

INFIDELS IN ENGLISH LEGAL THOUGHT: CONQUEST,  
COMMERCE, AND SLAVERY IN THE COMMON LAW FROM COKE  
TO MANSFIELD, 1603-1793.

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*English common law reports are dense with ideas. Yet they remain mostly untapped by intellectual historians. This article reveals how the history of ideas can engage with law and jurisprudence by following the notion that ‘infidels’ (specifically non-Christian individuals) deserved to receive exceptional treatment within England and across the globe. The starting point is Sir Edward Coke: he suggested that infidels could be conquered and constitutionally nullified, he suggested they could be traded with only at the discretion of the monarch, and he confirmed their incapacity to enjoy full access to the common law. This article will uncover how each of these assertions influenced the development of the imperial constitution in the seventeenth and eighteenth centuries, when it came to war, trade, and slavery. Identifying each of the major moves away from Coke’s prejudices, this article argues that sometimes common lawyers responded to political change but at other times anticipated it.*

The history of law must be a history of ideas. It must represent to us not merely what men have done and said, but what men have thought in bygone ages. [...] [W]e must infer what people thought in the past from what they wrote.

F. W. Maitland, “The Corporation Aggregate,” 1893.<sup>1</sup>

The English common law relies upon the abilities of counsel and judges to interpret and evaluate precedents. This makes the law reports, which record the argumentation used to inform the judgments subsequently offered as precedents, critical to the process of administering justice. So they are today, as they were in the early modern period, when the industry professionalised. As reports became produced in large quantities and consumed by students, so too were they eradicated of variations in language, style, and substance. Whether adjectival or declaratory, all of the ideas found within the reports could then be seen to fall, as still they can today, into one of two categories: *ratio decidendi*, which is the reasoning behind a specific decision that binds later judges, and *obiter dictum*, which is an observation hashed out in the course of reaching a specific decision that is not considered to bind judges but may nevertheless be persuasive to them. This article will concern itself principally with dicta in order to consider the circumstances whereby they have come to be discredited or used to develop new precedents in the context of legal and political crises associated with trade, war, and slavery. Specifically it will look at those circumstances which compelled individuals working within the English common law to consider the idea that infidels were somehow different to Christians. Inspired by work at the crossroads of legal history and the intellectual

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<sup>1</sup> Frederic William Maitland, “The Corporation Aggregate: The History of a Legal Idea” (unpublished lecture, 25th May, 1893).

history of the British Empire, this article presents a novel way to write the history of ideas.<sup>2</sup> This involves setting aside, but never forgetting, some of the best-known treatises and pamphlets in history, political philosophy, and political economy, in order to take jurisprudence seriously on its own terms.<sup>3</sup> Approaching the law reports in their totality, and in isolation, encourages us to think like common lawyers did: for them, no material was more important than these reports. They represent a repository of ideas. Furthermore, and this is not trifling, here is an approach that allows for some consideration as to how far the trajectory of any single idea may be determined by the medium of its presentation.

This article begins with a consideration of perhaps the most important English common lawyer of his time, Sir Edward Coke (1552-1634). Coke was a man who expressed a number of the profound constitutional anxieties peculiarly associated with the Tudor-Stuart transition. For J. G. A. Pocock, it was at this very moment that there began to flourish a kind of ‘historical thought’ especially idealistic of timeless custom. It has been tempting for some legal historians to simplify and contort Pocock’s argument to suggest that, as the royal prerogative came to be used and misused by Stuart kings, so too did the “common law mind” look with greater

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<sup>2</sup> Recent intellectual histories of empire which take law seriously include Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge, 2014); Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Princeton, 2015); Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton, 2015). The classic text is still David Armitage, *The Ideological Origins of the British Empire* (Cambridge, 2000). Intellectual legal histories include Alan Cromartie, *Sir Matthew Hale: Law, Religion, and Natural Philosophy* (Cambridge, 1995); Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England* (Cambridge, 2006); Michael Lobban, *The Common Law and English Jurisprudence, 1760-1850* (Oxford, 1991); Michael Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900* (Dordrecht, 2007); Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge, 2015). The pioneer of this tradition was Maitland, of course.

<sup>3</sup> This is not, of course, to suggest that the law reports represent the only place where law was discussed and acted out in the making of modern empires. Historians continue to maintain that ‘legal posturing’ was performed in a variety of different contexts by colonists, merchants, mid-level bureaucrats, governors, ministers, crown law officers, diplomats, and others who together shaped the legal mind of imperialism. Ronald Robinson and John Gallagher with Alice Denny, *Africa and the Victorians: The Official Mind of Imperialism* (Basingstoke, 1982); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires* (Cambridge, 2009); Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge, MA, 2016); Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford, 2011).

selectivity and insularity into the English medieval past for evidence of institutional stability *perseverant* of that prerogative.<sup>4</sup> Coke's pronouncements in *Calvin's Case* (1608) may be seen in this light, though it is more difficult to see all of Coke's offerings upon the subject of infidels in a similar way. Besides running the risk of overlooking some subtleties of distinction between *dicta* and *ratio* in his jurisprudence, more recent scholars, like David Chan Smith and Ian Williams, have persuasively cautioned against seeing Coke's approach to the powers of crown, parliament, and common law as inflexible. Instead we might rather see Coke as somewhat more of a reformist than he has been allowed by the strictest proponents of the theory that his 'ancient constitutionalism' was entirely oppositional to the royal prerogative.<sup>5</sup>

Commerce and empire were crucial to the modernisation of the English common law. Scholars of *Calvin's Case* and the imperial constitution have long appreciated this.<sup>6</sup> What is less common among historians, however, is an approach which takes a selection of Coke's ideas on the same topic from different sources in order to follow these through the jurisprudence. Doing so, as this article does, reveals how lawyers and judges responded to developments at home and abroad. The jurist of most importance in this frame will be Lord Mansfield (1705-93), whose reputation for intervention made him a favourite among private law reporters then, and historians now.<sup>7</sup> As a revamping Chief Justice, Mansfield made a sport of discrediting

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<sup>4</sup> J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study in English Historical Thought in the Seventeenth Century* (Cambridge, 1987), esp. 30-69. See also Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (Basingstoke, 1992).

<sup>5</sup> David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578-1616* (Cambridge, 2014); Ian Williams, 'Edward Coke', in Denis Galligan, ed., *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford, 2014); Cromartie, *Constitutionalist Revolution*, 179-233. For doubts about the ability to generalise about a "common law mind", see J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore, 2000).

<sup>6</sup> Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review*, 21/3 (2003), 439-82; Gavin Loughton, "Calvin's Case and the Origins of the Rule Governing 'Conquest' in English Law," *Australian Journal of Legal History*, 8 (2004), 143-80; Poole, *Reason of State*, esp. 19-167.

<sup>7</sup> See especially James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols (Chapel Hill, 1992); James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill, 2004).

Coke's dicta, conscious of the need to make the common law more functional within a religiously tolerant commercial society such as Great Britain, he thought, should become.<sup>8</sup> Between Coke and Mansfield there lived John Holt (1642-1710), who is thoroughly interesting for managing to survive the officeholding upheavals of the 1680s to become a proponent of the unpopular idea of imposing limitations on government.<sup>9</sup> This article will suggest moreover that a number of Holt's observations about infidels within debates about conquest, commerce, and slavery became influential in the development of the imperial constitution in his lifetime too. As Holt and his colleagues were made to engage with Coke's assertions about infidels, they were also confronted with an odd adaptation of these ideas, that is, one which suggested that the faithlessness of heathen slaves could provide for the possibility of recognising property in them.

By no means, it is important to qualify, did Coke introduce the concept of faith into the English legal tradition. In the Middle Ages, tenants abided by the feudal expectation that an oath of fidelity (or "fealty") was owed to their lords. Analogical to this was the expectation that clerks, merchants, and men of religion from Christendom beyond England were required to profess, upon arrival into the realm, their fidelity to the king (*ad fidem regis*).<sup>10</sup> Separate to this was the qualification of good faith (*bona fide*) for actions and obligations. This was a recognisable standard for individual interactions within the later medieval common law, just as it had been for civilians, canonists, and theologians on the continent.<sup>11</sup> A requirement of faithfulness was even

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<sup>8</sup> David Lieberman, *The Province of Legislation Determined* (Cambridge, 1989), 88-121.

<sup>9</sup> Philip A. Hamburger, "Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London v. Wood*," *Columbia Law Review*, 94/7 (1994), 2091-2153.

<sup>10</sup> For aliens, birthright, and status in England, see Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge, 2000).

<sup>11</sup> James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World, 1250-1550* (Liverpool, 1979); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Michigan, 2001); James Gordley, *The Philosophical Origins of the Modern Contract Doctrine* (Oxford, 1991), esp. 30-68; Martin Joseph Schermaier, "Bona Fides in Roman Contract Law," in Reinhard Zimmermann and Simon Whittaker, eds., *Good Faith in European Contract Law* (Cambridge, 2000), 63-92; James Gordley, "Good Faith in the Medieval Ius Commune," Zimmermann and Whittaker, *Good Faith*,

set out in the very name of the action at common law which developed in the sixteenth century to account for contracts (*assumpsit et fideliter promisit*).<sup>12</sup>

By contrast, what pertained within English law to faithlessness – specifically the inability to keep faith with other Christians – was obscure ever since the early emergence of this prejudice around the time of the Crusades. It may have been natural for William of Newburgh (1136-1198) to associate the Jews of York with “perfidy,” for this had become something of an ethnographic trope across western Europe since at least Isidore of Seville (560-636), but how far such rhetoric can be said to have influenced English law is certainly a question.<sup>13</sup> Lots of Jews bought and sold land and other things in England without much difficulty or harassment; or, at least, they did until 1290, when Edward I orchestrated a widespread eviction of Jews entirely on the basis of what he perceived to be the pernicious effects of their money-lending, rather than their faithlessness.<sup>14</sup> With England purged of its Jewish population during the fourteenth, fifteenth, and sixteenth centuries, that left few subjects of the realm around to identify openly as non-Christians – and none, it is surely more important for the purposes of this article, to record their pleas before the courts of common law. Not until 1520 was the inability of a “pagan” to have an action at common law first observed by Justice Richard Broke on a case of trespass in the Court of Common Pleas: to Broke’s mind, the circumstances of that case – concerning the disputed ownership between two Christian Englishmen of a bloodhound – required a distinction between damages and injury, for which purpose it was necessary to run

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93-117; Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Leiden, 2013).

<sup>12</sup> David Ibbetson, *Historical Introduction to Law of Obligations* (Oxford, 1999), 126-52.

<sup>13</sup> Bat-Sheva Albert, “Isidore of Seville: His Attitude Towards Judaism and his Impact on Early Medieval Canon Law,” *Jewish Quarterly Review*, 80 3/4 (1990), 207-20; Wolfram Drews, *The Unknown Neighbour: The Jew in the Thought of Isidore of Seville* (Leiden, 2006).

<sup>14</sup> Paul Hyams, “The Jews in Medieval England,” in Alfred Haverkamp and Hanna Vollrath, eds., *England and Germany in the High Middle Ages* (Oxford, 1996); Paul Hyams, “Faith, Fealty and Jewish ‘Infidels’ in Twelfth-Century England,” in Sarah Rees Jones and Sethina Watson, eds., *Christians and Jews in Angevin England* (York, 2013), 125-47; P. Elman, “The Economic Causes of the Expulsion of the Jews in 1290,” *Economic History Review*, 7/2 (1937), 145-54.

through the legal disabilities of outlaws, traitors, and pagans (all of whom featured alongside women and villeins).<sup>15</sup> Pagans belonged to this motley crew of common-law rejects owing to their inability to keep faith and swear oaths, a disability that was subsequently expanded, through legislation, to make them out to be the enemies of the crown.<sup>16</sup>

In other words, whereas *good faith* could attach itself to customs governing the intention and performance of individuals within contractual relations, and *fidelity* could attach itself to the symbolism and ceremony of loyalty and ligeance, *infidelity* was a vague condition of legal disability up to the end of the Tudor period. Coke's importance owes to his association of infidels with three particular characteristics in the early seventeenth century: infidels could be conquered and taken over *in toto*; infidels could be traded with only at the discretion of the monarch; infidels could never give evidence at common law. While these novelties were conceived in England from dicta and commentaries offered to explain conditions in England, their effects would be most remarkable beyond the British Isles. Lawyers at home and abroad had no choice but to return to Coke time and again to make sense of the developing imperial constitution from the earliest settlement at Jamestown to the aftermath of the Seven Years' War. As a result, a variety of different colonial interests were drawn into contemplations of their activities in relation to Coke's feelings about infidels. At different times, chartered corporations, private traders, slavers, planters, and settlers were affected in their own different ways by the *idea* of infidels.

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<sup>15</sup> *Y[ear] B[ooks]* Trin. 12 Hen. VIII, fo. 4, pl. 3 (1520.003ss): "Et home foit faire damage a moy, & ne faire injury (damnum absque injuria); Come si l' Seignior bate son villein, ou l' baron sa feme, ou on bate un home utlage ou traitor, ou pagan, ils n' auront accion, pur ceo qu ilz ne sont pas able de suir action." For the observation that the reference here to pagans is "esoteric," see J. H. Baker, *The Oxford History of the Laws of England, Volume VI: 1483-1558* (Oxford, 2003), 598n13.

<sup>16</sup> The earliest statutory expression of "infidels," found in a few Tudor statutes, recurs with similarly miscellaneous association to other foes of the crown: each of the Treason Acts of 1534, 1551, and 1571 takes aim at "any person" that might be "an Heretick, Schismatick, Tyrant, Infidel or Usurper of the Crown." See *Treasons Act* (1534), 26 Hen. VIII, c. 13; *Treason Act* (1551), 5-6 Edw. VI, c. 11; *Treason Act* (1571), 13 Eliz. I, c. 1.

In his assessment of Protestant wariness towards infidels in early modern empires, Richard Tuck argues that the idea of maintaining distance from non-Christians *because* they were non-Christians had finally become absurd by the early eighteenth century. Within the English common law tradition, Tuck sees *East India Company vs Thomas Sandys* (1683-5) as the turning point, despite judgment in that case actually supporting Coke's argument for the prerogative to impose restrictions upon trading with infidels.<sup>17</sup> This article will suggest, instead, that it was not until the other side of the Glorious Revolution that Coke's views upon infidel disability were abandoned. Additionally, it is acknowledged here that prohibiting communication and trade with infidels was only one of the hindrances faced by non-Christians in English law: when it came to the circumstances of conquered infidels, Coke's dicta were not dismissed definitively until the delivery of Lord Mansfield's adjudication in *Campbell v Hall* (1774), it is shown below. When it came to the assertion that infidelity provided for a qualified property in slaves, again it was Lord Mansfield, in *Somerset v Stewart* (1772), who did the same.

In conclusion, this article will reveal how the question of non-Christian deposition provides a fine way to understand, per Maitland, "what people thought in the past" not only about infidels but the entire common law enterprise. Here, as with every one of the major turning points presented in this article, we see one of two tendencies shown by common lawyers on the topic of empire: sometimes they responded to political change, and at other times they anticipated it.

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<sup>17</sup> Richard Tuck, "Alliances with Infidels in the European Imperial Expansion," in Sankar Muthu, ed., *Empire and Modern Political Thought* (Cambridge, 2012), 61-83.

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**“THE COMMON LAW WORKS ITSELF PURE” [Conclusion]**

This article has shown how, piecemeal, after *Nightingale*, judges in the English courts of common law aggressively queried many of the incapacities associated with the legal personality of infidels. Certainly the most stubborn of these incapacities to carry into the eighteenth century was the inability of infidels to give evidence in court. It is ironic that some of the earliest moves away from Broke and Coke on this head concerned only Christians. In *Wells v Williams* (1697), for example, the plaintiff was a French Protestant who brought a suit for the recovery of debts. His action was queried owing to his status as an “alien enemy,” it was alleged for Williams, amid the Nine Years War. “But now,” counsel for Wells retorted, “commerce has taught the world more humanity.”

It was beginning to teach the world political economy, as well. At the end of so many years of making new enemies on the continent, it was never so evident to common lawyers that it was now necessary to retain peaceful foreign merchants “*sub protectione*” in England, and to provide them with the fullest capacity to maintain actions at law. Finding for the French

plaintiff, the Chief Justice of the Common Pleas also took the opportunity to affix to the judgment a repudiation not only of Coke's dictum about *perpetui inimici* but also Broke's dictum about pagans in the Year Books of Henry VIII.<sup>18</sup> The Chief Justice in question was George Treby, who as counsel for Thomas Sandys had been the first to take issue with Coke's pronouncements on infidels thirteen years earlier, however losing as he did on that occasion. Treby could now try to set things right, if only with his own dicta. As such, that left it up to later judges to determine if they could be used to overturn preceding dicta and custom touching the inability of non-Christians to bring actions and give evidence in court. Herein we see a recurring trend in the early modern common law, a trend which, this article has argued, can best be understood by historians of ideas sensitive to the contingencies of personae, politics, and pragmatism, all of which together shaped the laws of England and its empire. The replacement of old dicta with new dicta amounts to more than just a thing of jurisprudence; it reveals the history of political and economic ideas at work.

Few examples illustrate this phenomenon better than *Omychund v Barker* (1744), which allowed Hindus to swear oaths, and present depositions, in pursuit of debts from the East India Company. Great Britain, at this stage, was strategically embedded into an alliance against France, amid a global fight over monarchy and religion that was soon to reach the shores of the Carnatic. All the while, the first intellectual strides were being made towards embracing "commercial society" and abandoning all "jealousy of trade."<sup>19</sup> It was in this context that the law officers of the crown were appointed counsel to "witnesses of the Gentoo religion" before

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<sup>18</sup> *Wells v Williams* (1697) 91 ER 46: 'for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons'. See also *Wells v Williams* (1697) 91 ER 1086.

<sup>19</sup> David Hume had recently published the first edition of his *Essays Moral and Political* (1741), wherein he decried the "great Jealousy" of nations with regard to commerce, being the rudiments of a more developed argument in "Jealousy of Trade" (1758) for all nations to adopt "enlarged and benevolent" policies of trade towards each other. See David Hume, *Essays, Moral and Political* (Edinburgh, 1741), 180-2 ("Of Liberty and Despotism"); David Hume, *Essays and Treatises on Several Subjects* (London, 1758), 187-9 ("Of the Jealousy of Trade").

Chancery late in 1744. “It is of the greatest moment,” argued the attorney general, Dudley Rider, “that we should have commerce and correspondence with all mankind; trade requires it, policy requires it, and in dealings of this kind it is of infinite consequence, there should not be a failure of justice.” These sentiments were then advanced, in the framework of an argument for a reforming common law tradition, by the capable solicitor general, William Murray (twelve years before swearing into the King’s Bench as Lord Mansfield). For the young Mansfield, Coke’s remarks from the *Institutes* were “not warranted by any authority, nor supported by any reason, and lastly contradicted by common experience.” Recognising, further, that the age of discovery had given way to the age of global commerce, Mansfield argued that the statutory requirement for providing oaths had fallen out of step with the times, warning that Chancery, if careless, may commit the same error:

All occasions do not arise at once; now a particular species of Indians appears; hereafter another species of Indians may arise; a statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.<sup>20</sup>

Expressions like this were to become emblematic of a common law tradition that could look just as comfortable tearing strips off its competing institutions as it could in Coke’s time. That Edmund Burke, during the impeachment of Warren Hastings before the Lords, would “use Lord Mansfield’s expression” about the common law and the fountain of justice, while making the case for “conforming our Jurisprudence to the Growth of our Commerce and of our Empire,” suggests something of the circumstantial importance of the expression.<sup>21</sup>

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<sup>20</sup> *Omychund v Barker* (1744), 26 ER 21, 22-3.

<sup>21</sup> Edmund Burke, “Debates on Evidence” (30 April 1794), in *The Writings and Speeches of Edmund Burke*, ed. P. J. Marshall and William B. Todd, vol. 7 (Oxford, 2000), 168-9. See Lieberman, 88-98; Bourke, *Empire and Revolution*, 820-50.

Mansfield's quickly iconic description of the common law working itself pure is all the more interesting because of its utterance before the Lord Chancellor in a court of equity. There, not only was his opinion shared, but the idea would be pushed even further by his senior colleague, John Willes, the Chief Justice of the Common Pleas. Willes argued more persuasively than Mansfield that the common law had to purge its impurities in order to make Christian toleration compatible with indiscriminatingly free trade. Not only bad statutes, but bad dicta, too, had to be discarded in the process. Obstructing infidels from maintaining an action in English courts was "contrary not only to the scripture but to common sense and common humanity [...]; and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits."<sup>22</sup> Now in a new Christian spirit of commerce, Hindu men were allowed to present depositions in the courts. Tradition could not entirely be abandoned in the process, however: it was clarified that Hindu testimony was permissible only because Hindus believed in their *own* deity.<sup>23</sup>

Part of the magic of the English common law, from the old Year Books through to the present, is the motivation it gives to its practitioners to engage with old contexts for the purpose of evaluating the reiteration of dicta and ratio in changing political and economic circumstances. In one sense, the common lawyers of the seventeenth and eighteenth centuries worked more as intellectual historians than their continental colleagues did, if only by the antiquity of the actions, the formality of the pleadings, and the encouragement they received to recall precedents in context. In another sense, however much they hoped to avoid reliving the mistakes of their ancestors, the deliberate and self-preservationist insularity of their profession

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<sup>22</sup> *Omichund v Barker* (1744) 125 ER 1312, seeing also 26 E.R. 15. Compare *Mary Collins v Lord Boyd* (1755) at *Morison's Dictionary of Decisions*, 9608

<sup>23</sup> English law was ecumenical before it was agnostic, while atheists waited for the Oaths Act (1888), 51 & 52 Vict., c. 46.

instilled in its practitioners a need to keep a little distance from debates in the Commons, coffeehouse gossip, and the writings of men like Bacon, Hobbes, Child, Locke, Hume, Smith, and Burke. Sometimes, undoubtedly, counsel and judges translated many of these externalities into the bespoke vocabulary of the common law. But at other times, they were clearly ahead of the curve, anticipating rather than responding to broader political changes.

Following infidels through this common law world reveals, firstly, a willingness to adapt old rules for new circumstances coupled, secondly, with a fear of moving too far from the precedents of old case law. Now, both of these characteristics are still attributable to common lawyers today, well after the globalisation of their enterprise (a development, it needs only be added, that might not have occurred if its strong intolerance towards non-Christians had not been expunged).