and I. Innys, I. Oshorn and T. Longman, C. Rivington, J. Stogg, T. Osborn, D. Browne, and T. Worrall ([London]), Edition: 5, 1728.

46 Swinburne, 1743, title page.

47 Specifically dealing with devise of land, although other alterations and additions are throughout.

48 The title of the 1793 edition states that it includes 'a TRUE Copy of the Will of the late Duchess of MARLBOROUGH.' She has been attributed as another editor/author in some accounts, but the meaning for this is unclear given her death in 1744. Further research is required as to why the Duchess is included.

49 Swinburne, 1793 V.1., 1.

50 Baker, 'Famous English canon lawyers', 8.

National Biography on Swinburne in 1898, Alfred Pollard made no mention of the 1793 edition but referenced editions from 1633 and 1678.⁵¹

12 The nine editions produced between 1590 and 1803 demonstrate the influence Swinburne held on English law and the importance of his treatise. It is because of that importance that the evolution, additions, and contradictions made throughout the 213-year period of reprints are discussed in the next section. The fading of this text in the early nineteenth century is most likely brought on by several factors; the massive size and cost of production, the waning relevance of ecclesiastical authority in testamentary issues, and various legal reforms such as the Wills Act 1837. While several alterations, additions, or removals occurred over time and across editions, the treatment of devise of land specifically demonstrates these evolutions.

2.1: Relevant Notes in Conjunction with the Changes, Alterations, Differences in Editions

13 Several grammatical changes occur between editions; for example, in the 1611 version Swinburne writes how he would indeed »seeme to be more bold then blinde baiarde« if he was to claim a masterful knowledge of many elements of the common law.⁵² In the 1635 version, the passage has been altered to »seeme to bee more bold then blinde Bayard.«⁵³ In the 1677 version, the passage is slightly altered once more, to »seem to be more bold then blind Bayard,«⁵⁴ a minor example which demonstrates that alterations to the practical and theoretical devise of land by wills occurred alongside writing and technical changes.⁵⁵ Derrett notes that »editions after his last are defaced with innumerable misprints and errors in citation.«⁵⁶ The inclusion of relevant statutes as an appendix became commonplace. The use of Latin also evolves between editions; the 1590 edition has a two page handwritten Latin message following the title page, which was expanded to seven pages in the 1611 version, reduced to three typed pages for the 1635 and 1640

51 'Swinburne was author of two books on ecclesiastical law, which are important from their intrinsic merit, and from being the first written in England on their respective subjects. They are: 1. 'A Briefe Treatise of Testaments and last Willes . . .' London, 4to, 1590 (the colophon bears date 1591). Another edition appeared in 1611, and a third, 'newly corrected and augmented,' in 1633. Later editions were issued in 1635, 1640, 1677, 1678, 1728, and 1743. A 'seventh' edition was prepared for press by John Joseph Powell [q. v.] and James Wake, and published in 3 vols. 1803, 8vo.' D.N.B., vol. 55, 229; Pollard states ten versions of the treatise, excluding the 1793 edition and including the 1633 and 1678. It is most likely a mistake as no such copies or references to these versions have been found (by myself or subsequent authors after Pollard—see the works of Marchant, Derrett, and Baker). Pollard also incorrectly places Swinburne's birth in c. 1560 and that he was 16 when he started at Oxford, rather than in his mid-twenties.

52 Swinburne, 1677, 86: spelt as Bayard; In Swinburne, 1611, 73, spelt as baiarde.

53 Swinburne, 1635, 123; In the 1640 version, 'seeme to be more bold then blinde Bayard.' [the second e on be has been dropped.] Swinburne, 1640, 123. The reference to 'blind Bayard' has been selected due to its unique nature – it refers to the mythical horse Bayard, which in some understandings was blind and foolish.

54 Swinburne, 1677, 86, Bayard; Swinburne, 1611, 73, baiarde.

55 This is just one example, several hundred exist throughout the various editions.

56 Derrett, *Henry Swinburne*, 12.

copies, and removed entirely from the 1677 version.⁵⁷ The 1590 version also includes handwritten comments throughout the treatise, on page 33v at the end of the first section, for example.⁵⁸ These handwritten notes might have been written by Swinburne himself or the publisher at Swinburne's direction, and were incorporated in later editions.

14 There was also considerable fluctuation between the page counts of editions. While editions in the late seventeenth century onward had increasingly better typesetting, some editions were larger than others. The editions in 1635 and 1640 differed in length only by one page, which some have interpreted to mean they are the same edition. However, it appears that one possible motive for the reprinting of the 1640 edition was the inferior quality of the 1635 version. Even by the standards of the early seventeenth century, it was a flawed edition with rampant issues in clarity of writing, page numbering, and text alignment. Some editions only had a marginal increase in page count, yet sections such as devise were increased significantly. Specifically, the 1677 edition decreased in overall page count but the section on devise of land increased by six pages (this was despite the increase in quality of printing—most notably in the typographical respects).⁵⁹

15 Although page count did not significantly change over the first four editions, from the late seventeenth century onward printers began expanding upon the devise of land section. These expansions consisted largely of quotations from statutes and substantive analysis of the case law. The editors of the 1803 edition note their preference for the most accurate version of the treatise, stating:

16 *Feeling many objections to the sixth edition [1743] of this author, namely, that in the attempt to modernize the text, the editor had not only altered the style and language of Swinburne, but in several instances mistaken, and thereby perverted his meaning, that in others he had omitted whole passages, besides which, the having incorporated his own notes with the text, and without furnishing the means to distinguish them; by which it appeared more like a new work, than a new edition of an old one: for these reasons, therefore, Mr. Powell, fixed on the edition of 1640, as the most correct, and whence the present has accordingly been taken.*⁶⁰

57 The lack of a Latin page is not due to any technical errors or missing pages; the pagination is correct (this is due to the where the image is placed in relation to the title page and the text); The first treatise 'was seen through the press by Swinburne himself, whose care is evident from the fact that copies of the first edition contain corrections on pasted slips, some even bearing further corrections in ink made at the author's direction.' Baker, *Monuments of Endlesse Labours*, 61: For specific examples of corrections or handwritten comments to be incorporated, see Derrett, *Henry Swinburne*, 11.

58 This copy is held by the University of Michigan, Law Library, Ann Arbor, Mich., call no.: rare book S978t 1590. It is accessible online via EEBO (0170).

59 Derrett, *Henry Swinburne*, 11.

60 Swinburne, 1803, V.1., A2-vi.

17 Curiously, Powell seems either to ignore or be unaware of the edition between his own and the 1743 publication. This point will be further analyzed in relation to the numbering of the nine versions; suffice to say that Powell's version had a slightly larger section on devise of land than the original 1640 edition.

3. Textual Evolution on Devise of Land

18 Devise of wills has always been a contentious topic, as devise is the testamentary disposition of land, i.e., the transfer of real property by the last will and testament of the deceased. However, while many debates were taking place in the surrounding centuries over the ability to transfer real property by wills, Swinburne wrote of its importance, stating that »it shall not be amisse to speake first of the bequeathing or devising of lands, tenements, and hereditaments«⁶¹ when discussing what could be left by a will. Swinburne devotes one-seventh of the text to what could be left via wills, totaling c.80 pages (around 14% of his original treatise) on the topic. While other works from the time touch on devise of land, none were so influential and widely-used.⁶² However, Swinburne's contribution to devise of wills has not always been appreciated; Professor Mirow states that Swinburne's 1590 edition »provides no treatment of devises of land, apart from setting out the text of the statutes ...« and goes on to note that readings on wills in the Inns of Courts must have been sufficient to any need for explanation of the statute.⁶³ While Swinburne did set out the context and scope of the 1536 and 1540 statutes, he also provided conditions in which devise of land was permitted. In subsequent editions, this treatment of devise of land was elaborated upon in dozens of additional pages.⁶⁴

19 In Swinburne's original two editions he states the following:⁶⁵

20 *The rule it is, that this matter of the devise of land, tenements and hereditaments, within this realme of England, with all questions incident thereunto, it is to be determind, according to the lawes temporall of this*

61 Swinburne, 1611, 72r [Pt. iii, s. 1.].

62 Other individuals who wrote on devise of land and wills included James Ley's *Learned Treatise Concerning Wards and Liveries*, London, 1642; Inns of Court readings by James Dyer (1552) and Ambrose Gilbert (1556).

63 Mirow, 'Readings on wills in the Inns of Court', 256; Mirow's statement on the 1590 edition states it 'provides no treatment of devises of land, apart from setting out the text of the statutes. ... It appears that the readings on wills filled the need for current and comprehensive expositions of the statute.' While the Inns of Court readings did provide treatment of the Statute of Wills 1540, they are by no means a complete treatment of the statute (or even better), Baker argues that these readings (with particular reference to Dyer [1552] and Gilbert [1556]) 'consisted principally of lists of cases connected by a few disjointed generalisations' and that Swinburne's treatment was more comprehensive. Baker, 'Famous English canon lawyers', 7.

64 For instance, more than ten pages on several new acceptable conditions of devise of land were added (not present in the 1590, 1611, 1635, 1640, and 1803 versions). This extensive treatment of conditions for devise of land was present in the 1677, 1728, 1743, and 1793 versions.

65 The following passage is my own modern translation: Swinburne, 1611, 73v-74v, more generally Pt. iii, s.1; The content is the same in the 1590, see 70v-71v (except for minor spelling differences).

realme, and is not subject to the rules and decisions of the laws civil or ecclesiastical; ... before I go any further, I am to crave this favour (learned professors, and serious students of the laws temporal of this realme,) that for as much as this your felde, wherein groweth all these questions concerning the devise of landes, does lie so just betwixt me and those other groundes, wherein the marke wherent I aime, is placed, ... Touching the bequest or devise of lands, tenements and hereditaments, this appeareth to be a true position, and ground agreeable to the civill law,⁶⁶ and also the lawes of this realme,⁶⁷ that lands, tenements or hereditaments, cannot be disposed or devised by will, but in certaine cases, of which some are approved by force of certaine customes,⁶⁸ within this realme, and some by force of certaine statutes.⁶⁹

21 In the same edition, he writes:

22 *Now followe certaine other cases authorised by the statutes of this Realme of England, wherein it is lawful to bequeath or devise landes, tenements and hereditaments by will, sometimes wholly, and sometimes in part only, or rateably, according to the nature of the tenure of such landes, tenements and hereditaments, as in the same statutes, which I have here set downe at large doth appeare.⁷⁰*

23 It is this statement that Mirow refers to when stating that Swinburne provided no treatment of devise of land. This argument is partially true, in that apart from his discussion on two general principles in which devise of land was permissible, Swinburne's focus remained on the statutes. However, this issue was remedied in later editions of the treatise, when he added twelve instances in which devise of land was permitted. Therefore, Mirow's statement is not entirely correct and should be amended to reflect the treatment of devise of land, albeit with preference to the statutes, a fact which the later editions remedied by providing copious notes and additional pages of treatment on devise of land. For instance,⁷¹ in the 1677 edition, over nineteen additional pages on the devise of land were added. The first section was titled »What shall be a good devise of

66 This footnote and the following three were the direct citations Swinburne made; Imperialis. De prohib. feud. alien. l.2. Feud. Bald. in c.l. de success. feud.

67 Stat H.8. an.27. C. 10. In princ. Doct & Stud. 1.l.c.8. Perkins. tit. devise. 102; This is one of the examples of Swinburne citing non-statute English material (perhaps due to his learned background, he favoured learned books over most case examples).

68 Infr. §. prox.

69 Infr. ead. part. §. 4.

70 Swinburne, 1611, 81r.; 1590, 78v-r.

71 Entire conditions on devise of land (both acceptable and unacceptable instances) were added in the 1677, 1728, 1743, and 1793 versions.

lands and tenements; what not: what estate shall pay by the words of the will, whether fee-simple, fee-tail, for life, or other estate.«⁷² The second was called »Devises of Lands with Limitations and upon Condition. What Condition in a Devise shall be good, what not: what words shall make a Condition, what not: and what Estate shall pay to the Devisee by implication,«⁷³ and the third was named »Devise of Reversions, Remainders, and of Rents, when good, and when not, and to whom.«⁷⁴ This new section included 118 additional footnotes, demonstrating the author's extensive research. In the 1728 edition, this section increased to over forty-two pages of additional content with over 240 footnotes.⁷⁵ The 1728 edition employed extensive practical cases and was well versed in citations of continental treatises, English case law, statutes, and the writing of important English jurists. The 1728 edition not only cited case examples, but also provided direct case reports as examples of successful and unsuccessful instances relating to devise of land. This trend continued in later editions: notably, the Dublin edition of 1793 provided a 'true' copy of the will of Sarah Churchill, the Duchess of Marlborough. The use of practical examples of wills and influential cases helped ensure the relevance of Swinburne's treatise. Interestingly, the final edition in 1803 did not include the additional material on devise of land which had been expanded upon in the previous versions, and instead issued a reprint similar to the 1640 edition.

24 While the later editions provided more copious details, even the 1590 edition briefly explained the twelve instances in which lands could be devised by wills:

72 Swinburne, 1677, 107.

73 Swinburne, 1677, 114; This section was extremely detailed, with extensive footnotes referring to relevant Elizabethan statutes and cases. For example, when discussing a man devising land to his wife upon the condition that their eldest son was to attend school, cites '33 Eliz. B. R. *Wellick and Hamonds cas.* C. lib. 6. *Collyers case.*' Swinburne, 1677, 114. These new sections were scattered with case examples and new statements not included in the first four editions. It is in this edition and those that followed that case law became an increasingly prominent factor.

74 Swinburne, 1677, 121.

75 Such titles in this section included: 'What shall be a good Devise of Lands and Tenements; what not: What Estate shall pay by the Words of the Will, whether Fee-simple, Fee-tail, for Life, or other Estate; and of the Intention of the Testator.' Swinburne, 1728, 130. The inclusion of intention of the testator is not present in the 1677 edition; 'Devises of Lands with Limitations and upon Condition. What Condition in a Devise shall be good, what not: what words shall make a Condition, what not: and what Estate shall pay to the Devisee by implication.' 1728, 140. This section is present in the 1677 edition but expanded upon. The following sections are not present in the 1677 editions: 'Fee-simple by Devise', 1728, 149; 'Fee-simple by the Word Paying', 1728, 150; 'By the Word Purchase', 1728, 152; 'By a Devise of all his Estate', 1728, 152; 'By the Word Inheritance', 1728, 153; 'By the Words dispose, give or fell, at his Will and Pleasure', 1728, 153; 'Where the Devisee takes the Lands with a Charge, 'tis a Fee-simple', 1728, 154; 'Fee-tail by Devise by the Words Heirs, &c', 1728, 155; 'Implication by Devise', 1728, 160; 'Devise of Reversions, Remainders, and of Rents, when good, and when not, and to whom', 1728, 163.

25 *Certain cases approved by custome, wherein it is lawful to devise lands, tenements or hereditaments. 1. Gavelkind lands may be divided by will.⁷⁶ 2. The cause wherefore the custom of Gavelkind did continue. 3. Burgage land divisible by will.⁷⁷ 4. To whom, and after what manner Burgage lands be divisible. 5. Whether any other person may devise Burgage lands but a citizen. 6. Burgage tenure a kind of tenure in soccage.⁷⁸ 7. Whether liuerie or feofin be needful, where burgage land is divided. 8. Whether the innocent may bequeath his part of Burgage land otherwise devisable. 9. Of lands devised to certain uses. 10. The custom of devising lands to feoffees reformed. 11. The causes of this reformation. 12 The statutes of acts of reformation.⁷⁹*

26 While the list of instances of permissible devise of land did not change between the nine editions, the interpretation and discussion were revised across the eighteenth-century publications. These editions also added commentary on statutes and updated the text with relevant statutes as they were passed.⁸⁰ For example, in the 1728 version (and the 1743 and 1793 editions, but not the one from 1803) following the text of the 1536 Statute of Uses, the author included three paragraphs referencing statutes under William and opinions of Coke. The inclusions state:

27 *Before this Statute was made, if Lands were limited to one and his Heirs, to the Use of another, the Cestui que Use might take the Profits; and the Person in whom the Freehold was vested was to make Estates according to the Direction of the Cestui que Use, who had only a bare Trust, and had no Remedy against the other for a Breach of Trust, but only in Chancery; but*

76 Gavelkind is a type of inheritance practice where a testator's land is divided equally among all male heirs, not just to the eldest. This is true in the instance of intestacy. Hugh Chisholm, ed. 1911 *Encyclopædia Britannica*, 11 v. (11th ed.), 'Gavelkind,' Cambridge, 1911, 538–539. For more on gavelkind see Richard Helmholz, 'The Early Enforcement of Uses', *Columbia Law Review*, vol. 79, no. 8, 1979, 1503 – 1513.

77 Burgage refers to tenure of land in return for annual rent or services provided. Burgage is in relation to a rental property in a town (also called 'borough' or 'burgh'). Tenure was typically in the form of money but could include services.

78 Soccage is a tenure of land involving payment of rent or other service (specifically excluding military service), often relating to agriculture. During the reign of Edward I, the statute *Quia Emptores* of 1290 (Statute of Westminster III) prevented tenants from alienating their lands by any means other than by subinfeudation, instead requiring all tenants to do so by substitution (should they wish to alienate their land—this was not compulsory). Subinfeudation was the creation of new tenures by tenants through sub-letting or alienating a portion of their lands. Hugh Chisholm, ed. 1911 *Encyclopædia Britannica*, 25 v. (11th ed.), 'Subinfeudation,' Cambridge, 1911, 1062. For more on subinfeudation see Hugh M. Thomas, 'Subinfeudation and Alienation of Land, Economic Development, and the Wealth of Nobles on the Honor of Richmond, 1066 to c. 1300', *Albion: A Quarterly Journal Concerned with British Studies*, vol. 26, no. 3, 1994, 397 – 417 and see Thomas Glyn Watkin, 'Quia Emptores and the Entail - Subinfeudation and the Family Settlement in Thirteenth Century England', *Tijdschrift voor Rechtsgeschiedenis*, vol. 52, 1991, 353 – 374.

79 Swinburne, 1590, 71v.

80 This could be understood as including and altering elements to ensure the treatise was legally relevant, as this treatise was primarily aimed at students.

now by this Statute the Possession is transferred to him who hath the Use, and what ever Estate a Man hath in the Use, the same he hath in Possession.

- 28 *[second paragraph - citing I Rep. 126 & 136] But several Things are required to the Execution of an Use within this Statute: The First is, that some Person should be seised: But the King, a Corporation, an Alien, one attainted, &c. cannot be seised to the Use of another; nor Tenant in Tail, Tenant by the Curtesy or in Dower; the Cestui que Use must be in Being [citation states See 11 & 12 Will. cap. 16.]; there must be an Use likewise in Being, either in Possession, Remainder, or Reversion, &c. And where one conveyes Lands to another by Fine, Feoffment, or Common Recovery, to the Use of his Last Will; and afterwards by his Will declares the Uses, &c. this he may do without any Consideration, either of Kindred or Money. [Third paragraph] It seems that Copyhold-Lands are not within this Statute, because the Transferring the Possession to the Use by the Operation of Law, without Allowance of the Lord and the Agreement of the Tenant, would be to the Prejudice of both [citation states - Coke Copyholder, Sect. 54].⁸¹*
- 29 These three paragraphs demonstrate an alteration of the text and discussion of material other than relevant new statutes. The statement »Before this Statute was made ...« refers to the pre-1536 statute, and deviates from previous editions which sought only to include relevant new statutes. The alteration or inclusion of additional discussions occurs throughout this edition and the immediate two that followed; the treatise no longer remained entirely true to Swinburne's version.
- 30 Although the list of twelve cases remained the same across all nine editions, Swinburne developed his analysis of these examples in the editions made throughout his lifetime. Most prominently, Swinburne wrote that three overarching principles existed in these cases, and analyzed their differences in the examples described below, shown in Appendix 1.⁸²
- 31 Swinburne followed this section by copying the text of the Statute of Uses (1536), the Statute of Wills (1540), and the Explanation of the Statute of Wills (1542). He then moved on to discuss the topic of devising goods and chattels by will. The nearest common law treatment of these statutes is found in the Middle Temple reading by James Dyer (1552) and the Lincoln's Inn reading by Ambrose Gilbert (1556); however, Swinburne's detailed discussion of the multi-faceted aspects of devise of land helped ensure the continued relevance of his treatise, even in subsequent editions with slightly altered elements. Derrett states that »however technical the subject-matter, the same cheerful tone appears, such as his contemporaries (lawyers as celebrated as Coke or as

81 Swinburne, 1728, 118; It is curious that discussing pre-1536 statutes, no mention was made to the Statute of Marlborough or even the Statute of Mortmain.

82 The Passage was taken from the 1590 edition, transcribed by myself. The following footnotes will refer to the works cited by Swinburne. This passage begins on 71v.

adventurous as Fulbecke) seldom achieved, though their writings were less systematic.«⁸³ Swinburne utilised »above two hundred and twenty-five authors ... and about two hundred and seventy-five works, if we exclude the basic texts of the *Corpus Juris*, the *Decretum*, *Decretales*, *Clementinae*, and *Extravagantes*.«⁸⁴ This is all the more impressive considering Swinburne published this work after practicing for only twenty-three years. Given the breadth of his source material and the complex subject matter he dealt with, Derrett noted that »indeed that seems a short time. Clerke was in the profession forty years before he drafted his *Praxes*.«⁸⁵

32 The editors of the 1793 version seem to be unaware of the existence of the 1743 version.⁸⁶ This could explain why the editor referred to it as the seventh edition; they agreed that the 1635 and 1640 versions were separate but were unaware of the 1743 edition. The exact same passage appeared that was reiterated in the various editions up to the 1728 edition, and this was present in the 1743 and the 1793 editions (but the 1793 edition did not extend the list to include the 1743 edition). Perhaps they omitted the 1743 edition for a reason that remains unclear; however, it is most likely that the editor and printer were unaware of its existence.

33 The final edition, published in 1803, did not follow the style of the three preceding editions and in some respects favoured the earlier editions with their focus on statutes. However, the 1803 edition was by no means a mere copy of the versions from the 16th and early 17th centuries; rather, this was the largest edition, printed over three volumes totaling nearly 1250 pages, with additional material. There are a variety of factors that might explain why the treatise was not reprinted after 1803, one of which is the deviation from Swinburne's initial purpose, that »this one little booke may serve in steed of many great volumes.«⁸⁷ The final edition in 1803 was expansive and expensive, and the 1250 pages of text could not be sustained and would be replaced by other works. In the same way Swinburne had wished to create a small work, others would now seek to write about the subject in more accessible and concise publications. Further, the growing irrelevance of ecclesiastical law, which was stripped of testamentary authority in the 1800s, may have also contributed to the irrelevance of Swinburne's writings—editors were unlikely to reprint

83 Derrett, *Henry Swinburne*, 13.

84 Derrett, *Henry Swinburne*, 17; Derrett compiled a list of sources Swinburne consulted [considering the treatise as a whole], listed in Appendix II of Derrett's text. Derrett provides a summary of some of the sources Swinburne himself used but the number of sources increased with each further edition. Baker notes 'his scholarly pains are evident in the copious citations, ... ranging from the classics to the latest continental writers on Canon law. Swinburne was not only familiar with the modern English reporters, Dyer and Plowden, and naturally with the *Decisions Rotae*, but more remarkably he was also *au fait* with the law reports of the *jus commune*, with d'Afflitto and Capece of Naples, with Corsier of Toulouse, and with Boyer of Bordeaux. The enormous range of learning displayed naturally raises the question where Swinburne could have read the books.' Baker, 'Famous English canon lawyers', 9; There continues to be debate surrounding Swinburne's access to material and the type of materials held in York and the Doctors' Commons: see G. D. Squibb, *Doctors' Commons*, Oxford, 1977, specifically 88 [responding to and questioning Derrett, *Henry Swinburne*, 18 and 32].

85 Derrett, *Henry Swinburne*, 17.

86 Swinburne, 1793, B2.

87 Swinburne, 1590, B.

a text which was no longer true to legal practice. Without much legal relevance, publishers lacked financial incentive to continue reprinting editions. However, it is important to note that Swinburne's influence did not suddenly end in 1803, even though his work was no longer reprinted.

34 Swinburne's treatise provides an interesting case study of devise of land and textual evolution in early modern England. The nine versions printed during this roughly two-hundred-year period reflect the importance of this text in the development of English law and the education of law students for over two centuries. The treatment of devise of land is a case study representative of wider issues, both within Swinburne's treatise and broader cultural, social, and legal developments. In Swinburne's lifetime, »land was still the most important asset.«⁸⁸ There are considerable variations in the subsequent editions, which allow readers to compare the types of cases in which devise of land was permissible for a period spanning over two centuries.

35 With reference to uses, »one plausible explanation for the apparent oversight by legal historians is the careless imposition of equity onto the use by subsequent editors of their work.«⁸⁹ Derrett is critical of the later editions, stating that »editions after his last are defaced with innumerable misprints and errors in citation.«⁹⁰ These issues were not limited to the section on devise of land. One such example from the 1793 edition was the removal of »references to customary law ... [replacing] it with an explanation that is entirely the editor's invention:«⁹¹

36 *The usual way in former days to dispose lands which men had by purchase, was be feoffments in trusts; and they directed by their last wills, how those feoffees should dispose the estates; and because a trust was properly under the jurisdiction of a court of equity: That court would compel the feoffee to execute the trust, the case he should refuse to do it at the request of the persons for whom he was intrusted.*⁹²

37 The 1677 edition made no mention of the idea that only Chancery could remedy against a breach of trust, yet the editor of the 1728 edition included:

38 *Before this statute was made [Statute of Uses], if lands were limited to one and his heirs, to the use of another, the Cestui que Use might take the profits; and the person in while the freehold was vested was to make estates*

88 Derrett, *Henry Swinburne*, 14.

89 Breach, 'The Development of the Use', 216.

90 Derrett, *Henry Swinburne*, 12; Derrett goes into particular difficulties, such as challenges the printers had in imputing citations—and in later editions, the Latin—which Swinburne insisted upon.

91 Breach, 'The Development of the Use', 216.

92 Swinburne, 1793, v.1, 56.

*according to the direction of the Cestui que Use, who had only a bare trust, and had no remedy against the other [a feoffee] for a breach of trust, but only in Chancery; but now by this statute the possession is transferred to him who hath the use, and what ever estate a man hath in the use, the same he hath in possession.*⁹³

39 The various editions' inclusions, alterations, or outright removal of sections occurred at the discretion of editors. The editors of the 1803 edition were critical of this and referenced Powell's decision to reprint based upon the 1640 edition in an effort to avoid such editorial alterations.

4. Devise of land⁹⁴

40 In 1981, Milsom stipulated that the Statute of Uses⁹⁵ in 1536 »had abolished both [uses and devises] together,« and that although the 1540 Statute of Wills⁹⁶ incorporated devises though circumventing the old mechanisms by making »it operate directly at law,« the issue of devising land was effectively put to rest (in the opinions of Henry VIII and his advisers upon passing 32 Hen. VIII, c.1.).⁹⁷ Swinburne, writing fifty years later, devoted a portion of his treatise to the topic of devise of land. Indeed, later editors of Swinburne's treatise included more material and lengthened the analysis of this section. It is therefore a focal point of this article for two reasons: first, it demonstrates changes in Swinburne's treatise between editions in both content and analysis, and second, it reflects the fact that the issue of devise of land was not definitively decided by the passage of two successive statutes. This article focuses on freehold land, which was much »altered by the Statutes of Uses and Wills,«⁹⁸ and leasehold land is not considered.⁹⁹ A series of important cases in devise of freehold land occurred leading up to Swinburne's time, and »by the end of the sixteenth century it had been established that, provided the testator took the proper steps during his lifetime and worded his will carefully, it was possible for him to devise land without reference to the Statutes of Wills.«¹⁰⁰

93 Swinburne, 1728, 118.

94 Several conditions/examples of devise of land were added in the 1677, 1728, 1743, and 1793 editions but not present in 1590, 1611, 1635, 1640, and 1803 editions.

95 27 Hen. VIII, c.10.

96 32 Hen. VIII, c.1.

97 S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed., London, 1981, 222.

98 Jones, 'Wills, Trusts and Trusting,' 277.

99 For more on the divide between freehold and leasehold land, see N.G. Jones, 'Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham,' 31, n. 3 *Journal of Legal History* (2010), specifically 274-281.

100 R.E. Megarry, 'The Statute of Uses and the Power to Devise', *Cambridge Law Journal*, 1940, 359.

41 Within the last few decades, it has become increasingly »known that by the late fourteenth and early fifteenth centuries it had become common for landholders to create feoffments to uses to in effect bypass the common law rule prohibiting the devise of freehold land by last will.«¹⁰¹ In Swinburne’s 1590 edition, his treatment of devises and uses included the following:

42 *there was also some-times used and practised, of devising lands, tenements, and hereditamentes by willes to certain uses, intentes, and trustes; which willes or testamentes of landes, tenementes or hereditamentes in feoffees handes were for the time accompted and taken for good. But this custom was reformed in many things...*¹⁰²

43 This section of Swinburne’s treatise deals with difficult issues, among which is »the question of the presence—or absence—of a power to devise.«¹⁰³ Indeed, contemporaries »saw a distinction between a feoffment to the uses of a last will, and the power of devise under the Statute of Wills 1540.«¹⁰⁴

44 In the immediate period leading up to Swinburne writing his treatise, several major cases occurred, of which two will be noted. First, the relation between uses and devise shall be outlined:

45 *Medieval uses can be divided into two great classes, those which transmitted land from one generation to the next and those which did not. [i] Uses of the [second] class were created to secure debts or other obligations, [ii] to avoid*

101 Ashley Hannay, ‘By Fraud and Collusion’: Feudal Revenue and Enforcement of the Statute of Marlborough, 1267–1526’, *Journal of Legal History* (2021), 1.

102 Swinburne, 1590, 72r.

103 Jones, ‘Wills, Trusts and Trusting,’ 295.

104 Jones, ‘Wills, Trusts and Trusting,’ 295.

creditors, [iii] to evade litigation, and [iv] to circumvent the Statute of Mortmain.¹⁰⁵

46 Richard Helmholz notes that fourteenth-century ecclesiastical courts enforced uses and that the main purpose of the feoffment to use was to permit the feoffor to devise land.¹⁰⁶ The Statute of Uses altered the pre-1536 tradition which allowed for feoffments to the uses of a last will, »by executing uses and passing legal title from the feoffees to *cestui que use*.«¹⁰⁷ Recent research has argued that »the legislation relating to loss of feudal revenue eventually culminated in the ‘assault on uses’ in the 1520s, the Statute of Uses 1536 and the subsequent political compromise of the Statute of Wills 1540.«¹⁰⁸ Some select cases have been outlined in both uses and devises to contextualize Swinburne’s treatment in the late sixteenth century.¹⁰⁹ When considering the relatively substantial expenses and amount of effort that publishers went to in order to expand and change the relevant sections on devise of land, it is curious why Swinburne’s treatise was not cited for this topic.¹¹⁰

105 Breach, ‘The Development of the Use’, 45; J. Biancalana, ‘Medieval Uses’, in R. Helmholz and R. Zimmermann (ed.), *Itinera Fiducia: Trust and Treuhand in Historical Perspective*, Berlin, 1998, 112; The Statute of Mortmain was passed in 1279 and 1290, and states the following: Statute of Writs for making Inquisitions of Lands to be put in MORTMAIN. CONCERNING Men of Religion who may hereafter desire to purchase Lands or Tenements of their own Fees or granting others, whereby those Lands or Tenements should fall into the Writ of Inquiry, Mortmain, against the form of the Statute of our Lord ... The Writ of our Lord the King in the Chancery to make Inquisition, whether it be to the loss of our Lord the King, or of others, if he give or assign to any Religious Men or others, any Lands or Tenements according to the Form of the Writ used in the Chancery, shall not be granted to any Man, in case where those Lands or Tenements are to come to Mortmain, but by Petitions put up in the full Parliament: And so that if those Religious Men, or other to whom such Lands or Tenements are to be granted, be so needy and poor that they cannot live of their own, Our Lord the King hereupon, after due advice had, shall do as shall please his Grace. *The Statutes of the Realm*, vol. 1., 1963: 111; Mortmain is understood as perpetual, inalienable ownership of real estate by a corporation or legal institution; (translated as ‘dead hand’), it sets out important principles for devise of land. The Statute of Mortmain can be viewed in conjunction with the chapter 6 of the Statute of Marlborough (1267) which addressed collusive and fraudulent feoffments, which made it illegal for tenants to enfeoff land to their eldest sons which would deprive lords of wardships and their feudal revenues. Marlborough introduced the concept that ‘feoffment could either be ‘bona fide’ or ‘by fraud and collusion.’ Hannay, ‘By Fraud and Collusion’, 3.

106 Breach, ‘The Development of the Use’, 42; R. Helmholz, ‘Trusts in the English Ecclesiastical Courts 1300 – 1640’, in *Itinera Fiducia*, 159; See also R. Helmholz, ‘The Early Enforcement of Uses’, 79, n.8 *Columbia Law Review* (1979), 1503–1513; R. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, Oxford, 2004, 421.

107 Jones, ‘Wills, Trusts and Trusting’, 277.

108 Hannay, ‘By Fraud and Collusion’, 7-8.

109 *Lingen’s Case* (1573); During Swinburne’s lifetime, several cases of uses were partially accepted in wills or came before the courts with equally interesting decisions. *Lingen’s Case* is an example of ‘a good devise of the land, by the intention of the devisor, although by no possibility could the feoffees stand seized to the said use’ (3 Dyer 323a). *Lingen’s case* demonstrates the limitations of an individual’s ability to hold freehold property seisin by a use, while a successful devise of land; For a more in-depth treatment of these cases (leading into the seventeenth century) see Jones, ‘Wills, Trusts and Trusting’, 273-282; other such cases of interest noted by Jones include *Aatley v Trevillion* (1589) and *Girland v Sharp* (1595).

110 In relation to how the treatise was used in practice, citations of »Swinb*« in the English Reports shows that the book was a source for the civil law of succession, as in force as such in the English law of succession to moveables, and not cited in relation to devises of land.

5. Swinburne and Uses

47 Swinburne treated uses under the heading: *certain cases approoued by custome, wherein it is lawfull to devise landes, tenementes, or hereditaments*.¹¹¹ Swinburne »appreciated the nature of uses and the effect of the statute while writing the treatise that later English courts routinely cited for testamentary issues.«¹¹² He wrote on uses that:

48 *devising lands, tenements, and hereditamentes by willes to certain uses, intentes, and trustes; which willes or testaments of landes, tenementes or hereditamentes in feoffees handes were for the time accompted and taken for good.*¹¹³ [New paragraph] *But this custome was reformed in manie things ...*
114

49 Swinburne situated the Statute of Uses as this reform, arguing that it »aimed to protect heirs and address uncertainties surrounding other legal rights that fifteenth-century uses caused.«¹¹⁵ As Hannay demonstrates, the aim within reform of uses may have been in line with feudal revenue via heirs, rather than »to protect heirs« themselves. Swinburne »conceptualised the use alongside other customary exceptions to the common law that allowed devises of land. Namely, Gavelkind, a customary division of lands amongst all heirs, and land held in Burgage tenure divisible by will.«¹¹⁶

50 Swinburne's treatment of devise of land, as well as the subsequent alterations and additions to the versions of his treatise following his death, reflect the importance of this subject and the failure of the statutes of 1536 and 1540 to resolve its issues. Devise of land received considerable treatment in each edition, and references by the common law courts would be made to this topic in several cases from the seventeenth to nineteenth centuries.¹¹⁷ Swinburne's treatise, in all its nine editions, influenced successive generations of English laws, both common and ecclesiastical.

111 Swinburne, 1590, 71v.

112 Breach, 'The Development of the Use', 215; Swinburne's treatise was cited in many common law courts and in cases, including *The Duke of St. Albans v Miss Caroline Beauclerk and Others* (1743) 2 ATK [637]; 26 Eng. Rep. 780 (Chancery); *Doe v Evans* (1839) 10 AD & E [227]; 113 Eng. Rep. 88 (King's Bench).

113 Swinburne, 1590 cites: 'Stat. H.8.20.22.C.10.'

114 Swinburne, 1590, 72r.

115 Breach, 'The Development of the Use', 214-215.

116 Breach, 'The Development of the Use', 215; Gavelkind and Burgage tenure 'pertaining to a specific locality, while uses appear in Swinburne's treatment as a general custom available throughout England.'

117 See footnote 112 for examples.

6. Conclusion

51 This article seeks to reassess how we understand Swinburne's *A briefe treatise of Testaments and last Willes*, its interpretation of devise of wills, and our knowledge of early modern textual evolution from the sixteenth to nineteenth centuries. Devise of land is only one example of the shift occurring in Swinburne's treatise and its influence on English law. As Helmholz has shown, when Swinburne was cited, those citations were primarily legal citations, demonstrating that lawyers made use of his coherent and learned treatments of the civil law on wills and testaments.¹¹⁸ This treatise helped educate and train law students over two centuries, thereby ensuring its place in the history of influential jurisprudential writing. It explains the influence of continental jurisprudence in England after the Reformation¹¹⁹ and the later decline of such influence. Swinburne's treatise reflects wider trends of the period, such as the decline of continental learned sources, a growing focus on English statutes and case law, and the creation of more readily accessible material. Considering Swinburne's career as an ecclesiastical lawyer, it is surprising that his treatise would come to represent such change, but the work was bolstered by his practical legal experience.¹²⁰

52 Nine editions of Swinburne's first treatise were published between 1590 and 1803. As outlined above, this article makes two claims. First, the debate surrounding the 1635 and 1640 versions was most likely not due to the copies being identical but rather the inferior quality of the 1635 version, which required a better version to be produced only five years later. This demonstrates the influence of the treatise; the need for a more legible version was quickly realised by publishers who understood the potential to profit from producing a better version just five years later. Secondly, the evolution of Swinburne's treatise on the devise of law demonstrates the unique traits of each version, which must be considered distinct. In particular, the sections on devise of land via wills altered both the scope of when such action was considered acceptable and the rationale behind such conditions. Ultimately, Swinburne's treatise represents one of the great English works on wills and testaments and was an important source for legal education in England. This treatise is only one example of the large topic of the validity and influence of continental jurisprudence in England after the Reformation.

118 Helmholz, "English Common Law and the *Ius Commune*: The Contributions of an English Civilian", 135.

119 For more on the validity of continental scholarship see R. H. Helmholz, *Roman Canon Law in Reformation England*, Cambridge, 1990.

120 Baker, *Monuments of Endlesse Labours*, 66: 'It is clear proof of the continuing importance of Swinburne's text to all English lawyers, and of its accessibility, that this final edition [1803] should have been the work of barristers trained in the law of real property rather than of a civilian from Doctors' Commons.' Further research is required to determine the legal tradition (ecclesiastical or common) of each editor, following the first two editions in which Swinburne was directly involved in the production.

121 The footnotes for appendix 1 denote the sources Swinburne used. All citations are taken from the 1591 edition unless noted.

Appendix 1:¹²¹ The first case wherein by custome of this realme of England it is lawfull for a man by his laste will or testament, to devise or bequeath landes, tenements or hereditaments, is this, namely, when lands, tenements or hereditaments are holden in Gavel-kind: for such landes, tenements or hereditaments by ancient custome, maie be given or devised by wil,¹²² (the same otherwise being duellie made). For after that William duke of Normandie, had invaded and conquered all England, Kent onelie excepted, at last also the Kentish-men yeilded, but upon condition that they might enjoy their ancient customs of Gavelkind, which was graunted onto them, & since has continued:¹²³ amongst which customes, being verie large and beneficiall, this is one; that they which holde landes in Gavelkind, may giue and fell the same, without license asked of their lordes: sauing unto the lordes, the rents and services due out of the same tenementes.¹²⁴

[new paragraph] The second cause is, when the lands or tenement be holden in Burgage tenure.¹²⁵ For it is the custome of diuers Cities and Boroughes of this land, (as in London, Yorke, Oxford, &c.) that such persons as are seased of landes, tenements or hereditamentes, lyinge and being in such cities or boroughes, and hold the same in burgage tenure, maie by their testamentes or last willes, give or bequeath the same to whom they will,¹²⁶ to holde in fee simple, or in fee taile, or for life or yeeres, or otherwise, and such bequeath or devise is good,¹²⁷ the will being lawfullie made, and proved before the ordinarie, as touching the goodes and chatelles bequeathed in the same, and enrowled before the maior of the said citie or borough.¹²⁸ Howbeit, it is not alwaies necessarie, that the testament be proved before the ordinary, or inrolled, wherein landes onelie, and no goodes and cattelles are bequeathed:¹²⁹ For in some places by the custome there used, the devisee maie enter to the landes devised, of his own authoritie, without any probation or inrolment praecedent, and in other places hee is to bee put in seasin, or possession by the Balise.

¹³⁰ [The following italicised passage was added by Swinburne in the 1611 edition but is not present in the 1590 edition] *Neyther is it necessary, that the will wherein burgage lands is devised, should be written according to the forme prescribed in the Statute of Henry the eighth,*

122 In Swinburne, 1591, 71v-73v, he cites (71r): Dyer. fol. 153.verb. devise. Terms of law. verb. Gavelkind & ita saepissime accipi a noenullis hui regni iurisperitis. In the 1611 edition (74v-76v), Swinburne cites the same but includes additional material: Dyer. fol. 153.verb. devise. Terms of law. verb. Gavelkind & ita saepissime accipi a noenullis hui regni iurisperitis. *Trac. de repub. Angl.fol.107.* 1611, 74r.

123 Lambert. Permbulation of Kent. fol.23.

124 Terms of law. Vbi supr. Lambert.vbi.supra.fol.416.

125 Fitzherb.Nat.Bre.ex graui querela. in prin.Doct & Stud.li.I.C.7.&10. - Referring to Christopher St. Germain, *Doctor and Student* (1528).

126 Brook.Abridg.tit.devise.n.22.51.Fitzher in d.Br.exgravi que-rela.Doet.& Stud: d.c.7.&10. Lindw.in.c.statut.de testam.lib.3.provincial.constitue. Cant.verb.de consuetudine.& verb. laicalis feodi.cod.c.

127 Fitzherb. In d.Breui exgravi querela.

128 Fitzherb. In d.Breui exgravi querela.

129 Brook Abridg. tit. devise. n.43.

130 Brook.d.tit.devise.n.43.principall grounds. tit. burgage.fol.43.

¹³¹ *the said land being devisable before the making of that statute, prescribing a forme of the devise of lands, which could not passe by will, before the making of that statute, as I have formerly declared.*¹³² And it seemeth not to be needeful, to the validitic of the devise in this case, that the testator should be a citizen; or burgess of that citie or boroughe where the landes or tenements devised doo lie: but it is sufficient, if the landes and tenementes be holden in burgage:¹³³ For that not he onelie is said to holde in burgage, who is a citizen or burgesse of the place where the lands or tenementes be, and holdeth of the kinge, or other lorde landes or tenementes, lying in the citie or borough, yeelding therefore to his said lord a certaine yeerelie rent: but he also that is no citizen or burgesse, which holdeth of anie lord landes or tenementes in burgage, yeelding upon him a certaine rent by the yeere,¹³⁴ which tenor in burgage is but a kind of tenure in soccage.¹³⁵ However there is this difference betwixt citizens, burgesses, and free-men, and those which be not citizens, burgesses or free-men, that is to say, citizens, burgesses and free-men, may bequeath their burgage landes to Mortmain, which others can not doe.¹³⁶ And in some borough by the custome thereof, a man may devise by his testament lawfullie made, his landes and tenementes, which hee hath in fee-simple within the same borough at the time of his death, and by force thereof the divisee, after the death of the testator, maie enter into the tenementes to him devised, to have and to holde to him after the sorme and effect of the devise, without anie libertie of seasin thereof to be made unto him.¹³⁷ But if there be two joynite tenauntes in fee-simple, within one borough, where the landes and tenementes within the same be devisable by testament, if one of the said joynite tenants devise that which to him belongeth, by testament and die, this devise or legacie is voide:¹³⁸ The reason is, for that no devise can take effect til after the death of the testator, who did bequeath and devise the same, but by his death all the lande dooth incontinentlie by the lawe of this realme, come to the survivor, who neither claimeth nor hath anie thing by devise but of his owne right by the survivor according to the course of the lawe of this lande, and for this cause such devise is voide.¹³⁹ [New paragraph] Another case there was also some-times used and practised, of devising lands, tenements, and hereditamentes by willes to certain uses, intentes, and trustes; which willes or testamentes of landes, tenementes or

131 Swinburne 1611 cites: H.8.32.ca.1.

132 Swinburne 1611 cites: Sup.part.I.S.II.c.5; This brief passage included in 1611 denotes how it is not always necessary for a devise to be written according to the form presented in the Statute of Wills.

133 Brook tit.devise.n.22.

134 Old.tenures.verb.burgage.

135 Littleton.tit.burgage.in prine.

136 Brook Abridg. tit. custome. n 7.38.41. tit. devise. n.22. 28. Doct. & Stud. lib. I.c.10.

137 Littleton.tit.burgage.

138 Principal grounds. fol.20.b.

139 Principal grounds. fol.20.b.

hereditamentes in feoffees handes were for the time accompted and taken for good.¹⁴⁰ [New paragraph] But this custome was reformed in manie things, for divers good considerations: namelie, because by the common law of this realme, lands, tenements & hereditaments: be not devisable by testament: and also for that such devises were not onelie hurtfull to the heire of the testator, beeing manie times thereby disinherited, but also for the divers other inconueniences did by reason thereof insue: as that the lordes lost their wards, mariages, reliefs, harriots, escheates, aids, *pur faire fitz chiualer & pur file marier*. Furthermore by occasions of suche willes, and other conueiaunces, to secret intentes, uses and trustes, men could not be certainelie assured, of anie landes by them purchased, nor knew not against whom they should use their actions & executions, for their rights and titles. Besides this, men married lost their tenaces by the curtesie, women their dowries; finally the prince himselfe lost the profits of the landes of persons attained: For reformation whereof a statute was made in the time of King Henrie the eight, and enacted as followeth.¹⁴¹

140 Stat. H.8.20.22.C.10.

141 Stat. H.8.an.27.c.10.