

**COMPANIES, PRIVATE INTERNATIONAL LAW, AND DIPLOMACY  
IN THE ATLANTIC WORLD: EARLY MODERN IMPERIALISM AND FOREIGN  
CORPORATE ACTIVITY IN EUROPEAN LEGAL AND POLITICAL THOUGHT**

Edward Cavanagh

Thesis submitted to the Faculty of Graduate and Postdoctoral Studies  
in partial fulfilment of the requirements for the Doctorate in Philosophy in History

Department of History / Département d'histoire  
Faculty of Arts / Faculté des arts  
University of Ottawa / Université d'Ottawa

© Edward Cavanagh, Ottawa, Canada, 2016

## **Abstract**

This thesis is concerned with jurisdictionally evasive European corporations in the Atlantic region. In the wake of renewed interest in trading companies in the historical literature on empires and colonies, this study explores the claims of corporations to foreign lands, the dispossession of pre-existing populations, and the emergence of legal conflicts out of these events and other related extra-European processes. To that end, this thesis engages with medieval legal and economic history, to explain the origin of the modern corporate form, the changing patterns of landholding and commerce across Europe, and the response of canonistic and civilian legal traditions to these developments. After emphasising the importance of the coastal region stretching from Lisboa to St. Petersburg, where trading companies thrived, each of the individual corporations involved in the colonisation of America is introduced. An intellectual history is then presented, covering relevant legal thought; here, the focus moves from patents and jurisdiction to the Roman law of property and in particular the idea of prescription, to contracts, and finally to war. These, I argue, are the ideological contexts most relevant in a legal history of corporations and early modern imperialism. The narrative which then follows is based upon primary research conducted in archives from across the globe. Here, special attention is given to English, French, Dutch, and Swedish corporate activity in the early modern 'Atlantic World' (1603-1673). Regionally, the main focus is drawn towards Ireland, North America, and South Africa, where corporations established their claims against other Europeans and against indigenous communities through a combination of separate means. Private law was more practical on the ground, while public law justifications tended to be more spurious and ambivalent, even if there was never a clean formula adoptable when it came to the acquisition of territory by European corporations away from Europe, and might was invariably right. This argument is presented before returning, finally, to the European context. The legal history of colonialism in the seventeenth-century Atlantic has never been presented so stringently from the corporate perspective for the purpose of contrast to the European diplomatic context; the result of such an approach is a new way to consider the origins of private international law in world history.

### **Acknowledgements:**

This thesis could not have been completed without the support of several institutions. Of those, I wish to thank the Centre for European Global Studies at the University of Basel, the Lauterpacht Centre for International Law at the University of Cambridge, L'Institut Français d'Afrique du Sud Recherche, the Osgoode Society for Canadian Legal History, the Ontario Trillium Foundation, and, of course, the University of Ottawa. Even with all of that support – some parts of it unexpectedly and fortunately availed to me in the first place, some of it unexpectedly and unfortunately withdrawn from me in the last – I was made desperate financially at least once per year. For their help through these tough periods abroad, I thank my parents, Mick and Jane. This thesis has benefited from the informal input of several experts, including Julie Ash, Jerry Bannister, Carlos Espaliú Berdud, Richard Burchill, Colin Bundy, Emile Coetzee, Ben Collins, Adrien Delmas, Lisa Ford, Jan Grabowski, Allan Greer, Gerald Groenewald, Patrick Harries, Edward Keene, Cornelia Knab, Ken Macmillan, Elizabeth Mancke, Paul McHugh, Andrew Nicholls, Will Pettigrew, Élizabéth Pigeon, Teresa Pullano, John G. Reid, Hayley Ross, Andrew Ruoss, Andrew Sergeant, Neil Slaughter, Tristan Stein, Ron Stevenson, Phil Stern, Isabelle Surun, Clément Thibaud, Edith Viljoen, Craig Yirush, and others I can't quite remember now but offer my thanks all the same. I must extend my deep gratitude to my shrewd examiners, Professors Damien-Claude Belanger, Andrew Fitzmaurice, Jan Grabowski, and Mark Jurdjevic. Nobody has been more helpful than Rich Connors, my supervisor, however. His intellectual generosity, historiographical expertise, and advocacy on my behalf over the last four years have allowed me to become ensconced in this project. That he has maintained his commitment to teaching and supervising hundreds of other students in this period is exemplary to all of us.

### **A note on dates and language:**

Most western European states had come to adopt the New (Gregorian) Style of dating for official correspondence and record-keeping by the seventeenth century, although England was somewhat slower than most of its neighbours in this respect. A strong effort has been made to convert all seventeenth-century dates in this thesis to the New Style. Occasionally, where I have considered it helpful to include the Old Style alongside the New Style in citations, both dates are provided in the footnotes.

All translations are mine, unless otherwise stated in the footnote. The bilingualism embraced by l'Université d'Ottawa has encouraged me to provide French passages untranslated, however. Where the direct translation of Latin or Dutch passages is not offered in the footnote or alongside quotes, I have paraphrased to the best of my ability instead.

**Companies, Private International Law, and Diplomacy in the Atlantic World:  
Early Modern Imperialism and Foreign Corporate Activity  
in European Legal and Political Thought**

Abstract	ii
Acknowledgements	iii
A Note on Dates and Language	iii
Contents	iv
<b>Introduction</b>	<b>1</b>
<b>Chapter 1:</b> Corporations and the Transformation of Europe in the Middle Ages	<b>32</b>
<b>Chapter 2:</b> The Business of Empire in the North Atlantic World	<b>66</b>
<b>Chapter 3:</b> Patent and Prescription in Legal Thought	<b>86</b>
<b>Chapter 4:</b> Patent and Prescription in Practice, 1603-1631	<b>110</b>
<b>Chapter 5:</b> Contract and Conquest in Legal Thought	<b>129</b>
<b>Chapter 6:</b> Contract and Conquest in Practice, 1607-1631	<b>154</b>
<b>Chapter 7:</b> Evasion in Practice, 1562-1663	<b>169</b>
<b>Chapter 8:</b> Patents, Prescription, Contract, and Conquest in Practice, 1631-1655	<b>191</b>
<b>Chapter 9:</b> Diplomacy and Private International Law in Europe, Part I, 1603-1635	<b>215</b>
<b>Chapter 10:</b> Diplomacy and Private International Law in Europe, Part II, 1621-1655	<b>249</b>
<b>Chapter 11:</b> Case Study – The Cape of Good Hope, 1611-1675	<b>271</b>
<b>Conclusion</b>	<b>299</b>
<b>Bibliography</b>	<b>306</b>

## Introduction

Corporations changed the face of Europe, and then proceeded to change the face of the world. This study explores how these changes took place, making the Atlantic Ocean central to the frame of analysis. Before coming to terms with the extra-European activity of various European corporations, however, this dissertation must necessarily retain a disciplined focus upon Europe. Here, the history of medieval institutions is explored before the intellectual context of an even older Western legal and political tradition can be presented. The purpose of offering these detailed background sections *before* exploring the colonising actions of companies in the Atlantic is to reveal exactly what was radical about these actions, over and above the corporate agency (rather than the state agency) of the entities performing them. For a corporation to remove itself from an originating jurisdiction into a foreign domain was radical, and so too was the presumption that charters and the like carried some kind of authorisation for them to do so. For a corporation to acquire immoveable property, through prescription, contract, or war, was also radical in foreign jurisdictions, over and above the doctrinal issues associated with each method. For a corporation to conduct itself abroad in ways that inflicted damage upon the financial interests of other corporations, and then to escape punishment for this activity in Europe and abroad – hence, becoming ‘jurisdictionally evasive corporations’ – was radical too. To illustrate all of this, this dissertation preoccupies itself with the medieval context, before devoting its attention to the seventeenth-century period in which these issues came to a head, as the conduct of corporations in the ‘Atlantic World’ raised a number of unprecedented legal questions both within Europe and beyond it.

With so much historical scholarship produced on the seventeenth-century ‘Atlantic World’ following the seminal publication of Kenneth Gordon Davies’s monograph in 1974 (and with much of it using and reusing the same primary material), new dissertations on the topic require justification.<sup>1</sup> This thesis takes an unusual approach to this history. After exploring the medieval context, focusing principally upon the evolution of institutions and

---

<sup>1</sup> Kenneth Gordon Davies, *The North Atlantic World in the Seventeenth Century* (Minneapolis: University of Minnesota Press, 1974). For further reading, see especially J. H. Elliot, *Empires of the Atlantic World: Britain and Spain in America, 1492-1830* (New Haven: Yale University Press, 2006), and the collection of essays in *The British Atlantic World, 1500-1800*, ed. David Armitage and Michael J. Braddick (Basingstoke: Palgrave Macmillan, 2002).

the nature of legal thought, this study focuses upon a particular actor, the corporation, as it burst onto the Atlantic scene between 1606 and 1686. This approach is explicitly comparative. While true that few studies of this period have been presented, as this one is, by making use of Dutch, English, French, and Swedish materials harvested from a combination of published and archival collections, the principal novelty of this thesis stems from its comparative and multi-lingual approach to the topic, which is adopted in the wake of recent legal-historical scholarship on imperialism, and historical research on the early modern corporation.

In the last two decades, the study of the legal history of early modern imperialism has attracted both historians interested in law and legal scholars interested in the history of English and British empires. Since the original contribution of J. P. Greene in *Peripheries and Center* (1986), which explored the relationship between the American colonies and a legislating metropolitan parliament between 1607 and 1788, historians have acknowledged and attempted to explain something like an ‘imperial constitution’.<sup>2</sup> For Mary Sarah Bilder, this was a constitutional tradition which, like custom, went largely unwritten, as it was adapted and accepted by peripheral colonies (her key example in this respect being the corporate Rhode Island) and central institutions (her key example being the Privy Council) over the same period.<sup>3</sup> More recently it has been suggested by Ken MacMillan, in relation to the early English empire, that the royal prerogative was fundamental to the construction of this constitution, and not only that; it was the crown which gave ‘legal imperialism’ its impetus.<sup>4</sup>

Instead of balancing out these interpretations, this thesis offers the cautious reminder that these situations were exceptional to the English. In the United Dutch Provinces, by contrast, there was hardly such a thing as the ‘royal prerogative’, and never anything like a ‘crown colony’, so its imperial constitution took a different and more republican shape. The character of the French imperial constitution, on the other hand, was more of a diverse and *ad hoc* affair owing to the provincialism and localism of the separate

---

<sup>2</sup> Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (Athens: University of Georgia Press, 1986).

<sup>3</sup> Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2008).

<sup>4</sup> Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006).

interests constructing the enterprise, especially before the onset of absolutism under Louis XIII and XIV. These are simple observations, yet they illustrate the necessity of maintaining a comparative perspective in legal histories of empires (or ‘imperial constitutions’). Such an approach provides a means to contemplate what it was that made English, Dutch, or French imperialisms unique. And yet, perhaps that is the wrong kind of enquiry to pursue. Was there, instead, a European imperial constitution – and what did it look like? This is a more inviting question, and it requires this thesis to operate within a global frame. In this frame, it remains essential to take notice of the metropolitan context: how colonies were part of expansionist policies, how colonial politics could be embedded into early modern diplomacy, and how the ideology of imperialism informed the decisions of colonising states, unquestionably remain important factors in the shaping of empires. These questions cannot be posed in isolation from what in the extra-European world contributed to the formation of imperial constitutions. To stand in the metropole and gaze outwards onto the colonies allows only for a unidirectional view of law and politics. Moreover, this approach moves away from fruitful lines of enquiry in recent legal imperial history, which identify a number of composite polities, overlapping and incomplete jurisdictions, along with corporate, proprietary, and royal governments abroad.

In this respect, Lauren Benton’s interventions have been exceptionally significant. *A Search for Sovereignty* (2010), which identifies a number of different ways in which geography and sovereignty influenced each other, follows from her ground-breaking comparative study of *Law and Colonial Cultures* (2002), which was the first to confront historians of colonialism to think seriously about jurisdiction, subjectivity (in legal terms), and difference across the globe.<sup>5</sup> Similarly concerned with jurisdiction, Lisa Ford’s *Settler Sovereignty* has been just as important in the development of the legal history of empire. Although Ford is concerned in *Settler Sovereignty* with a much later period than this dissertation, it is her boldly comparative approach of ostensibly different case studies – the post-Bigge convict-turned-settler colony of New South Wales and early Republican

---

<sup>5</sup> Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires* (Cambridge: Cambridge University Press, 2010).

Georgia – that makes her argument, about the extension of settler jurisdictions over indigenous people and the dissolution of legal pluralism, so successful.<sup>6</sup>

Ford's monograph is attractive within two very different bodies of research. One of these has been profoundly influenced by the work of Benton and Ford herself; historians following their leads are increasingly interested in colonial jurisdictional practice, along with the variations of pluralistic legal orders across empires, which are seen to be crucial for providing an understanding of how law worked in the early modern extra-European world. This approach has produced a messier and more complex picture than historians have been accustomed to present, but with this has come a more steadfast commitment to global perspectives of the legal history of empire.<sup>7</sup> The other context in which Ford's *Settler Sovereignty* belongs is the larger tradition of writing the legal history of dispossession in settler colonies, which merits somewhat closer attention on its own.

The emergence of common law aboriginal title in the 1960s and 1970s, most artfully explored by Paul G. McHugh, had a profound impact upon two generations of history writing in settler societies.<sup>8</sup> Necessarily, much of the focus in the associated historical literature was upon the extent to which the English common law had any place for aboriginal rights, following the work of Canadians Kent McNeil and Brian Slattery.<sup>9</sup> In Australia, meanwhile, Henry Reynolds published what was, at the time, a provocative and characteristically accessible study in *The Law of the Land* (1987), which explicitly critiqued the legal activity which led to, and subsequently overlooked, the dispossession of Australian Aborigines.<sup>10</sup> Thereafter, a distinct historical concern emerged, which led to a number of edited collections, put together by scholars principally from Australia, Canada, and New Zealand, which sought to understand the development of the common law in the

---

<sup>6</sup> Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in Australia and America, 1788-1836* (Cambridge, MA: Harvard University Press, 2010).

<sup>7</sup> This approach has culminated most recently in the collection of essays in Lauren Benton and Richard J. Ross, ed., *Legal Pluralism and Empires, 1500-1850* (New York: New York University Press, 2013).

<sup>8</sup> Paul McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2010).

<sup>9</sup> See especially Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (Saskatoon: University of Saskatchewan Native Law Centre, 1979).

<sup>10</sup> Henry Reynolds, *The Law of the Land* (Ringwood: Penguin, 1987).

settler colonies.<sup>11</sup> Paul McHugh's *Aboriginal Societies in the Common Law* (2004) was the breakthrough monograph in this legal-historical field, not only for its depth and breadth, but also for its methodology, being the first to take history seriously on its own terms instead of falling victim to narrating precedents in chronology to pass off as history.<sup>12</sup> McHugh's study was complex, rigorous, and deeply careful with respect to the common law tradition. This complexity, however, has recently been surpassed by Mark Hickford's 2012 study of colonial New Zealand, which emphasises the political potency of the legal discourse of native title, and moreover, shows just how much legal historians can be take from a single case study.<sup>13</sup> A renewed concern with the legal history of settler colonialism would not be confined to the old dominions, however. Stuart Banner's *How the Indians Lost their Land* (2005) sets new standards of clarity and acumen, seeing dispossession resulting from the inconsistent applications and uneven manifestations of law and power on the American frontier. This approach he would extend across a majestic, if at times simplistic, comparative study in *Possessing the Pacific* (2007).<sup>14</sup> In particular, this latter publication was part of a shift towards more broadly comparative legal histories of settler colonialism, in which Peter Karsten's ambitious study of property, labour, custom, and governance made important early inroads in 2002.<sup>15</sup> Perhaps no comparative study of this kind was more compelling than John C. Weaver's *The Great Land Rush and the Making of the Modern World, 1650-1900* (2003), which illustrates the legal mechanisms used to 'uproot native title' and establish settler property in a dizzying thematic analysis of Australia, New Zealand, the United States of America, Canada, and South Africa. This book offers an account of how property rights were defined, measured, and allocated to

---

<sup>11</sup> A. R. Buck, John McLaren, and N. E. Wright, ed., *Land and Freedom: Property Rights and the British Diaspora* (Aldershot: Ashgate, 2001); John McLaren, A. R. Buck, and Nancy E. Wright, ed., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005); Shaunnagh Dorsett and John McLaren, ed., *Legal Histories of the British Empire: Laws, Engagements and Legacies* (New York: Routledge, 2014); Shaunnagh Dorsett and Ian Hunter, ed., *Law and Politics in British Colonial Thought: Transpositions of Empire* (Basingstoke: Palgrave Macmillan, 2010).

<sup>12</sup> Paul McHugh, *Aboriginal Societies in the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004).

<sup>13</sup> Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford: Oxford University Press, 2012).

<sup>14</sup> Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005).

<sup>15</sup> Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora: The United States, Canada, Australia, and New Zealand, 1600-1900* (Cambridge: Cambridge University Press, 2002).

settlers, and how this contributed not only to the dispossession of indigenous populations, but also to the acceptance, among settlers, of democratic principles and a market economy.<sup>16</sup>

Alongside these publications, there were a number of others more sympathetic to the view of modern courts. Typically this historiography began as legal research. What has been called ‘juridical history’ (or ‘indigenous rights history’, ‘law office history’, or ‘advocacy history’) concerns itself with superficially similar intellectual concerns but, as a body of historical scholarship designed to connect with the concerns of lawyers and the aboriginal claimants they represented, their interpretations are not always faithful to the widest body of archival material, the worst of which have been criticised on the grounds of empirical weakness.<sup>17</sup> These authors were loyal more to the present than the past. Pragmatic methodology such as this often inspires observations that are polemical, overly politicized, and unimaginatively Whiggish. To be fair, often these are not the faults of the historians – or the litigators who sometimes employed them – but are rather the causes of an interpretative presentism apparently mandatory for this kind of work. If some movement away from this approach is detectable, praise might equally be given to Paul McHugh and Lisa Ford for the new directions they chart. McHugh’s work confines the legalism of aboriginal title to the post-1960s context. If law and history are to meet, McHugh – a dual expert – shows how. By approaching aboriginal-settler relations as both common lawyer and intellectual historian, McHugh’s work is most challenging to those who have made a profession out of seeing the royal prerogative as timelessly housing an until-now-unseen ‘right’ for indigenous people. Whereas McHugh offers a stern corrective to legal scholars, Ford perhaps offers more to historians. *Settler Sovereignty* instigated a debate about jurisdiction and how it works. Evaluating the legal consequences of settler colonialism, Ford prompts her reader to grapple with the enduring political consequences of settler courts recognising indigenous criminal activity (*inter se*), and the origins, therefrom, of the

---

<sup>16</sup> John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal and Toronto: McGill-Queens University Press, 2003).

<sup>17</sup> For critical reflection on this development, see Paul G. McHugh, ‘The Common-Law Status of Colonies and Aboriginal “Rights”: How Lawyers and Historians Treat the Past’, *Saskatchewan Law Review* 61 (1998), 393-429; Ian Hunter, ‘Natural Law, Historiography, and Aboriginal Sovereignty’, *Legal History* 11 (2007), 137-67; Bain Attwood, ‘*The Law of the Land* or the Law of the Land? History, Law and Narrative in a Settler Society’, *History Compass* 2 (2004), 1-30.

‘perfect settler sovereignty’ requisite to determine the paltry extents to which native title could find expression in settler constitutions thereafter.

In the last two decades or so, there has also developed a strong tradition of contemplating imperialism and international law from the viewpoint of intellectual history too. In this area, perhaps no piece of scholarship is more important to the arguments presented in this thesis than a recent study of the idea of occupation in western political thought, Andrew Fitzmaurice’s *Sovereignty, Property and Empire, 1500-2000* (2014). Occupation, Fitzmaurice argues, has made for a versatile concept, doctrine and analogy for the purposes of empire and, on its own terms, in international legal thought. The idea of occupation has been used to explain rights in private law and public law: to property and to territory, to ‘personal’ sovereignty and to state sovereignty, to things, to land, to people and to more. Upon illustrating this intellectual history, Fitzmaurice concludes the book by laying to rest (apparently definitively) a long-running debate among scholars about the meaning of *terra nullius*.<sup>18</sup> Earlier contributions to the intellectual history of imperialism have attempted to explore some of the ideological traditions of rationalising settler colonialism within humanistic and scholastic thought, in relation both to the natural law and the *ius gentium*.<sup>19</sup> This is an ideological tradition which emerges with the sixteenth-century ‘Salamanca School’ (headed by Francisco de Vitoria) and continued to emerge right up to its nineteenth-century dénouement, and can be presented by historians on its own terms or, as is sometimes the case, within the context of strict dichotomies (for some examples, humanism/scholasticism, justification/criticism of colonialism, and the law of nature/nations). Historians may be eager to search for ‘doctrines’ in this literature, but a close reading demands more restraint.

The ideology of imperialism that emerges from the writings of legal and political theorists between the sixteenth century and the nineteenth century can present a few red herrings to historians uninitiated with the intellectual context of the time. Generally, jurists

---

<sup>18</sup> Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014).

<sup>19</sup> Andrew Fitzmaurice, *Humanism and America: An Intellectual History of English Colonization, 1500-1625* (Cambridge: Cambridge University Press, 2003); Anthony Pagden, *Spanish Imperialism and the Political Imagination: Studies in European and Spanish American Social and Political Theory, 1512-1830* (New Haven: Yale University Press, 1990); Anthony Pagden, *Lords of All The World: Ideologies of Empire in Britain, France, and Spain, 1400-1800* (New Haven: Yale University Press, 1995).

only came to ponder colonialism and settler colonialism in their entirety *ipso post facto*.<sup>20</sup> While the importance of these reflections cannot be ignored in the history of international legal thought, an uncritical reading of this material in the context of colonising on the ground raises the dilemma of anachronism. Removed from the juristic traditions in which these authors wrote, both the language itself and the normative means of its deployment can give the appearance of totalising methods of empire with ancient intellectual pedigree. To the juridical historian especially, the temptation is great to use this literature to argue for the credibility of a doctrine of this or a doctrine of that. Some examples from the intellectual history suffice to illustrate the kind of doctrines up for grabs here. In a recent chapter for *The Oxford Handbook of the History of International Law*, Fitzmaurice illustrates how discovery, conquest, and occupation were conceived and applied in the age of empire.<sup>21</sup> For Anthony Pagden, by contrast, conquest, discovery, and purchase were the three main legal ideas at work on the American frontier.<sup>22</sup> To take another example, merely the title of an essay by James Muldoon on the eighteenth-century American John Adams ('Discovery, Grant, Charter, Conquest, or Purchase') offers another coterie of options.<sup>23</sup> By no means was Adams the only coloniser on the ground to devise a series of justifications for New World property rights, though he did so, like juridical and some intellectual historians have, quite after the fact. For on-the-ground accuracy, historians may be served better by the mid-seventeenth-century opinions of Johan Risingh, governor of New

---

<sup>20</sup> In the process, it would be they who conceived of a truly *international* law in this period. Setting the melancholy mood in the background, as this study will show, was the destruction of many natural land regimes and the mass appropriation of property, by Europeans acting away from Europe in the corporate form. And if this was tragic, which it was, then the slow gestation period which followed – before the birth of a positivist and ostensibly public-oriented international law, no longer blatant in its ethnocentric bias yet still disingenuous in its approach to global universalism – was even more tragic for indigenous people. See especially Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism, and Order in World Politics* (Cambridge: Cambridge University Press, 2004); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2004).

<sup>21</sup> Andrew Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory', *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 840-61.

<sup>22</sup> Anthony Pagden, 'Law, Colonization, Legitimation, and the European Background', *The Cambridge History of Law in America*, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 1-31.

<sup>23</sup> James Muldoon, 'Discovery, Grant, Charter, Conquest, or Purchase: John Adams on the Legal Basis for English Possession of North America', *Many Legalities of North America*, ed. Christopher Tomlins (Chapel Hill: UNC Press, 2001), 25-46.

Sweden, on the lawful means to create titles to land: ‘1. *Occupatio per bellum justum aut vacui vel derelicti occupatio*. 2. *Donatio a justo possessore*. 3. *Emptio*. 4. *Investitura sine qua priores tituli evanescent*’. But even Risingh, who was right there in the Delaware valley testing these methods, gives a picture of the legal history of dispossession that is too neatly formulaic and totalising.<sup>24</sup>

This dissertation engages sparingly with the legal thought of those writing after particular events, and instead looks back into the past to find an appropriate means to categorise the acquisition of foreign land. To do this, the Roman foundations of property law are linked with the actions of European colonising interests on the ground. The technique of intellectual history is therefore used selectively and sparingly – to shed light on the ideological context of expansion, principally but not solely from private law sources, up to (but not exceeding) the early emergence of Hugo Grotius in the first half of the seventeenth century. By omitting an analysis of ideas considered *after* the actions in question took place, an anachronistic interpretation of ideas in practice can be avoided.

This thesis presents a narrative welded onto a rigid treatment of key elements of Roman law. In this frame, private law necessarily triumphs over public law; private law, indeed, helps almost entirely to explain public law I argue, but this approach is hardly new, nor is it only relevant to historians. Hersch Lauterpacht’s early research relied upon a similar approach in his compelling treatment of public international law in *Private Law Sources and Analogies of International Law* (1927), even though his findings were unfairly obscured for a long time (primarily, it would seem, because of the great interwar acceptance of public international legal institutions at the time of their emergence).<sup>25</sup> And yet, while Lauterpacht’s case for the recognition of public law doctrines as private law analogies may

---

<sup>24</sup> Johan Risingh’s Journal, *The Rise and Fall of New Sweden: Governor Johan Risingh’s Journal 1654-1655 in its Historical Context* (hereafter *JRJ*), ed. Stellan Dahlgren and Hans Norman (Stockholm: Almqvist & Wiksell, 1988), 178-81. ‘Occupation through a just war which renders occupied land derelict and vacated. 2. Donation from a rightful possessor. 3. Purchase. 4. Investiture, without which title lapses’. Nevertheless, this is an intriguing categorisation, in particular the last of these justifications. Investiture can relate to authority or power in Latin, but its legal application in this period was more nuanced. A metaphor derived from the act of covering (*investire*) and associated with *seisin* or actual possession, *investitura* conveys, in old Germanic property law, ‘the act by which the control over a piece of land was conveyed in a legal manner’. See Rudolf Hübner, *A History of Germanic Private Law*, trans. Francis S. Philbrick (Boston: Little, Brown and Co., 1918), 185.

<sup>25</sup> Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (London: Longman, Green and Co., 1927).

have been the most insightful produced in his generation, he was hardly inventing the wheel. Private law ideas inspired the most enduring publicist contributions in the work of Hugo Grotius, and a close reading of the Salamanca School reveals the same trend. From a historical perspective, of course, it should be little wonder why private law ideas were the most sensible resources for jurisdictionally evasive companies in the extra-European world. The corporation, much as it would govern and wage war like a state abroad, was just the same as a private person in law. These twin characteristics make the subject of study so compelling, but further refinement is necessary. More specifically, this thesis provides a legal history of corporate activity beyond Europe. By giving priority to private law and corporations, a new side is presented to the familiar story of Europeans dispossessing indigenous communities and creating land rights for themselves. This allows for an original interpretation of the emergence of *private international law* to be offered.<sup>26</sup>

To pursue this line of analysis, emphasis is placed upon incorporated actors, removing proprietary actors beyond the scope of this dissertation. The distinction between corporations and proprietorships has been made for some time and is commonly sustained today, notwithstanding recent attempts to dissolve the distinction.<sup>27</sup> Following Herbert L. Osgood, this dissertation embraces a strict distinction between the two forms of colonial government in the Atlantic world.<sup>28</sup> The corporation was a singular entity made up of multiple interests, with pooled capital, and a common economic interest at home. An

---

<sup>26</sup> The term 'private international law' was coined sometime in the early nineteenth century. As it will be used in this thesis, the term refers to those conflicts of law and jurisdiction which affect private interests. See John Westlake, *A Treatise on Private International Law: Or the Conflict of Laws, with Principal Reference to Its Practice in the English and Other Cognate Systems of Jurisprudence* (London: W. Maxwell, 1858); A. V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws, with notes of American Cases by John Bassett Moore* (London: Stevens and Sons, 1896); A. E. Anton, *Private International Law*, 3rd ed. of Paul Beaumont and Peter McEleavy (Edinburgh: W Green & Son, 2011). By contrast, the term 'international law' was Jeremy Bentham's from the late eighteenth century, only really coming into its own after the establishment in 1873 of l'Institut du Droit International.

<sup>27</sup> L. H. Roper and B. Van Ruymbeke, ed., *Constructing Early Modern Empires: Proprietary Ventures in the Atlantic World, 1500–1750* (Leiden: Brill, 2007).

<sup>28</sup> Herbert L. Osgood, 'The Proprietary Province as a Form of Colonial Government, I', *American Historical Review* 2, 4 (1897), 644-664; Herbert L. Osgood, 'The Proprietary Province as a Form of Colonial Government, II', *American Historical Review* 3, 1 (1897), 31-55. See also Marshall Harris, *Origin of the Land Tenure System in the United States* (Ames: The Iowa State College Press, 1953), wherein the distinction between corporate and proprietary is based principally in the form of administration in America rather than the form it took in Europe. This thesis cannot include unincorporated corporations and chartered proprietary bodies politic in America within a study about European corporations more generally, partly for want of space.

incoming stream of capital, typically through trade and/or land allocations, was the main motivation of their collaboration. Incorporation bestowed a privilege onto the company that could be taken away at any moment, generally after judicial or executive enquiry. The body politic of a particular company in Europe was counterbalanced by the strategic installation of administrative headquarters abroad, which operated as corporate governments themselves, albeit informally. Proprietary bodies, by contrast, were often made up of a particular nobleman and his followers, or sometimes a collection of noblemen and their followers, with personal pledges of capital and therefore few direct interests in enterprise. Individually privileged before receiving additional royal authority to expand their estates through this speculative manner, proprietors constructed colonial enterprises that were contingent upon fewer special conditions than chartered corporations, and they operated without a regulated controlling body fixed in Europe. While their colonial administrations could sometimes take the form of a body corporate, the settlements clustered around this government were organised in a style more akin to fiefdoms or palatines, accountable not to any regulated corporate directorate in Europe, but to a variable form of centralised and personal rule that could be situated anywhere.

Presenting the early modern corporation on its own terms, this dissertation has been inspired by recent historical research into the early modern corporation, and is offered in the wake of Philip J. Stern's influential *The Company-State* (2011). Taking the English East India Company for his subject, Stern investigates how 'the particular form of Company sovereignty was constituted, notable through a balance of English charters, Asian grants, and the Company's own political behaviour'.<sup>29</sup> Developing the concept of the 'company-state', Stern presents the East India Company as an entity independent in matters of public international and domestic governmental importance; it is an approach which dissolves a conventional but ahistorical 'state'/'non-state' division in the historiography of early-modern extra-European expansion.<sup>30</sup> The value of Stern's interpretation lies not so much in its conceptualisation of 'the state', which may have enjoyed more purchase during

---

<sup>29</sup> Philip J. Stern, "'A Politie of Civill & Military Power': Political Thought and the Late Seventeenth-Century Foundations of the East India Company-State", *Journal of British Studies* 47, 2 (2008), 257.

<sup>30</sup> See, however, for what is perhaps the best appraisal of private 'state-builders' abroad, Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 2002).

the 1980s and 1990s, when political scientists, historians, and sociologists were most engaged with statehood; rather, Stern succeeds above all in presenting an approach which facilitates a new comparative history of corporations across empires.

A number of historians have emerged in Stern's wake to engage with the concept.<sup>31</sup> Stern himself has insisted upon the wide applicability of his original idea. Writing on the Atlantic English companies, Stern writes that 'they came from the same stock; they were corporate bodies politic, founded in charters, letters, patents, and instruments of incorporation but functioning as political authorities and communities in their own right'.<sup>32</sup> More recently, Stern has presented a compelling argument about English 'overseas corporations' forming part of a 'commonwealth' – 'far more than intermediary bodies or outsourced, privatized extensions of the state'.<sup>33</sup> With this interpretation, the 'company-state' concept lost some of its importance; the corporation itself is better to be seen by historians on its own terms. Subsequent research into what William Pettigrew, author of a recent monograph on the much-overlooked Royal African Company, calls 'corporate constitutionalism', makes the case for renewed historical attention to early modern corporations across English, European, and global histories. This assertion has recently captured the attention of some of the leading intellectual historians of the field, resulting in a round table on early modern corporations and the imperial constitution in *Itinerario*.<sup>34</sup> Even if there may be some limits to the extent to which historians can experiment with this kind of interpretation – and one easily expects that these will thoughtfully be reached by Pettigrew and his collaborators – it no longer appears sustainable to approach the corporation solely in relation to the 'crown' or 'state' in the history of the British Empire.<sup>35</sup> What also remains to be seen – and what this thesis explicitly explores – are the lengths to

---

<sup>31</sup> See, for example, Arthur Weststeijn, 'The VOC as a Company-State: Debating Seventeenth-Century Dutch Colonial Expansion', *Itinerario* 38, 1 (2014), 13-34; Edward Cavanagh, 'A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company', *Canadian Journal of Law and Society* 26, 1 (2011), 25-50.

<sup>32</sup> Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2011).

<sup>33</sup> Philip J. Stern, "Bundles of Hyphens": Corporations as Legal Communities in the Early Modern British Empire', *Legal Pluralism and Empires*, 21.

<sup>34</sup> See, for instance, the special forthcoming issue of *Itinerario* on this topic.

<sup>35</sup> See, however, Elizabeth Mancke, 'Chartered Enterprises and the Evolution of the British Atlantic World', in *The Creation of the British Atlantic World*, ed. Elizabeth Mancke and Carole Shammas (Baltimore: Johns Hopkins University Press, 2005), 237-62; Michael J. Braddick, *State Formation in Early Modern England, c. 1550-1700* (Cambridge: Cambridge University Press, 2000).

which comparative historians of imperialism can maintain a focus upon jurisdictionally evasive European corporations in the extra-European world without detriment to more traditional, top-down or metropolitan-focused interpretations.<sup>36</sup>

Taking its direction from recent research on the legal history of imperialism and early modern corporations, this dissertation offers a number of critical revisions to prevailing interpretations about the legal instruments used to precipitate and justify the possession and dispossession of land in the temperate landmasses of the seventeenth-century Atlantic. Attempting to connect a history of the private and public institutions of late-medieval Europe with a history of early modern expansion onto the extra-European world, this dissertation also answers recent calls for newly ambitious historical studies to break from long-set moulds.<sup>37</sup>

Economic history necessarily plays an important part in the early parts of the study which follow. About the history of trade and exploitation across the early modern world, and the bidirectional economic relationship between these European states and their markets across the seas, much has been written and argued by historians as different in approach as Immanuel Wallerstein and James Belich.<sup>38</sup> This thesis does not seek to challenge these broad interpretations. Instead, it focuses on one industry, that generated by transplanting people into the temperate regions earmarked as sites for European reproduction. It focuses on one resource, land, the access to which was necessary to all settlers, and became, unsurprisingly, fiercely quarrelled over between natives and newcomers.

The establishment of settler colonies, which invariably entailed the dispossession of pre-existing communities wherever and however they were politically established, provides the background to this thesis. Companies were nearly everywhere important actors in this regard, a reality which can be emphasised more strongly by historians. In key windows of corporate rule, or periods during which direct metropolitan government was

---

<sup>36</sup> See, for example, Ken Macmillan's history of mapmakers and monarchs, *Sovereignty and Possession*.

<sup>37</sup> Jo Guldi and David Armitage, *The History Manifesto* (Cambridge: Cambridge University Press, 2015); James Belich, John Darwin, Margret Frenz, and Chris Wickham, ed., *The Prospect of Global History* (Oxford: Oxford University Press, 2016).

<sup>38</sup> Immanuel Wallerstein, *The Modern World System*, 4 vols. (Berkeley: University of California Press, 2011); James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld* (Oxford: Oxford University Press, 2010).

ambivalent and patchy, companies often instigated the earliest (and most legally onerous) acts of dispossession and acquisition. In their flagrant ignorance of established sovereignties, frequently in the face of often-concerted indigenous resistance, and in their efforts to evade the jurisdictions imposed by courts and parliaments, these companies reveal an 'imperial constitution' of an altogether different type to that which historians have already explored. Presented here, then, are the ideological, economic, and institutional contexts of this globally significant development. Once these contexts are explored, the presentation of empirical research follows. Regional case studies are made of corporate activity in North America, South Africa, and Ireland, before the ramifications of this activity in Europe are considered at the end of this dissertation. Having come full-circle, it then concludes.

Chapter One explores the corporate foundations of medieval Europe. In particular, the emergence of commercial corporations in merchant cities is identified as a development of overwhelming international significance. This introductory narrative explores the economic and institutional processes which precipitated the emergence of the early modern trading corporation. Changes in the style of European jurisdictional practice at this time, often in direct response to the actions of these companies in maritime contexts, are highlighted here. The nature of European land rights in the late medieval period are also discussed. The resulting narrative of this chapter provides the context for the enquiries which follow into the intellectual history of corporations and empire, as this thesis moves between the early modern and the late medieval periods. Presenting this history regionally allows for a rudimentary explanation of why the Iberian states did not develop a corporate culture of imperialism to the same extent as the Dutch, the English, the French, or even the Swedish. This concern carries over into Chapter Two. After explaining how trading companies emerged in these locales separately, the focus in this chapter shifts to consider each of the Atlantic corporate endeavours which emerged in these locales between the start of the seventeenth century up to the post-Westphalian 'Age of Mercantilism' in the third quarter of the century.

The central enquiry which follows is simple. How did corporations acquire land abroad? Received interpretations of the earliest stages of imperialism and the appropriation

of non-European space often tend to prioritise the act of discovery itself.<sup>39</sup> This thesis offers an alternative analysis by downplaying the importance of ‘first dibs’ in the global history of the great land rush. For early modern Europeans, it was a novel and untested assertion that a claim to foreign territories, or even merely the exclusive right of passage, could be derived from ‘discovery’. It found no basis in Roman law or in canon law, and the idea was unheard of before the fifteenth century (and indeed it remained unsupported in the Euro-American legal tradition for some time thereafter).<sup>40</sup> After all, Europe, North Africa, the Levant, and the Orient were never *terrae incognitae*; they were home to sophisticated, well-established polities long known to each other, be they ‘infidel’ or Christian. A momentous shift in thinking, it is often asserted, came with the impositions of the Pope in response to Portuguese and Spanish expansion into the Atlantic during the fifteenth century (even if this was clearly part of a longer tradition of interventionist Catholic concern with the non-Christian world going back to Innocentius IV).<sup>41</sup> Increasingly, the church concerned itself with small islands and parts of the African coast, nearest to Europe, and issued a number of small-scale concessions, which confused rights to territory with responsibility to convert inhabitants of small islands and parts of the African coast. Then, at the end of the century, came a far more wide-reaching expression of papal authority. The bulls of Alexander VI (1431-1503), which were issued throughout 1493, acknowledged the exclusive claims of Portuguese and Spanish crowns on the grounds of first discovery to most of the world. These crowns, in turn, then acknowledged the claims of each other in the Treaty of Tordesillas, which was signed the following year and ratified again in 1506.<sup>42</sup>

---

<sup>39</sup> For an introduction to the literature on symbolic acts of possession, compare Arthur S. Keller et al., *Creation of Rights of Sovereignty through Symbolic Acts, 1400–1800* (New York: Columbia University Press, 1938), with Patricia Seed, *Ceremonies of Possession in Europe’s Conquest of the New World, 1492–1640* (Cambridge: Cambridge University Press, 1995). For the ‘doctrine of discovery’ from these origins up to its use in aboriginal title legalism in America, Canada, Australia, and New Zealand, see Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

<sup>40</sup> As Andrew Fitzmaurice argues, ‘The “doctrine of discovery” may be a useful shorthand when applied to the justifications of empire employed by States, but it is misleading if applied to the history of the law of nations which has largely been opposed to the principle of discovery’. Andrew Fitzmaurice, ‘Discovery, Conquest, and Occupation of Territory’, 841.

<sup>41</sup> See James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian world, 1250-1550* (Liverpool: Liverpool University Press, 1979).

<sup>42</sup> For the institutional development of Iberian imperialism, see below, chapter 1.

If these were the beginnings of a ‘doctrine of discovery’ and its deployment by European sovereigns – and the middle chapters of this dissertation begin from the basis that there was never so much a doctrine as there was a discourse – the detractors of discovery, not its defenders, were the main ones to elaborate upon the idea. The Salamanca scholars were the first jurists to dissent from the embarrassing ethnocentrism implied by a special Christian right of discovery. In America the Spaniards had not, and Francisco de Vitoria was unequivocal about this, ‘discovered a hitherto uninhabited desert’, for ‘the barbarians possessed true public and private dominion’. Merely being the first to identify non-Christian populations offered the Spaniards, on its own, ‘no support for possession of these lands, any more than it would if they had discovered us’.<sup>43</sup>

Of course, the kinds of rights which might be availed through ‘discovery’ entirely depended on the type of empire in the offing. The conversion of infidels was one thing, and rather a straightforward, personal, and localised thing at that, even if it was part of a bigger project of extending the Christian empire. The intervention of the Pope on these grounds – his endorsement of the discovery of salvageable souls – was culturally insensitive but at least made sense within an apostolic worldview. The natural rights of communication and commerce combined into another thing altogether: these led to mutual advantage if a fair trade resulted. But if anything the recognition of the natural lawyers in this period of human sociability and the benefits of *communicandi* and *commerciandi* implicated the liberality of trade abroad; and while there may be legal consequences to work out if these rights were denied by hosts, discovery could not be made to amount to exclusivity or monopoly. Overwhelmingly different, of course, was the deployment of the discourse of discovery to facilitate the exclusive appropriation of foreign territory. This was altogether more public and more deliberately obtrusive onto foreign jurisdictions, which made it a more contentious task, and merely speaking about discovery proved to be decidedly inept for it. If discovery could be said to confer anything like land in the European imperial imaginations of the sixteenth and seventeenth century, then this was to be bound up in contingencies. The idea signalled only the rudimentary and premonitory

---

<sup>43</sup> Francesco de Vitoria, *On the American Indians*, in *Francisco de Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 264, 265. For discussions on this point, see Lauren Benton and Benjamin Straumann, ‘Acquiring Empire by Law’, *Law and History Review* 28, 1 (2010), 20-3; Fitzmaurice, *Sovereignty, Property, Empire*, 40-51.

stage of an imperial endeavour. Insofar as it conferred *a right to pre-empt* onto crowns (or in the Iberian instance, onto God's representative, the Pope), the territory incorporable was only that which was radically accepted to fall within the relevant sovereign's demesne for he or she to grant it away (or do anything, really, with it); and if this talk could be said then to have been used to piece together claims to foreign territory, such claims were cognisable only to Christian European sovereigns, and at all times that cognisability was contingent upon the lands being, firstly, empty if not sparsely peopled by heathens, and secondly, sufficiently distant from the realm of the European subject first to 'discover' before others. This is convoluted. In simpler words, a claim of possession through discovery hinged on many factors. As it turned out, a claim of this kind amounted to little in the face of physical competition and the prudent application of private law ideas derived from the Roman tradition, this thesis shows.

The equation of discovery with possession became unworkable immediately after the New World became known to Europe. This, then, is not merely some historiographical bugbear. Fact is at stake here. From very early on, even the Spanish and the Portuguese, the sole beneficiaries of the discourse, disagreed on how potentially derivative claims might be realised in practice. Their disagreement stemmed from confusion over the substance of papal paperwork, which said nothing of the methods lying at their disposal to extend their authority into the sea in order to control the self-interested fortune hunters who sailed them. Lauren Benton makes the case that there was little to distinguish the Iberian approach to indigenous rights of property and sovereignty on the ground from the approaches of those who followed them across the Atlantic anyway.<sup>44</sup> It has to be added that not only did the jurists of Spain and Portugal immediately doubt the validity of deriving title from *descoberta* in natural law, but additionally there developed in their discussions a puzzling inconsistency between them as to the meaning of the very word, which was often conflated with *conquista*.<sup>45</sup> Other European colonising states were immediately critical of the application of discovery in the New World too. '[T]o uninhabited lands, although discovered, anyone may go', the French diplomat Anne de Montmorency bluntly reminded

---

<sup>44</sup> Lauren Benton, 'Possessing Empire: Iberian Claims and Interpolity Law', in *Native Claims: Indigenous Law against Empire, 1500–1920*, ed. Saliha Belmessous (Oxford: Oxford University Press, 2012), 19–40.

<sup>45</sup> For this, see below, chapter 5.

the Spanish ambassador to France in 1540, in defence of Jacques Cartier's voyages to North America – even if, not long after this, the French began to claim, albeit convincingly to nobody, that Cartier's precedence in the Saint-Laurent region afforded Le Roi de France an exclusionary right there.<sup>46</sup>

Claims based upon discovery appear not have had any persuasive *legal* effect across Europe. It is inescapably true, to be sure, that for at least two centuries following the mid-sixteenth century voyages of Cartier, the discourse and ceremony of discovery performed a function of conventional imperial formality, enlivening charters, proclamations, royal instructions, ambassadorial rhetoric, disembarkation ceremonies, and more, as several scholars have pointed out (and a perusal of relevant foreign correspondence from the period will confirm). Yet, to derive an internationally recognisable title from this kind of pageantry alone was impossible, according to the standards of medieval canon and civil law, as well as the early modern traditions of *ius gentium* and natural law.<sup>47</sup> This fact was neither lost on Vitoria nor on the English either. '[T]o bring in the title of *First Discovery*', wrote Thomas Gage (1603-56), 'to me it seems as little reason, that the sailing of a *Spanish* Ship upon the coast of *India* should entitle the King of *Spain* to that Countrey, as the sailing of an *Indian* or an *English* Ship upon the Coast of *Spain*, should entitle either the *Indians* or the *English* unto the Dominion thereof'.<sup>48</sup> This *legal* reality has for a long time been lost on scholars of discovery, with the notable exception of Andrew Fitzmaurice.<sup>49</sup> Much more than discovery was needed to supplement land claims abroad. On a *de facto* level, claimants with *animus possidendi* needed to establish a physical presence, and moreover, earn both the foreign and local acknowledgement of that presence. From this basis, this dissertation seeks to show how this worked in practice without focusing on the discourse of discovery.

---

<sup>46</sup> Emperor to the Cardinal of Toledo (11-13 November 1540), in *A Collection of Documents Relating to Jacques Cartier and the Sieur de Roberval* (hereafter: *DJCR*), ed. Henry Percival Biggar (Ottawa: Public Archives of Canada, 1930), 141.

<sup>47</sup> For imaginative historians eager to identify legal 'doctrines', the *ius gentium* tradition of the early modern period has presented something of a boon, because it is not generally considered to have been a body of positive law. 'This argument', Andrew Fitzmaurice poignantly remarks with respect to similarly disingenuous arguments for the 'doctrine' of *terra nullius*, 'would appear to grant considerable licence to the historian in search of a doctrine'. See the discussion in Fitzmaurice, *Sovereignty, Property and Empire*, 302-3n2.

<sup>48</sup> Thomas Gage, *A New Survey of the West-Indies* (London: A. Clark, 1677), preface.

<sup>49</sup> See, however, Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory', 841-8.

In the extra-European world, a distinction may be discerned between, on the one hand, strategies used by Europeans to defray the claims of other Europeans, and on the other hand, strategies used by Europeans upon indigenous populations. Starting with those strategies used among Europeans, Chapters Three, Four, and Eight explore the limits of claims based on letters patent, charters, commissions, and the like (*paperwork*), and those based on the undisputed acquisition of land ratified by the passage of time (*prescription*). Here, a diverse range of printed primary source material is called upon to provide legal and anecdotal evidence, some of which from classical antiquity, but most from medieval Europe. Canonists (church legal scholars) and civilians (Roman legal scholars) created an enduring legal tradition through their publications at this time, while medieval governments bureaucratized and left an elaborate paper trail as they did so.

What is called ‘official’ or ‘royal’ paperwork in this dissertation refers to the gamut of documents issued during the sixteenth and seventeenth centuries to colonially bound companies and proprietors to evidence the consent and authorisation of sovereigns. These have been reproduced, analysed, and cited by historians time and again, even though, as sources, they reveal little about colonialism itself. As one might expect, a range of interpretations has been offered about their contents. James Muldoon, for a recent example, makes a long drawn-out analogy between charters and papal bulls in order to argue that they ‘provided a legal and moral basis for English settlement of North America’.<sup>50</sup> ‘These colonial charters’, suggested George Louis Beer much earlier in *The Origins of the Old Colonial System* (1908), ‘constitute to a large extent both the political and the economic framework of the early English Empire’.<sup>51</sup> More recently, legal historian Christopher Tomlins has gone somewhat further in this direction, to regard ‘chartering as a legalized strategy of colonial planning and implementation’ in the early English Empire. As he elaborates:

Charters gave the English colonizing impulse specific documentary form and embodiment by elaborating the discourse of planting in a language of legalities. This might be thought simply a matter of “legitimation.” But it was much more besides. Essentially, the exercise of writing charters furnished projectors with means to plan enterprises whose dimensions in practice could not be known with

---

<sup>50</sup> Muldoon, ‘Discovery, Grant, Charter, Conquest, or Purchase’, 25-46, quote at 46.

<sup>51</sup> George Louis Beer, *The Origins of the Old Colonial System, 1578-1660* (New York: Macmillan, 1908), 16.

any certainty. Writing charters allowed projectors to describe and pursue claims to American space in detail; to declare, with considerable linguistic precision, their conceptions of the appropriate order of things and people that would be created by colonizing; and to impose that order onto unmapped social and physical circumstance.<sup>52</sup>

Tomlins's observations provide a reasonable starting point here, even if the notion of an exceptionally English 'language of legalities' finds no endorsement in this comparative study. That the earliest of such documents were speculative exercises in planning cannot be denied, but that still leaves the question of their *function* in the New World. On this question, there have been divergent opinions among lawyers past and present, both with respect to the application of this paperwork against other Europeans but also against indigenous peoples. No donation, 'whether divine or human', wrote Hugo Grotius in *De Iure Praedae* (1604), can affect 'the property of others' (and although he was writing in this passage specifically about the papal bulls, the 'human' alternative he offered speaks volumes).<sup>53</sup> On the other side of the equation, take for another example the consequential opinion on the impact of charters upon native property interests delivered by Chief Justice John Marshall in *Johnson v McIntosh* (1823). For Marshall, 'various patents' confirmed British ownership of land rights across all of North America, and not only that, they transferred these rights to settler governments in the form of proprietors and companies. The many charters and patents issued by the French, Dutch, and especially those from the English, he ruled,

cannot be considered as nullities, nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone, and in those cases in which the powers of government as well as the soil are conveyed to individuals, the Crown has always acknowledged itself to be bound by the grant.<sup>54</sup>

---

<sup>52</sup> Christopher Tomlins, 'The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century', *Law and Social Inquiry* 26, 2 (2001), 316.

<sup>53</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006 [1604-8]), 310.

<sup>54</sup> *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 8 Wheat (1823), 580.

‘Thus has our whole country been granted by the Crown while in the occupation of the Indians’, Marshall could conclude.<sup>55</sup> The extent to which charters intrinsically dispossessed (or had some kind of discernible impact upon) indigenous communities has recently been revisited after the emergence of common law aboriginal rights litigation from the 1960s. The first ripples here came out of Canada. In a new wave of legal scholarship – most from the epicentre of Saskatchewan – French and English charters for colonising companies were shown not only to imply the creation of new title abroad, but also to allow for the recognition of a subsidiary aboriginal property right.<sup>56</sup>

While most historians of empire have not considered charters to hold any direct consequences specifically for indigenous people, the idea that charters conferred title or something like it has received some support in the historiography.<sup>57</sup> Percival Griffiths in *Licence to Trade* (1974) explains that some royal grants ‘conferred territorial jurisdiction over lands not belonging to any Christian power of which the Company might take possession’.<sup>58</sup> For Beer, all ‘colonial undertakings’ (which were ‘not private, but public in character’), sought their charters principally because these documents offered ‘the only method by which they could obtain a legal title to the soil as well as the authority to govern the settlers thereon’. Then he goes much further, noting how, ‘in a number of instances, the patentees were allowed to exclude all others, whether Englishmen or aliens, from

---

<sup>55</sup> *Johnson v McIntosh*, 579. For a comparison between the remarks in Marshall’s decision and his subsequent historical scholarship, see Lindsay G. Robertson, ‘John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine’, *Journal of Law and Politics* 13 (1997), 759-77.

<sup>56</sup> See Slattery, *Land Rights of Indigenous Canadian Peoples*, esp. 90-1, 95-125; Brian Slattery, ‘Understanding Aboriginal Rights’, *Canadian Bar Review* 66 (1987), 727-83; McNeil, *Common Law Aboriginal Title*, esp. 241-2. French-Canadian legal scholars, with scholarly grounding more so in the civil law than the common law tradition, have generally shown more hesitance on this question. See, for example, the important but now somewhat dated study by Michel Morin, *L’Usurpation de la Souveraineté Autochtone: Le Cas des Peuples de la Nouvelle-France et des Colonies Anglaises de l’Amérique du Nord*, (Montréal: Boréal, 1997), esp. 69-70.

<sup>57</sup> See, however, Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America* (Cambridge: Cambridge University Press, 2010), 114: ‘Whether or not Crown licensing of English voyages of “conquest” as well as “discovery” in its earliest letters patent was an implicit admission in fact of the sovereignty of indigenous non-Christians over those “lands not actually possessed of any Christian Prince, nor inhabited by Christian People” that early-modern expositors of Roman law admitted in theory, colonizers’ advisors [?] certainly acknowledged both the presence and authority of local sovereigns – indigenous princes and peoples – in the territories that colonizers designed to occupy, and addressed the necessity, indeed the advantages, of reaching strategic accommodations with them en route to gaining dominion over them’.

<sup>58</sup> Percival Griffiths, *A Licence To Trade: The History of English Chartered Companies* (London: Ernest Benn Ltd, 1974), xii.

commercial intercourse with the new settlement’, while offering, however, no concrete examples to support this assertion. ‘Finally’, he writes in the very next sentence, ‘the consent of the government was necessary because it was assumed that the proposed colonies were to be under English jurisdiction’.<sup>59</sup> Just how this English jurisdiction was manipulated in order to expel other Europeans unbound to observe such a jurisdiction in the first place remains unclear in Beer’s account. Other historians have made similar suggestions about charters demanding the observation of foreign subjects. On the topic of pre-1663 New France, W. J. Eccles suggests that French grants of monopoly rights were designed ‘to exclude foreigners’, and that French charters could ‘forestall claims by other powers’.<sup>60</sup> The surest leaps in this direction have been taken by another Canadian historian, Ken MacMillan. ‘To the English’, he writes, ‘the official royal charter, functioning as an open, international, document’, in the eyes of contemporaries, provided for the ‘authorization’ of all of the ‘possessory claims’ of settlers. As a charter could be used, somehow, against even non-English subjects, it ‘was not’, therefore, ‘a document intended solely for internal, domestic, reading’. He elaborates: ‘Patentees were issued the original patent so that they could, where necessary, show to other Englishmen and Europeans that their activities had the express authority of a sovereign monarch’.<sup>61</sup>

Chapters Three, Four, and Eight seek to explore the limits of these conclusions. What this requires first of all is a less caricatured treatment of the medieval bureaucratic culture that gave birth to charters than early modern imperial historians have thought to provide. Across western Europe, between the tenth and the fifteenth century, many types of official paperwork – of which the charter was but one kind – emerged. Very few of these documents were diplomatic, and almost all were jurisdictionally specific. After considering this background, it is then asked if, when, and how this kind of paperwork came to be acknowledged by foreign interests on the ground in the seventeenth-century ‘Atlantic World’, and what, if any, legal implications this acknowledgement carried.

---

<sup>59</sup> Beer, *Origins of the Old Colonial System*, 16-7.

<sup>60</sup> W. J. Eccles, ‘Sovereignty-Association, 1500-1763’, *Canadian Historical Review* 65 (1984), 479, 481.

<sup>61</sup> Ken MacMillan, ‘Common and Civil Law? Taking Possession of the English Empire in America, 1575-1630’, *Canadian Journal of History* 38 (2003), 415, 416, 418. These comments have subsequently received the cautious support of Tomlins in *Freedom Bound*, 114.

In contrast to the many colonial historians who have emerged to offer their interpretations on the substance and effect of this official paperwork in the New World, very few have written in much depth about the Roman law of prescription, or as it was called after the glossators, *praescriptio longi temporis*. To legal scholars, prescription is well known. As an idea, it became one of the most enduring private law analogies in public international law from the time of Hugo Grotius right up to that of Hersch Lauterpacht and beyond.<sup>62</sup> Historians have not yet shown the same regard for the idea. Indeed, one of the leading historians on the establishment of overseas possessions in the seventeenth century renders an entirely erroneous meaning of the word. In the essay ‘Taking Possession and Reading Texts’, Patricia Seed takes prescription to mean ‘by declaration or decree’.<sup>63</sup> As revealed in Chapter Three, however, ‘prescription’ does not mean anything of the sort. Confusion of this type evidently stems from a literal translation of the Latin word, and appears not to be based on the legal genealogy of *praescriptio*, which runs all the way back to Ancient Roman civil law and the magisterial procedures of the *praetor*. *Praescriptio*, and the connected concept of *usucapio*, both refer to the preparatory actions of a possessor of certain property against the owner of the same property. As Andrew Fitzmaurice puts it, prescription was ‘a variant of the Roman law of *occupatio* in which a thing becomes the property of a person by her or his long and continued possession of it’.<sup>64</sup> Respectfully, there is still more to it than that, as this dissertation reveals in the context of corporate claims to extra-European property during the period in question.

Therefore, this dissertation pays close attention both to the application of *paperwork* and *prescription* in colonial settings. As this analysis gets underway, it becomes clear that making reference to paperwork and prescription to justify a land claim was a technique that only crowds of Englishmen, Frenchmen, Dutchmen, and Swedes in the extra-European Atlantic comprehended, and often only among themselves. On colonial ground, attempts were made to use these methods by foreign corporations and individuals only to establish claims to property and territory *as against* the claims of other foreign

---

<sup>62</sup> Lauterpacht, *Private Law Sources*, 116-9, 275-7; Randall Lesaffer, ‘Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription’, *European Journal of International Law* 16, 1 (2005), 25-58.

<sup>63</sup> Patricia Seed, ‘Taking Possession and Reading Texts: Establishing the Authority of Overseas Empires’, *William and Mary Quarterly* 49, 2 (1992), 197-8.

<sup>64</sup> Fitzmaurice, *Sovereignty, Property and Empire*, 43.

corporations and individuals. Alone, these methods failed; they were easily disqualified by shows of force and intimidation. Besides, little of this conduct had any impact upon the claims of non-European populations to things and land in the same space. When several groups of indigenous peoples, who operated within local political systems in accordance with their own customs, were met by Europeans in the seventeenth-century Atlantic, a more dynamic approach was required by the newcomers to that which had been developed for their interactions with other Europeans. Legally, this was much more radical. In these unusually pluralistic environments, European corporations had to overcome some of the jurisdictional and procedural difficulties besetting their own early modern legal cultures in order, first, to recognise the land rights of pre-existing communities, and second, to select the appropriate legal instruments to disqualify these land rights after their recognition.

Of all such instruments, little consideration is given throughout this dissertation to ‘alliances’, ‘treaties’, ‘accords’, and other such public agreements conducted with varying degrees of formality in the Americas, Africa, and Asia. Much scholarship has already engaged with this subject. Instead of scouring the historical record to make sense of ‘native treaties’ and the phenomenon of ‘treatying’ in the seventeenth-century New World, an alternative approach is suggested here.<sup>65</sup> This terminology can be misleading; besides, it is irrelevant to this dissertation. There are four good reasons for this. Firstly, and most importantly, agreements of this kind tended to be commercial or martial in character. As such, they had nothing to do with the alienation of territory requisite for its regeneration as real estate for settlers by intruding corporations, which is the principal concern in this dissertation. Secondly, and what is most often overlooked in the literature, the Europeans who usually brokered these agreements – especially in the period of history contemplated in this dissertation – were not sovereigns or their diplomats but the employees of corporations. As such, they acted on behalf of the private interests of urban cosmopolitan investors, and never directly, if at all, on behalf of the monarchs and parliaments of the

---

<sup>65</sup> Dorothy Jones, *Licence for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982); Saliha Belmessous, ed., *Empire by Treaty: Negotiating European Expansion, 1600-1900* (Oxford: Oxford University Press, 2015); C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967), and *The European-African Confrontation: A Study in Treaty-Making* (Leiden: Sijthoff, 1973); Jeffrey Glover, *Paper Sovereigns: Anglo-Native Treaties and the Law of Nations, 1606-1664* (Philadelphia: University of Pennsylvania Press, 2014), and for ‘treatying’, 35.

metropole (to whom their links were tenuous in the trading houses of European merchant cities, let alone on the other side of the ocean). Thirdly, statesmen watching on from Europe were generally disingenuous when they considered the native rulers entering into these agreements as comparable, in terms of status and authority, to the sovereigns of Europe. As such, indigenous polities could not be taken seriously, for as long as they lacked ambassadorial representation, inasmuch as they could make no realistic threats of reprisal through evenly matched open wars, and insofar as the words of their sent or kidnapped envoys were understood by few and trusted by fewer still. Fourthly, ‘treaties’ were to be found within a body of international custom that was entirely *public* in nature, and they were most common across Europe in *post bellum* contexts, whereas private legal pacts and promises called upon a different set of moral and legal principles. To wit: when Grotius wrote of *contractibus*, he was writing about a very different thing to Gentili, for instance, who wrote of *foederibus*.<sup>66</sup>

On the ground, the cession of land from native proprietors was most efficiently facilitated by *contract* and *conquest*. This argument emerges in Chapters Six and Eight, which calls upon primary material, both printed and archival, focusing principally upon the English, Swedish, and Dutch record. Before presenting this argument, some intellectual context is provided of these very different legal techniques. *Contract* was a phenomenon of private law, whereas *conquest* could be both private and public. *Contract* was superficially peaceful whereas *conquest* was overtly violent. Both, in some parts of the medieval legal tradition, might allow for the transfer of a right to immoveable property, and wherever they did not, chicanery might offset either method to bring about the same result. Doctrinal uncertainty abounded, however, on the eve of the seventeenth century about the functionality of contracts and wars away from Europe, as Chapter Five sets out, which relies heavily upon Roman and canon law textbooks, but also attempts to consider how both ideas were considered in the late medieval imagination more generally.

---

<sup>66</sup> Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005 [1625]), 2: 729-67; Alberico Gentili, *Du Jure Belli*, trans. John C. Rolfe (Oxford: Clarendon Press, 1933), ch. 18. For context, see Randall Lesaffer, ‘Alberico Gentili’s *Ius Post Bellum* and Early Modern Peace Treaties’, in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 210-40.

The novelty of the presentation of this material on contract is clear. Despite the obvious and well-known importance of land purchases in the history of North American settler colonialism in the seventeenth century, no legal historian has contemplated, at any length, the medieval body of contract law which gave rise to these transactions. One of the main arguments made here is for the recognition of the centrality of faith in medieval contract law. This theoretical restriction of private law relationships to Christian jurisdiction has for a long time been overlooked, especially in the Atlantic scholarship.<sup>67</sup> Focusing principally on military alliances rather than private contracts, Richard Tuck at least identifies that such a concern existed, even if he makes the somewhat puzzling assertion that this was a particularly Protestant paranoia.<sup>68</sup> The suggestion can be made, however, that canon lawyers after Innocentius IV were probably quite alarmed by the creation of contracts with non-Christian Jews and Arabs – even if, shortly after his time, the emergence of the customary body of *lex mercatoria* took a secular stance on the same question for obvious reasons. Differences in faith were not the only impediments to contract; differences in language, too, as well as the difficulties associated with ensuring that a transaction was cognisable to other external interests, are also found in the contract law of the *ius commune* on the eve of the age of discovery.

Conquest, on the other hand, has attracted attention, but the results of this scholarship have been mixed. For example, in what is still considered to be a seminal treatment of the topic, Robert A. Williams Junior's *American Indian in Western Legal Thought* (1990) presents a selective review of conquest thinkers, which he marshals to support a premeditated argument about 'the racist discourse of conquest of the Doctrine of Discovery'.<sup>69</sup> Thankfully, conquest in the law of war has not escaped the focus of more disciplined intellectual historians. Foremost among them is Richard Tuck, whose thesis and starting point in *The Rights of War and Peace* (1999) is Hugo Grotius, and whose argument is for the endurance of late-sixteenth century humanism through the

---

<sup>67</sup> See Alexandrowicz, *Introduction to the History of the Law of Nations*, however, for a treatment of contracts and treaties with respect to non-Christians in the Indies.

<sup>68</sup> Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 92-3; Richard Tuck, 'Alliances with Infidels in the European Imperial Expansion', in *Empire and Modern Political Thought*, ed. Sankar Muthu (Cambridge: Cambridge University Press, 2012), 61-83.

<sup>69</sup> Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990).

seventeenth.<sup>70</sup> For Peter Haggenmacher, by contrast, medieval jurisprudence remains the best way to understand Grotian ideas about war.<sup>71</sup> Tuck surely exaggerates the contradiction of these approaches, for the discourses of *ius naturae* and *ius gentium* could surely be said to have sustained each other during the sixteenth and seventeenth centuries, with both owing much to canonists and civilians for instigating their academic debates in that period.<sup>72</sup> Imperialism is not central in these discussions as they are, for instance, in Martine Julia van Ittersum's *Profit and Principle*, which presents a compelling way into the intellectual history of Grotius and war by consulting a wider range of archival and manuscript materials and making the imperial context central to her analysis.<sup>73</sup> Anthony Pagden, although less concerned with the Dutch context, offers a number of insightful observations about the meaning of *conquest* within the imperial ideologies of Iberia, England, and France, with a particular focus upon the Spanish. Sadly, however, the *conquistadors* of Spain and the Salamanca school are only slightly relevant to this thesis, and those later across Europe who concerned themselves with conquest and settlement subsequent to these events taking place in the extra-European world are even less relevant.<sup>74</sup> A synthetic approach is adopted in this thesis in order to understand corporate conquests. Contemporary European thinkers and colonial actors are considered here, as well as the older Roman and church traditions of thinking about war that fed into their discourses. While medievalists have said much about the law of war, they have done so mostly in isolation from the early-modern imperial context.<sup>75</sup> Making a connection between

---

<sup>70</sup> Tuck, *Rights of War and Peace*.

<sup>71</sup> Peter Haggenmacher, *Grotius et la Doctrine de la Guerre Juste* (Paris: Presses Universitaires de France, 1983).

<sup>72</sup> Richard Tuck, 'Peter Haggenmacher, *Grotius et la Doctrine de la Guerre Juste*', *Grotiana* 7 (1986), 87-92. The recent work of Annabel Brett is revealing a picture more complex still, bound up, as she explores, in the concept of the *civitas*. Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press, 2011).

<sup>73</sup> Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615* (Leiden: Brill, 2006).

<sup>74</sup> Pagden, *Lords of all the World*, esp. 11-28, 63-102; Anthony Pagden, 'Conquest and the Just War: The "School of Salamanca" and the "Affair of the Indies"', in Muthu, *Empire and Modern Political Thought*, 30-60.

<sup>75</sup> An important exception here is James Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994). Other key studies include Muldoon, *Popes, Lawyers and Infidels*; Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965); Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975); Ryan Greenwood, 'War and Sovereignty in Medieval Roman Law', *Law and History Review* 32, 1 (2014).

these literatures, this dissertation has no ambition to identify, in conquest, ‘a racist, colonizing, rule of law’, or ‘a set of Eurocentric racist beliefs’,<sup>76</sup> but instead hopes to pinpoint what exactly was radical about New World wars in the pre-Grotian traditions of appraising *ius ad bellum* (justice to wage war) and *ius post bellum* (justice after war): not only the fact that colonial wars were being declared and waged by corporations against infidels, but also that their victories availed so much to the corporations at the cost of infidel society.

As the corporate usage of *contract* and *conquest* to develop land claims made *as against* the rights of native communities are explored, the messy reality emerges that some corporations in seventeenth-century extra-European contexts never made any attempt to secure their rights of occupation against those of pre-existing communities. In Chapter Seven, the circumstances which allowed some companies to acquire land abroad without acknowledging the land rights of pre-existing communities are discussed. The starting point here is the acceptance – *contra* the wide-reaching narratives one gets from Stuart Banner’s *How the Indians Lost Their Land* and parts of John Weaver’s *Great Land Rush* – that many pockets of land across North America were treated as though they had no owners. Such circumstances were actually common beyond Europe: there were, in other words, many forerunners to colonial New South Wales (a territory considered, in popular regard at least, to be the first settler colony of the British Empire founded upon the denial of aboriginal land rights). To be clear, the argument is not made in this dissertation for the existence of an all-encompassing ‘doctrine of *terra nullius*’, for it cannot be shown to have existed before the nineteenth century (and few scholars can be confident of identifying anything like a ‘doctrine’ thereafter either).<sup>77</sup> Rather, it is argued that the decision to put policies of *evasion* into effect, or otherwise to replace these policies with a piecemeal approach to allowing individual titles to be secured against the native claim, was often the constitutionally enduring decision of a founding corporation. So it worked in the New World, at least, where the Compagnie de la Nouvelle-France and its French predecessors adopted such a stance. A strangely resilient historiographical tradition of describing pre-1663 New France as a place without dispossession – as a place where interactions between

---

<sup>76</sup> Williams, *American Indian*, 325, 326.

<sup>77</sup> See Fitzmaurice, *Sovereignty, Property and Empire*, esp. 256-331.

settlers and natives were only based on equality and mutual respect – is directly challenged in this chapter.<sup>78</sup> This is achieved through a re-reading of well-known source material, including the *Jesuit Relations* and Samuel de Champlain's writings.

By way of contrast, the Londonderry plantation offers an English/'British' viewpoint to similar questions posed within New France.<sup>79</sup> State papers and statutes, very different kinds of documents, reveal this story. As a case study, Ulster has been included for the purpose of drawing a comparison to the American scenario and connecting the longer story with late medieval politics. In order to further a discussion initiated a few decades ago by David B. Quinn and Nicholas Canny, and carried on recently by Audrey Horning, it has been necessary to present the colonial administration of the London companies (The Irish Society) within a comparative constitutional perspective in this chapter, for they, too, evaded the recognition of Irish landownership. Unusual for the time, this kind of relationship between crown and corporation was more in line with British imperialism of a later period.<sup>80</sup>

Having explored the development of an 'imperial constitution' made up of corporate possession and dispossession in the North Atlantic world – by analysing the use and misuse of paperwork, prescription, contract, and conquest – this dissertation returns to the European context in Chapters Nine and Ten. These chapters call upon a wide range of archival and manuscript material, from collections in England, France, and the Netherlands, along with a number of printed collections of primary materials in English and French. Using this material, it is illustrated how disputes among corporate actors, which could only be comprehended in private law terms, were often the triggers to specific ambassadorial diplomacy in Europe. The point here is to present new arguments about the

---

<sup>78</sup> See, for example, W. J. Eccles, 'Sovereignty-Association', 480; Brian Slattery, 'Understanding Aboriginal Rights', 769; Cornelius J. Jaenen, 'French Sovereignty and Native Nationhood during the French Regime', *Native Studies Review* 2 (1986), 84.

<sup>79</sup> Nicholas Canny, *Making Ireland British, 1580-1650* (Oxford: Oxford University Press, 2001); Jane Ohlmeyer, *Making Ireland English: The Irish Aristocracy in the Seventeenth Century* (New Haven: Yale University Press, 2012).

<sup>80</sup> David B. Quinn, 'Ireland and Sixteenth Century European Expansion', *Historical Studies* (1958), 22-32; David B. Quinn, *The Elizabethans and the Irish* (Ithaca: Cornell University Press, 1966); Nicholas Canny, 'The Ideology of English Colonisation: From Ireland to America', *William and Mary Quarterly* 30, 4 (1973), 575-98; Nicholas Canny, *The Elizabethan Conquest of Ireland: A Pattern Established, 1565-1576* (New York: Barnes and Noble, 1976); Audrey Horning, *Ireland in the Virginian Sea: Colonialism in the British Atlantic* (Chapel Hill: University of North Carolina Press, 2013).

changing legal nature of diplomatic dispute resolution, and to bring out of obscurity a number of little-known seventeenth-century attempts to establish a multinational ‘corporate conjugation’. These arguments require engagement with a different historiography.

International relations in the Middle Ages were markedly different to international relations of the post-Westphalian period, as Garrett Mattingly makes clear in his timeless study of renaissance diplomacy. Observed ‘from a point of view which takes a jarring congeries of hostile sovereignties to be the natural order of the world, medieval “international law” seems formless, and medieval diplomacy, in theory and practice, absurd’, he writes.<sup>81</sup> It is, of course, well established that European diplomacy underwent many drastic changes from the middle of the fifteenth century to the middle of the eighteenth century. It was in this period, historians insist, that diplomacy transformed from a medieval and aristocratic institution into a bureaucratic and professional institution. Ambassadors themselves transformed from temporary sojourners, in a number of different capacities but with specific negotiable objectives, into permanent ‘resident ambassadors’, with general representative duties. The entities sending these representatives transformed from a diversity of authorities (encompassing but not limited to kings and queens, parliaments, the church, cities, duchies and other provincial estates) to a singular community of nominally equal and territorially fixed sovereign states or confederacies with pretence to act as such within Europe.<sup>82</sup>

Accounting for these definitive transformations of diplomacy, historians often eschew the search for any neat turning points, yet still place varying emphases on some of the great public law milestones of continental history: towards the beginning of these narratives is the Treaty of Venice in 1495, towards the centre is the Treaty of Westphalia

---

<sup>81</sup> Garrett Mattingly, *Renaissance Diplomacy* (New York: Dover Publications, 1988 [1955]), 15.

<sup>82</sup> M. S. Anderson, *The Rise of Modern Diplomacy, 1450-1919* (London: Longman, 1993); Lucien Bély, *Les Relations Internationales en Europe, XVIIe-XVIIIe siècles*, 4th ed. (Paris: Presses Universitaires de France, 2007); Jeremy Black, *A History of Diplomacy* (London: Reaktion Books, 2010); Mattingly, *Renaissance Diplomacy*; David Jayne Hill, *A History of Diplomacy in the International Development of Europe*, 3 vols. (New York: Longmans, Green, and Co., 1905-1914); W. J. Roosen, *The Age of Louis XIV: The Rise of Modern Diplomacy* (Cambridge, MA: 1976); Donald E. Queller, *The Office of the Ambassador in the Middle Ages* (Princeton, NJ: Princeton University Press, 1967). See also the articles collated in *L’Invention de la Diplomatie*, ed. Lucien Bély (Paris: Presses Universitaires de France, 1998), *Politics, Religion and Diplomacy in Early Modern Europe*, ed. M. R. Thorp and A. J. Slavin (Kirksville, MO: Sixteenth Century Journal Publishers, 1994), and *Revue d’Histoire Diplomatique* (1887-present).

in 1648, and towards the end (and nearer the present) is the ‘diplomatic revolution’ entailed in the Treaties of Westminster and Versailles in 1756. Because the central four chapters of this thesis are concerned with a bloc of time exactly in the middle of this window, several observations about the nature of these transformations can be offered from the perspective of corporations and private legal interests more generally in Chapters Nine and Ten. Addressing the diplomacy necessitated in Europe polities by the actions of jurisdictionally evasive corporations in the extra-European Atlantic world, this thesis explores the legal nature of several disputes between 1603 and 1673, and in the process, it seeks to reveal key aspects of the changing nature of international legal thought during this period.

Finally, an extended analysis is made of a single case study, which reflects all of the concerns touched upon in this dissertation. The history of corporate interests in the Cape of Good Hope between 1610 and 1675 is explored in Chapter Eleven. Here, the thematic layers of this dissertation bond into a narrative. This case study calls upon evidence from archives in Cape Town and The Hague, along with a number of printed manuscript collections in Dutch and French, to show how paperwork, prescription, evasion, contract, and conquest were all put to work on the ground at the Cape – and how all of this was identified, and then overlooked, in wartime Europe during this period.

## Chapter 1: Corporations and the Transformation of Europe in the Middle Ages

The early-modern expansion of Europe – both its people and its laws – may be told as a story of corporate activity. But this story begins much earlier. Ancient historians reveal an epoch determined entirely by the collaboration of human effort, but in that respect differ little to cultural anthropologists, in their hypothetical postulations about the origins of ‘cultural coherence’ and human society from ‘prehistory’ onwards. Within intellectual history, the Romans were the real pioneers of the corporate idea though, for they first came to grips with the benefits accruable from association for mutual gain, and then found a place for the institution in their politics. Although this form of association is known as the ‘corporation’ today, this name was only adopted after the fifteenth century. Deliberate collectives before then went by a number of names, among others, *universitas*, *societas*, *collegium*, *civitas*, *populus*, *respublica*, and, tellingly, a whole series of *con-* and *com-* terms, among them *congregatio*, *conventus*, *communitas*, *confraternitas*, *concilium*, and *conjuratio*.<sup>1</sup> Regardless of the distinctions between these concepts as they developed in classical Rome – and the record is sufficiently obscure to encourage some speculation on the matter – each appellation was vested with an idea which was more or less the same. Each was a body of subjects acting together with a common interest as a *universitas*, which came to enjoy, in law, bundles of special rights of which some were akin to legal personhood.

As early as the Roman period, these associations could be informal or formal. Gaius (130-80) reveals that ‘corporate bodies of a special kind are only permitted for a few reasons’ (*paucis admodum in causis concessa sunt huiusmodi corpora*), giving as examples the miners, bakers, and shipowners of Rome. As P. W. Duff points out, though, these were only the exceptional corporations of the time, there being thousands of *collegia* established during the second and third century. The distinction in Gaius, Duff shows in his seminal treatment of personality in Roman law, hinged upon those special rights that may or may not have been afforded to the corporation as a singular entity. These rights

---

<sup>1</sup> Pierre Michaud-Quantin, *Universitas: Expressions du Mouvement Communautaire dans le Moyen-Age Latin* (Paris: Librairie Philosophique J. Vrin, 1970). See also Gaines Post, *Studies in Medieval Legal Thought* (Princeton University Press, 1964), 27-59; Antony Black, *Guilds and Civil Society in European Political thought from the Twelfth Century to the Present* (Ithaca: Cornell University Press, 1984), 3-120.

allowed to special designations of the Roman corporation included the ownership of property, the ability to sue in a singular capacity, and some if not all of the features of a legal personality, but there were several other corporate forms with fewer privileges which operated as nominal collectivities generally, which were overall the more common type in the classical period.<sup>2</sup>

The corporation's composite singularity and endurance through time were the attributes which made it so exceptional in the scholastic period of the Middle Ages, as civilians and canonists developed the corporate idea in a way which diverged from Arabic traditions.<sup>3</sup> That, in the wake of this revival, the appellation of 'corporation' was settled upon seems fitting. At the Latin root of this instruction can be found the infinitive *corporare*, which means simply to form into a singular body (*corpus*). No better lexeme might have been adopted, for this is precisely, in European law, what the jurists between the twelfth and the fifteenth century definitively provided. The famous comment of Innocentius IV (1194-1254) offers one of the earliest medieval considerations of the legal fiction giving rise to the corporate form, though it has been overestimated and contorted to meet the ends of the juristic 'realists' after Otto von Gierke.<sup>4</sup> A '*collegium*', Innocentius confirms in the *Apparatus* (1254), by virtue of its '*universitatis*' – that is, its accommodation of all within a whole – is, in law but not reality, '*una persona*'.<sup>5</sup> In this spirit, there arose a canonistic tradition of thinking about the corporate form as a 'traditional person', as Johannes Andraea (1270-1350) put it, 'who in an individual substance is a rational entity', regardless of its name (e.g. '*universitas*', '*communitas*', '*collegium*', '*corpus*', '*societas*').<sup>6</sup>

---

<sup>2</sup> P. W. Duff, *Personality in Roman Private Law* (Cambridge: Cambridge University Press, 1938), 148-9.

<sup>3</sup> As Timur Kuran points out, while the form of the Islamic company (*waqf*) allowed for collaboration and collectivity, it did not provide for a juristic personality. Timur Kuran, 'The Absence of the Corporation in Islamic Law: Origins and Persistence', *American Journal of Comparative Law* 53, 4 (2005), 785-834.

<sup>4</sup> Duff, *Personality*, 221-3; Walter Ullmann, 'The Delictal Responsibility of Medieval Corporations', *Law Quarterly Review* 64 (1948), 81. See also Otto von Gierke, *Political Theories of the Middle Age*, trans. F. W. Maitland (Cambridge: Cambridge University Press, 1900); F. W. Maitland, 'The Corporation Sole (1900)', in *Maitland: State, Trust and Corporation*, ed. David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2003), 9-31.

<sup>5</sup> '[C]ollegium in causa universitatis fingatur una persona', from *Apparatus*, c. 57 X 2.20, quoted in J. P. Canning, 'The Corporation in the Political Thought of the Italian Jurists in the Thirteenth and Fourteenth Centuries', *History of Political Thought* 1, 1 (1980), 17; Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press, 1957), 306.

<sup>6</sup> 'Nomina "universitase", "communitas", "collegium", "corpus", "societas" sunt quasi idem significantia [...] ob hoc nullum horum est vera persona, que est rei rationabilis individua substantia; inde collegium

It is no coincidence that clerical groups right across Christendom were beginning to adopt the corporate form at just this time.<sup>7</sup> This church context was crucial and from it the jurisprudence cannot be divorced (and the same will apply to later observations in this thesis with respect to prescription, contract, and war). That Christ himself was a body corporate, and so too were his followers, was laid out in the Corinthians.<sup>8</sup> By the Middle Ages, however, the entire Christian world was operated through corporate entities, often (as in English law) called the ‘corporation sole’, which referred to an office in perpetuity (for example, an Archbishop) and all the rights of property, enjoyments of trust, and obligations of jurisdiction attached thereto – all separate to the unexceptional legal personality of the individual or individuals making up that office. Church actors worked in groups, and churches *themselves* worked in groups. This is largely why much of the early thoroughgoing legal reflections upon corporations were principally canonical in scope, as Walter Ullmann’s research on Innocentius IV suggests. Indeed, the fiction theory was but one of Innocentius’s many contributions to corporate thought. On corporate crimes, the Pope conceived largely of any crimes, in church law, committed by whole *collegia*, and it followed that, for corporate punishments, the Pope considered the feasibility of excommunicating whole *collegia*.<sup>9</sup>

Not until the fourteenth century was a more universal conception of the corporation, with civil and religious agency and both public and private legal capacities, more thoroughly developed by jurists. Bartolus of Saxoferrato (1313-57) was the first to qualify and expand the musings of Innocentius on the corporation’s legal singularity. Bartolus explored the means and circumstances by which a corporation could be convicted and punished in criminal law, which had to start from the basic legal fiction that the corporation was one person notionally separate from the members constituting it. The ‘*universitas*’, he put it, ‘according to a legal fiction, represents a person, different from all of the persons

---

dicitur persona non vera, sed representata’. Johannes Andraea, *Sextus*, 5.11.5, n.8-9, quoted in Canning, ‘The Corporation’, 17.

<sup>7</sup> See also below, 47-8.

<sup>8</sup> 1 Cor. 12: 12-4 (*King James Bible* [hereafter: *KJV*]): ‘For as the body is one, and hath many members, and all the members of that one body, being many, are one body: so also is Christ. For by one Spirit are we all baptized into one body, whether we be Jews or Gentiles, whether we be bond or free; and have been all made to drink into one Spirit. For the body is not one member, but many’.

<sup>9</sup> Ullmann, ‘Delictal Responsibility’, 77-96.

who belong to it'.<sup>10</sup> This thinking would be refined at the hands of the civilian Baldus de Ubaldis (1327-1400), in his conceptualisation of the *populus* as *persona*. As J. P. Canning has shown, Baldus 'produced a conception of the city-*populus* that had not been enunciated before, namely that it is a collection of natural, political men (citizens) into a unitary entity which is an abstract and immortal person with a substratum of physical members, and which is both self-governing and territorial'.<sup>11</sup> Crucially, the political agency of these collectives, according to the Italian city-state civilians, came into existence not necessarily by concession but could merely through the passage of time (i.e., by prescription or custom), which will be considered again in Chapter Three.

This was a fundamentally political conception of the corporate form, and it became functional for several medieval collectives. Among the first to adopt the form explicitly were bodies politic in communities whose social complexity confounded traditional ruling authorities and were more efficiently delegated, by sovereigns, to local governments, rather than to palatinate or seigniorial grantees. Several communities in the middle ages made a transformation, like this, into corporate municipalities. This represented a widespread sovereign outsourcing of political authority; a manoeuvre which at first supported, but ultimately undermined, feudal social relations. The most drastic manifestations of these political bodies corporate were the self-governing and territorial city-states of Italy, especially Venice, Genoa, Florence, and Siena. Other forms of corporation emerged over the same period, which should not escape notice. Craftsmen formed into guilds, benevolists formed into charities and hospitals, teachers and students formed into universities, and clerical groups formed into land-hungry ecclesiastical corporations, which were called, among other things, congregations, convents, and chapters.<sup>12</sup>

Technically these were all corporations, in spite of the great variations between them in their form and function. They were governed by their own elected leader or by a

---

<sup>10</sup> Ullmann, 'Delictal Responsibility', 85-92 (my translation of a quote at 86: '*Secundum fictionem juris ipsi non dicunt verum, nam universitas repraesentat unam personam, quae est aliud a scholaribus seu ab hominibus universitatis*'). See also Luc Foisneau, 'Elements of Fiction in Hobbes's System of Philosophy', *Fiction and the Frontiers of Europe, 1500-1800*, ed. Richard Scholar and Alexis Tadié (Farnham: Ashgate, 2010), 80-1.

<sup>11</sup> Canning, 'The Corporation', 31.

<sup>12</sup> For universities, see Marcia L. Colish, *Medieval Foundations of the Western Political Tradition, 400-1400* (New Haven: Yale University Press, 1998), 265-73. For guilds, see below, 51-3. For municipal government, see below, 54-5. For ecclesiastical corporations, see below, 47-8. For city-states, see below, 53-4.

board of elected, invited, or prescribed (in both senses of the word) members. Some passed their own bylaws, and many owned and transferred their own property; some sued and were sued, and many did even more than that unseen. Of this legal character – more about which will be revealed throughout this study – just a few things have to be stressed about the medieval corporate form at this stage. Whatever the name by which it went, whether formal or informal in construction, whether whole or the sum of its parts in law, whether church or lay, and whether its constituents were voluntarily or involuntarily marshalled, it is important to acknowledge that *all* associations of this genus shared a distinctly governmental function. Already novel by virtue of their singular personalities in law, corporations were, at the same time, self-regulating, mostly autonomous political bodies.<sup>13</sup> A person and a government, as much private as public, the corporation was a political entity which changed the face of Europe. Its impact upon the development of European commerce, upon its cultures of maritime trade and landholding, and upon the urban organisation of society, was immense in the lead-up to the age of early modern imperialism. While recognising the teleological trajectory of this approach, this chapter proceeds from here to recount a corporate history of medieval Europe.

Trading corporations and ‘business associations’ are particularly important in the context of late medieval and early modern European expansion. These emerged when individuals with investible capital united with entrepreneurs, with a common interest in the acquisition and redistribution of property through the market, to form into a ‘company’ (derivative of Latin *companio*, which alludes to the sharing of bread). These emerged in the period of rising consumption and wealth accumulation between the tenth and twelfth century as a result of the rise of cross-border ‘venturing’ (i.e., stockpiling between corresponding markets). This demanded new forms of collaborative association (partnerships and groups with pooled capital), and along with it, new forms of contract (sharing profits and minimising liability). These legal innovations probably spread from their likely origins in

---

<sup>13</sup> Philip J. Stern, ‘Bundles of Hyphens: Corporations as Legal Communities in the Early Modern British Empire’, *Legal Pluralism and Empires, 1500-1850*, ed. Lauren Benton and Richard Ross (New York: New York University Press, 2014), 40.

the Arabic world into Italy, where *societates* and ‘super companies’ offered an example of how to facilitate both functions within the corporate form itself.<sup>14</sup>

The *companio* eclipsed the Mediterranean trading world by the fourteenth century, and the vocational life of an average merchant was all of a sudden thoroughly organised and professionalised. He was ‘no longer’, writes Peter Spufford in the *New Cambridge Medieval History*, ‘a simple individual capitalist’. Spufford continues: ‘As head of a company he was also a manager responsible to his shareholders and depositors, and in complex business relationships with factors, agents, carriers, innkeepers, insurers, sub-contractors, suppliers and customers scattered over much of western Europe and in the Mediterranean’.<sup>15</sup> This was altogether new. Accepting that the Mediterranean region dominated for the time being – becoming, as Fernand Braudel showed long ago in his epic treatment of the topic, a self-contained region with its own patterns of trade, movement, and culture by the 1500s – then it is important to reflect on the institutional change occurring elsewhere in late medieval Europe too.<sup>16</sup> A commercial confederation stretching from the Baltic Sea to the North Sea took shape during the fifteenth century. Within this Hanseatic ‘empire of trade’, merchant collaboration reached unprecedented levels.<sup>17</sup> In the north at this time too, particularly in what is now Germany, the first large metal and coal

---

<sup>14</sup> Kuran, ‘The Absence of the Corporation in Islamic Law’; John Tolan, Henry Laurens, & Gilles Veinstein, *Europe and the Islamic World: A History* (Princeton, NJ: Princeton University Press, 2013), 79; Abdullah Alwi Haji Hassan, *Sales and Contracts in Early Islamic Commercial Law* (Selangor: Other Press, 2007); Robert S. Lopez and Irving W. Raymond, ed., *Medieval Trade in the Mediterranean World: Illustrative Documents Translated with Introductions and Notes* (London: Oxford University Press, 1955), 174-211; R. de Roover, ‘The Organisation of Trade’, *The Cambridge History of Europe, III: Economic Organization and the Policies of the Middle Ages*, ed. M. M. Postan, E. E. Rich and Edward Miller (Cambridge: Cambridge University Press, 1963), 46-59. For the Italian context, see Armando Sapori, *Studi di Storia Economica Medievale*, 3rd ed. (Florence: G. C. Sansoni, 1955); Edwin S. Hunt, *The Medieval Super-Companies: A Study of the Peruzzi Company of Florence* (Cambridge: Cambridge University Press, 1997). So remarkable were these developments that they compelled Max Weber to produce his first serious publication on *Zur Geschichte der Handelsgesellschaften im Mittelalter* (1889), which explores the Italian-led transformation of the *societas* model into that of the modern business ‘sociation’, or *Vergesellschaftung*. See Max Weber, *The History of Commercial Partnerships in the Middle Ages*, trans. Lutz Kaelber (Lanham: Rowman & Littlefield, 2003). A better overview of these developments is to be found, however, in Edwin S. Hunt and James M. Murray, *A History of Business in Medieval Europe, 1200-1550* (Cambridge: Cambridge University Press, 1999), 11-128.

<sup>15</sup> Peter Spufford, ‘Trade in Fourteenth-Century Europe’, *The New Cambridge Medieval History: VI, 1300-1415*, ed. Michael Jones (Cambridge: Cambridge University Press, 2015), 181.

<sup>16</sup> Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, trans. Siân Reynolds, 2 vols. (London: Collins, 1972-3).

<sup>17</sup> G. V. Scammell, *The World Encompassed: The First European Maritime Empires, c. 800-1650* (London: Methuen, 1981), 38-54.

companies financing mines and controlling output emerged. This was a region in which companies big and small could profit.<sup>18</sup> It fostered a distinctly Germanic corporate tradition, central to which was the conceptualisation of association (*Genossenschaft*) with a ‘collective hand’ (*zu Gesamte hand*).<sup>19</sup> Everywhere in Western Europe, markets and fairs, most of them near waterways and coastlines, began to flourish and meet regularly, which had the effect of diversifying the traditional agrarian economies of Europe and consolidating hitherto disparate regions into market blocs. This transformation was particularly felt in the Low Countries, where towns formerly of little consequence were suddenly great ‘cities of commerce’ by the fourteenth century.<sup>20</sup>

The economic effects of all of this were seismic. Trade and heightened collaboration, together, connected the major European hubs of capital and industry, and fostered the movement of consumable goods through ports and across borders. This activity beckoned what is known as the medieval ‘commercial revolution’. It was a revolution thoroughly transnational in character, and it was incredibly contagious, even if historians are divided about the extent to which it can be considered prototypical of modern capitalism.<sup>21</sup>

Recognising the institutional peculiarity of the corporations and partnerships which gave rise to this frenzy of trade, it is also important to observe the manifold responses of established political regimes to the interconnection of interests engendered by this process.

---

<sup>18</sup> Justyna Wubs-Mrozewicz and Stuart Jenks, ed., *The Hanse in Medieval and Early Modern Europe* (Leiden: Brill, 2013).

<sup>19</sup> The similarity and parallels of this tradition cannot be explored here, but interested readers will benefit from Rudolph Hübner, *A History of Germanic Private Law* (London: John Murray, 1918), 109-59.

<sup>20</sup> See Jessica Dijkman, *Shaping Medieval Markets: The Organisation of Commodity Markets in Holland, 1200-1450* (Leiden: Brill, 2011); Oscar Gelderblom, *Cities of Commerce: The Institutional Foundations of International Trade in the Low Countries, 1250-1650* (Princeton, NJ: Princeton University Press, 2013); James D. Tracy, *Holland under Habsburg Rule, 1506-1566: The Formation of a Body Politic* (Berkeley: University of California Press, 1990), 9-32. For the interrelationship between these burgeoning cities and those on the eastern coast of England, see Nelly Johanna Martina Kerling, *Commercial Relations of Holland and Zeeland with England from the Late 13th Century to the Close of the Middle Ages* (Leiden: Brill, 1954), 1-57.

<sup>21</sup> The term comes from Robert S. Lopez, *The Commercial Revolution of the Middle Ages, 950-1350* (Cambridge: Cambridge University Press, 1976). See also, generally, Hunt and Murray, *History of Business in Medieval Europe*; J. N. Ball, *Merchants and Merchandise: The Expansion of Trade in Europe, 1500-1630* (London: Croom Helm, 1977); Stephen A. Epstein, *An Economic and Social History of Late Medieval Europe, 1000-1500* (Cambridge: Cambridge University Press, 2009), 70-99. For scepticism of the protocapitalist argument, begin with Martha C. Howell, *Commerce before Capitalism in Europe, 1300-1600* (Cambridge: Cambridge University Press, 2010).

Medieval sovereigns suspicious of treason and capable of surveillance were naturally reluctant to allow subjects to leave their realms and return as they pleased, though the earliest trading companies – which were inclined towards sending agents on contract, while enjoying some fixity of situation near a market, port, or in the city near creditors – could escape the brunt of this suspicion. Medieval bureaucracies were rarely powerful enough to maintain the requisite surveillance to police this movement and networking. As it happened, official suspicion towards traders declined in fairly close correlation with the prospect of raising revenue from subjects engaged in the trade, crudely, through the introduction of tariffs and dues, and on top of this, through the availing of commercial incorporation and special trade privileges only to the highest bidders, which requires additional comment. Corporate obligations, among them the regular payment of monetary tributes, had to be upheld in return for the right to associate, sometimes a singular personality in law, and sometimes a right of monopoly, naturally, in full compliance with every statute and custom in force at home. Domestically tied to the realms of the monarchs from whose favour their incorporation originated – for, in law, it was required for many associations to have their privileges validated and vested into one unit by the sovereign or delegate governing entity – early trading companies were kept accountable as any other subject may have been, when their actions touched the lives of subjects within the acknowledged territories of a given realm.

It rarely worked so neatly in practice. A variety of polities – city-states, caliphates, cantons, comtés, duchies, feudalities, ports, principalities, tributaries, and whatever alliances and confederations of the same – cascaded across Europe in the late Middle Ages, and the borders between them were sometimes illusory.<sup>22</sup> Uncertainties of jurisdiction were common across these polities, and this plurality was made all the more complicated by the variable interventions of ecclesiastical courts. In particular, it was the rise of cross-border trading which revealed these inconsistencies of law and order, and nowhere was this so evident as it was in cosmopolitan settings, where most of the lucrative trade was carried out. Because ‘international traders were footloose’, as Oscar Gelderblom suggests, a radical transformation of urban institutions and a good deal of legal innovation took place

---

<sup>22</sup> A remarkable if now outdated overview of these political entities remains Henry Hallam, *View of the State of Europe During the Middle Ages*, 3 vols. (London: J. Murray, 1818).

during the thirteenth and fourteenth centuries in order to ensnare them within jurisdictions.<sup>23</sup>

New uncertainties emerged in private law at this time. Just which rules could be called upon at fairs, ports, and markets, when the transactions of these highly mobile merchants and agents fell into dispute, was not always immediately clear. Merely identifying the home, or homes, of the footloose trader was one thing, and not always a straightforward thing in the days before passports. More difficult still was the task of contemplating whether the laws of a local polity or those of his host were more important to him personally, or the company in which he had a stake, or the merchants with whom he traded, or the creditors who funded it all. Collaboration (from a legal standpoint, the division of responsibilities and rights among several actors) made all of these problems more complex.

There were, of course, near-universal sources of law which were accepted, to varying degrees, across pre-reformation Europe, after canon law and Roman civil law had congealed into something of a *ius commune* from the twelfth century onwards.<sup>24</sup> But for all the innovation of the decretalists and the commentators, they were forced to use old legal resources for new needs. Trade, at exactly this time, was becoming more complex than it had ever been in the Roman Empire, and increasingly featured a multiplex of interests involved in the movement of capital and goods. These interests could be directly or indirectly related to one another. Contracts facilitating transfers among and between these interests went begging for closer attention, more about the internationality of which will be said later. On top of this, commercial questions of a novel character – touching value, debt, and equity, for instance – emerged. These were often complicated on points of law. Disciplined readers of canon law and civil law could provide no solid guidance on these matters. The ethicists of Ancient Greece, like some of the theologians they later inspired, were of little immediate use either.

What was needed in this context was a new source of law for these invariably private disputes, and this is precisely what can be seen emerging from the thirteenth

---

<sup>23</sup> Gelderblom, *Cities of Commerce*, quote at 201.

<sup>24</sup> Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800*, trans. Lydia G. Cochrane (Washington, DC: Catholic University of America Press, 1995 [1989]). For England, see R. H. Helmholz, *The Ius Commune in England: Four Studies* (Oxford: Oxford University Press, 2001).

century. Instead of resolving disputes in established courts away from the market, which disrupted the trade, incurred additional expenses, and was subject to the unpredictability and potential bias of local rulings, merchants established their own market courts. In England, some of these sessions were called the ‘Courts of Piepowders’, and they accommodated travelling merchants and vagabonds alike (from the French *pieds poudrés*, for ‘dusty feet’).<sup>25</sup> Disputes in courts like this, among and between visiting and local traders, were resolved here to the remarkable thump of a common beat, independent of traditional judiciaries. A customary legal regime, from its origin within these informal and locally established courts, consolidated and was hereafter accepted (with varying degrees of conviction) across the trading parts of Europe as *lex mercatoria* (merchant law). To be sure, this formal appellation veils the informality of the kind of arbitration it inspired, but from a functional point of view, merchant law was undeniably important for this period. This was secular custom, dealt quickly and impartially; a ‘self-constituting legal regime’, as Richard Ross and Philip Stern recently describe it, which developed transnationally, and in the process placed pressure on royal courts, town courts, and church courts if not to observe its conventions then to relinquish some jurisdiction over traders moving in and out of the region.<sup>26</sup> Although scholars of modern international legal procedures seldom cast their gaze back so far, the example of such a framework should surely bid them otherwise, though here it remains just to notice that it was the relationship of medieval funders acting in collaboration or in syndicates that largely necessitated the novel format in the first place. The traders they sent needed law in the locality of their deployment.

Meanwhile, as trade became more multicultural, as the scope for customs taxation grew, and as the smuggling of imports became more organised and lucrative, the conduct of criss-crossing foreign merchants was increasingly subjected to top-down regulation. Trade agreements established specific privileges and protocols for foreign traders and their conduct, which depended on the nature of diplomatic relationships between signatories at

---

<sup>25</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), book 3, chapter 4, On Private Wrongs: ‘[...] so called from the dusty feet of the suitors; or according to sir Edward Coke because justice is there done as speedily as dust can fall from the foot’.

<sup>26</sup> For this, see Richard J. Ross and Philip J. Stern, ‘Reconstructing Early Modern Notions of Legal Pluralism’, in Benton and Ross, *Legal Pluralism and Empires*, 109-41. See also Mary Elizabeth Basile et al., ed., *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife* (Cambridge: Ames Foundation, 1998); V. Piergiovanni, ed., *From Lex Mercatoria to Commercial Law* (Berlin: Duncker und Humblot, 2005).

any period. Elaborate statutory regulation of particular staple trades owe their origin to thirteenth-century Germany, from where the idea of *stapelrecht* spread through the Hanse and into England, where the first Statute of the Staple was passed in 1353.<sup>27</sup> The Mediterranean trade was no less regulated, of course. Here individual trading cities often enforced restrictions of their own. One of the prevailing reasons for this kind of regulation was to protect local industry (wine production, for example); another was to restrict the exportation of essential foodstuffs, to offset the likelihood of famine.<sup>28</sup> In fact, there developed a great deal of regional variations in the regulation of medieval trade, and nowhere was the resultant jurisdictional uncertainty so profound as it was by the sea.

The thirteenth and fourteenth centuries witnessed great increases in the carrying capacities of cargo ships, with the most important technological advances coming in the fifteenth.<sup>29</sup> The growth of bulk trade, and the intensification of naval warfare – both of which organised entirely by private contractors from the late medieval period onwards – were paired consequences of this.<sup>30</sup> Accordingly, and as a result, maritime trade and naval administration attracted new legal attention. Maritime justice was generally the job of special councils and courts in seaport towns from the thirteenth century onwards, with written codes of maritime law becoming particularly elaborate regarding sea-related private law and public law from about the fifteenth century onwards.<sup>31</sup> The role of these courts was to sort out the new kinds of relationships that had been forged between

---

<sup>27</sup> Otto Gönnerwein, *Das Stapel- und Niederlagsrecht* (Weimar: Verlag Hermann Böhlau Nachf., 1939); Maurice Keen, *England in the Later Middle Ages: A Political History*, 2nd ed. (New York: Routledge, 2003), 127-30.

<sup>28</sup> See especially the documented examples in Lopez and Raymond, *Medieval Trade*, 327-37. See also Kerling, *Commercial Relations*, 12-3, 92-3; Michel Mollat du Jourdin, *Europe and the Sea*, trans. T. L. Fagan (Oxford: Blackwell, 1993), 111-4.

<sup>29</sup> Jan Bill, 'The Cargo Vessels', *Cogs, Cargoes and Commerce: Maritime Bulk Trade in Northern Europe, 1150-1400*, ed. Lars Berggrev et al. (Toronto: Pontifical Institute of Mediaeval Studies, 2002), 92-112; Frederick M. Hocker, 'Technical and Organizational Development in European Shipyards, 1400-1600', *Maritime Topography and the Medieval Town*, ed. Jan Bill and Birthe Clausen (Copenhagen: University of Copenhagen, 1999), 21-32.

<sup>30</sup> See David Parrott, *The Business of War: Military Enterprise and Military Revolution in Early Modern Europe* (Cambridge: Cambridge University Press, 2012).

<sup>31</sup> Edda Frankot, 'Of Laws of Ships and Shipmen': *Medieval Maritime Law and its Practice in Urban Northern Europe* (Edinburgh: Edinburgh University Press, 2012), 6-26, 144-98. For a detailed Mediterranean case study analysis, see Eugene H. Byrne, *Genoese Shipping in the Twelfth and Thirteenth Centuries* (Cambridge, MA: Mediaeval Academy of America, 1930).

shipowners, agents, merchants, mariners, and creditors.<sup>32</sup> Trading in collaboration not only raised new questions; it also resurrected and problematised old ones too. Shipwreck, collision, prize, salvage, and even maritime wages increasingly fell within the purview of this body of law, which acquired the Latin appellation of *ius maritimum* just as Latin was going out of fashion. Starting its humble life here essentially as a set of shipping regulations, the *ius maritimum* gradually developed a coherent jurisprudence of its own, borrowing from the old Roman law while promulgating local trading regulations, with subtle distinctions in application from jurisdiction to jurisdiction.<sup>33</sup>

Maritime legal issues became especially more difficult to resolve when they were in some way wrapped up in martial matters, which was common enough in this period. After all, the merchant ship and the navy ship was, more often than not, one and the same ship in the Middle Ages. A new kind of jurisdiction emerged to deal with just this kind of ambiguity, principally to uphold the principles of fairness in the seafaring trade during times of war and peace. In France, during the first half of the fifteenth century, offices of *amirauté* emerged along the coast and operated provincially, contentiously watched over by a royally appointed ‘Admiral of France’ (the jurisdiction of whom was sketched out in the 1550s and clarified in a royal edict of Henri III in 1584). Through this loosely connected network of officialdom, French maritime law was meted out – customarily reliant upon the Judgements of Oléron, the Laws of Wisby, and regulations observed across the Hanseatic world – until the assumption of personal discretion by Cardinal Richelieu over maritime and naval matters in 1626-7.<sup>34</sup> In England, by contrast, admiralties enjoyed none of the

---

<sup>32</sup> For Weber, it would be the creditors which represented the thorniest legal entity in this coterie, but there was little, in sea law, to distinguish between their interests and those of merchants using the credit. See Weber, *History of Commercial Associations*, 63-83. This corrective might unfairly hinge on the question of translation and terminology. For an illuminating study of the relationships between shipowners, shipmasters, crews, and shipping merchants in England, see Robin Ward, *The World of the Medieval Shipmaster: Law, Business and the Sea* (Woodbridge: Boydell Press, 2009).

<sup>33</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 1: 332-55. For the argument that law manifested in oceanic corridors according to geopolitical and trading conditions differing from place to place, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010), 104-61.

<sup>34</sup> Lancelot-Voisin La Popelliniere, *L'Amiral de France et par Occasion, de Celuy des Autres Nations, tant Vieilles que Nouvelles* (Paris: Chez Thomas Perier, 1584); Estienne Cleirac, *Us et Coustumes de la Mer* (Bordeaux: Guillaume Millanges, 1647). See, for an overview, Alan James, *The Navy and Government in Early Modern France, 1572-1661* (Woodbridge: Boydell Press, 2004), 11-76. For a recent case study on the operation of French admiralty courts in relation to a dispute with the Portuguese over prize, which places Cleirac's fascinating text into the context of its preparation, see Francesca Trivellato, “‘Amphibious Power’:

kind of provincial autonomy enjoyed by *amiraux* in France, but there was less statutory intervention and greater judicial deliberation in their operation. The maritime jurisdiction of ‘the admirall’ in England can be traced back at least to Edward I, but it would not be until the latter half of Edward III’s reign, in the middle of the fourteenth century, that the first admiralty sessions were heard in court. The jurisdiction was ultimately the same as the French, extending over all matters of maritime law touching England, including both prize and civil matters. This distinction sharpened in English admiralty jurisprudence with time, especially as the operation of the admiralty veered closer in vicinity to naval matters. Specially formed English admiralty courts drew much less from customary law and preferred to consult the Roman civil law (if inconsistently) when hearing actions brought against ships, goods, agents, merchants, and companies (but never sovereigns).<sup>35</sup> This was the model, more so than that of the French, followed by the United Dutch Provinces when their Staten Generaal (the Estates-General, the supreme legislating body of the United Dutch Provinces) established five courts of *admiralteit* as part of its first judicial reforms after the rejection of Habsburg control in 1579. The biggest of these courts came to sit in Amsterdam, which also collected customs, oversaw the construction of warships, and recruited seamen, on top of its judicial tasks.<sup>36</sup> The principal reason for this sudden explosion of maritime legal institutions in Europe was the expansion of sea-based trade, which was increasingly dominated by shipowners, merchant syndicates, and creditors, but entirely run by agents and seamen involved for fixed terms, all whom woven together into a tapestry of contracts, commissions, and IOUs (or ‘letters obligatory’). These were the legitimate interests of the seafaring trade, granting though that many of them could be quite deceitful. What must be considered separately are the overtly renegade interests involved in the same industry. Merchant ships developed their own rules and flouted others like

---

The Law of Wreck, Maritime Customs, and Sovereignty in Richelieu’s France’, *Law and History Review* 33, 4 (2015), 915-44.

<sup>35</sup> Sir Travers Twiss, *Monumenta Juridica: The Black Book of the Admiralty* (London: Longman and Co., 1871-4); John Godolphin, *A View of the Admiral Jurisdiction* (London: W. Godbid, 1661). See also Lionel H. Laing, ‘Historic Origins of Admiralty Jurisdiction in England’, *Michigan Law Review* 45, 2 (1946), 163-82; Charles S. Cumming, ‘The English High Court of Admiralty’, *Tulane Maritime Law Journal* 17 (1992-3), 209-56.

<sup>36</sup> Jonathan Israel, *The Dutch Republic: Its Rise, Greatness, and Fall, 1477-1806* (Oxford: Oxford University Press, 1995), 295-6; Gelderblom, *Cities of Commerce*, 164-7. The Dutch admiralty’s national fleet was in turn emulated by the English at the start of the seventeenth century. For this, see John Cramsie, ‘Commercial Projects and Fiscal Policy of James VI and I’, *Historical Journal* 43, 2 (2000), 345-64.

never before in the Middle Ages, at a moment in time that is best elucidated by a turn to language. Familiarity with the multilingual etymologies of piracy offers a good idea of when and where it became so pressing to develop protocols of policework for illicit maritime prospecting: *zeerovers* (fourteenth-century Dutch, for ‘sea robbers’), *piratas* (Ancient Greek into fourteenth-century Spanish and Italian, becoming ‘pirates’), *corsaires* (fifteenth-century French from Italian ‘*corsaro*’, for ‘courier’ or ‘plunderer’), *vrijbuiters* (sixteenth-century Dutch, becoming ‘freebooters’ in English), *kapers* (seventeenth-century Dutch, for ‘hijacker’), *boucaniers* (sixteenth-century French-Arawakan, becoming ‘buccaneers’ in English and ‘*boekaniere*’ in Dutch), and as well *privateers* and *sea-dogs* (both seventeenth-century English and unique to that language) commenced their rule of the seas across the same period their presence was acknowledged within key European dialects.<sup>37</sup> Observe, moreover, the format of their composition and the versatility of their political affiliation. Attuned to a common business model, these groups were rogue companies, with weak, if any, loyalty to a European ruler, and often-complex structures of local governance.<sup>38</sup> Sailing alongside them all, adopting some of their questionable techniques of accumulation or otherwise becoming entirely their victims, were the ships of the more apparently amicable merchant companies of the European mainland on commission or contract. All of this called for more rigorous assertions of jurisdiction over the sea, and with that came the greater opportunity for merchant syndicates to launder prize through admiralty courts.<sup>39</sup>

In tandem with this was the development and expansion of the seafood industry and the emergence of big fishing companies, which triggered the beginnings of a sea change in

---

<sup>37</sup> These and other etymologies contemplated in this dissertation come from various dictionaries and resources, of which none have been more helpful than the Oxford English Dictionary.

<sup>38</sup> Peter T. Leeson, ‘An-*arrgh*-chy: The Law and Economics of Pirate Organization’, *Journal of Political Economy* 115, 6 (2007), 1049-94.

<sup>39</sup> Anne Pérotin-Dumon, ‘The Pirate and the Emperor: Power and the Law of the Sea, 1450-1850’, *Political Economy of Merchant Empires*, ed. James D. Tracy (Cambridge: Cambridge University Press, 1991), 196-227; Lauren Benton, ‘Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction’, *International Journal of Maritime History* 23, 1 (2011), 1-15; Benton, *Search for Sovereignty*, ch. 3. See also for England and the Atlantic context, David H. Webb, ‘Profiting from Misfortune: Corruption and the Admiralty under the Early Stuarts’, *Politics, Religion, and Popularity in Early Stuart Britain*, ed. Thomas Cogswell, Richard Cust, and Peter Lake (Cambridge: Cambridge University Press, 2002), 103-23; Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon Press, 2000).

metropolitan understandings of sovereignty and territoriality.<sup>40</sup> That pun is only excusable because it is relevant: while most Christian European monarchs pretended a right to sovereignty of sea in the Middle Ages – and some more than others after the late-fifteenth century, by dint of papal favouritism, as will be discussed later – these pretensions began to be relinquished in the face of the demands of fisherfolk and trading companies. Indeed, the part played by the humble herring in the development of international legal order was far bigger than most unacquainted with the topic might assume. This clupeid was largely responsible for teaching land-based governments of their inability to regulate foreign fisheries. This lesson was revealed slowly but surely between the fifteenth and early seventeenth centuries, when the imagination of *mare clausum* gradually yielded to that of *mare liberum*.<sup>41</sup> This was all to the relief of seafood merchants and their customers on the ground, for whom their ability to tend to a market of consumers on land was greatly affected by the over-regulation of fishing on the sea. Statutory regimes regulating staple trades, there remained, and closed ports could still be floated past by fishing vessels which themselves may have been regulated as to the types of fish they could carry, but the limits of medieval trade regulation were clearly reached with maritime resource exploitation, and the commercialisation of fishing, principally in the north-western portion of Europe, followed suit.<sup>42</sup>

Focusing upon collaboration, association, and incorporation during the medieval period provides for the appreciation of a great commercial revolution, and the political, legal, and economic challenges posed by maritime trade, warfare, plunder in this context. Returning to focus upon the European mainland over the same period, several other

---

<sup>40</sup> Anthony Beaujon, *The History of the Dutch Sea Fisheries: Their Progress, Decline and Revival* (London: William Clowes and Sons, 1884); Noël de la Morinière, *Histoire Générale Des Pêches Anciennes et Modernes*, 2 vol. (Paris: L'imprimerie Royale, 1815); Maryanne Kowaleski, 'The Commercialization of the Sea Fisheries in Medieval England and Wales', *International Journal of Maritime History* 15, 2 (2003), 177-231. See also the essays collected in David J. Starkey, Chris Reid and Neil Ashcroft, ed., *England's Sea Fisheries: The Commercial Sea Fisheries of England and Wales Since 1300* (London: Chatham, 2000); Michel Mollat, ed., *Histoire des Pêches Maritimes en France* (Toulouse: Bibliothèque Historique Privat, 1978).

<sup>41</sup> For a useful summary of the intellectual side of this transition see Monica Brito Vieira 'Mare Liberum vs Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas', *Journal of the History of Ideas* 64, 3 (2003), 361-77.

<sup>42</sup> Thomas Wemyss Fulton, *Sovereignty of the Seas: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters* (Edinburgh: W. Blackwood, 1911), 1-117.

important developments can be identified as well. There were great changes imposed upon, and indeed caused by, interests with a stake in the land itself. This story risks oversimplification. The nexus of medieval social and political relations was not everywhere the same, and the emergence from feudalism of private property relations, bound together by modern state institutions, is a multifaceted story difficult to convey briefly.<sup>43</sup> But this transition is important at least to keep in mind if the earliest patterns of possession and dispossession in European empires are to be understood. For this reason, land rights in the history of corporate and composite politics, within the settled and predominately agricultural regions of the Christian and western part of the European continent, will now be considered.

Perhaps the greatest transformation on the land since the great Germanic migrations (*völkerwanderung*) and the consequent sequestration of Europe into feudal societies after the fall of the Roman Empire has to be the mass acquisition of land by the church. Between the rise of the mendicant movement and the beginnings of the Papal Schism (ca. 1193-1378), thousands of ecclesiastical corporations fell upon the land from Kraków to Galway, all of them attached to Rome but to each their own separate holding.<sup>44</sup> In most places, the corporate form, for this reason so attractive to the canon lawyers and early conciliarists, allowed for a given church group to acquire titles, generally by purchase or gift, and hold these titles as a sole person with perpetual succession and a degree of separation from the Pope.<sup>45</sup> These acquisitions were substantial in some places but less so in others. Often they inspired the attempts of various sovereigns to kill the practice off. This is an expression perfectly suitable for the movement: in France, the taxes imposed on alienation after 1269

---

<sup>43</sup> Marc Bloch, *Feudal Society*, 2nd ed., 2 vols. (New York: Routledge, 2014 [1965]); François Louis Ganshof, *Feudalism*, trans. Phillip Grierson (New York: Harper and Row, 1964); Carl Stephenson, *Medieval Feudalism* (Ithaca: Cornell University Press, 1942); S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976).

<sup>44</sup> C. H. Lawrence, *The Friars: The Impact of the Early Mendicant Orders on Medieval Society*, rev. edition (London: I. B. Tauris, 2013); Christopher Brooke, *Churches and Churchmen in Medieval Europe* (London: Hambledon Press, 1999); Piotr Górecki, *Parishes, Tithes, and Society in Earlier Medieval Poland c. 1000 – c. 1250* (Philadelphia: American Philosophical Society, 1993); Ian Forrest, ‘Continuity and Change in the Institutional Church’, *The Oxford Handbook of Medieval Christianity*, ed. John H. Arnold (Oxford: Oxford University Press, 2014), 186-98.

<sup>45</sup> For this, see Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*, 2nd ed. (Leiden: Brill, 1998), esp. 89-142. See also Henri Cardinal de Lubac, *Corpus Mysticum: The Eucharist and the Church in the Middle Ages*, trans. Gemma Simmonds et al. (Notre Dame, IN: University of Notre Dame Press, 2010 [1949]).

to restrict this phenomenon were considered *amortissant*, which were supplemented in 1275 by another *ordonnance* to control gifts of land to the monasteries in the same spirit. This kind of regulation can be traced all the way back to King Henri II, who imposed the first restrictions on church acquisitions of royal land as early as 1191.<sup>46</sup> Even more ardent attempts to restrain the land acquisition of corporate landholding in medieval Europe can be identified across the Channel, where among the most drastic church holdings were to be found. In England, by the thirteenth century, church groups had grown particularly wealthy, where they enjoyed all the benefits of feudalism but few of its burdens, and where they were gradually assuming control of the privileged market in alienable land. King Edward I passed the first Statute of Mortmain in 1279 to restrain church landholding, which was followed by the passage of a series of other legislative measures in the same name over the next two centuries. This legislation required church groups to receive statutory provision or direct crown consent to purchase land, or otherwise risk its forfeiture (and fall into the ‘dead hand’).<sup>47</sup> Mortmain tenure applied not only to ecclesiastical corporations, however, but also to lay corporate forms in England too. This was confirmed in the 1391 statute, which explicitly extended the same restrictions to cities, towns, boroughs, guilds, and fraternities.<sup>48</sup> This had the effect of aggrandising the sense of royal privilege that went with the permission to associate for lay corporations, but ecclesiastical corporations, which formed by their own self-sustaining authority, remained aloof of this trend, and through a number of ingenious ways (as revealed in the work of Sandra Raban), they managed to work around mortmain regulations just as they did in France. Church holdings would remain large and secure in England, until eventually Henry VIII orchestrated the dissolution of the monasteries in England and Ireland between 1536 and 1540.<sup>49</sup>

---

<sup>46</sup> This had the effect of encouraging seigneurial collaboration with ecclesiastical corporations. The church was able to continue amassing land in France, which it increasingly held in the names of aspirant laymen, upon whom were furnished a number of advantages in return. For this context, see Adhémar Esmein, *Cours Élémentaire d’Histoire du Droit Français*, 3rd edition (Paris: Société du Recueil Sirey, 1920), 310-14; Theodore Evergates, *The Aristocracy in the County of Champagne, 1100-1300* (Philadelphia: University of Pennsylvania Press, 2007), 76-81.

<sup>47</sup> Sandra Raban, *Mortmain Legislation and the English Church, 1279-1500* (Cambridge: Cambridge University Press, 1982).

<sup>48</sup> Chantal Stebbings, ‘The Commercial Application of the Law of Mortmain’, *Journal of Legal History* 10, 1 (1989), 37-44.

<sup>49</sup> Francis Aidan Gasquet, *Henry VIII and the English Monasteries*, 2 vols. (London: J. Hodges, 1888-9). For Ireland, see Brendan Bradshaw, *The Dissolution of the Religious Orders in Ireland Under Henry VIII* (Cambridge: Cambridge University Press, 1974).

Beyond those in the possession of ecclesiastical corporations, rural and semi-rural lands with the best privileges attached to them in the high Middle Ages were reserved for noblemen. A lord enjoyed significant control over lands under his custodianship, under tenure he held from his sovereign with conditions. The asset title to the land was vested in his individual, hereditary estate, which could be enlarged or reduced by wars or in gentlemen's agreements, both generally requiring sovereign assent. A lord could alienate, subinfeudate, or lease his *'eritage'* – as it was tellingly known in French before the standardised application of the Roman-derived *'immobilier'* – if his conditions of tenure permitted it, and if the regnant sovereign imposed no restrictions on him doing so. Lands without heirs, lands in disuse, or lands in misuse, were forfeited back to the sovereign; and from there, new titles to land could originate. Subterraneous of this layer of property rights, of course, were the very different property rights available for short-term tenants and peasant vassals, who could never hope to alienate or to accumulate but only to work the land and enjoy its wealth – and only for as long as both the land's productivity and the family's loyalty were kept up. Servants and other dependents were refused even that; generally they were provided with lodgings and little else.<sup>50</sup>

Great variations in custom across Europe, along with locally specific dues of fealty and homage that were often mixed and overlapping, combine to make it difficult to generalise about property in medieval land regimes, at least in a way that is coherent to readers unfamiliar with the esoteric language of feudal property. Moreover, recent research, in which respect Susan Reynolds's thoroughly revisionist *Fiefs and Vassals* is particularly important, discredits older caricatured portrayals of unruly overlords and hapless peasants; Reynolds argues instead for the prevalence across medieval Europe of a self-consciously bureaucratic system of allocating and monitoring property rights, which parallels the similar developments in medieval governance identified by M. T. Clanchy.<sup>51</sup> Still, it should not be too radical to remark on the exploitative characteristic common to all of these little societies in order to appreciate what factors led to the corrosion of the system, even if this involves following inadvertently a simplistic tradition of social enquiry made

---

<sup>50</sup> For the legal operation of this system, see below, 138-41.

<sup>51</sup> Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Oxford University Press, 2001); M. T. Clanchy, *From Memory to Written Record: England, 1066-1307*, 2nd edition (Oxford: Blackwell Publishers, 1993).

famous first by Karl Marx.<sup>52</sup> This was a hierarchical system of redistribution, which saw wealth, first brought into existence by obligatory production, channelled from the bottom rungs to the top. From this basis, the role of individuals within the system can be understood, which may seem something of a distraction, but it will become clear why these developments are important to acknowledge in later chapters of this thesis, as it comes to consider the role of contract in the transfer of land amid and after the demise of feudalism.

Peasants, restricted in their capacity to accumulate, and moreover, confined within a static and unfree market which denied them any fair evaluation of their interests in immovable property anyway, could only lead a life that was modest at best, and grim at worst. Relatively, the lives of rural landholding noblemen were splendid, though their lot was not maintained without fending off the occasional challenge. Besides parrying the territorial ambitions of neighbouring lords, bent on ‘private war’, and avoiding the attention of quarrelling monarchs, declaring ‘public war’ – this important distinction will be elaborated later – there was also the need to renegotiate power-sharing arrangements with clerical characters eager to maintain their own regional supremacy, even if that meant sharing some of it.<sup>53</sup> None of these challenges could be overcome without a bit of tact, requiring, where necessary, access to abundant reserves of patronage, privilege, and power.

Commoners increasingly posed a threat to the stability of conservative rural order from the fourteenth century onwards, in loose correlation with the development of the commercial revolution. The utility of patronage and lordly networks became reduced as spurts of population growth and consolidation, an increasingly competitive marketplace in staples, and on top of this, the creation of new needs and wants (which, among the wealthier sort at least, equated to *more* needs and wants), placed new pressure on traditional sources of wealth and necessitated surplus production.<sup>54</sup> The requisite manpower to achieve this,

---

<sup>52</sup> Karl Marx, *Capital: A Critical Analysis of Capitalist Production*, 3 vols. (Moscow: Foreign Languages Publishing House, 1954-62 [1887]). For a more recent, teleological analysis of ‘historical economic systems’, Manuel Gottlieb, *A Theory of Economic Systems* (New York: Academic Press, 1984).

<sup>53</sup> This kind of patronage worked both ways, of course, but land ownership was the central reason for its necessity. For a recent study, see Elizabeth Gemmill, *The Nobility and Ecclesiastical Patronage in Thirteenth-Century England* (Woodbridge: Boydell Press, 2013).

<sup>54</sup> Fourteenth-century Europe saw the rise of ‘luxury consumption’, which, as Peter Spufford explains, meant ‘[t]o be housed, furnished, served and dressed better and even to drink and eat better. In many cases better just meant more’. Spufford, ‘Trade in Fourteenth-Century Europe’, in Jones, *New Cambridge Medieval History VI*, 164.

however, was not always available in the right areas. Certain regions were prone to severe shortages in rural labour power. At no time was this more widespread than in the wake of the Black Death (1346-53), when populations drastically plunged across Europe.<sup>55</sup> This narrative is well known, but its economic consequences bear re-emphasis. In the wake of the disaster, commoners were afforded some mobility, for the labour power only they could provide became scarce, and as a result, more valuable. A rise in labouring wages often followed, especially in England and the Low Countries. Even if those able to attach themselves to the estates of titleholders enjoyed no legal improvement in their property rights as a result of these changes, their bargaining power for improvements in their conditions certainly increased. What was once a fairly unusual sight to see across Europe – rural producers like *Piers Plowman* (ca. 1370-1390) twisting ever so gently the arms of landowners – had, by the fifteenth century, become routine.<sup>56</sup>

Meanwhile, from within the more populous villages, there came heightened demands for reform and an even greater embrace of a new collective spirit. From about the eleventh century onwards, village artisans took to collaborating, sometimes secretly and sometimes openly, for the purpose of setting standards and prices for their work. The key instrument here was the guild, what the French called the *corps de métiers*, and the Germans called the *Kaufmannsgild*, a corporate form, which was as much the cause as it was the consequence of the diversification and professionalization of urban production patterns.<sup>57</sup> Skilled and semi-skilled labourers were not the only beneficiaries of this form,

---

<sup>55</sup> For a comprehensive overview, see Ole J. Benedictow, *The Black Death, 1346-1353: The Complete History* (Woodbridge: Boydell Press, 2004).

<sup>56</sup> See especially Rodney Hilton, *Bond Men Made Free: Medieval Peasant Movements and the English Rising of 1381* (New York: Routledge, 2003). But see also Samuel Cohn, 'After the Black Death: Labour Legislation and Attitudes Towards Labour in Late-Medieval Western Europe', *Economic History Review* 60, 3 (2007), 457-485. For the 'problem of labour' in England after the plague, see James Bothwell, P. J. P. Goldberg and W. M. Omrud, ed., *The Problem of Labour in Fourteenth-Century England* (York: York Medieval Press, 2000). For the legal-historical argument that the Black Death transformed traditional English society see Robert C. Palmer *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law* (Chapel Hill: University of North Carolina Press, 2001). The allegation that the Black Death led to a 'great divergence' in Western Europe is not all that radical; see Sevket Pamuk, 'The Black Death and the Origins of the "Great Divergence" inside Europe, 1300-1600', *European Review of Economic History* 2 (2007), 289-317; David Herlihy, *The Black Death and the Transformation of the West* (Cambridge, MA: Harvard University Press, 1997).

<sup>57</sup> Shelaigh Ogilvie, *Institutions and European Trade: Merchant Guilds, 1000-1800* (Cambridge: Cambridge University Press, 2011), 19-40; Epstein, *Economic and Social History*, 100-28. For the intellectual context, see Black, *Guilds and Civil Society*. For guilds in their more commonly accepted context of labour and prototypical unionism, see Steven A. Epstein, *Wage Labour and Guilds in Medieval Europe* (Chapel Hill:

however. Town merchants also formed into guilds, which, by the fourteenth century, had acquired a more commercial function, which often led to particularly ornate manifestations of the format (in Spain, the *consulado*, and in Germany, the *hanse*). Here were the earliest important associations of outwardly ambitious ‘merchant communities’, regions and institutions that would become so central to the operation of imperialism and mercantilism by the seventeenth century.<sup>58</sup>

Big cities were the favourite locales of merchants, and companies of merchants, devoted to the accumulation of wealth through decidedly non-feudal means. They emerged with the convergence of three fundamental economic conditions, as Gelderblom recently concludes – namely, a community of footloose merchants, urban institutional autonomy, and easy access to domestic and foreign markets.<sup>59</sup> In these ‘cities of commerce’, merchants led the charge against status. As capital and property became pooled within new institutional forms in new urban and peri-urban localities, these sites grew and separated from where much of the wealth and enterprise of the traditional landholding nobility had hitherto been directed. Merchants saw in entrepôt towns an opportunity to attract investment and expand. Labourers, whether pushed or pulled, saw in towns the opportunity to develop new vocations. Behind all of this can be seen the visible hand of a geographically expanding market, and an increasingly exclusive conceptualisation of the trading corporation. As ‘non-feudal islands in the feudal seas’, M. M. Postan writes, these loci were ‘places in which merchants could not only live in each other’s vicinity and defend themselves collectively but also places which enjoyed or were capable of developing systems of local government and principles of law and status exempting them from the sway of the feudal regime’.<sup>60</sup> Urban guilds and other early mercantile associations were the main providers of this autonomy and exclusivity. And while these privileges often led, as Shelaigh Ogilvie explains, to the locking up of resources within selective networks, nevertheless, the institutional framework of this kind of accumulation became normalised

---

University of North Carolina Press, 2001), esp. 10-101, and for England, see, most recently, Gervase Rosser, *The Art of Solidarity in the Middle Ages: Guilds in England, 1250-1550* (Oxford: Oxford University Press, 2015).

<sup>58</sup> Frederic Mauro, ‘Merchant Communities, 1350-1750’, *The Rise of the Merchant Empires: Long-Distance Trade in the Early Modern World, 1350-1750*, ed. James D. Tracy (Cambridge: Cambridge University Press, 1990), 255-86.

<sup>59</sup> Gelderblom, *Cities of Commerce*.

<sup>60</sup> M. M. Postan, *Medieval Economy and Society* (Harmondsworth: Pelican, 1979), 232.

in the process, and by the early modern period, had instilled itself into the trading corporation.<sup>61</sup>

This coincided with an ongoing redirection of economic power from the countryside towards the cities which took place between the fourteenth and the sixteenth centuries, when the decisions of investors about what to do with surplus capital had more bearing on the development of European society than the decisions of the rural nobility about what to do with surplus land. More specifically, it was definitively in the long European recovery from the Plague that cities began to mushroom at a blizzing pace, and their spores were the deposits of market forces, not feudal ones. For the first time since the days of Ancient Rome, Europe's economic focus began to shift from the dominant Mediterranean centre towards the western fringe, where portside towns began to enjoy unprecedented growth.<sup>62</sup> The key changes in this respect took place in the century between 1400 and 1500. It was in this period that new social relations, settlement patterns, and political disputes began to bring rural powerbrokers and urban powerbrokers into new conflicts. Population was culled unevenly across Europe before this century, and then it gradually stabilised until, after around 1470 or so, it swelled in patches.<sup>63</sup> At this moment, when growing populations organised into urban units, the separate efforts of workers and merchants combined to turn these communities into great cities – wheresoever, that is, trading routes allowed for a thriving commerce.

In all of this was a change of such significance that the history of late-medieval western Europe has productively been recounted simply as a number of regional manifestations of a universal conflict between town and country over this period.<sup>64</sup> Only the associational politics involved in this dispute, and the legal and institutional consequences of urbanisation, are relevant to this chapter. Big cities – however governed

---

<sup>61</sup> This is the argument presented in Ogilvie, *Institutions and European Trade*. But see also, even more recently, Gelderblom, *Cities of Commerce*.

<sup>62</sup> James Belich delivered the 2014 Trevelyan Lectures at Oxford on 'The Black Death and the Spread of Europe: Plagues, Trades, and West Eurasian Expansion, 1346-1800', which heralds an important contribution to this field. See, for now, Pamuk, 'Black Death', and Jan de Vries, *European Urbanization: 1500-1800* (Cambridge, MA: Harvard University Press, 1984). For cities, see below, 63-72.

<sup>63</sup> Harry A. Miskimin, *The Economy of Later Renaissance Europe, 1460-1600* (Cambridge: Cambridge University Press, 1977), esp. 20-8.

<sup>64</sup> S. R. Epstein, ed., *Town and Country in Europe, 1300-1800* (Cambridge: Cambridge University Press, 2001); Trevor Dean and Chris Wickham, ed., *City and Countryside in Late Medieval and Early Renaissance Italy: Studies Presented to Phillip Jones* (London: Hambledon Press, 1990).

and by whatever names they went – were populous, rich, and territorially ambitious by necessity. When push came to shove, they could generally outmuscle scattered, conservative authorities. Few measured up to the great Italian city-states. These hybrid embodiments of lordly and merchant interests, bound together within powerful collectivities, exercised corporate political power more impressively, if haphazardly, than most in the Middle Ages.<sup>65</sup> Some employed privately organised companies of war, like those run by the *condottiere*, which were martially better equipped than any rural lord could dream of mustering. This was one reason why the supremacy of the corporate city-states endured for as long as it did, until the combined efforts of military campaigners from across Europe saw the military prowess of these cities finally humbled after the Italian War of 1494-8.<sup>66</sup> The legal ramifications of such showings of force by the *civitas*, it should be added, were profound at the time, and indeed remained profound beyond it. The singular legal entity of a *populus*, to whatever extent such a personality existed merely *de facto*, often provided for a special type of exemption for illicit (criminal) or legitimate (military) violence, as set out by Bartolus and Baldus in the fourteenth century, as they mused for perhaps the first time in the Western intellectual tradition about the extent and manageability of corporate criminal liability.<sup>67</sup>

Meanwhile, less ambitious political communities, like those founded by grant or prescription in England, France, and the Low Countries, opted for a more pacific, bureaucratic, and participatory style of corporate government. Called the *commune* in Belgium and France, the *stadt* in the Teutonic regions, and the *borough* and *township* in England, these municipal governments, which were generally dependent upon local taxes for their operation, were installed across western Europe as fixed communities became diversified and complex.<sup>68</sup> Often, they rivalled royal governments; ultimately, they became

---

<sup>65</sup> Philip Jones, *The Italian City-State: From Commune to Signoria* (Oxford: Clarendon Press, 1997). See also John E. Law and Bernadette Paton, ed., *Communes and Despots in Medieval and Renaissance Italy* (Farnham: Ashgate, 2010).

<sup>66</sup> See especially Michael E. Mallett and Christine Shaw, *The Italian Wars 1494-1559: War, State and Society in Early Modern Europe* (New York: Routledge, 2011). See also Tom Scott, *The City-State in Europe: Hinterland, Territory, Religion* (Oxford: Oxford University Press, 2012), 64-127, 193-213.

<sup>67</sup> For this, see above, 34-5, and below, 98-9.

<sup>68</sup> Henri Pirenne, *Les Villes et Les Institutions Urbaines* (Paris: Librairie Félix Alcan, 1939), esp. 1: 226-74, 2: 201-18; Fredrich W. E. Keutgen, *Urkunden zur Städtischen Verfassungsgeschichte* (Berlin: Felber, 1901), 1-219; Léon Vanderkindere, *Choix d'Études Historiques* (Bruxelles: Weissenbruch, 1909), esp. 251-379; David Nicholas, *The Later Medieval City, 1300-1500* (London: Longman, 1997), esp. 108-22, 141-79;

contained within consolidating sovereignties. These municipal forms were hardly impervious to manipulation by particular interest groups in the late medieval period, but there were some variations to this trend from place to place. Whereas, in England, for example, town governments came to be dominated by the merchant elites and the individual guilds by the fifteenth and sixteenth centuries, in French municipalities over the same period, it tended to be the lawyers, the officials, and the bureaucrats in control of *les corps politiques*.<sup>69</sup> And, for all the progressive social changes triggered by the creation of municipal polities, none of these cities was entirely vanquished of the nobility; indeed, opportunistic noblemen easily identified some of the potential profits realisable through stake-holding in new financial institutions, if not participating directly within them. Additionally, there was power to be accrued by those of the nobility who offered to meet some of the fiscal needs of states committed to rampant continental warfare. They could also become the wealthy patrons of needy merchants. These became the lordly affairs of a new era – and they could only be conducted in the city, in liaison with politicians, the merchant élite, courts, banks, and other like-minded members of the nobility from the fifteenth century onwards.<sup>70</sup>

Massive changes, therefore, were taking place in the understandings of property in land and things among western Europeans just as they began to collaborate in cities and form into business associations to push outwards onto the sea and into the wider world. In this, it cannot be strongly enough stressed, was a synchrony of world-changing significance. The age of maritime discovery and the rise of bulk trade began just as the

---

Norman Pounds, *The Medieval City* (Westport: Greenwood Press, 2005), 95-118. The legal history of municipalities is most richly presented on the topic of the English context, for which see especially James Tait, *The Medieval English Borough: Studies on Its Origins and Constitutional History* (Manchester: Manchester University Press, 1999 [1936]), esp. 221-62, which it is best to consult after Frederic William Maitland, *Township and Borough* (Cambridge: Cambridge University Press, 1897). See also C. A. Cooke, *Corporation, Trust, and Company: An Essay in Legal History* (Cambridge, MA: Harvard University Press, 1951), 19-35. The term ‘municipality’ comes from the Roman Empire’s use of *municipia* – an Italian community incorporated through citizenship within the Roman city-state – which only nominally relates to the medieval form of autonomous local government.

<sup>69</sup> This is the argument which emerges throughout R. H. Hilton, *English and French Towns in Feudal Society: A Comparative Study* (Cambridge: Cambridge University Press, 1992). See also Jean-Charles de Lavie, *Des Corps Politiques et de Leurs Gouvernements*, 2 vols. (Chez Pierre Duplain: Lyon, 1764); Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict, and London’s Overseas Traders, 1550-1653* (London: Verso, 2003).

<sup>70</sup> Hillay Zmora, *Monarchy, Aristocracy, and the State in Europe, 1300-1800* (London and New York: Routledge, 2001), esp. 54-75; Nicholas, *Later Medieval City*, 180-202; Parrott, *Business of War*.

medieval marriage of land and status began its devolution into the merest relationship *de facto*. Contract was taking the place of status.<sup>71</sup> Old estates, commons, and church holdings alike were all becoming availed by piecemeal to more competitive markets in ‘real estate’. Capital was being pooled by the syndicates of urban entrepreneurs, whose ilk were also among those colonisers later tugging at the robes of their monarchs for trading privileges abroad. Labour followed capital, and formed into great pools which eventually overflowed where else but onto the colonies, where land and opportunity both apparently abounded. It is the argument of this chapter that the politics of association and incorporation greatly facilitated, if not partially caused this transformation.

By fluke or design, but certainly in relation to each other, it is in this same period of transition from the late medieval to the early modern that the movement of the Atlantic frontier westward towards the Americas and southward towards gateways opening onto Indian and Pacific oceanic domains can be witnessed. Europe was suddenly made into an ‘Old World’, increasingly defined against, if not entirely by the ‘New’.<sup>72</sup> For all the geographic, theological, legal, and historical changes to the European imagination as a result of these discoveries, the most important revelations were plainly economic. After all, what pulled the Old World into the New were new markets and industries, untapped pools of labour and commodities, and the untold riches accruable from their admixture. Naturally, trading areas of Europe with Mediterranean and Atlantic portside access were best poised to capitalise. And this they did, as is well known: the Iberian kingdoms of Castile and Aragon (united into a singular Spanish crown), and Portugal were first off the mark, followed by those in the Habsburg system overtaking it, and others here and there on the fringes. Iberian supremacy was untouchable for most of the sixteenth century, when Spain and Portugal were easily the biggest players in the extra-European world. It would not be until the second half of the century that Catholic France, Protestant Netherlands, and duplicitous England would join them. This requires some reflection.

The ascendancy of Portugal and Spain was incremental over the fourteenth and early fifteenth centuries. Factory plantations were established on the islands of Madeira,

---

<sup>71</sup> See Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861), esp. 169-70.

<sup>72</sup> See especially J. H. Elliott, *The Old World and the New, 1492-1650* (Cambridge: Cambridge University Press, 1992).

Canary, Azores, and Cape Verdes, while in the meantime, trading bases were established in northern and northwestern Africa where Portugal by far took the keener interest of the two.<sup>73</sup> Spain and Portugal were not, in this period, the best of allies, and moreover, they were never alone in this extra-European field of commerce: at just about every step, the French could be found, as also the commercially superior Italians, who were busy harnessing the region's wealth to Genoa and often funding the enterprises of others. If the Genoese seemed far ahead in the Mediterranean race, then the discovery of the New World by Christopher Columbus – not for the Italians (though he was Genoese), not for the Portuguese (though he was based in Lisboa), but for the Spanish kingdom of Castile commissioning his expeditions – caught the Spaniards up to speed. The Portuguese had not stood still throughout all of this. Their ships had edged into parts of Africa yet unseen by Europeans – its western coast down to its southernmost point – first with the expeditions of Diogo Cão and Bartolomeu Dias in the 1480s, then with the expeditions of Vasco da Gama, which opened up the Indian Ocean at the end of 1497.<sup>74</sup>

These epic Iberian discoveries were acknowledged by each other, after they earned the acknowledgement of the papacy, under the pretences, in this period, of something like a universal jurisdiction over a benevolent Christian empire. Within a couple of years of Columbus's American landfall, Pope Alexander VI (1431-1503) issued a series of declarations (or 'bulls') and orchestrated the Treaty of Tordesillas of 1494, which effectively ended a bitter dispute between Spain and Portugal by dividing the world into two portions for each to receive.<sup>75</sup>

---

<sup>73</sup> Felipe Fernandez-Armesto, *Before Columbus: Exploration and Colonization from the Mediterranean to the Atlantic, 1229-1492* (Philadelphia: University of Pennsylvania Press, 1987); Ivana Elbl, 'The King's Business in Africa: Decisions and Strategies of the Portuguese Crown', *Money, Markets and Trade in Late Medieval Europe*, ed. Lawrin Armstrong et al. (Leiden and Boston: Brill, 2007), 89-118.

<sup>74</sup> D. A. Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867* (Cambridge: Cambridge University Press, 1991), 9-24; Malyn Newitt, *A History of Portuguese Overseas Expansion, 1400-1668* (London and New York: Routledge, 2005), 36-61; A. J. R. Russell-Wood, *The Portuguese Empire, 1415-1808: A World on the Move* (Baltimore: Johns Hopkins University Press, 1998), esp. 8-26; Sanjay Subrahmanyam, *The Portuguese Empire in Asia, 1500-1700: A Political and Economic History*, 2nd ed. (London: Wiley Blackwell, 2012), 59-86; Scammell, *World Encompassed*, 225-49, 301-20.

<sup>75</sup> Charles E. Nowell, 'The Treaty of Tordesillas and the Diplomatic Background of American History', *Greater America: Essays in Honour of Herbert Eugene Bolton*, no editor (University of California Press, Berkeley, 1945), 1-18; Frances Gardiner Davenport, ed., *European Treaties Bearing on the History of the United States and its Dependencies to 1648* (Washington, DC: Carnegie Institution, 1917), 1: 56-100.

For most of the sixteenth century, Spanish and Portuguese empires developed separately and both were capable to defray contests from other foreign powers. They operated within different geographical and economic parameters: Spain directed some of its energy towards establishing plantations first in the Caribbean and later in parts of the Pacific, but most of its energy towards mining gold and silver in America along and above the equator; Portugal directed some of its energy trading in exotic goods and human chattel either side of the south Atlantic, but most of its energy towards assuming direct control of the spice trade in the Indian. The unification of Spain and Portugal took place in 1580 and lasted for sixty years; divorced after 1640, the two began to flounder separately in oceans off their favourite bits of foreign coast that were now frequented by French, Dutch, and English vessels too. By this time, these were the ships sent by corporations associated with more powerful European empires; and by the eighteenth century, the Iberian imperial regimes were a shadow of what they were.<sup>76</sup>

For the most part, however, Iberian imperialism remains beyond the scope of this dissertation. This is because in neither Spanish nor Portuguese imperial configurations was the large, land-hungry *corporación* the principal actor to anywhere near the extent it was in English, Dutch, and French empires of the seventeenth century.<sup>77</sup> To understand this further, the institutional framework of the Iberian imperial world up to the beginning of the seventeenth century has to be explored, if only to establish what made Dutch, French, and English empires, which developed in the same period, so different.

Most glaring of these differences was the installation of centralised regulatory authorities in Portugal and Spain. The Portuguese crown established its *Casa da Índia* at Lisboa in the immediate wake of Vasco da Gama's return from the Indies; this move was emulated by Ferdinand and Isabella in 1503, when they established their *Casa de Contratación* in Sevilla. Separately, from their respective seaport locations, these official trading houses had mixed successes in their attempts to control all elements of the overseas trade. They administered imports and exports, maintained a trading fleet, oversaw

---

<sup>76</sup> Scammell, *World Encompassed*, 290-8, 358-69. For the intellectual context, see Anthony Pagden, *Lords of All The World: Ideologies of Empire in Britain, France, and Spain, 1400-1800* (New Haven: Yale University Press, 1995).

<sup>77</sup> See however, for republics and corporations in a later period, María Teresa Calderón and Clément Thibaud, *La Majestad de los Pueblos en la Nueva Granada y Venezuela (1780-1832)* (Bogotá: Universidad Externado de Colombia, 2010).

emigration, and sometimes even resolved disputes between traders on commission. Imagine, here, the fusion of a centralised admiralty court with a monolithic Board of Trade, interventionist rather than responsive in function, which operated solely for the purpose of raising revenue for the state. There was nothing like the *Casas* elsewhere.<sup>78</sup>

The Spanish colonial enterprise, from a legal standpoint, featured rapid transactions and the agency of individual actors. It was a regime that left a paper trail of small, short-term contracts. America's *conquistadors* – the term itself resonant of the *Reconquista*, the importance of which will be considered in another chapter – received their commissions directly from the crown, to lead small privately-funded military contingents. These men enjoyed, in return, a share of whatever silver and gold they might find. Metals came into the ownership of individuals, once they were mined by indigenous labourers kept in line by military force. As soon as they were partially pacified, frontiers were feudalised, availed to small groups of settlers, and administered by crown representatives. Grants of Indian vassals were issued, with conditions, by the crown to 'white proprietors', the *encomenderos*, which essentially transformed whole native communities into tributary serfs on pockets of agricultural land.<sup>79</sup> Large grants of land were issued for manorial estates, the *estancias* and the *haciendas*. All of this amounted to a very medieval regime in which the crown's presence was always felt: a system attracting impatiently greedy colonisers and men with *seigniorial* aspirations, but never the trustees of specialised companies in Spain.<sup>80</sup>

The Caribbean was similar in all respects but that of labour. Unlike in Meso-America, where Spaniards enslaved resilient indigenous populations living near mines or coerced them into agricultural labouring livelihoods within the *encomienda*, indigenous

---

<sup>78</sup> Stanley J. Stein & Barbara H. Stein, *Silver, Trade, and War: Spain and America in the Making of Early Modern Europe* (Baltimore: Johns Hopkins University Press, 2000), 12-19; Newitt, *History of Portuguese Overseas Expansion*, 68-72.

<sup>79</sup> Scammell, *World Encompassed*, 320-35, quote at 322.

<sup>80</sup> Scammell, *World Encompassed*, 340-9; Tzvetan Todorov, *The Conquest of America: The Question of the Other*, trans. Richard Howard (New York: Harper and Row, 1984); J. H. Elliot, *Empires of the Atlantic World: Britain and Spain in America, 1492-1830* (New Haven: Yale University Press, 2006), 39-47; Timothy J. Yeager, 'Encomienda or Slavery? The Spanish Crown's Choice of Labor Organization in Sixteenth-Century Spanish America', *Journal of Economic History* 55, 4 (1995), 842-59; James Lockhart, 'Encomienda and Hacienda: The Evolution of the Great Estate in the Spanish Indies', *Hispanic American Historical Review* 59 (1969), 411-29; Peter Bakewell, 'Mining in Colonial Spanish America', *Cambridge History of Latin America, Volume II: Colonial Latin America*, ed. Leslie Bethell (Cambridge: Cambridge University Press, 1984), 123-5.

Caribbeans through disease and slaughter were tragically and rapidly made sparse. Labour had to be imported into the region, optimistically for mining at first, and then later for agriculture. Amerindian labourers were sourced from raiding expeditions on continental America, but after 1518, it was considered much easier to ferry African slaves from across the Atlantic into Hispaniola. The transportation, distribution, and control of African male chattel would have made perfect work for a specialised Spanish monopoly, but no such thing emerged. Instead, under the Spanish regime, the trade in slaves – not unlike the trade in those commodities cultivated by them – was the heavily regulated pursuit of small enterprise; through it, small and multiple streams of wealth were channelled directly to the crown, in a system that offered no encouragement to organised corporate interests. Slaving was possible only by accepting special contracts (called *asientos*) from the crown, which were issued to merchants and small companies – mostly Lisbon – for short, fixed periods. The concessions were too brief, and the market too regulated and competitive, for any diversified, capital-intensive enterprises to find encouragement in the Spanish Atlantic.<sup>81</sup>

The economics of Portuguese imperialism went even further in this direction, not just with respect to slaves – it took until 1775 before a large corporate monopoly was chartered for slaves in Angola and Upper Guinea, far too proximate to the British abolition of the slave trade to make long-term gain<sup>82</sup> – but with respect to all areas of foreign trade. This trend began with the early expansion of merchants into Africa during the late fifteenth century, which opened up a trade that developed at a much faster pace than the government, in Portugal, could deal with. The crown was incapable of administering an open market; it could not collect revenue from each of Lisboa's many merchant entrepreneurs. Instead, and especially during the Joanine and Manueline period (1471-1521), the crown repeatedly declared itself the sole monopolist of foreign trade. This 'royal monopoly' was often leased out to private interests, but it remained vested in the crown; in fact, it was not unknown for Portuguese monarchs to fund merchant enterprise with their own personal wealth, and avail

---

<sup>81</sup> Kathleen Deagan, 'The Archaeology of the Spanish Contact Period in the Caribbean', *Journal of World Prehistory* 2, 2 (1988), 187-233; B. W. Higman, *A Concise History of the Caribbean* (Cambridge: Cambridge University Press, 2011), 60-89; Noble David Cook, *Born to Die: Disease and New World Conquest, 1492-1650* (Cambridge: Cambridge University Press, 1998). For contracts in the early Spanish empire, see Stein and Stein, *Silver, Trade, and War*, 106-45.

<sup>82</sup> Manuel Nunes Días, *Fomento e Mercantilismo: A Companhia Geral do Grão Pará e Maranhão (1755-1778)* (Belém: Universidade Federal do Pará, 1970).

ships with consignments from their personal fleets. In the simplest terms, the crown's priorities were here directed to the rapid creation of revenue at the expense of securing the ongoing stream from the source. Heavy import taxes were enforced, prices were fixed, and a system of mandatory, transferrable, but jurisdictionally specific trade licences (*cartazes*), were all implemented at home.<sup>83</sup>

A more hostile regulatory framework for large, high-risk, trading companies is difficult to imagine, yet from an economic standpoint, which was the standpoint of other Europeans gaining entry into the Indies, these were exactly the kinds of companies for which the spice trade called. Voyages to the Indies were long and costly, trade relations in Asia were unpredictable, the market for tea and spices in Europe was variable, and most burdensome of all was the regularity, especially after the 1590s, of piracy and warfare both petty and public. This was hardly ideal for small-time investors who could never hope to control the market at any one side, let alone both, by sending merchants ships one or two at a time. Though Portugal relinquished its royal monopoly from the second half of the sixteenth century, Portuguese trade in the Indies remained restricted to small merchant bodies until 1628, when the *Companhia do Comércio da Índia* was chartered. This company had arrived all too late and undercapitalised, and a time of much upheaval in Portugal, to make any headway; by this time, English and Dutch companies had largely stolen the show anyway.<sup>84</sup>

Meanwhile, in Brazil, where the Portuguese had been experimenting with settlements, the colonial system was organised into a cluster of captaincies (*capitães-donatários*). Feudal and conservative in character, these seigniorial captains were charged with the founding and defence of towns, and enjoyed jurisdiction over settlers under their mandate. Fourteen were envisaged for Brazil in the early 1530s, but only six were actually

---

<sup>83</sup> Elbl, 'The King's Business in Africa'; Jorge M. Pedreira, 'Costs and Financial Trends in the Portuguese Empire', and Luiz Felipe de Alencastro, trans. Marguerite Itamar Harrison, 'The Economic Network of Portugal's Atlantic World', *Portuguese Oceanic Expansion, 1400-1800*, ed. Francisco Bethencourt and Diogo Ramada Curto (Cambridge: Cambridge University Press, 2007), 49-87, 109-37; K. S. Mathew, 'Trade in the Indian Ocean and the Portuguese System of Cartazes', *The First Portuguese Empire*, ed. Malyn Newitt (Exeter: Exeter Studies in History no. 11, University of Exeter, 1986), 9-36; Subrahmanyam, *Portuguese Empire in Asia*, 33-57; Newitt, *History of Portuguese Overseas Expansion*, 1-173.

<sup>84</sup> Stuart B. Schwartz, 'The Economy of the Portuguese Empire', Bethencourt and Curto, *Portuguese Oceanic Expansion*, 33; Subrahmanyam, *Portuguese Empire in Asia*, 153-90; Newitt, *History of Portuguese Overseas Expansion*, 217-51.

taken up in the few decades which followed, and their trials outnumbered their achievements.<sup>85</sup> In some respects these groups were associational and incorporative, but these *capitães-donatários*, like the *encomenderos*, were far more akin to palatinate proprietorships, insofar as they installed a ‘planter aristocracy’ around a singular head, and not a settler society around a corporate *universitas*.<sup>86</sup>

It is true that Portuguese and Spanish imperial crowns, throughout the sixteenth and seventeenth centuries, were inclined to outsource colonial endeavour, achieving empire on the cheap by availing special privileges to individual men with influential friends in officialdom and access to existing merchant networks. It is also true that both crowns were inclined to withhold direct royal administration for decades, sometimes generations, in the colonies established by crown-endorsed entrepreneurs. It is also true, however, that specialised corporations with long-term ambitions took a long time to emerge to advance or exploit either system, and by the time they did emerge, their accomplishments were achieved too late to be anything but dim in comparison to those corporations from England and the United Dutch Provinces, especially. This is one reason why the legal history of the engagement between Iberian and extra-European worlds cannot be explored fully in this dissertation.

Regionally, too, Iberia becomes peripheral to the European region studied in this thesis, as the Mediterranean trading world of late medieval Europe became decentred.<sup>87</sup> Instead, those regions of northern Europe with frontage or easy access onto the Atlantic Ocean come to dominate the early modern history of corporate expansion. In this area, starting in Basque country, moving along the English Channel, through the North Sea and into the mouth of the Baltic, a vibrant economic network had developed by the fifteenth century.<sup>88</sup> This trading region was much less firmly attached to the Mediterranean trading world than Spain and Portugal. Here there was a cluster of seaport merchant towns boasting access both to the seacoast and to some local river system or other. It was ‘around 1500’,

---

<sup>85</sup> Newitt, *History of Portuguese Overseas Expansion*, 126-8.

<sup>86</sup> For ‘planter aristocracy’, see Scammell, *World Encompassed*, 250. For this distinction between proprietary and corporate colonial governments, see above, 10-11.

<sup>87</sup> See, for this, Paul E. Chevedden, Donald J. Kagay and Paul G. Padilla, ed., *Iberia and the Mediterranean World of the Middle Ages*, 2 vols. (Leiden: Brill, 1995-6).

<sup>88</sup> For a fuller appreciation of this region during the entire medieval period, see Adriaan Verhulst, *The Rise of Cities in North-West Europe* (Cambridge: Cambridge University Press, 1999), esp. 68-148.

writes Michel Mollat du Jourdin in *Europe et La Mer*, that ‘an international chain of merchant groups linked the two poles of maritime circulation, the Scheldt to the north and the southern extremity of the Iberian peninsular to the south’, instigating a ‘European change of direction from the Mediterranean to towards the Atlantic and its northern extensions’.<sup>89</sup> This northwesterly thrust, to take nothing away from Jourdin’s originality and insight, took place in the European economy perhaps a century earlier than this. Seaports in this region were gradually taking over the Italian city-states after this point, and finally overtook them in the wake of the Turkish conquest of Constantinople in 1453, which eroded many Mediterranean trading linkages and tilted the balance in the European economy.<sup>90</sup>

Ports in the Atlantic region were especially dynamic. Most had their own shipping calendars and protocols to provide for the best advantage to be drawn not only from Mediterranean and Hanseatic regions, but also to provide for regionally specific needs in cloth, grain, and wine, and, crucially, to derive optimal replenishment from the fisheries near Britain, Greenland, Iceland, and, eventually, Newfoundland. These seaport towns and cities were no sovereigns; few of them resembled Genoa or Venice.<sup>91</sup> They were attached, instead, to polities of various strength and size, which were changing all the time and falling in and out with one another. That perhaps made them more versatile, for this narrow corridor of saltwater nearest the Atlantic became an economic region diverse enough to allow for temporary adjustments during occasional fits of warfare, and this allowed the most important ports to transform into powerful merchant cities by the seventeenth century.<sup>92</sup> In England, the dominant city was London. In the United Provinces, this was Amsterdam. In France, a different situation developed, and no dominant city emerged from the cluster of traditional seaport towns along the Côte Atlantique, although it must be said that they were all intravenously linked to Paris inland. Like the other main seaport cities from Lisboa to St. Petersburg – and more especially from Bordeaux to Gothenburg – their

---

<sup>89</sup> Jourdin, *Europe and the Sea*, 102-3.

<sup>90</sup> Ball, *Merchants and Merchandise*, 190: ‘Heightening tension in the eastern Mediterranean following the Turkish conquest of Constantinople caused the Genoese to swing the balance of their commerce further to the west, and a crisis in Venetian trade with the Levant’, which for Ball, was a pivotal factor behind ‘the geographical pattern of trade chang[ing] in favour of the Atlantic and North Sea regions’.

<sup>91</sup> Scott, *The City-State in Europe*.

<sup>92</sup> This will be explained more fully in the next chapter.

emergence and growth was largely due to the diversity of trading, carrying, and holding patterns unique to the North. The Mediterranean trading region, which had been dominated by the Genoa and Venice, was losing its central position within the European economy, while the Hanseatic League, which had relied on an elaborate preferential trade system, was no longer relevant in this new context.<sup>93</sup> More and more, it was each port to its own merchants – and those nearest the Atlantic were best poised to capitalise on the new era.



These had become important European ports in the global economy by the end of the Middle Ages. These would be the principal locales involved in the creation of empires overseas. Previously, most merchants gazed into the Atlantic with fish on their minds. Then, these thoughts were taken over by the prospect of colonisation. The following chapter will identify which cities became the domiciles of the most active trading companies in the Atlantic context during the first half of the seventeenth century. Cities attached to England, the United Dutch Provinces, France, and Sweden have been chosen for this purpose. It will be necessary to consider each of these regions separately, before

---

<sup>93</sup> See Scammell, *World Encompassed*, 55-82, 141-52, 201-20.

exploring the Atlantic 'New World' from the perspective of the merchant cities most vested in its exploitation.

This chapter began with a narrative history of the Middle Ages, central to which were the politics of collaboration, association, and incorporation, for the purposes of accumulation. The merchant company has been singled out here for its role in the 'commercial revolution' of the period. Traders in collaboration created a myriad of intertwining interests. When these interests fell into dispute, they pulled market and maritime jurisdictions in new directions. Meanwhile, the medieval corporate form was pivotal on the land. Ecclesiastical corporations acquired masses of land and reorganised the rural scene, while guilds and municipalities reorganised the urban scene. This is, of course, a unidirectional and focused reading of medieval history, without which, however, it would be difficult to comprehend entirely the transformative seventeenth century of corporate expansion which follows.

## **Chapter 2: The Business of Empire in Key Parts of the North Atlantic world**

Two regions are toured in this chapter. First, the westerly and coastal region of Europe is disaggregated and its key portside towns are introduced. An effort is made here to explore the associational cultures of entrepreneurialism within English, French, Dutch, and Swedish areas on the coast. Having sketched out the rudimentary economic history of this part of Europe to 1600, what follows is a tour of the northerly Atlantic world. This section is necessarily selective, focusing only upon those regions in which European corporations concentrated their efforts in the seventeenth century.

England is located upon a tiny island at the elbow of Europe. Its merchants were able to use this isolation and sea-frontage to their great advantage during the period of maritime commercial expansion. By 1600, a strong central government, along with a dynamic import and export economy controlled by experienced corporations, existed in mutual dependence. But this had taken some time to materialise, and the revival after the Black Death was pivotal. Small portside towns on rivers and coasts, some of which had prospered since before Norman times with others relatively young, began to thrive after this period. Noteworthy were the Cinque Ports (Dover, Hastings, Hythe, New Romney, and Sandwich), Bristol, Chester, Exeter, Hull, London, Newcastle, Portsmouth, Plymouth and York. The City of London became the principal populous hub for merchants and traders, who took with enthusiasm to the guild form and sought charters to bind their collaboration regularly from the reign of Edward III (1327-1377) onwards. Each of London's twelve great livery companies – the Grocers, the Mercers, the Haberdashers, the Fishmongers, the Drapers, the Goldsmiths, the Skinners, the Salters, the Ironmongers, the Vintners, the Clothworkers, and the Merchant Tailors – can trace their origins back to the general vicinity of this period.<sup>1</sup> Wool and woollen products provided the most valuable export trade for England's merchants from this period onwards, a trade which, during the fifteenth century, fell under the control of collaborating and networking merchants, most notably the Staplers and the Merchant Adventurers. These companies, through the energies of their stationed agents,

---

<sup>1</sup> See William Herbert, *The History of the Twelve Great Livery Companies of London* (London: William Herbert, 1837).

exported their produce to various locations all along the oceanic corridor from the Baltic north right down to the Spanish south.<sup>2</sup> The traffic between south-easterly England and the Low Countries became particularly busy between 1400 and 1550, with the former sending wool and the latter receiving grain in large quantities regularly.<sup>3</sup> Slightly further south, French ports received English wine merchants who could zip back and forth across a conveniently slim portion of the Channel. English ships could take their call at Protestant French ports, or those ports happy to export to the English regardless of any political or religious conflict.

The Channel became a vibrant super-highway of trade in this period, and accordingly, the south of England, due to its vicinity to French, Dutch, and Flemish ports, began to assume greater importance than the north. Bristol became the most thriving import town engaged by Londoners during the fifteenth century, taking in wool, fruit and oil from the Mediterranean, iron from the Basque region, wine, woad, and salt from the French, and fish from the north.<sup>4</sup> Meanwhile, in the City of London, where some residents grew fat from the rural produce of France and the Low Countries, a growing community of investors, merchants, and entrepreneurs strengthened their links to England's key southern ports. From the 1540s, a number of enterprising companies emerged with plans to dominate imports from new exotic locales (Morocco, Guinea, Russia, Greenland, Turkey, the Levant, the Indies, and other places with names yet undecided upon or discovered).<sup>5</sup> By the reign of Elizabeth I, which saw the last remnants of the Hanseatic League removed from the country when the London Steelyard was closed in 1598, a thriving import/export market had centred upon southerly England, connected by many prongs to local ports along the opposing coastlines yet still linked up with the Mediterranean and the northern fisheries.<sup>6</sup> By the end of her reign, there were well over a hundred parent and child companies in

---

<sup>2</sup> E. M. Carus-Wilson, *Medieval Merchant Venturers: Collected Studies* (London: Methuen & Co., 1954), 143-82.

<sup>3</sup> Nelly Johanna Martina Kerling, *Commercial Relations of Holland and Zeeland with England from the Late 13th Century to the Close of the Middle Ages* (Leiden: Brill, 1954).

<sup>4</sup> Carus-Wilson, *Medieval Merchant Venturers*, 1-97.

<sup>5</sup> For trade and the formation of companies, see Cecil T Carr, *Select Charters of Trading Companies, A.D. 1530-1707* (London: B. Quaritch, 1913), xi-xxvii; George Cawston and A. H. Keane, *The Early Chartered Companies (A.D. 1296-1858)* (London: Edward Arnold, 1896), 6-25.

<sup>6</sup> T. H. Lloyd, *England and the German Hanse, 1157-1611: A Study of Their Trade and Commercial Diplomacy* (Cambridge: Cambridge University Press, 2002), 292-362.

London, and a well-entrenched culture of entrepreneurialism that was entirely dependent upon government privileges (without which it was inconceivable to speculate in foreign trades abroad).<sup>7</sup>

At this time in France, by great contrast, an entirely different political economy had developed, one that was still in the process of falling under the control of a centralised monarchy. Indeed, it is difficult to speak of a singular westerly coastal region, for the area between Basque country and Flanders was highly fragmented.<sup>8</sup> Calais, in the northern-most region bordering Flanders, remained under English control until the mid-sixteenth century, and since the thirteenth century had been closely connected with the Cinque Ports, especially Dover (from which it was separated by just fifty kilometres of Channel sea).<sup>9</sup> Direct English influence tended not to last as late as that; elsewhere on the coast, the English were mostly expunged by 1453 during the reign of Charles VII, who saw out the end of the Hundred Years War.<sup>10</sup> So the story went in Normandy, but reclamation hardly closed the region off from the English trade and the wider Atlantic economy: coastal Dieppe maintained its focus on the northern fisheries and still received plenty of ships from across the Channel over the next century, whereas the larger riverside town of Rouen strengthened its links with the main trading ports from the Baltic to Spain, importing both French and foreign produce in large quantities to sustain the important redistributive role it had adopted in the northeastern region over this period.<sup>11</sup> Further south along the coast was the region of Brittany, which transformed from an independent duchy in 1488 into one the most important economic regions under royal control thereafter. Here merchants were

---

<sup>7</sup> The regulation of a trading economy has been analysed in a vast literature. See generally R. H. Britnell, *The Commercialisation of English Society, 1000-1500* (Cambridge: Cambridge University Press, 1993). For the politics of trade at the onset of the Elizabethan period, see Robert Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict, and London's Overseas Traders, 1550-1653* (London: Verso, 2003), esp. 3-91. For the period of Henry VIII, see F. J. Fisher, 'Commercial Trends in Sixteenth-Century England', *Economic History Review* 10, 2 (1940), 95-117.

<sup>8</sup> See, however, the classic treatment in E. Levasseur, *L'Histoire du Commerce de la France, Première Partie: Avant 1789* (Paris: Librairie Nouvelle de Droit et de Jurisprudence, 1911), 147-231.

<sup>9</sup> Richard Turpyn, *The Chronicle of Calais in the Reigns of Henry VII and Henry VIII to the Year 1540*, ed. John Gough Nichols (London: Camden Society, 1846). See generally Susan Rose, *Calais: An English Town in France, 1347-1558* (Woodbridge: Boydell Press, 2008).

<sup>10</sup> See, for an introduction, Christopher Allmand, *The Hundred Years War: England and France at War c.1300-c.1450* (Cambridge: Cambridge University Press, 1988). The classic account remains Desmond Seward, *The Hundred Years War: The English in France 1337-1453* (Harmondsworth: Penguin, 1999)

<sup>11</sup> Levasseur, *Histoire du Commerce*, 150-2; Philip Benedict, *Rouen during the Wars of Religion* (Cambridge: Cambridge University Press, 1981), 19-21. For the economic history of Normandy between 1350 and 1550, see Michel Mollat, *Le Commerce Maritime Normand à la Fin du Moyen Age* (Paris: Plon, 1952).

organised principally within the highly autonomous towns of Rennes, Nantes, and Saint-Malo, where they remained suspicious for a long time of centralised attempts to control the economy, yet happily received some of the best trading privileges on offer in the whole of France. The outward stretch of the absolutist state into this region was slowly incremental and only became significant from the mid-seventeenth century.<sup>12</sup> Up to this time, this energetic maritime trading region experienced its 'golden age', as its merchants plugged the local economy into a wider trading network dominated by fast-moving Dutch, English, Iberian, and Bordelais merchants.<sup>13</sup> Further south, in the regions of Poitou and Guyenne, the key portside towns included the wine-producing town of Bordeaux and the famous export town of La Rochelle, the economies of which developed in close contact with one another during the fifteenth and sixteenth centuries, but were at the same time deeply rooted in local systems of production and trade.<sup>14</sup>

Due to this regional diversity from Dieppe to Bordeaux, only a few generalisations can be made about the trading geography. Economically, linkages to multiple trading networks gave these ports an important middleman role between Old France of the Mediterranean and the northern and Atlantic trading communities. Religiously, this area was traditionally more Protestant in character than the Catholic regions closer to the Mediterranean, which was perhaps more the cause than it was the effect of the orientation of the import and export economies of these portside towns. Indeed, it was not until Louis XIII's reign (1610-43) and its immediate aftermath that the large (and often majoritarian) Protestant communities of these portside towns disintegrated in the face of Catholic reassertion. Politically, what this transformation always entailed was a more interventionist approach of French crown officials, which in turn tended to antagonise the merchant and noble élite of these towns during the transformative first half of the seventeenth century.<sup>15</sup>

---

<sup>12</sup> James B. Collins, *Classes, Estates, and Order in Early-Modern Brittany* (Cambridge: Cambridge University Press, 1994).

<sup>13</sup> Alain Croix, *L'âge d'or de La Bretagne, 1532-1675* (Éditions Ouest-France: Rennes, 1993); Henri Touchard, *Le Commerce Maritime Breton à la Fin du Moyen Age* (Les Belles Lettres: Paris, 1967); Collins, *Classes, Estates, and Order*, 33-34.

<sup>14</sup> Etienne Trocme and Marcel Delafosse, *Le Commerce Rochelais de la Fin du XV<sup>e</sup> Siecle au Debut du XVII<sup>e</sup>* (Paris: A. Colin, 1952).

<sup>15</sup> This was especially the case in La Rochelle, where a largely Calvinistic merchant community looked to Africa, America, and the Indies for new trading opportunities on the eve of its expulsion. See Kevin C. Robbins, *City on the Ocean Sea: La Rochelle, 1530-1650: Urban Society, Religion, and Politics of the French Atlantic Frontier* (Leiden: Brill, 1997). For the argument that the Catholic verve of New France and the

The workings of patronage and privilege in these portside merchant towns were therefore more volatile here than elsewhere in France, and volatile they would remain until Cardinal Richelieu emerged to consolidate merchant interests and encourage collaboration in the Atlantic French region after 1624.<sup>16</sup>

Accounting for the rise of Dutch dominance in the global economy of the seventeenth century requires a different narrative again, and this is largely due to the peculiar political circumstances of the Low Countries. First, it should be noted that Holland and Zeeland escaped the brunt of the Black Death. In these provinces, unusually, urban populations continued to expand throughout the middle decades of the fourteenth century, leading to a state of ‘urban particularism’, in Jonathan Israel’s terms, which ‘was stronger than provincial cohesion’.<sup>17</sup> Cities were not only the most important sites for Dutch trade, but they were also the locus of Dutch identity. Related to this, there was an especially diverse and flourishing guild culture in the towns of the Low Countries, which laid the institutional platforms for merchant collaboration in the period. This was severely hampered during the rule of Karel de Stout (Charles the Bold), the Duke of Burgundy, who imposed restrictions on merchant collaboration and introduced burdensome trade taxation during his reign over the ‘Burgundian Netherlands’, which he treated like a personal fief. Within weeks of the Duke’s death in 1477, however, circumstances changed. His daughter Mary, who accepted the reins, was immediately under pressure to provide for much greater freedom of political and mercantile association. These reforms were provided in an important statute which bore the revealingly patronising name of the ‘*Grand Privilège*’.<sup>18</sup> Habsburg domination, as it turned out, could not allow for all of these freedoms to be enjoyed for very long. But the reactions elicited by the reversion to overrule would be very different in the mid-sixteenth century to the late fifteenth. The merchant élite of the Low Countries had become peeved. Their great ‘herring fleet’, and more generally the bulk

---

deprotestantisation of La Rochelle were related developments, see John Bosher, ‘The Political and Religious Origins of La Rochelle’s Primacy in Trade with New France, 1627-1685’, *French History* 7 (1993), 286-312. For Rouen’s transformation in a slightly earlier period, see Benedict, *Rouen during the Wars of Religion*.

<sup>16</sup> A. D. Lublinskaya, *French Absolutism: The Crucial Phase, 1620-1629*, trans. Brian Pearce (Cambridge: Cambridge University Press, 1968), 220-326.

<sup>17</sup> Jonathan Israel, *The Dutch Republic: Its Rise, Greatness, and Fall, 1477-1806* (Oxford: Oxford University Press, 1995), 14, 24. See also Daniel Curtis, ‘What Kind of Horseman? Plague and Urbanization in the Low Countries, 17th Century’, Unpublished Paper (2015).

<sup>18</sup> Kerling, *Commercial Relations*, 210; Israel, *Dutch Republic*, 28.

freightage of fish and grain which had become so central to the increasingly distinct economy of the northern Netherlands, could take no more jeopardy, so they protested.<sup>19</sup> These were not, of course, the sole reasons behind the ‘Dutch Revolt’, underway in 1568, but it was certainly true that a key motivation of those involved was to liberate the entrepôt economy from cyclical over-regulation. The revolutionaries were ultimately successful, and from 1579 the United Provinces emerged proudly urban and maritime in focus. The many bulk freighters that could be seen docked in ports, some of them special vessels known as *sluits*, provided the technology required to dominate the maritime trade at the end of the sixteenth century. The requisite capital and direction were contributed by communities of merchants, who were happy to approach the region’s shipowners in pursuit of new opportunities, and were no longer hampered but encouraged to do so by the central government in the form of the Staten Generaal.<sup>20</sup> Thus was the Dutch ‘Golden Age’ underway, in which the trading corporation was a central actor.<sup>21</sup>

If the Dutch, English, and French were near equals in the race for Atlantic enterprise in 1600, the Swedes were late starters and severely handicapped by comparison. Politically, Scandinavia had been a volatile and shapeshifting region until the beginning of the seventeenth century. Its economy generally faced eastward, with most of its coastal ports being small, specialised, and after the mid-fourteenth century, Hanseatic. Scandinavian towns were small, and guilds were few and generally frowned upon.<sup>22</sup> Stockholm was the only merchant portside city with any serious clout on the Swedish coast during the fifteenth century. Its most prized exports were minerals, the trade of which was lucrative enough to sustain a growing import economy. Between 1450 and 1550, Stockholm welcomed ships from wider Scandinavia as well as English and Dutch traders (so long as they came with

---

<sup>19</sup> James D. Tracy, *Holland under Habsburg Rule, 1506-1566: The Formation of a Body Politic* (Berkeley: University of California Press, 1990), 90-114.

<sup>20</sup> R. W. Unger, ‘Dutch Herring Technology and International Trade in the Seventeenth Century’, *Journal of Economic History*, 40 (1980), 253-79. See, generally, Israel, *Dutch Republic*, 129-230.

<sup>21</sup> Israel, *Dutch Republic*. See also Simon Schama, *The Embarrassment of Riches: An interpretation of Dutch culture in the Golden Age* (New York: Knopf, 1987); Timothy Brook, *Vermeer's Hat: The Seventeenth Century and the Dawn of the Global World* (New York: Bloomsbury Press, 2008).

<sup>22</sup> Michael Roberts, *The Early Vasas: A History of Sweden, 1523-1611* (Cambridge: Cambridge University Press, 1968), 31; Eli F. Hecksher, *An Economic History of Sweden*, trans. Göran Ohlin (Cambridge, MA: Harvard University Press, 1968), 44-60.

salt, hops, or cloth).<sup>23</sup> This economic activity was regulated and taxed, raising enough revenue to allow Gustav I to purchase a state fleet from Hanseatic Lübeck and use this to establish the Swedish navy in the 1520s. Gustav I then broke many ties with Lübeck, looking instead to create new international political and trading relationships in the following decade.<sup>24</sup> Sweden's global ambition paused after the reign of Gustav I, as it became crippled by political infighting, embroiled in eastern European geopolitical conflicts, and troubled by domestic religious turmoil. The rise to power of Gustav II Adolphus in 1611, however, marked a drastic change in affairs. Gustav II shifted much of Sweden's attention away from the east and towards the west, and he took his inspiration from the Dutch. Its Catholicism purged, the new and improved 'monolithic Lutheran state' received a thorough makeover, with reforms both to the public service and to the church.<sup>25</sup> Perhaps Gustav II's most important reforms, however, were directed towards the modernisation and strengthening of the navy, which after the 1630s was administered efficiently by Admiralty Courts (*Amiralitetskollegium*).<sup>26</sup> Sweden suddenly looked very Dutch, and even began to attract many of investors and entrepreneurs from United Provinces. Rapidly, by the 1640s, Sweden had become a powerful presence in the region.

Sweden, the United Dutch Provinces, France, and England are the principal imperial nations considered in the thesis which follows, as corporations from these nations expanded westward into the Atlantic World and acquired property in new locales. To begin this story, the first colonial domain to explore is also the closest to mainland Europe, separated from the Scottish mainland by just twenty-two kilometres of Irish Sea. The expansion of the English into Ireland definitively began with Henry VIII's rise to the position of 'King of Ireland' in 1541. English adventurers after this period were often dismayed during their tours of the Irish countryside by what they perceived to be its complete foreignness to the

---

<sup>23</sup> Anders Andrén, 'State and Towns in the Middle Ages: The Scandinavian Experience', *Theory and Society* 18 (1989), 599-602; John Allyne Gade, *The Hanseatic Control of Norwegian Commerce during the Late Middle Ages* (Leiden: Brill, 1951), 104-22; Hecksher, *Economic History*, 62.

<sup>24</sup> Roberts, *Early Vasas*, 91-107

<sup>25</sup> Roberts, *Early Vasas*, 462.

<sup>26</sup> Jan Glete, *Swedish Naval Administration 1521-1721: Resource Flows and Organisational Capabilities* (Leiden: Brill, 2010).

English common law.<sup>27</sup> Superficially, this was so. Installed was a politically lateral system of chiefly succession known as tanistry, which awarded country-specific titles on the basis of seniority. Coupled with this was a widespread practice of sharing estates, regarded to be a form of gavelkind, which furnished tenants with the freehold interest, but reserved rents and jurisdiction to the lord.<sup>28</sup> It all looked different to the counties of England, but never so radically incompatible to have impeded dozens of aspirant Englishmen from requesting Irish titles after Henry VIII. What this new demand for land required, and moreover what the new constitutional relationship with Ireland after 1541 demanded, was the only solution legally possible: a statutory program of land reform for the plantation areas designed to standardise titles while at the same time reward and encourage loyal landowners. It is from these origins that the ‘surrender and re-grant’ model of creating common law titles emerged. It was introduced by crown agents, not corporations, and allowed for the first largely abortive attempts at plantation by ‘adventurers’, and the luring of many in the Old English and Gaelic nobility into the New English order of things.<sup>29</sup> The results of the ‘surrender and re-grant’ model were mixed, but regardless of one’s historiographical sympathies, its failings have to be seen to outweigh its successes. Not only was the model relentlessly provocative, inspiring the resistance of defiant old chiefs and regretful new earls in fairly consistent generational cycles, but it was administratively cumbersome too, taking far longer to transform the rural countryside of Ireland into an English polity than most Protestant Britons on the other side of the sea hoped.<sup>30</sup>

But these plantations attracted mostly ‘adventurers’ – male entrepreneurs who came to Ireland in order to advance their social standing relative to England, for whom returning to England was the back-up plan in the event they could not secure the favour of the new administrators and the respect of locals. In the north, things were different, following the

---

<sup>27</sup> For English perceptions of Ireland in this period more generally, see David B. Quinn, *The Elizabethans and the Irish* (Ithaca: Cornell University Press, 1966); John Patrick Montaña, *The Roots of English Colonialism in Early Modern Ireland* (Cambridge: Cambridge University Press, 2011).

<sup>28</sup> K. W. Nicholls, ‘Land, Law, and Society’, *O’Donnell Lecture Delivered at University College Cork, May 1976* (Dublin: National University of Ireland, 1978).

<sup>29</sup> For the wider story in a groundbreaking monograph, consult Jane Ohlmeyer, *Making Ireland English: The Irish Aristocracy in the Seventeenth Century* (New Haven: Yale University Press, 2012).

<sup>30</sup> For the surrender and regrant system in the context of a program to incorporate Ireland into Great Britain, see Nicholas Canny, *Making Ireland British, 1580-1650* (Oxford: Oxford University Press, 2001). But see also W. F. T. Butler, ‘The Policy of Surrender and Regrant’, *Journal of the Royal Society and Archaeological Society of Ireland* 3 (1913), 47-65, 99-128.

orchestration of a resistance movement by Hugh O'Neill and Rory O'Donnell at the turn of the century. The pair submitted to the crown in 1603 after the revolt was pacified, but a few years later – and quite out of the blue – they fled for the continent along with several other Gaelic lords and a number of followers. Upon this 'Flight of the Earls' in 1607, James I was presented a fine opportunity, if not the perfect excuse, to change entirely the landscape of the north. Lacking the resources to do it, however, his Privy Council approached the City of London.<sup>31</sup> At the outset of 1610, after some negotiation, James I and the City eventually reached an agreement, paving the way for a new corporation to be formed out of twelve London companies, overseen by twenty-six citizens, and called The Society of the Governor and Assistants, London, of the New Plantation in Ulster, within the Realm of Ireland (or, just 'the Irish Society').<sup>32</sup> This company of companies (of companies) was by royal charter incorporated on March 29th of 1613.<sup>33</sup> In return for significant capital investment at the outset, the companies of the Irish Society were granted by lottery some of the best parts of Ulster, central to which being 'O'Cahan's Country', between the rivers Bann and Foyle, home to the diocese of Derry and the county of Coleraine. In this area (refashioned 'County Londonderry'), during the first few decades of the Irish Society's rule, a predominately Gaelic Irish community (those native to Ireland and predominantly Catholic), along with some Old English (those descended from twelfth-century Anglo-Norman migrants, mostly Catholic and largely assimilated within Irish society), were met with an incessant flow of Presbyterian Scottish immigrants who intended not to return to Scotland but rather to transform into Ulstermen and Ulsterwomen, and to conceive and birth the same.<sup>34</sup>

Continuing westward across the Atlantic Ocean, Newfoundland is next encountered. In the first half of the sixteenth century, this island attracted small groups of

---

<sup>31</sup> Motives and Reasons to induce the City of London to undertake the Plantation in the North of Ireland (28 May 1609), *Calendar of State Papers* (hereafter: *CSP*): *Ireland* (1608-10), 207-10.

<sup>32</sup> Articles of Agreement (28 January 1609/10), in *Calendar of the Carew Manuscripts* (hereafter: *CCM*): *James I, 1603-23*, 36-7.

<sup>33</sup> Although twelve companies received their separate grants (the Clothworkers, the Drapers, the Fishmongers, the Goldsmiths, the Grocers, the Haberdashers, the Ironmongers, the Mercers, the Merchant Taylors, the Salters, the Skinners, and the Vintners), each of these companies represented several smaller companies. Collectively there were 55 companies incorporated within the Irish Society.

<sup>34</sup> The best analysis of Munster and Ulster in a British context is Canny, *Making Ireland British*. The classic study of Ireland in the Elizabethan imperial imagination remains Quinn, *Elizabethans and the Irish*.

independent European fishermen – predominately Basque, French, and West Country men – to its cod-rich shores, but these seasonal visitors barely imperilled the native Beothuk. This extractive industry was sustainable and dominated by smallholders beyond the jurisdiction of controlling European-based interests. By the late century, however, companies and monarchs from coastal westerly Europe began to see an opportunity in these waters. In 1583, the Devonian Sir Humphrey Gilbert – operating with letters patent of 1578 and with the backing of London merchants – made a claim to the island for Elizabeth I. This was followed somewhat later in 1609 by the claim of Henry Hudson, an Englishman who sailed out of Amsterdam for the Vereenigde Oostindische Compagnie. These claims amounted to little for as long as the sundry other Europeans there could continue about their business without taking notice of either new claimant. Gradually, however, over the course of the seventeenth century, Europeans contemplated the establishment of a more permanent presence on the island. It would be the united London and Bristol Company, which received its charter in 1610, to settle the Newfoundland ‘English Shore’ and thereby oversee the first stages of the island’s slow transformation from a seasonal fishing station into a place of permanent settlement. Albeit briefly, this company laid the platform for subsequent proprietary interests to establish a thriving hub of transatlantic trade by securing exclusive access to local fishing haunts and accumulating great stretches of Beothuk coastal territory for the rest of the seventeenth century.<sup>35</sup>

Further west of Newfoundland lies north-eastern North America on the mainland split apart by the great St. Lawrence River. From the Atlantic coast, where the river is flanked underneath by the ocean gathering at the Bay of Fundy, the Saint Lawrence runs upwards into Lake Ontario. This chunk of the continent either side of the river, principally the home of the Malecites, Abenakis, Mi’kmaq, Etchemins, Montagnais and Algonquins (who were members of the Algonquian language group), and the Hurons, Hochelagas, Stadaconas, Oneidas, Onondagas, and Mohawks (who were members of the Iroquoian language group), was first haunted by intruders predominately from the western France. Upon the third and final commissioned voyage of the Malouin Jacques Cartier in 1541-42,

---

<sup>35</sup> Gillian T. Cell, *English Enterprise in Newfoundland, 1577-1660* (Toronto: UTP Press, 1969); Peter E. Pope, *Fish into Wine: The Newfoundland Plantation in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 2004).

the interests of wealthy merchants, cardinals, and patrons of Brittany – based largely out of Rouen and Le Havre – dispatched a series of expeditions to North America during the 1570s and 1580s with mixed but promising results. The founding of ‘Nouvelle-France’, which took place over the next hundred years, was principally due to the work of little companies based along the western coast of France, even if there were no functional monopolies ever granted for the trade in the region. Indeed far from attracting any exclusive and prevalent corporation, this region, from the late sixteenth century to the end of the 1620s, attracted a succession of collaborative seigneurial and merchant interests, whose often-interprovincial partnerships would each boast of ambitious plans attractive to the unpredictable favours of kings, admirals, viceroys, and regional assemblies. During the reigns of Henri IV and Louis XIII (1589-1643), there came a steady trickle of lettres and commissions from kings to jostling sieurs, but there was much confusion. Some of these overlapping grants became defunct through disuse, while others were transferred between interests in the name of speculation. Throughout the 1610s and into the early 1620s, a number of competitive interests clashed and clogged, from which confusion emerged some more organised corporations. Associates of the Compagnie de Monts, the Compagnie de Caëns, the Compagnie de Rouen et Saint-Malo, and the Compagnie de Montmorency, each begged for royal favour in this period, while elbowing their way into the courts and *parlements* of France where the validity of their own commissions and letters patent could be attestable above all others. A forced merger of the most resilient of interests involved in these schemes took place in 1622, but the incorporation of these interests proved brittle; it ultimately disintegrated within a few years. Then, under the direction of Cardinal Richelieu, efforts were renewed to put together a large-scale company from 1626, which finally resulted in the royal letters patent granted in the April of 1627 to the Compagnie de la Nouvelle-France (made up of ‘Cent-Associés’ with a mixture of courtly and merchant interests). Unequivocally, this chartered company was to maintain a monopoly of the trade in furs, and it would be tasked with administration of a growing settler population for the next four decades.<sup>36</sup>

---

<sup>36</sup> Henry Percival Biggar, *The Early Trading Companies of New France: A Contribution to the History of Commerce and Discovery in North America* (Toronto: University of Toronto Library, 1901); Marcel Trudel, *The Beginnings of New France, 1524-1663*, trans. Patricia Claxton (Toronto: McClelland and Stewart Ltd, 1973), 34-209; Helen Dewar, ‘Litigating Empire: The Role of French Courts in Establishing Colonial

It was around the time of the emergence of the united Compagnie de la Nouvelle-France that a much smaller enterprise, entirely autochthonous to the Channel, had set its sights upon New France. Political exigencies were the cause of this corporate transformation. A family business which straddled France and England, without preference at first for either, in the early seventeenth century, the Kirkes were engaged in a somewhat modest merchant trade in the buying and selling of French wine. Gervaise Kirke, the family patriarch, had fostered important though largely Huguenot networks at La Rochelle (being the closest port to Bordeaux) and Dieppe (being a key French entrepôt close to Portsmouth) by the 1620s for the wine trade. But with the outbreak of hostilities between England and France from the beginning of 1627 – following the French seizure of merchant wine vessels at Bordeaux – this family business, which had thrived on the dual loyalties of the Kirke family, became no longer feasible.<sup>37</sup> With war, however, came a new commercial opportunity for the Kirkes: David Kirke, for his brothers, ‘obtained letters of marque’ from the delegates of Charles I on December 17th, 1627, which authorised (it can only be presumed) their capture of French prizes in the Atlantic.<sup>38</sup> Funds of at least £10,000 were then raised in London to fund the voyage of the first expedition of the new company, and even more would be raised for the subsequent expedition the following year. So came into existence the Merchant Adventurers to Canada, whose triumphs in New France, for their London investors as much as for the grace of Charles I, earned the Kirke brothers their status as naturalised Englishmen in 1628, and two of them, David and Thomas, knighthoods. These titles would endure for longer than the company’s occupation of Quebec, however.<sup>39</sup>

---

Sovereignties’, in *Legal Pluralism and Empires, 1500-1850*, ed. Lauren Benton and Richard J. Ross (New York: New York University Press, 2013), 49-79. Philip P. Boucher makes the interesting but brief claim that, ‘[u]nlike their English counterparts, French mercantile entrepreneurs resisted the colonizing obligations of ill-conceived and ill-funded state-sponsored charter companies’. See Philip P. Boucher, ‘Revisioning the “French Atlantic”: Or, How to think about the French Presence in the Atlantic World, 1550-1625’, *The Atlantic World and Virginia, 1550-1624*, ed. Peter C. Mancall (Chapel Hill: UNC Press, 2007), 274-306.

<sup>37</sup> Henry Kirke, *The First English Conquest of Canada*, 2nd ed. (London: Sampson Low, Marston & Co., 1908), 33-64; Leon Pouliot, ‘Que Penser des Frères Kirke?’, *Bulletin des Recherches Historiques* 44, 11 (1938), 321-335.

<sup>38</sup> Letters of Marque (17 December 1627), *CSP Domestic* (1628-9), 303. See also Historical Manuscripts Commission, *The Manuscripts of Earl Cowper* (hereafter: *CMS*), (London: Her Majesty’s Stationery Office, 1888), 1: 375.

<sup>39</sup> For the Kirkes, see Andrew Nicholls, *A Fleeting Empire: Early Stuart Britain and the Merchant Adventurers to Canada* (Toronto and Montreal: McGill-Queens University Press, 2010).

South-eastward, Nouvelle-France melts into l'Acadie – where the original grant of Pierre du Gua de Monts in 1603 gave foundation to the first serious efforts at French settlement for the two decades following. For all interests concerned, however, the area turned out to be the site of pandemonium. It was rattled by the incursions of the Virginia Company throughout the 1610s, and then from early 1628, by a colonial experiment in Scottish baronetcies led by the Earl of Stirling, and his son and namesake, Sir William Alexander the younger. But this area was never so factious as it was until after 1632, when the Scottish of 'Nova Scotia' were, for the most part, placed out of the picture, and employees of the Compagnie de la Nouvelle-France and various discordant representatives of the French crown attempted to settle upon a consistent government for l'Acadie.<sup>40</sup>

To the south of l'Acadie, the Kennebec River, whose source is the large Moosehead Lake at the south-east of Québec, drains southwardly into the Atlantic. Either side of this river lived the Malecites, Abenakis, Mi'kmaq, and Etchemins, where the French corporate and proprietary interests of l'Acadie overlapped with the English proprietary interests of Maine. Following the Atlantic coast southwardly from here, past Massachusetts Bay and around the Cape Cod, forms the easterly coastline of New England. Inland of this area, home of the Wampanoags, Massachusetts, Pawtuckets and Narragansetts (among other Algonquian speakers), a series of English corporate and proprietary regimes, many of them overlapping, competed for supremacy.<sup>41</sup> The result was an almost constant procession of authority crises and title disputes throughout the seventeenth century, many of which carried over into the eighteenth. The origins of 'New England', which are possibly even more confusing than the origins of New France, must also be discussed before turning to explore the role of companies in this region.

The first English corporate settlement in New England was the abortive attempt of the Virginia Company of Plymouth at Sagadahoc, at the mouth of the Kennebec River,

---

<sup>40</sup> For the clearest elucidation of the overlapping royal, corporate, and proprietary claims of the Scottish, French, and English in this region, see John G. Reid's pioneering study, *Acadia, Maine, and New Scotland: Marginal Colonies in the Seventeenth Century* (Toronto: University of Toronto Press, 1981). Much is also to be gleaned, at least from the English perspective, from correspondence kept at the National Archives of the United Kingdom (hereafter: NAUK) Colonial Office (hereafter: CO) 1/5 and 1/6. The Canada Adventurers, sometimes called the Anglo-Scotch Company, appears to have been a rather informal affair, and there is scant documentation revelatory of its actual operations.

<sup>41</sup> See especially James Axtell, *The Invasion Within: The Contest of Cultures in Colonial North America* (Oxford: Oxford University Press, 1985).

which commenced in the summer of 1607 and was abandoned early the next year. This company was one of two, the other being the Virginia Company of London, to receive a combined royal charter on April 10th of 1606, authorising ‘plantations’ across an absurdly large portion of the eastern American mainland. Following the failure of Sagadahoc, the Virginia Company of Plymouth lapsed into abeyance, leaving the Virginia Company of London – rechartered and strengthened in May 1609 – for several years the sole English corporate enterprise with any claim to the coast from Cape Fear to the Penobscot River.<sup>42</sup>

It was in this window that the Virginia Company of London authorised a grant to ‘John Peirce and Associates’, a modest combination operating in tandem with Robert Cushman and John Carver, who were advocating for the interests of some Puritan separatists in Leiden. On this miniscule authority, the outfitting of the Pilgrim-filled *Mayflower*, in the summer of 1620, took place.<sup>43</sup> Onboard this ship, certain members of the small company sceptical of the crown’s authority in the New World composed the famous ‘Mayflower Compact’, an early American constitution – the first ever – for the hyper-Christian ‘New Plymouth’ colony. It would be the first successful settlement in New England, unique as the only one whose authority flimsily stemmed from the doomed Virginia Company of London. On the ground, though, this hardly mattered. By the time the *Mayflower* landed at Cape Cod, some members of the defunct Virginia Company back in old Plymouth had formed, with more companions, a new corporation: the Council for New England.<sup>44</sup> It received a charter for planting and fishing in America in 1620, and in doing so, effectively restricted the London Virginia Company’s realm of authority to the Chesapeake area. Retroactively, the Plymouth Pilgrims received their permission to remain

---

<sup>42</sup> All English charters, unless otherwise stated, are read from the Yale Avalon Project, available at [http://avalon.law.yale.edu/subject\\_menus/statech.asp](http://avalon.law.yale.edu/subject_menus/statech.asp), last accessed 9 July 2015.

<sup>43</sup> Generall Quarter Courte at Sir Edwin Sandys House (2 February 1620), *Records of the Virginia Company of London*, ed. Susan Myra Kingsbury (hereafter: *RVCL*) (Washington: Government Printer, 1906), 1: 303. See also Charles M. Andrews, *The Colonial Period of American History* (New Haven: Yale University Press, 1934), 1: 249-78. John Frederick Martin, on the other hand, calls this ‘the Plymouth Company’ and places great emphasis on a corporate constitution connecting the London and Leiden backers of the colony. This name is not adopted here in order to avoid confusion with the Virginia Company of Plymouth (an English corporation), the Town of Plymouth (a New England corporation), the Council for New England (form of proprietors based in old Plymouth) and the backers of the first Plymouth expedition. See John Frederick Martin, *Profits in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth Century* (Chapel Hill and London: UNC Press, 1991), 134-9.

<sup>44</sup> This has also been called ‘The New England Company’ by some historians, such as E. B. O’Callaghan, *History of New Netherland; Or, New York under the Dutch* (New York: D. Appleton & Co., 1846), 1: 130.

in America by the Council for New England, and the dissolution of the Virginia Company of London shortly followed in 1624, which left the Council to be the dominant English company for the next decade.<sup>45</sup>

But it is not the Council for New England, more like a table of absentee gentleman-proprietors than any business association, that is of most interest to this thesis, but rather the joint-stock Massachusetts Bay Company, whose origins can be traced back to a grant from the Council in 1628 to ‘The New England Company for a Plantation in Massachusetts Bay’. Within a year of that grant, this corporation applied for its own royal endorsement, which it received, in the form of a ‘Patent for Establishing a Governor and Company of the Massachusetts’s Bay in New England’.<sup>46</sup> From this point onwards, this corporation is better known as the Massachusetts Bay Company, the lifespan of which –over half a century – was more remarkable than most others in the period.<sup>47</sup> It would be the first of all such colonising companies to move its head of operations, charter of incorporation, and many of its directors and investors away from the founding directors in Kent to the colony itself, a feat definitively (and controversially) accomplished with the hearing of the first Massachusetts Bay Company court at Charlestown on August 23rd of 1630, and the establishment of the general court the following month.<sup>48</sup> Puritans then attached themselves to the company and fled across the Atlantic to settle under its government in New England. It gave the Massachusetts Bay Company a competitive edge over its predecessors; from 1635 onwards, after the frustrated proprietors directing the Council for New England were obliged to ‘joyn in a voluntary surrender of ye Grand Patent of their Corporation’, the Massachusetts Bay Company became the dominant government entity in the region,

---

<sup>45</sup> See George D. Langdon Jr., *Pilgrim Colony: A History of New Plymouth, 1620-1691* (New Haven: Yale University Press, 1966).

<sup>46</sup> A copy of the Patent for Establishing a Governor and Company of the Massachusetts’s Bay in New England (3 March 1628/9) may be found at NAUK CO 1/5/1, 33-7.

<sup>47</sup> For the early history of the organisation of the Massachusetts Bay Company and its predecessors in New England, the pioneering study remains Frances Rose-Troup, *The Massachusetts Bay Company and its Predecessors* (New York: Grafton Press, 1930). For the argument that the Massachusetts Bay Company was the first to transform from corporation to corporate colony, and became subsequently the archetypical American colonial government, see Herbert S. Osgood, ‘The Corporation as a Form of Colonial Government, II’, *Political Science Quarterly* 11, 3 (1896), 502-33.

<sup>48</sup> The First Court of Assistants, Holden att Charlton (23 August 1630), *Records of the Governor and Company of the Massachusetts Bay in New England* (hereafter: *MBCR*), ed. Nathaniel B. Shurtleff (Boston: William White, 1853), 1: 73.

lording it – there is perhaps no better term – over each of the small communities of New England for the next few decades.<sup>49</sup>

Tensions were quick to arise between the newly dominant Massachusetts Bay Company and the ‘colony and corporation’ of New Plymouth, as well as the rival English colonisers in Old Plymouth, creating a situation not all that dissimilar to that which paralysed attempts to people New France two decades earlier.<sup>50</sup> In this period, the Massachusetts Bay Company encountered some tough critics. Some were New Plymouth notables, next-door; others were grantees and former members of the Council for New England, the lot of them aspirant aristocratic proprietors in England with personal royal connections. They emerged, sporadically throughout the 1630s and 1640s, to question the authority of the Massachusetts Bay Company in the peripheral regions of New Hampshire and Maine to the north, Rhode Island to the south, and Connecticut to the west.<sup>51</sup> This the company’s English critics did in various ways: some questioned its charter’s validity, some held out their hands for conflicting crown-granted proprietaries, some questioned the company’s title, some sought their own titles directly from native sellers.<sup>52</sup> But in spite of these challenges, the Massachusetts Bay Company remained the powerhouse government of New England, and it would maintain this dominance until 1684.

The company’s challenge was most laborious not in Plymouth, Kent, or London, where its chartered rights were critiqued and technically nullified, but on the Connecticut River, west from Massachusetts Bay. From the mid-1630s – when the resistance of native Pequots, Mohegans, Niantics, and Narragansetts (among other Algonquian speakers) was on the rise – the company’s jurisdiction clashed not only with the nascent Puritan polities at Saybrook and New Haven, but also with the Dutch. Here was part of the area styled ‘Nieuw Nederlandt’, whose corporate beginnings likewise require contemplation.

---

<sup>49</sup> Petition of the New England Council (26 April 1634), and subsequent Act for the Resignation of the Great Charter of New England (25 April 1635), NAUK CO 1/6, 70, 72-8; *CSP Colonial (America and West Indies)*, 1: 205-6.

<sup>50</sup> Plymouth referred to itself as ‘colony and corporation’ in 1636; see William Brigham, ed., *The Compact with Charter and Laws of the Colony of New Plymouth* (Boston: Dutton and Wentworth, 1836), 30.

<sup>51</sup> See, for an introduction, Charles E. Clark, *The Eastern Frontier: The Settlement of Northern New England, 1610-1763* (Hanover and London: University Press of New England, 1970), 13-62; David E. Van Deventer, *The Emergence of Provincial New Hampshire, 1623-1741* (Baltimore and London: Johns Hopkins University Press, 1976), 21-82; Sidney V. James, *Colonial Rhode Island: A History* (New York: Charles Scribner’s Sons, 1975), 13-74.

<sup>52</sup> Andrews, *Colonial Period of American History*, 1: 249-429. Some of this will be considered below.

Merchants from the United Provinces, most of them based in Amsterdam, were immediately interested in America after their emancipation from Habsburg control. They were behind a series of expeditions into the 'Westindische' region from the late sixteenth century onwards, devoting, from the 1610s onwards, more and more energies towards controlling the fur trade in New Netherlands. An equally amorphous moniker as New France, New England, and the others, the term for the Dutch part of North America corresponded roughly to the region straddling the Atlantic coast from the Connecticut River area, past the Hudson River and southward towards the Delaware River, encompassing a fair distance inland of that as well as the island of Manhattan. After the mixed successes of smaller collaborative efforts, the Nieuw-Nederland Compagnie was put together in the early months of 1614, and received its charter by October of that year from the Staten Generaal. Three years of exclusive rights in the region later, and a few years in limbo after that, the company fell apart. From its rubble came the much bigger, and more powerful, Geoctroyeerde Westindische Compagnie. Delivered its first charter in 1621, which contained far greater guarantees and privileges than its predecessor, the company was controlled by its Heren XIX (the nineteen Lords, who were formally spread out into chambers at each of the key portside cities of Amsterdam, Groningen, Hoorn, Middelburg and Rotterdam).<sup>53</sup>

The Westindische Compagnie's interests spread far beyond the Connecticut River region of Nieuw Nederlandt and right across the Westindische region, so much so that this American colony can be considered of 'little importance' when compared to the company's presence elsewhere in the Atlantic world.<sup>54</sup> If that is indeed the case, then it is no less important for our attention to focus on the river because of it, for it formed the junction of many overlapping corporate interests from the 1620s right up to the 1660s. It would be at the Connecticut River, throughout the 1630s and 1640s, that the Westindische Compagnie

---

<sup>53</sup> Simon Hart, *Prehistory of the New Netherland Company* (Amsterdam: City Archives of Amsterdam, 1959); Oliver A. Rink, *Holland on the Hudson: An Economic and Social History of Dutch New York* (Ithaca: Cornell University Press, 1986), 1-68.

<sup>54</sup> In the decades following the company's formation, a region of South America around what is now Brazil, along with parts of the Caribbean, and the African Gold Coast, became some of the main foci of its investments. See Mark Meuwese, *Brothers in Arms, Partners in Trade: Dutch-Indigenous Alliances in the Atlantic World, 1595-1674* (Leiden: Brill, 2011). For the claim that 'The Dutch presence on the Connecticut River was of little importance', see Jaap Jacobs, *New Netherland: A Dutch Colony in Seventeenth-Century America* (Leiden: Brill, 2005), 4.

and the Massachusetts Bay Company clashed with each other while also scuffling with a handful of domestic corporate bodies politic (three of which receiving royal charters as proprietaries).<sup>55</sup> The complexity of the indigenous geopolitics of the wider region made all of this more volatile. From the bottom of Lake Champlain into the valley of the Hudson River (so-named by the English navigator working for the Oostindische Compagnie), the region was dominated by the Five Nations Iroquois (Senecas, Cayugas, Onondagas, Oneidas, and most important in this region, Mohawks), though it was also home to the Susquehannocks and Mahicans (among others, mostly Iroquoian-speakers, who moved in and out of the region according to the demands of war and trade). Here, where the Westindische Compagnie was strongest, the Iroquoian domain clashed with the Algonquian domain – as it did in the outskirts of New England and, most abrasively, around the French-dominated Lake Ontario – which required divisive policy programs in order to secure access to furs and land. Downstream of the Hudson leads to Manhattan Island and Long Island on the Atlantic coast of America, which was the home of several small Iroquoian nations, and a region where the Dutch were the strongest Europeans after 1626, notwithstanding the encroachment of English and Scottish competitors throughout the 1630s and 1640s.<sup>56</sup>

The junction of New England and New Netherland was, therefore, a particularly competitive arena among international corporations and indigenous nations. So too, however, was the region along the coast in the southward direction towards Delaware Bay. So-named after the one-time Virginia Company of London governor Thomas West (the Lord de la Warre), the valley and surrounding region were realistically coveted by neither of the Virginia Companies. The Geoctroyeerde Westindische Compagnie had a stake here from the early 1630s, but its presence – initially, anyway – was thinly spread. Identifying a lost opportunity to plug one of the few remaining holes along the North American coastline, Willem Usselinx and Peter Minuit broke away from the Westindische

---

<sup>55</sup> Andrews, *Colonial Period of American History*, 1: 430-95, 2: 67-194; William E. Nelson, *The Common Law in Colonial America, Volume 1: The Chesapeake and New England, 1607–1660* (Oxford: Oxford University Press, 2008), 81-100.

<sup>56</sup> Compare Denys Delage, *Bitter Feast: Amerindians and Europeans in Northeastern North America, 1600-64*, trans. Jane Brierly (Vancouver: UBC Press, 1993); Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill: UNC Press, 1992); Bruce Trigger, *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered* (Montreal and Toronto: McGill-Queen's University Press, 1986).

Compagnie and took their plans for a new colonising project away from Amsterdam and made for Stockhölme. Gustavus II Adolphus of Sweden was originally supportive of the idea as early as 1624, but the project fell through because of a lack of funds. When, early the following decade, plans were resurrected for 'Nya Sverige' in Stockhölme, Dutch financial backers were sought to underwrite the initiative. It was a masterstroke which paved the way for the beginnings of the Sverige Söder Compagniet, the Nya Sverige Compagniet, and various other iterations of essentially the same unstable Swedish corporation, put together in 1637 for colonising the Delaware River. Here it maintained a physical presence until 1655. Home of the Lenape (and other eastern Algonquian speakers), and occasionally ascended by raiding Iroquois, the region was anything but quiet. The Westindische Compagnie refused to recognise the privileges afforded to the Swedish company, regardless of the involvement of Dutch financiers. This meant that 'New Sweden' faced its biggest challenges from their Dutch neighbours, but that is not to overlook the many Englishmen who also sought to maintain a permanent trading presence on the Delaware from at least 1634.<sup>57</sup>

Furthest south on this tour of the North Atlantic American coast, Chesapeake Bay is reached. In 1584, Sir Walter Raleigh was to Virginia what Sir Humphrey Gilbert was to Newfoundland in 1583: that is, the patented commander of the first English chartered effort to colonise the region which ultimately came to nil. The so-called 'Lost Colony of Roanoke' – its settlers most likely dispersed by unimpressed locals – was nothing short of a disaster.<sup>58</sup> Only in 1607, when the Virginia Company of London offloaded its first settlers in Powhatan country, did the enduring occupation of the region get underway.

Having surveyed some of the key loci of corporate activity in the North Atlantic World, it is necessary now to consider the means deployed by these companies to establish their territorial claims. In Chapters Four and Eight, this thesis will explore how these companies established their claim as against other Europeans, focusing upon the separate

---

<sup>57</sup> Stellan Dahlgren, 'New Sweden: The State, the Company and Johan Risingh', *JRJ*, 1-43; Richard Waldron, 'New Sweden: An Interpretation', *Revisiting New Netherland: Perspectives on Early Dutch America*, ed. Joyce D. Goodfriend (Leiden: Brill, 2005), 71-91; C. A. Weslager, *Dutch Explorers, Traders and Settlers in the Delaware Valley 1609-1664* (Philadelphia: University of Pennsylvania Press, 1961); C. A. Weslager, *The English on the Delaware* (New Brunswick: Rutgers University Press, 1967).

<sup>58</sup> Karen Ordahl Kupperman, *Roanoke: The Abandoned Colony*, 2nd ed. (Lanham: Rowman and Littlefield, 2007).

strategies of claiming by *prescription* and proclaiming by *patents*. Before this can be illustrated with colonial examples, however, some legal-historical background is needed to contextualise these developments.

### Chapter 3: Patent and Prescription in Legal Thought

The legal history of making claims to property and jurisdiction by making recourse to the conditions of a written legal instrument provides important context to the history of corporate expansion presented in this thesis. As this chapter progresses, it will be evocative occasionally of the overdone adage conveying the pen's superior might to the sword. Early-modern traditions of legalese and bureaucracy were medieval in origin, establishing the procedural and doctrinal foundations of political interaction. Only working within this broad context can the function of patents, and similar legal instrument, within Europe be understood. Prescription, taken here to encompass all means of fortifying rights of ownership by making recourse to the passage of time, is also explored in this chapter. The focus here will be upon the Western legal tradition, where necessarily our starting point is with the Romans; from there, these two discrete methods will interweave through the medieval period up to the end of the sixteenth century, just as corporations began to adopt both as they sought to strengthen their claims to land in the extra-European world.

Roman jurists are often accredited for the earliest advancements in *juri scripto legibusque* (written law). Yet it is important to note, from the outset of this enquiry, that their achievements were not accomplished free of hindrance. Immediately there was a conflict between *law as manifest in a series of codes* to be written down and memorised, and *law as manifest as ancient and fluid custom* to be recalled to create *jus* through force if necessary. This conflict can be picked up in a number of classical texts. If the former kind of law seemed artificial, then the latter was more natural for Romans, whose culture was proudly oratorical. There is a clear glimpse of this in Cicero's speech in defence of Titus Annius Milo (52 BCE), for example. '*Lex*', Cicero apparently declared to the trial justices, was something 'not written but born with us [...] not learned or received by tradition, or read, but what we have taken and sucked in and imbibed from nature herself'. Why else, asked Cicero, did men bear swords and consult warriors? 'Surely it would never be permitted for us to have them if we might never use them', he offered.<sup>1</sup> In

---

<sup>1</sup> *M. Tullii Ciceronis Scripta quae manserunt omnia*, ed. Reinhold Klotz (Leipzig: Bibliotheca Teubneriana, 1853), 234-5, paraphrased and translated from *Pro Milone*, 4: 10-11: 'Quid comitatus nostri, quid gladii volunt? quos habere certe non liceret, si uti illis nullo pacto liceret. Est igitur haec, iudices, non scripta, sed nata lex; quam non didicimus, accepimus, legimus, verum ex natura ipsa adripuimus, hausimus, expressimus;

the end, this was not enough to disprove the accusation of guilt, and Milo was exiled for murder by association.<sup>2</sup>

Six centuries elapsed before Justinian (482-565) commissioned the publication of three legal texts: the *Code* (a compilation of laws), the *Digest* (an anthology of juristic opinion), and the *Institutes* (a textbook). But shortly after their proclamation and dissemination in 529, this body of civil law fell largely into disuse. A European tradition of *juri scripto legibusque* had to endure the consequences of the *völkerwanderung*, which occurred on the back of the dissolution of the Roman Empire, and coincided with a reversion to largely unwritten customary legal codes. Shards of Roman legal principles survived principally in the orated form, as communities splintered apart and feudalised. Although the Enlightenment cannot be taken too uncritically at its word to regard this period before the rise of lay literacy to resemble a ‘dark age’ of lawlessness, it is probably true that the sword was never so mightier than the pen as it was in this period.<sup>3</sup>

From the late eleventh century onwards, a succession of glossators, commentators, and scholars rediscovered Justinian. By the fourteenth century, an elaborate body of Roman private law, the *Corpus juris civilis*, had been reconstituted and was gaining acceptance across Europe.<sup>4</sup> Canon law underwent a similar revival, following Gratian’s compilation (or, rather, what he considered to be a ‘*concordia discordantium canonum*’) of the *Decretum* in the mid-twelfth century.<sup>5</sup> Between 1100 and 1400, an insurgent culture of

---

ad quam non docti sed facti, non instituti sed imbuti sumus, —ut, si vita nostra in aliquas insidias, si in vim et in tela aut latronum aut inimicorum incidisset, omnis honesta ratio esset expediendae salutis. Silent enim leges inter arma; nec se exspectari iubent, cum ei qui exspectare velit, ante iniusta poena luenda sit, quam iusta repetenda’. The contested meaning of *lex* in classical antiquity is a topic which deserves more consideration than this thesis can provide. For the argument that the word itself derives from *legere* (‘to read aloud’), and the implication therefore that it relates to the authoritative declaration of custom, see Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh: Edinburgh University Press, 1966), especially chapter one.

<sup>2</sup> James S. Ruebel, ‘The Trial of Milo in 52 B.C.: A Chronological Study’, *Transactions of the American Philological Association* 109 (1979), 231-49.

<sup>3</sup> See especially Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009), 121-91; Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 29-32. See also Katherine Fischer Drew, ‘The Barbarian Kings as Lawgivers and Judges’, *Life and Thought in the Middle Ages*, ed. Robert S. Hoyt (Minneapolis: University of Minnesota Press, 1957), 7-29.

<sup>4</sup> Charles M. Radding and Antonio Ciaralli, *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill: Leiden, 2007), esp. 35-110.

<sup>5</sup> James A. Brundage, *Medieval Canon Law* (Abingdon and New York: Routledge, 2013), 44-69. See also the essays collected in Wilfried Hartmann and Kenneth Pennington, ed., *The History of Medieval Canon Law*

writing and scholarship was facilitating the metamorphosis of lore into law.<sup>6</sup> At the same time, the adoption of new and mundane bureaucratic procedures by local medieval governments was fostering the development of lay literacy. Europe was moving ‘from memory to the written word’, as M. T. Clanchy puts it.<sup>7</sup>

Nowhere was this development more transformative, and by extension provocative, than on the land itself, which requires elaboration. What had been common to the many variations of European feudal land regimes was essentially procedural. Traditionally, the transference and confirmation of the titles of subjects was done orally and with the addition of symbolism for sincerity. After a public announcement of the terms of tenure, a clump of turf might be uprooted, a handful soil handed over, a twig forced into the ground, or something else similarly quaint might take place. Ceremonies of infeudation were equally important for confirming subordinate land rights. These were often elaborate affairs, featuring oaths, kisses, and other gestures. Ritualistic procedures such as these began to disappear as the adoption of written instruments came to perform these functions. From the tenth century, land rights across Europe were increasingly inscribed onto paper. Around this time, it is interesting to note that the meaning of ‘deed’ begins to acquire its modern meaning as a sealed document made by a donor of land, and was gradually less associated with the physical act of symbolic and ceremonial conveyance.<sup>8</sup> Land rights were becoming things written, though trinkets might still be used in the affair (knife handles and rods were often stuck into parchment to attest to a document’s accuracy, for example). Soon, however, it became conventional for the sake of authenticity merely for the interested individuals to apply a mark to the document (typically a cross, an ode to God), before

---

*in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX* (Washington, D. C.: Catholic University of America Press, 2008).

<sup>6</sup> See, generally, Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), vol. 1. This sprouted a new culture of reading across Europe, for which see Roger Chartier, *The Order of Books: Readers, Authors, and Libraries in Europe Between the Fourteenth and Eighteenth Centuries* (Cambridge: Polity Press, 1994), translated from the French *L’Ordre des Livres*.

<sup>7</sup> My argument which follows takes much inspiration from Clanchy, whose study of England inspired a historiographical revolution among medievalists, and should be essential reading for early modernists. His argument, that lay literacy owed its origins much more to the mundane elements of medieval bureaucracy (inscribing pipe rolls, issuing charters, etc.) than to the church, is supported by a wealth of data he interprets with much skill. See M. T. Clanchy, *From Memory to Written Record: England, 1066-1307*, 2nd ed. (Oxford: Blackwell Publishers, 1993).

<sup>8</sup> Clanchy, *Memory to Written Record*, 52.

sealing it with hot wax.<sup>9</sup> Conveyance was changing drastically, and written contracts and proofs were becoming essential in the new modes of transferring title.<sup>10</sup>

The emergence of the sealed and registered ‘title deed’ afforded monarchs greater bureaucratic control over the liege nobility. When this power was exploited – medieval kings could be wicked – the pen and the sword turned upon one another just as they had in the trial of Milo. Take, for instance, the enquiries into *quo warranto* during the reign of Edward I (1272-1307). The name of the procedure itself (‘by what warrant’) is, in the first place, worthy of note, signalling as it did a confident new era of recordkeeping and the stocktaking of privileges. But this era would not properly transpire without first invoking some resentment in the countryside. A relevant folk story, recorded by Walter of Guisborough in his *Chronicles* (1300-1315), runs as follows:

... [T]he king [Edward] disquieted some of the magnates of the land, by his judges wanting to know of the Warrant [*quo Waranto*] by which they held their lands, and those without a good warrant had their lands seized; among the rest, the Earl Warenne was called before the king’s judges and interrogated *quo Warento*, who brought forth an ancient and rusty sword and said: “Behold, men of my lord, behold my Warrant! For my ancestors came with William the Bastard and conquered the lands by the same sword, and with this sword I will defend them from anyone intending to occupy them. The king did not conquer and subject the land by himself for our progenitors were sharers and partners with him.”<sup>11</sup>

---

<sup>9</sup> Clanchy, *Memory to Written Record*, 32; John M. Kaye, *Medieval English Conveyances* (Cambridge: Cambridge University Press, 2009), 14. Kaye’s research suggests that one of the most important changes to these documents, in terms of their form, was the addition of considerations of time in their terms.

<sup>10</sup> John Baker, ‘Deeds Speak Louder than Words: Covenants and the Law of Proof, 1290-1321’, *Laws, Lawyers and Texts: Studies in Medieval Legal History in Honour of Paul Brand*, ed. Susanne Jenks, Jonathan Rose, and Christopher Whittick (Leiden: Brill, 2012), 177-99. See also J. H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), 223-58.

<sup>11</sup> Harry Rothwell, ed., *The Chronicle of Walter of Guisborough* (London: Royal Historical Society, 1957), 216: ‘Cito post inquietavit rex quosdam ex magnatibus terre per iusticiarios suos scire volens quo Waranto tenerent terras et si non haberent bonum varentium saysiuit statim terras illorum; vocatusque est inter ceteros Comes de Warena coram iusticiarios regis et interrogatus quo Warento teneret produxit in medium gladium antiquum et eruginatum et ait “Ecce domini mei ecce Warentum meum. Antecessores enim mei cum Willelmo bastardo uenientes conquesti sunt terras suas gladio et easdem gladio et easdem gladio defendam a quocunque eas occupare volente. Non enim rex per se terram deuicit et subiecit sed progenitores nostri fuerunt cum eo participes et coadiutores.”’ ‘The story is certainly inaccurate in details’, Clanchy explains, ‘but it has a value comparable with the myths Fitz Neal recorded a century earlier about the Norman Conquest and written law. Myth is not necessarily the “purely fictitious narrative” of a dictionary definition. In oral tradition it can be a formulation of fundamental belief and experience handed down in a memorable way. The Warenne story recalls a non-literate tradition of the Norman Conquest, and, if examined as an evocation of a dying oral culture, it indicates better than more formal records the change of attitudes which had occurred since the coming of the Normans [...] [I]t is important and useful precisely because it does seem to be a popular legend. At the heart of the story is a memory which allegedly went back to the Norman Conquest and an archaic method of proof, the exhibition of the rusty sword, which had been superseded in Edward I’s courts by written evidence and book-learned law’. Clanchy, *Memory to Written Record*, 35-7.

Challenges such as these were hardly unique to the English countryside. Matthæi Parisiensis (1200-1259) recorded a similar confrontation in 1247 between French barons and the clergy enquiring into their lands. Much repined, ‘the king’s chief men’ declared that ‘the kingdom was won not by written law [*jus scriptum*], nor by the arrogance of clerks [*clericorum*], but with the sweat of our armies [*bellicos*]’.<sup>12</sup>

Lordly land rights made for a touchy subject during the medieval period – and they became particularly more sensitive when new kinds of paperwork purported to take them away and vanquish the memory of ancient conquests and gifts. Yet it is remarkable that across all other spheres of custom and tradition in the same period, the triumph of script went largely unchallenged as it was received within wider society. Accordingly, the legal and political functions of the written word quickly became many. Between the tenth century and the fourteenth century, a range of new functions was accorded to specially issued instruments, which took a number of novel forms. Some of these included the writ (*breve* or *scriptum*), the chirograph (*chirographum*), official letters (*litterae*), certificate of credentials (*testimonium*), the patent (*patentium*), the warrant (*warrantum*; sometimes *commission* in French), and the charter (*carta*; *octrooi* or *oorkonde* in Dutch, *urkunde* in German, *konungaförsäkran* in Swedish royal terminology, *l’acte écrit* or *charte* in French).<sup>13</sup> These names were sometimes used interchangeably, because the distinctions between them were often minimal. For simplicity, they may be seen, together, to comprise a new and principally secular type of official paperwork, whose job was just to lubricate some of the more frictional social interactions of the medieval and renaissance periods.

Of these, only the *testimonium* (and its variants) had mobile utility. Akin to a modern letter of reference (and sometimes even called ‘*littere recommendatorie*’ in England), *testimonia* could be issued by sovereigns, aristocrats, or respected members of

---

<sup>12</sup> Matthæi Parisiensis [Matthew Paris], *Chronica Majora*, ed. Henry Richards Luard (London: Longman & Co., 1877), 4: 593: ‘quod regnum non per jus scriptum, nec per clericorum arrognatiam, sed per sudores bellicos fuerit adquisitum’.

<sup>13</sup> Clanchy, *Memory to Written Word*, 81-113. See also Karl Heidecker, ed., *Charters and the Use of the Written Word in Medieval Society* (Turnhout: Brepolspublishers, 2000); Peter Johanek, ‘Zur Rechtlichen Funktion von Traditionsnotiz, Traditionsbuch und Früher Siegelurkunde’, in *Recht und Schrift im Mittelalter*, ed. Peter Classen (Sigmaringen: Thorbecke, 1977), 131-62.

the clergy, for subjects compelled, for whatever reason, to leave their own local area.<sup>14</sup> During the second half of the thirteenth century in the English countryside, it would have been ‘imprudent’, Clanchy suggests, for subjects not to carry a *warrantum suum de fidelitate* (warranty of faithfulness) into neighbouring villages.<sup>15</sup> Onto special bearers, a *testimonium* might declare an office or title, but these were jurisdictionally specific privileges. Even if they were read publicly and aloud, as they often were, *testimonia* were only functional within a given realm or domain, as subjects of foreign realms or domains were under no obligation whatsoever to acknowledge the message of such documents. Hence, the proclamation of special privileges could be addressed to specific subjects, or even to all of a monarch’s subjects, but never to foreign subjects.<sup>16</sup> Whenever foreign recipients were addressed, it was never to declare the applicability of new conditions over them, but rather to make the polite request for accommodation or passage. Intercontinental warfare made passes of this kind more necessary, and therefore more commonplace, from the end of the fourteenth century onwards. These were often given to specifically named soldiers, general messengers, and couriers who needed to make unhindered passage through foreign lands.<sup>17</sup> Diplomats, on the other hand, began to carry similar letters of

---

<sup>14</sup> For several examples, see Pierre Chaplais, ed., *English Diplomatic Practice, Part I* (London: PRO, 1982), 1: 1-45. It is to be kept in mind that these were documents with explicitly diplomatic functions, unlike colonial charters and letters patent.

<sup>15</sup> Clanchy, *Memory to Written Word*, 48. By this time, in England at any rate, the concept of warranty was on its way to acquiring its own legal character, largely as a clause in written charters providing for ‘good lordship’. See Paul R. Hyams, ‘Warranty and Good Lordship in Twelfth Century England’, *Law and History Review* 5, 2 (1987), 437-503.

<sup>16</sup> On this, see the distinction between patent rolls and close rolls in S. R. Scargill-Bird, *A Guide to the Principal Classes of Documents preserved in the Public Record Office* (London: Eyre & Spottiswood, 1891), 34. In a footnote citing this as one of two sources, Ken MacMillan offers the same reference to an elaboration between the distinction between *rotuli litterarum clausarum* (close rolls) and *rouli litterarum patentium* (patent rolls) for evidence that a letter patent ‘was not a document intended solely for internal, domestic’ use. This interpretation is all the more remarkable given the clarity afforded elsewhere in the guidebook’s under the more appropriate header (‘Charters and Grants [Royal]’), where it is confirmed that charters were documents conferring gifts or exemptions from one crown subject to another crown subject, or from the crown itself to its own subjects either individually or in corporate form, but in all cases limited to subjects of the single sovereign. Scargill-Bird, *Guide*, 52-9. The other reference in the footnote is to the equally interesting but equally unresponsive examples provided in Hubert Hall, ed., *A Formula Book of English Historical Documents* (Cambridge: Cambridge University Press, 1908), 1: 24-5, 54-60. Compare Ken MacMillan, ‘Common and Civil Law? Taking Possession of the English Empire in America, 1575-1630’, *Canadian Journal of History* 38 (2003), 415n25, which, incidentally, appears to duplicate Patricia Seed, ‘Taking Possession and Reading Texts: Establishing the Authority of Overseas Empires’, *William and Mary Quarterly* 49, 2 (1992), 185n9.

<sup>17</sup> See, for an example, Henry III’s Letters Patent for the Earl of Winchester (1512/3), Hall, *Formula Book*, 1: 60-1. For a discussion, see Valentin Groebner, ‘Describing the Person, Reading the Signs in Late Medieval and Renaissance Europe: Identity Papers, Vested Figures, and the Limits of Identification, 1400–1600’,

credentials around this time, although they were typically more embellished documents. According to the common format of diplomatic credentials, the acknowledgement of a common faith was essential, for this implied trustworthiness. Added to this were a formal greeting, an abundance of compliments, and the seal of the sending sovereign. This was the best way, though it was never a guaranteed way, to gain entry into a foreign ruler's court for the purpose of engaging in specific conversations.<sup>18</sup>

This was a trend of great significance. Herein lay the beginnings of identity documentation – the earliest passports. Initially, these were used for travel over land, gradually for passage over the borderless sea, and usually in the context of intermittent warfare.<sup>19</sup> It is undeniable that passes of this kind were among the most internationally ambitious documents written up by local authorities in the late medieval period. But from a legal perspective, it is important to recognise that they discharged no obligations in foreign jurisdictions. Passes generally offered guidelines for action, but never proclaimed rules – and there were no guarantees about the response of the host. The same, indeed, was true of all other documents issued in the Middle Ages, with two major exceptions.

First are the papal letters of the medieval period. These were the decrees expressing the authority of the Pope, and they went by many names, among them *auctoritas*, *epistola*, *litterae*, *pagina*, *praecptum*, *privilegium*, and *scriptum*.<sup>20</sup> Today these are regarded to

---

*Documenting Individual Identity: The Development of State Practices in the Modern World*, ed. Jane Caplan and John Torpey (Princeton: Princeton University Press, 2001), 15-27; Daniel Nordman, 'Sauf- Conduits et Passeports, en France, à la Renaissance', *Voyager à la Renaissance*, ed. Jean Ceard and Jean-Claude Margolin (Paris: Maisonneuve et Larose, 1987), 145-58.

<sup>18</sup> Garrett Mattingly's description of the average ambassadorial *testimonium* in 1400 is useful to us in this context. 'The document is on parchment, in Latin, engrossed in the best chancery style, and sealed with the seal of the state. It greets the recipient by all his titles and is signed with all the seals of the sender, but the text between is commonly no more than a few lines, the sense of which is to beg the recipient to give full faith to the bearer (usually named) in what he shall say on behalf of the signer. Sometimes a specific subject is mentioned, more often not. Usually there is an elaborate complimentary close'. Garrett Mattingly, *Renaissance Diplomacy* (New York: Dover Publications, 1988 [1955]), 33-4.

<sup>19</sup> For sea passes, see generally Claudia Moatti and Wolfgang Kaiser, ed., *Gens de passage en Méditerranée de l'Antiquité à l'Époque Moderne: Procédures de Contrôle et d'Identification* (Paris: Maisonneuve et Larose, 2007); Susan Rose, *Medieval Naval Warfare, 1000-1500* (London and New York: Routledge, 2002). For an impressive study of the use of British ship passes in the Mediterranean during the seventeenth and eighteenth centuries, see Tristan Stein, 'Passes and Protection in the Making of a British Mediterranean', *Journal of British Studies* 54, 3 (2015), 602-31.

<sup>20</sup> Reginald L. Poole, *Lectures on the History of the Papal Chancery, Down to the Time of Innocent III* (Cambridge: Cambridge University Press, 1915), 40. Poole's book remains an indispensable resource to scholars interested in the topic.

comprise a singular form: the ‘bull’. This word conveys the application of a lead seal to the documents (*bullae*), a practice which appears to have been in existence from at least the sixth century.<sup>21</sup> Our documentary evidence suggests, however, that bulls remained fairly uncommon until the accession of Leo IX (1049-1054), when the Catholic Church itself began to bureaucratise, of which the emergence of secretaries and the expansion of the papal chancery provides good evidence. When the Pope exercised his authority by issuing bulls, these decrees were designed to apply to specific areas of Europe, most commonly to announce excommunication, to extend certain privileges, or to signal jurisdictional exceptions. At the same time political and religious, these exceptional documents extended no further than Christendom, and even within Christendom became contentious after the fifteenth century (for which no better example can be provided than the reception given to the *Inter Caetera* of 1493).<sup>22</sup> For this reason, the analogy offered by Muldoon between papal bulls and colonial patents is to be taken cautiously; whereas the former were deliberately outward and might function across Christendom, the latter were secular and jurisdictionally specific by design.

The second form of document to consider are letters designed for special application during periods of jurisdictional deficit: those for ‘marque and reprisal’. There was a Roman tradition of permitting legal exceptions and *condemnatio* for the encouragement of *restitutio*, of course. But this particular format of legally aggressive letters making declaration of exceptions emerged later in the early bureaucratic period of European history, that is, between the eleventh and thirteenth centuries. Letters of marque and reprisal were specifically designed to facilitate restitution for subjects from whom property had been unjustly seized beyond their own realm and were therefore in the absence of normal recourse.<sup>23</sup> After applying for letters of marque from their own local authorities, aggrieved subjects could then collaborate for the purpose of seeking their restoration of their property or the equivalent compensation.<sup>24</sup> Essentially, these letters provided a public

---

<sup>21</sup> Poole, *Lectures*, 24-5.

<sup>22</sup> Herbert Thurston, ‘Bulls and Briefs’, *The Catholic Encyclopedia*, vol. 3 (New York: Robert Appleton Company, 1908), available at <<http://www.newadvent.org/cathen/03052b.htm>>, accessed 9 July 2015. See also, above, 15-6.

<sup>23</sup> See, for some good examples of early English letters of marque, Chaplais, *English Diplomatic Practice*, 1: 382-6.

<sup>24</sup> Marie-Claire Chavarot, ‘La Pratique des Lettres de Marque d’après les Arrêts du Parlement (XIIIe-début XVe siècle)’, *Bibliothèque de l’École des Chartes* 149, 1 (1991), 51-89; Emily Sohmer Tai, ‘Law of Marque’,

endorsement of a particular private law interest abroad, and in that sense, had to be taken seriously by foreign recipients, lest their actions attracted even greater attention from foreign war-making sovereigns. The jurisdictional audacity of these documents ensured they were typically only used in contexts of open war, or contexts in which provocative restitution was expected to bring about the declaration of open war or reprisals in return, from the fifteenth century onwards. Importantly, wherever these documents allowed for the restitution of property, this provision was only applicable to moveable property. Letters of marque empowered no vigilante or ‘privateer’ to claim foreign land or modify immovable property rights, whether in their own names or that of a sponsoring monarch.

Having made this important distinction, it will now be necessary to reflect further on medieval distinctions of property and the kinds of civil action that could affect property interests, and return, finally, to the law of property during the move from memory to written word. The first serious reflections on the distinctions between movable and immovable property go back to the Romans, though it would not be until the later medieval period (1100-1400) that scribes began to reconstitute – if selectively – the Roman law of property or things (*res*). Property touched just about everything in Roman law, and it is for this reason that property had to be classified, disaggregated, and regulated by ancient jurists, and likewise but only where necessary, by the medieval scholars who resurrected them. These typologies of property remain around today. From the Romans are derived the distinctions, sometimes subtle and at other times blatant, not only between properties *mobilia* and *immobilia*, but also between properties divisible and indivisible, sacred and secular, consumable and inconsumable, principal and accessory, ownable and unownable, corporeal and incorporeal, and private, common, and public. In practical application, however, the Roman law of property remained defiant of neat classificatory systems, and there is some inconsistency across ancient legal texts. The details, in suits of private law, were often much messier than the neat categorisation implies.<sup>25</sup> Although this study cannot

---

*Trade, Travel, and Exploration in the Middle Ages: An Encyclopedia*, ed. John Block Friedman and Kristen Mossler Figg (Routledge: New York, 2000), 338-9.

<sup>25</sup> See for example William L Burdick, *The Principles of Roman Law and their Relation to Modern Law* (Rochester NY: Lawyers Co-operative Publication Company, 1938), esp 298-308; Paul du Plessis, ‘Property’, *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), 175-98, esp. 175-89; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, 3rd edition, revised by Peter Stein (Cambridge: Cambridge University Press, 2007), 180-281.

provide a comprehensive overview of the Roman law of property, what is necessary and revealing in the context of medieval legal history and the age of corporate settler colonialism which followed it, however, is some reflection upon the principal actions to be used in Roman private law in order to *establish* a claim to immoveable property.

This was relatively straightforward in environments where no rival claimants could be identified. As Justinian had set out in the *Institutes*, that which belongs to nobody, by natural reason, concedes to the earliest occupier (*'quod enim ante nullius est, id naturali ratione occupanti conceditur'*).<sup>26</sup> Such is the basis of what has been called the rule of 'first taker', which has appeared in a number of forms since Justinian, as Andrew Fitzmaurice explores best.<sup>27</sup> Rare, though, were the environments in which such a rule could be applied. Then just as now, multiple interests were often connected to a singular thing or *res*, and few circumstances provided for a perfectly vacant *dominium*. It is also important to recognise the great pressure exerted, during the medieval period, by ecclesiastical corporations upon land-hungry monarchs; kings and queens became especially anxious to revert empty estates to the royal demesne in this period. If, therefore, some regard is to be shown to the 'rule of first taker' – or to the much more specious public law 'doctrines' analogised from it by twentieth-century jurists – then it is important to recognise the unusual nature of such a context in private law. The first takers in the history of private immovable property were few.

The establishment of a new private claim to *res* required the measurement of this claim against that of another potential claimant of the same *res* – a context in which the rule of first taker could not come into play. In such instances, time became the most crucial determinant for conflicting interests (the distinction of which was sometimes made between owner and possessor). In other words, the enquiry to be made in Ancient Rome, as it was later in medieval Europe, was less into *who was ostensibly there first* but rather into *who was effectively there for a sufficiently long period of time*. In classical law, the generation of ownership through continuous possession was called *usucapio*. This rule provided relief to a possessor against an owner who was not considered to be taking the

---

<sup>26</sup> Justinian, *Institutiones*, II, 1, 12. Justinianic law cited in this dissertation derives from the *Corpus Iuris Civilis*, 3 vols., ed. Theodor Mommsen and Paul Krueger (Dublin: Apud Weidmannos, 1968).

<sup>27</sup> Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014).

appropriate steps to secure his ownership of property. For land ownership to divert to the possessor, the act of possession had to be performed in good faith, and it typically required a just cause (pertaining, perhaps, to an awry sale), over and above the passage of time (typically, ten or twenty years).<sup>28</sup> By the sixth century, the principles and procedures of *usucapio* were simplified, and the term was replaced by *praescriptio longi temporis*, which now referred to the acquisition of land ownership after a slightly longer period of possession.<sup>29</sup> This was a Justinianic construction, and its supersession of *usucapio* was ideal for the era later to beckon – relating not only the importance of time (*prae-*) but also the written legal process of instigating a suit (*-scriptio*) for the resolution of disputed property interests. Certainly, the passage of time (*longi temporis*) remained the most important element of prescription: for immovable property, the period for uninterrupted possession was fixed at thirty or forty years depending on the relationship between the original owner and challenging possessor; the period for claimants of moveable property was much less, and usually only a matter of years (in a process which was sometimes still called *usucapio* rather than *praescriptio*). Although there were variations and exceptions in the law of prescription as it was resuscitated in the medieval period, what remained constant was the applicability of the rule only to the ownership of private property, and not to the ownership of public property or common property.

Such, at least, was how prescription developed in the *Corpus iurus civilis*. Canonists offered their own take on prescription after the twelfth century, such that, by at least the fourteenth century, ‘the legal concept of prescription’, writes Kantorowicz, had become of ‘capital importance’ to the church.<sup>30</sup> Justinian offered only a brief consideration of prescription in relation to church matters in the *Codex*, but the passage is a remarkable one for its treatment of sacred and secular associations together in relation to property. Trusts and donated titles held by the Roman Church, as well as those held by charities, hospitals, monasteries, orphanages, and aged care facilities (*‘religiosissimis locis’*) and

---

<sup>28</sup> Alan Watson, *The Law of Property in the Later Roman Republic* (Oxford: Clarendon Press, 1968), 31-2, 48-61; H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge: Cambridge University Press, 1972), 151-5.

<sup>29</sup> Justinian, *Codex*, VII, 31: 33-5. See also Jolowicz and Nicholas, *Historical Introduction*, 506; Burdick, *Principles*, 342-5.

<sup>30</sup> Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press, 1957), 165.

even those held by cities, were subject to exceptional rules of prescription: in a state of disuse, this property could only be reclaimed after the term of a natural life (that is, a hundred years), which for Justinian amounted to an ‘almost perpetual right of recovery’.<sup>31</sup> Corporate prescription in Ancient Rome was therefore exceptional. Seen, much later, from the point of view of the canonists, this provided a considerable deterrent to all natural prescribers and could be used to make ecclesiastical land essentially inalienable. Prescription was not only useful to protect the church holdings, however. It could also be made to work *for* the church (if performed in good faith), which required a much wider applicability of the concept. In the *Decretum* of Gratian, pioneering enquiries were made as to whether ecclesiastical rights could be removed by prescription.<sup>32</sup> Gratian’s examples concerned the clergy of a particular church facing challenge by the claims of a neighbouring clergy, generally to lands and revenues through tithes, but the *Decretum* also contemplated the possibility of laymen impinging upon the same.<sup>33</sup> This would not be all. More innovatively, prescription appeared to provide a way to mete out rights generally in the church, and was put to work to settle disputes over the obedience of hierarchy within and across ecclesiastical districts. For example, the right to enjoy a particular representative position in the clergy might be encroached upon and superseded by another clergyman through prescription in good faith.<sup>34</sup> Thus, after Gratian and his followers, not only were ordinary rights in land (*temporalia*) and tithes (*spiritualia*) potentially determined by prescription, but ecclesiastical jurisdiction itself – the right to administer sacrament and pastoral care – could be determined by prescription too. Hereafter, in canon law, the coverage of prescription was broadly extended over both church and civil matters. According with, and amplifying earlier Roman legal guidelines, *bona fide* became a mandatory requirement for ecclesiastical prescription, following the decrees of Innocentius III (1206) and the meeting of the Fourth Lateran Council (1215).<sup>35</sup> Good faith would become the most enduring component of canonistic prescription in the wake of Johannes

---

<sup>31</sup> Justinian, *Codex*, I, 2: 23.

<sup>32</sup> *Liber Extravagantium Decretalium*, in *Corpus Iuris Canonici*, ed. Emil Friedberg, vol. 2 (Graz: Akademische Druck-u. Verlagsanstalt, 1959), C. 16, q. 3.

<sup>33</sup> A useful overview may be found in follows R. H. Helmholz, *The Spirit of Classical Canon Law* (Athens, GA: University of Georgia Press, 1996), 178-81.

<sup>34</sup> Helmholz, *Spirit of Classical Canon Law*, 49.

<sup>35</sup> For canonistic prescription in good faith, see Noël Vilain, ‘Prescription et Bonne Foi: Du Décret de Gratien (1140) à Jean d’André (d. 1348)’, *Traditio* 14 (1958), 121-89.

Andreae (1270-1348), who gave himself the job of synthesising civilian prescription with church understandings of the same.<sup>36</sup>

Prescription, from around this time, came to be acknowledged by a number of prominent civilians, none more important than Bartolus de Saxoferrato (1313-57). Bartolus would imbue the idea of prescription with another function altogether, offering the suggestion that the public right of sovereignty could be affected by the passage of time. For Bartolus, the *de jure* sovereignty of ‘*Principem Romanum*’ might span the ‘*dominium totius orbis*’, but *de facto* rights of sovereignty (and, with that, exemption from imperial rule) could be established after an unspecified time through ‘*praescriptio*’ – or sometimes, in a telling construction, through ‘*consuetudine praescribi*’. This, to be sure, was the reluctant blending of two ideas Bartolus otherwise strove to separate: elsewhere, a strong distinction is made between custom, which required the majority consensus of the *universitas*, and prescription, which concerned only those individuals affected or ‘disposed’.<sup>37</sup>

Bartolus was a city-state civilian, a profession which came with a particular agenda. This gave him an eagerness to provide additional credibility to the corporate Italian *populus*, the political authority of its government, and also its claims to exercise jurisdiction over gulfs and bays.<sup>38</sup> His position on public prescription was never offered solely for the Italians, however; indeed, an example offered in his *Commentaries* on Justinian was a justification in favour of the sovereignty of the King of France. ‘*Credo enim regem Franciae non subjectum esse Imperio*’, he asserts and in the process lends his endorsement to the legitimacy of all of the new splintering Christian polities of the late medieval

---

<sup>36</sup> Helmholz, *Spirit of Classical Canon Law*, 191-8; Vilain, ‘Prescription et Bonne Foi’, 153, 163-4, 179.

<sup>37</sup> ‘[C]onsuetudo est jus disponens ex consensu populi vel majoris partis universitatis constitutum [...] praescriptio vero est jus dispositum [...] consentiunt in ea tamquam singuli, non tamquam universi’. From this basis, Bartolus offered that prescription embodied the principles of contract more so than custom, even if both prescription and custom required the passage of time for the creation of right. For these passages and their analysis, see Walter Ullmann, ‘Bartolus on Customary Law’, *Juridical Review* 52 (1940), 265-83.

<sup>38</sup> Walter Ullmann, ‘The Delictal Responsibility of Medieval Corporations’, *Law Quarterly Review* 64 (1948), 85-92; Joseph Canning, ‘The Corporation in the Political Thought of the Italian Jurists in the Thirteenth and Fourteenth Centuries’, *History of Political Thought* 1, 1 (1980), esp. 31; Magnus Ryan, ‘Bartolus of Sassoferrato and Free Cities’, *Transactions of the Royal Historical Society* 10 (2000), 65-89; Floriano Jonas Cesar, ‘Popular Autonomy and Imperial Power in Bartolus of Saxoferrato: An Intrinsic Connection’, *Journal of the History of Ideas* 65, 3 (2004), 369-81. See also Joseph Canning, *A History of Medieval Political Thought: 300-1450* (London: Routledge, 1996), 161-73.

period.<sup>39</sup> Later, Venetian and Genoan civilians who came after Bartolus took sufficient inspiration from him to justify their claims to exclusive control over maritime traffic within their respective gulfs, which culminated in the important defence of the practice in the *Tractatus de Praescriptionibus* of Johannes Franciscus Balbus, published in several editions from the middle of the sixteenth century into the seventeenth.<sup>40</sup> In these discussions over the enjoyment of a public and sometimes exclusionary right, an important ambiguity developed as to whether prescribers required their claim to be measured against an antecedent entity (by implication, against the *Imperium Romanorum*) or none at all (by implication, through *consuetudo*).

Prescription also found a place within English juristic thought. ‘Bracton’ (1225?-60), in *De Legibus et Consuetudinibus Angliae*, provides some of the earliest examples of its application. Prescription in this tract, as it was established in earlier Roman law, operated only in exceptional contexts to punish the ‘negligence’ of an owner, ‘for time runs against the indolent and those unmindful of their right’, as Bracton comments on the law of obligations.<sup>41</sup> Additionally, Bracton reveals a small but nevertheless distinct place for the rule in relation to the usage of land without express permission. A man in the absence of vicinage, unburdened by any conditions of service, and lacking any donation or title which permitted him to use a specific piece of land, could make his claim into *iure*, after a ‘long time’, and through ‘long usage’ (i.e., ‘exceeding the memory of man’).<sup>42</sup> Prescription therefore generated rights in the early common law, but these rights always fell short of actual ownership of immovable property. Franchises (generally, jurisdictional rights) rather than actual sections of land (the security of which was still effected thereby) were the most important subjects of prescription in medieval England following the prescriptive exceptions to the *quo warranto* enquiries of Edward I.<sup>43</sup> Over the next two centuries, as

---

<sup>39</sup> For this passage and an analysis, see Cecil N. Sidney Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought* (Cambridge: Cambridge University Press, 1913), 108-10, and see also 137-9.

<sup>40</sup> See, for example, *Tractatus de Praescriptionibus* (Cologne: Gymnicum, 1590).

<sup>41</sup> *Bracton on the Laws and Customs of England*, trans. Samuel E. Thorne (Cambridge, Mass: Harvard University Press, 1968), 2: 288: For situations in which prescription cannot apply, see *Bracton*, 2: 58.

<sup>42</sup> *Bracton*, 3: 186.

<sup>43</sup> When all magnates of the realm were demanded to relinquish those of their privileges which could not be proven to have come from a legitimate royal grant, exception had to be allowed for titles older than a hundred years: ‘all who say they have had undisturbed possession of liberties before the times of king Richard and since without interruption and can show this by good inquest may enjoy the things thus possessed’.

English common lawyers distinguished themselves from their continental counterparts by elaborating a system of precedents and depending upon the issuance of writs, so too did *praescriptio* become confused with *consuetudo* as it had in Italy.<sup>44</sup> This appears to have owed to the application of prescription in English legal contexts seemingly lacking of any identifiable interests to prescribe *against*, which represented a departure from Roman tradition.<sup>45</sup> Only in the sixteenth century was this kind of prescription rethought of as *custom*, but not all that definitively, for these two concepts could still be clumped together and considered as one (as they were, for instance, in parts of Christopher St. Germain's *Doctor and Student* [1518]), until clarity was finally afforded by *Swayne's Case* (1609), which distinguished between prescription as *personal* and better pertaining to rights, and custom as *local* and better pertaining to law.<sup>46</sup>

A curious ambiguity regarding the distinction between custom and prescription had developed within European juristic thought by the sixteenth century. What one also sees in this period is the gradual appreciation of the idea's versatility by humanist scholars operating within and against the scholastic tradition. In this frame, few were more influential than Fernando Vázquez de Menchaca.<sup>47</sup> In the *Controversies* (1564), Vázquez

---

Thereafter, in the common law, writes Holdsworth, 'it came to be thought that prescription was based not so much on a personal law in favour of the person seised, as on the fact that such immemorial user was conclusive evidence of a grant made before the time of legal memory'. 18 Edward I Stat. 2 (1290), in *English Historical Documents, Volume III: c. 1189-1327*, ed. Harry Rothwell (Abingdon: Routledge, 1996), 465; William Searle Holdsworth, *A History of English Law*, 5th ed. (London: Methuen & Co., 1942), 3: 169-70. See, for a wider treatment, Thomas Arnold Herbert's Yorke Prize Essay of 1890, published as *The History of the Law of Prescription in England* (Cambridge: Cambridge University Press, 1891).

<sup>44</sup> As David Ibbetson suggests, there was much 'terminological slippage between custom and prescription' in the medieval common law, and the precise meaning of 'prescription might once have been controversial'. David Ibbetson, 'Custom in Medieval Law', *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge: Cambridge University Press, 2007), 166, 172.

<sup>45</sup> Ibbetson, 'Custom in Medieval Law', 166; Alan Cromartie, 'The Idea of Common Law as Custom', Perreau-Saussine and Murphy, *Nature of Customary Law*, 213-4. Both refer to an entry in the Year Book from Henry VI's time which established two kinds of prescription, and can be translated as: 'one which extends throughout the whole realm, which is properly law; and another which some county, or some town, city or borough has had for time'.

<sup>46</sup> Christopher Saint German, *Doctor and Student*, ed. William Muchall (Cincinnati: Robert Clark and Co., 1886 [1518]), 5, 79, and esp. 290, where the superiority of the 'constitution' over 'prescription' is likened to that of the 'law' over 'custom'. *Swayne's Case* (1609), 8 Co. Rep., 64: 'And note a Difference between Prescription which is made in the Person of any, as he and all his Ancestors, &c. or all those whose Estate he hath, &c. and Custom which lies upon the Land, as *infra Manerium talis habetur Consuetudo*, &c., and this Custom binds the Land, as *Gavelkind, Borough-English*, and the like'.

<sup>47</sup> D. Fernandi Vasqvii Menchacensis, *Controversiarvm Illvstrivm* (Venice: Franciscum Rampazetum, 1564). This is the edition reproduced in the 1933 publication of the *Controversies* (Valladolid: Cuesta; 4 vols.) from which the following passages are drawn.

starts from the basis that in nature everything (*'omnia'*) originated in the state of commons. For *omnia*, he gives the specific examples of fields, plains, farms, and all things immovable (*'agri, campi, praedia, & reliqua immobilia'*). Insofar as the presumption of a right of ownership to these things had to be proved to others, for Vázquez there was no better conceivable method than to make recourse to prescription.<sup>48</sup> Without competitors, land sat idle, ready to be claimed by an occupant; in the face of competition, the creation of the right of ownership required thirty or forty years of uninterrupted possession.<sup>49</sup> This is hardly radical. More unusual, however, is his natural law rendering of the rule of first taker (which, for Vázquez, could be generated through time and usage), and the contemplation of this idea under the broad head of 'Prescription'. That Vázquez did not consider this means of acquiring ownership to be prescription in the strictest sense is fairly (but not always entirely) clear in the *Controversies*, but the need for him to consider these ideas together, calling upon the same Roman legal terminology, is certainly noteworthy. Too much, however, should not be made of this, because this kind of acquisition attracts little attention within a much wider discussion of prescription. Upon establishing the particular contexts in which title (*'titulus'*) is not needed to prescribe against, Vázquez then proceeds to explore the contexts in which title can be presumed after a long time and vested in an ancient possessor or user. These are exceptional contexts too, pertaining mostly to beneficial ownership, servitude, and obligations.<sup>50</sup> In other contexts, for Vázquez, a title is generally required for the possessor to initiate and sustain a claim by prescription.<sup>51</sup>

Having spent much of the first book of the *Controversies* justifying the *imperium* of Spanish kings, Vázquez is compelled to reiterate this endorsement within the frame of prescription, offering 'a new declaration of how the Spanish kings have the rights of Emperors'. It was a Spanish king, declares Vázquez, who liberated the Spaniards from the Moors and the Saracens, irrespective of the Roman Empire (*'Romano posthabito imperio'*), and this allowed for the requisite time (*'tempus immemoriale'*) to pass in order to provide for the enjoyment of untrammelled sovereignty.<sup>52</sup> As a result, Vázquez concludes, no other

---

<sup>48</sup> Vázquez, *Controversies*, II, c. li, nos. 14-6.

<sup>49</sup> Vázquez, *Controversies*, II, c. li, nos. 20, 27; see also, c. lxxv, no. 3.

<sup>50</sup> Vázquez, *Controversies*, II, c. lxi, no. 1-2; c. lxv, esp. nos. 1, 15-6, 19; c. lxxiii; c. lxix; c. lxxviii.

<sup>51</sup> Vázquez, *Controversies*, II, c. lxvii, esp. nos. 5-7; c. lxxvii, no. 7.

<sup>52</sup> Vázquez, *Controversies*, II, c. lxxxii, no. 21.

king, prince, nation, subject, or church can prescribe against the Spanish king.<sup>53</sup> Similar independence from the Roman Empire, after the passage of time, may have been achieved by the *civitates* of Venice and Genoa, Vázquez concedes, albeit with more circumspection than the Italian civil lawyers before him.<sup>54</sup>

On the distinction between custom and prescription, Vázquez aligns himself entirely with Bartolus.<sup>55</sup> But this distinction is barely relevant to the question of most importance in Vázquez's mind relating to the city-states, namely, the very *character* of the thing at stake in controlling maritime jurisdiction.<sup>56</sup> It would be his reflection upon this question in the final and eighty-ninth capitulation of the second book that made Vázquez so attractive to later scholars after him. In natural law, all things, for Vázquez, were common in the beginning. Humans after Adam individually came to enjoy the use of, and sometimes *dominium* over, these things. Hence, the right to use and/or own land (*terra*), a river (*flumine*), or a gulf (*gulfa*) can now, to various degrees, be prescribed with immemorial possession, subject however to procedural obligations. The sea is different, for it remains and always will remain a part of the commons. It cannot therefore be subject to prescription. The distinction here is basic. A river, the distinct parts of which have been subject to exploitation by fishermen since time immemorial, and the shores of which have been acquired and owned after prolonged usage, may be subject to prescription, but never to the extent of excluding the rights of peaceable passage. A sea, no part of which can be alienated or brought out of a primaeval state through usage or time, remains in a state of commons and cannot, therefore, be prescribed against.<sup>57</sup> This assertion – stripping down the claims of the Italian city-states to maritime jurisdiction within their own gulfs, and reducing this right to a form of ownership that cannot prohibit the passage and communication of others – requires additional support, which leads Vázquez back to the first principles of prescriptive reasoning. As prescription in the strictest sense demands an interface between owner and possessor (*'differentia inter agentem, & patientem'*), there can be no opportunity to reject rights of maritime navigation on this basis, because a nation

---

<sup>53</sup> See Vázquez, *Controversies*, II, c. li, 37-8, a claim which appears in relation to the subordination of ecclesiastical corporations to the King of Spain after the vanquishment of infidels.

<sup>54</sup> Vázquez, *Controversies*, II, c. lxxxii, no. 9.

<sup>55</sup> Vázquez, *Controversies*, II, c. lxxxiii, nos. 30-1.

<sup>56</sup> Vázquez, *Controversies*, II, c. lxxxiii, nos. 30-1.

<sup>57</sup> Vázquez, *Controversies*, II, c. lxxxix, nos. 15-6, 22, 30-1.

cannot prescribe against itself. Not only does this disqualify the claims of Genoa and Venice, but it also applies to the separate attempts of the Portuguese and the Spanish to prohibit other Europeans from navigating the seas on their way to the Indies by making recourse to immemorial usage (reasoning which Vázquez considers to be ‘insane’).<sup>58</sup> And what, then, if ‘*Genuenses & Venetos*’ prescribed against each other, or ‘*Hispanis and Lusitanis*’ tried the same? This was an impossibility, because prescription, being purely civil, cannot be used ‘*inter exteros*’, writes Vázquez. Prescription’s effects, in other words, were jurisdictionally specific, seemingly regardless of the inalienability of the *res* at hand: sovereigns could no more measure their claims of *imperium* against one another than foreign subjects could measure their claims of *dominium* against one another.<sup>59</sup>

Finally to consider, on the eve of the corporate expansion into the New World, was the first serious legal tract of Hugo Grotius, *De Iure Praedae* (1604). Although he considered Vázquez to be ‘the pride of Spain’ in his wholly positive appraisal of the *Controversies*, there was a subtle point of difference between them.<sup>60</sup> Whereas Vázquez, albeit ambivalently, saw in the primaevial state of nature a situation in which immoveables existed in common, and could subsequently be claimed through possession *longi temporis*, Grotius was plain that ‘prescription, upon whatsoever interval of time it may be based, is not applicable in regard to those things which have been assigned to all mankind for its common use’.<sup>61</sup> Although Grotius attributed to Vázquez ‘the thesis that public places which are common by the law of nations cannot be made the objects of prescription’, he was really only borrowing the Spaniard’s notion that the rights of navigation on the seas could never be affected by claims based on prescription.<sup>62</sup> Grotius took a firmer stance than Vázquez on immoveable property, following what he considered to be ‘the general abolition of communal ownership’ in organised (European) society. Principally, though, this point was developed in the framework of an argument against the claims of a ‘private person’ to ‘prescriptive rights over the public possessions of a given nation’, and this was

---

<sup>58</sup> Vázquez, *Controversies*, II, c. lxxxix, no. 32.

<sup>59</sup> Vázquez, *Controversies*, II, c. lxxxix, no. 33; see also II, c. li, 32-4.

<sup>60</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006 [1604-8]), 346.

<sup>61</sup> Grotius, *On the Law of Prize and Booty*, 343.

<sup>62</sup> Grotius, *On the Law of Prize and Booty*, 340-6, quote at 343.

*not* (at least, in *De Iure Praedae*), an idea developed explicitly in relation to the lands of foreign sovereigns in the Indies.<sup>63</sup>

Our investigation so far in this chapter into the conflict between the pen and the sword has led an analysis of discrete concerns which are not intuitively related – namely, the jurisdictional specificity of written legal instruments, and the nature of disputes over property rights in Roman civil law. An unusual context at the very end of the Middle Ages suddenly made these issues relevant to each other, however, and that was the European discovery of the ‘New World’. To be certain of this, it is useful to explore an early dispute between Spain and England following the expeditions of Francis Drake.

By the terms of her commission to Francis Drake in 1577, Queen Elizabeth authorised the privateer to do very little. Given command of a small fleet, which comprised a few royal ships along with any potential prizes (those ‘other shipps as shall ioyne with you’), Drake was directed to head into ‘the seas’, where he would enjoy, at all times on his voyage, ‘full power and iurisdiction’ over the English subjects of his crew (and them alone).<sup>64</sup> With these powers, his expedition turned out to be a remarkable one. Drake circumnavigated the world and, in the process, accumulated for himself and his queen an incredible bounty, through the plunder of Spanish treasure-laden ships which he seized off the coasts of South America and the islands of the East Indies. The seizure of this Pacific bounty led to a diplomatic furore back in Europe. As an event, it perfectly opens a window onto some of the uncertainties faced by the major corporations in the extra-European world for the next century.

Learning of these catastrophic losses, the Spanish ambassador to England, Don Bernardino Mendoza, was quick to lodge a formal demand for restitution in London. Invoking the superiority of the papal jurisdiction to argue for the exclusive right of the Spanish to frequent the Indies, and conflating his concerns with property, passage, and trade, Mendoza’s complaints represented all that was so confusing about the place of the extra-European world in the juristic thought of the post-Tordesillas and pre-Grotian period. The unenviable obligation to respond to this protest fell to the English diplomat, Robert

---

<sup>63</sup> Grotius, *On the Law of Prize and Booty*, 352-6, quote at 352.

<sup>64</sup> Letter Patent to Francis Drake (15 March 1587), Plymouth and West Devon Record Office (hereafter: PWDRO), 277/15.

Beale. To dislodge the Iberians from their delusions about donations, Beale drew his inspiration from their common civilian tradition; ‘Roman law’, as Garret Mattingly puts it, ‘was the warp on which the legal garment of the great [European] society was being constantly woven’ in this period, and its resources were the most accessible to European diplomats during the fifteenth and sixteenth centuries.<sup>65</sup> Beale, however, produced a somewhat different treatment of the legal issues in question. He offered two justifications for Drake’s plundering. Firstly, the Spanish had impeded the English from commerce, contrary to the *ius gentium*, and secondly, their illicit collusion with rebels in Ireland and England was more expensive to Queen Elizabeth than the amount exacted by Drake (even though his letters patent were not explicitly issued with restitution in mind). To some extent, though, these matters were academic. If all was fair in trade and war, for Beale it followed that there was nothing fair about the Spanish pretence to ownership of immovable property beyond Europe. For it was ‘not intelligible’ to Elizabeth, Beale informed the Spanish ambassador,

that her subjects and those subjects of other Princes should be prohibited from the Indies, by an unconvincing Spanish right, from the Roman Pope’s donation, in whom she acknowledged no prerogative in such cases, and no authority to oblige Princes owing him no obedience; or to infeudate the Spaniard in the *New World* and invest him with its possession. No other proprietary right have the Spanish but this claim based upon the construction of some huts and the denomination of some rivers or Capes. This donation of things belonging to somebody else, which has no basis in law, and this imaginary propriety, cannot without violation of the law of nations prevent other Princes from pursuing commerce in the region, or establishing Colonies, where the Spanish do not inhabit, since prescription without possession avails nothing; moreover they may also freely navigate that vast Ocean, since the use of the sea and the air is common to all. No title to the Ocean can be claimed by a nation or a private person, for neither nature, nor public usage, permits any occupation of it.<sup>66</sup>

---

<sup>65</sup> Garrett Mattingly, Garrett Mattingly, *Renaissance Diplomacy* (New York: Dover Publications, 1988 [1955]), 21: ‘In what we call the international law of the fifteenth century, Roman law was the most important element, the warp on which the legal garment of the great society was being constantly woven’.

<sup>66</sup> Guilielmo Cambdeno (William Camden), *Annales Rerum Anglicarum, et Hibernicarum Regnante Elizabetha* (Francofurti: Ioannis Bringeri, 1616), 329: ‘Praeterea illam non intelligere, cur sui et aliorum Principum subditi ab Indiis prohibeantur, quas Hispanici iuris esse persuadere sibi non posset, ex Pontificis Romani donatione, in quo praerogitauam in eiusmodi causis agnouit nullam, nedum auctoritatem, ut Principes obligaret, qui nullam ei obedientiam debent; aut Hispanum *Nouo* illo *Orbe* quasi infeudaret, et possessione investiret. Nec alio quopiam iure quam quod Hispani hinc illinc appulerint, casulas posuerint, flumen aut Promontorium denominauerint, quae proprietatem acquirere non possunt. Ut haec rei alienae donation, quae ex iure nihili est, et imaginaria haec proprietas obstare non debeat, quo minus caeteri Principes commercia in illis regionibus exerceant, et Colonias, ubi Hispani non incolunt, iure gentium nequaquam

This was no longer a defence of Drake; it was a critique of the acquisition of *dominium* by donation. Papal decrees meant nothing to subjects of European monarchs disobedient of the pope's authority, Beale declared – as of course Grotius would later in 1604 – but this was straightforward enough for the times. Far more interesting was Beale's denial that any such paperwork could infeudate even those subjects of Spain who were obedient to Rome. It followed for Beale that even if the papal donations conveyed some legitimate 'propriety', which he did not accept, then the Spaniards could make no claim to that which they did not 'inhabite'. This was a point which led Beale to deploy, if somewhat nebulously, the Roman civil law concept of *praescriptio longi temporis*, which functioned in the civil law to impose a time limit upon neglected rights of use and ownership.<sup>67</sup> For Beale, rights to immovable property abroad were yet to transfer to the Spaniards, moveable property remained right in the hands of the unjustly wronged taker, and the sea, being common to all and alienable to no subject, monarch, or pope, was properly the possession of none.

What follows in this thesis is an enquiry into how issues of this kind emerged, and were resolved, along the American and African coastlines of the Atlantic Ocean during the seventeenth century. This was a period which saw the corporations of coastal western Europe dispatch numerous ships for westward and southward expeditions onto the extra-European stage. Just like the Spanish and the Portuguese with their papal bulls and treaties in the sixteenth century, each of these seventeenth-century European companies claimed their own territories and justified those claims based on the passage of time, and each came

---

violato, deducant, cum praescriptio sine possessione haud valeat; necnon Oceanum illum vastum libere nauigent, cum maris et aeris usus omnibus sit communis. Nec ius in Oceanum populo aut privato cuiquam possit competere, cum nec natura, nec usus publici ratio occupationem permittat'. That the anonymous speaker here is Robert Beale is the authoritative determination of Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order* (Oxford: Oxford University Press, 1999), 112n5.

<sup>67</sup> Beale's remark in the quoted passage about prescription ('*praescriptio sine possessione haud valeat*') has been interpreted differently by historians. Patricia Seed, for example, attributing the oration to Queen Elizabeth herself, argues that the queen 'was quoting a commonplace of medieval English law: "A man cannot by prescription [that is, by declaration or decree] make title to land", an understanding, as already noted, not shared by Spaniards or indeed by any other European power of the time'. This reading, though it is supported by an impressive barrage of legal textbooks, overlooks the meaning of *praescriptio* in the medievally resuscitated Roman law, and moreover appears to betray an earlier observation in the same article, when the author declares that 'Possession in Roman law (from which English as well as Spanish law derives) signifies two things: physical presence and intention to hold the territory as one's own'. Seed, 'Taking Possession and Reading Texts', 189, 197-8.

with their own paperwork – charters, commissions, donationsbrev, lettres, octrooien, patents, and other legal instruments of the same kind.

Some of these documents granted similar rights to the same region, and on that basis, appeared to cancel each other out, while others gave only nominal and temporary endorsement of a particular colonising interest or other. All of these documents were granted from specific authorities to their own specific subjects. None of these documents were diplomatic in design or intent, even if a few mistaken colonists pretended, for a time, them to be. Some historians have suggested otherwise.<sup>68</sup> Principally, it seems, this is due to a particular trend of *reading* patents as historical and legal sources. However, what a text said, and how it was used, were different things. Nevertheless, to ignore the content of these documents would be to miss the clearly detectable trend of abstaining from the provocation of foreign subjects. This is not to imply, as some have, a great pan-European public law enterprise abroad; it is instead, to affirm, the jurisdictional specificity of official paperwork.<sup>69</sup> Most patents, from very early on, contained a provision restricting the territorial ambitions of the nominated company to areas not yet claimed by other Europeans: ‘not [...] held, occupied, possessed, ruled, or under the subjection and obedience of any princes or potentates, our allied and confederates, and especially of our very dear and beloved brothers, the King of Portugal’, reads the 1541 patent of Sieur de Roberval, to take one example; ‘not actually possessed of any Christian prince or people’, reads the 1578 patent for Sir Humphrey Gilbert, to take another.<sup>70</sup> Not all did this, however, and there are a few instances of fairly radical jurisdictional provisions abroad. Samuel de Champlain’s commission of 1612, issued under the authority of Charles de Bourbon, carried the remarkable claim that not only ‘des François’, but also ‘autres’ caught trading in ‘ledit fleuve Sainct Laurent’ were to be apprehended and conveyed to Normandy to face ‘justice’; this, along with other privileges in the commission, were apparently to be observed and respected by ‘tous Princes, Potentats, & Seigneurs estrangers, leurs Lieutenans généraux, Admiraux, Gouverneurs de leurs Provinces, Chefs & conducteurs de

---

<sup>68</sup> For this, see above, 15-23.

<sup>69</sup> Seed, ‘Taking Possession and Reading Texts’, 187.

<sup>70</sup> Commission for Roberval (15 January 1541), *DJCR* 180; Letters Patent to Sir Humfrey Gylberte (11 June 1578), in Rev. Carlos Shatter, *Sir Humfrey Gylberte and His Enterprise of Colonization in America* (Boston: Publications of the Prince Society, 1903), 95-102.

leurs gens de guerre, tant par mer que par terre, Capitaines de leurs villes & forts maritimes, ports, costes, havres, & destroits'.<sup>71</sup> Similarly, the Geoctroyeerde Westindische Compagnie octroy of 1621 permits the company to pursue redress, through martial means if necessary, from 'anyone' attempting to impede upon existing contractual relations with locals, or attempting otherwise to hinder 'the navigation, commerce, trade or traffic of this Company'.<sup>72</sup> These clauses, which pre-empt restitution, may give the *prima facie* appearance of automatic international legal coverage, but this assumption should not go untested. It will be suggested instead in this thesis that legal historians would do better to call upon a wider source material to understand *how* patents were used and interpreted abroad, rather than taking their provisions at face value. It suffices now to say that neither the French nor the Dutch took advantage of these exceptional rights.

The dispute between Beale and Mendoza scratches the surface of some of the questions that would arise from a bureaucratic culture of imperialism in which the Roman law of property provided the most coherent resource for all Europeans engaged in the pursuit for foreign possessions. Just how far could it be said that any of these documents invested in Europeans any special rights in public law and private law beyond Europe? Under what obligation were subjects of the same issuing realm, with or without their own paperwork, to acknowledge these documents? Under what obligation were subjects of separate European realms, who represented competing corporations, to acknowledge these documents? What were the appropriate procedures to ensure that key privileges carried within these documents – especially those pertaining to the exercise of jurisdiction over people and to the rights of property within certain territories – could be enjoyed, upheld, and made cognisable to both insiders and outsiders? How were the claims of pretending possessors to be appraised? What factors determined the limitations, both in terms of time and space, of rights to property established abroad? What might be done to constrict or

---

<sup>71</sup> Samuel de Champlain, *Oeuvres de Champlain* (hereafter *OC*) 2nd ed., ed. C.-H Laverdière (Québec: Imprimé au Séminaire, 1870), 5: 888-91.

<sup>72</sup> *Van Rensselaer Bowier Manuscripts* (hereafter: *VRBM*), trans. Arnold J. F. van Laer (Albany: State University of New York, 1908), 108-9: 'Ende of 't ghebeurde (dat Wy geensints en verwachten) dat yemant de Scheep-vaert, Negotie, Handelinghe ofte Traffijcque van dese Compagnie, contrarie het algemeene Recht, ofte oock jegens 't inhouden vande voorschreve Tractaten, Verbonden ende Entre-coursen in eenigeer manieren wilde beschadigen ofte hinderlijck wesen, sullen hun daer tegens mogen defenderen, ende reguleren in conformiteyt vande instructie by ons daer van te geven'.

expand these limits? How effective was the Roman law of prescription in unrecognised or contested jurisdictions?

These questions were often resolved with shows of force – indeed, the sword was mightier than the pen in the New World. In the process, the law of nations functioned differently in the extra-European world than it did within Europe, where private suits and public diplomacy were the polite means to resolve the same kind of questions in this period.<sup>73</sup> Before illustrating this contrast, the next chapter explores patents, prescription, and the circumstances that led to the recognition among Europeans of their self-created rights of acquisition abroad.

---

<sup>73</sup> For this, see below, chapters 9-10.

## Chapter 4: Patent and Prescription in Practice

The many trials of the *Jonas*, an unlucky French ship in the Saint-Laurent and wider Atlantic region, say plenty about the patchy and conflicting nature of the presence of the French in America. Accordingly, the *Jonas* presents a fine opportunity to begin a discussion about paperwork and time-honoured rights in the wider region.

After 1604, the ship operated under a commission for the Compagnie de Monts. Founded under the direction of Pierre Du Gua, the Sieur de Monts, this company had from the outset experienced difficulties with interlopers (that is, private French traders who sought furs irrespective of the exclusive trading rights granted to the company). The main competitors of the *Jonas* in the western Atlantic were French – in the first place, anyway. In early 1606, the French company faced its first serious encounter with a foreign trading vessel, and the experience would not be a happy one for the crew of the *Jonas*.<sup>1</sup> They were caught unaware when the *Witte Leeuw* (White Lion) sailed into the mouth of the Saint-Laurent under the direction of Hendrick Corneliszoon Lonck. He carried a letter of marque advertising his need for reprisal from Iberian ships, which had been issued months earlier in Amsterdam, from where the ship had been sent by a company of eight. When the superiorly armed *Witte Leeuw* stumbled across the *Jonas* and the *Grégoire* in the summer, its Dutch crew quickly seized both ships without facing anything of a struggle. All of the furs, munitions, and provisions belonging to the French were taken by the Dutch, before the pair of ships, utterly emptied, were released back to the Compagnie de Monts.<sup>2</sup>

The *Jonas* had little time to recover from its unjustified humiliation before it was rearmed and called into action for an offensive strike. It was around the same time as this Dutch attack that it emerged that illicit trading was being conducted by interlopers from *within* the ranks of the Compagnie, in a ship off Cape Breton. That the mastermind of this plot, the Dutch-born French-naturalised Corneille de Bellois, had enjoyed the trust of de

---

<sup>1</sup> Helen Dewar, “‘Y establir nostre auctorité’: Assertions of Imperial Sovereignty through Proprietorships and Chartered Companies in New France, 1598-1663’ (PhD diss., University of Toronto, 2012), 43. Eight vessels ‘at least’, according to Dewar, ‘contravened the company’s trading privileges in 1604; by 1607, there were perhaps as many as eighty interlopers each season in the St. Lawrence alone’.

<sup>2</sup> Simon Hart, *Prehistory of the New Netherland Company* (Amsterdam: City Archives of Amsterdam, 1959), 12-3.

Monts in the capacity as his personal *procureur*, made his interloping all the more odious. François Gravé du Pont, Maître of the *Jonas*, swooped upon the suspected ship. The sensible step was to issue its crew with an on-the-spot writ (a '*deffence*') authorising the confiscation of the vessel and its cargo. Accused of colluding with Bellois against de Monts, they were apprehended on the authority of this piece of paper, and then escorted back to France by the redeemed *Jonas*.<sup>3</sup> The ship then made its way for Rouen towards the end of 1606, at the same time that the Virginia Company of London was outfitting their three ships to ferry the first settlers bound for the Chesapeake from the Thames.

A starkly different experience awaited the English passengers of the *Discovery*, the *Godspeed*, and the *Susan Constant*. They aimed for a very different region. Whereas, in the opening decade of the seventeenth century, French enterprise struggled principally to maintain monopolies of trade and the security over their cargo up north in this period, by contrast, to the south far away from New France, an English corporation was aiming for the Chesapeake, which was much closer in vicinity to the actually occupied regions of New Spain. This threw up challenges of a slightly different variety to that posed by marauding marques like the *Witte Leeuw*.

This different context is made clear in a meeting of the Virginia Company of London's council, convened upon the departure of the first fleet for America. The protests of Spanish jurists, the Council's members felt, were inevitable. Expecting the civil and natural lawyers of Spain to respond with a defence of the Spanish right of trade with Indians, and predicting the clerics to defend the Spanish program of religious conversion, it was the 'Canonists' who were thought most capable of preparing an argument for rights to the territory of America. These were the scholars, the Council predicted, who 'will defend [tha]t title vpon [th]e Donation, of Alexander, w[hi]ch] is so grounded upon the principles of theyr religion [tha]t some of their best authors haue pronounced [i]t Heresy to doubt it'. But this, to the legal minds of the Virginia Company of London, was all quite wrong. The Spanish, in their confusion of justification and outcome, and in their blending of the divine with the secular, made an 'incoherent' claim. What is more, they were out of step with current international juristic thought, for 'at this day, from all [th]e authors extant

---

<sup>3</sup> Dewar, 'Y establir nostre auctorité', 46-7.

[...] (though they admit [th]e purpose of [th]e donation, yet departing from [th]e very lettre) [hold that it] can be gathered for him no title, of Dominion or property, but only a Magistracy, and Empire' – and one constitutionally capable of the promulgation of Catholicism, and that was it. The Spanish might have their 'Donation', it is true, but 'wee seek Dominion', which demanded the establishment of a particularly 'publique' presence in Virginia, and maybe even a 'quarrel' or two.<sup>4</sup>

The actually occupied regions of New Spain turned out to be much further away from the Chesapeake than the London venturers originally assumed. There was never was any public face-off between the Spanish and the Virginia Company of London's government in Jamestown during the early period of the colony's establishment. Rumours may well have spread across Europe of an inevitable 'rupture between England and Spain over Virginia' in 1612, but by this time, in the eyes of those on the ground, the Spanish claim to the region had grown inferior to that of the English.<sup>5</sup> Uninterrupted occupation made the London Company's claim good. As London Alderman and company supporter Robert Johnson declared in *Nova Britannia* (1609),

the Coasts and parts of Virginia haue beene long since discovered, peopled and possessed by many English, both men, women, and children, the naturall subjects of our late Queene Elizabeth, of famous memorie, conducted and left there at sundrie times, And that the same footing and possession is there kept and possessed by the same English or by their seede and of[f]spring, without any interruption or inuasion, either of the Sauages (the natiues of the countrie) or of any other Prince or people (for ought wee [h]eare or know) to this day, which argueth sufficiently to vs (and it is true) that ouer those English and Indian people, no Christian King or Prince (other then Iames our Soueraigne Lord and King) ought to haue rule or Dominion, or can by possession, conquest, or inheritance, truely claime or make iust title to those Territories, or to any part thereof.<sup>6</sup>

The passage of time was considered to fortify the Virginian claim in Johnson's mind, in other words. By contrast, for William Strachey, the company's secretary in Jamestown in 1609 and 1610, improvements did that. 'For the King of Spaine', Strachey penned, 'he hath no title nor collour of title to this place, which we by our industry and expenses have only

---

<sup>4</sup> A Justification for Planting in Virginia (1606-7), *RVCL*, 3: 2-3.

<sup>5</sup> *CSP Venice* (1610-1613), 441.

<sup>6</sup> Robert Johnson, *Nova Britannia Offering Most Excellent Fruites by Planting in Virginia: Exciting All Such as be Well Affected to Further the Same* (London: Samuel Macham, 1609).

made ours'. By 1611 at least, in Strachey's mind, 'the Pope's donative of all America' was disqualified. Prescriptive reasoning may not have been articulated explicitly in these passages, but there is a faint sense of the patient/agent interface of prescription in another passage, in which Strachey clarifies that 'Noe Prince' could enjoy the ownership of 'landes' not taken 'actuall possession of'.<sup>7</sup>

While the first settlers were busy taking 'actuall possession' of Jamestown, they were indeed fortunate never to face an attack by the Spanish because their resistance in such an event would have been abysmal. From the very beginning of the Jamestown settlement, political instability had been the rule rather than the exception. This was a serious concern for the company, but it was nothing compared to the extreme famine which gripped the colony and killed many in the same period. English gardening was not quickly adapted to the new environment, and the colony's provisions, which expired quickly in humid conditions and were prone to the raids of vermin, rapidly depleted. In the early years of its existence, the Jamestown administration grew so desperate for food that it looked everywhere to find more, and it would be on these food-finding expeditions that the Virginia Company of London was led into its quarrels – and they would not be quarrels with the Spanish.

In the beginning of 1613, Samuel Argall was sent to the Potomac River to get food. He enjoyed some success, bartering for a reasonable quantity of corn from the local Patawomeck people. This he delivered to the starving settlers of Jamestown, before returning to try again, at the same place, in April. He may have failed to get his hands on more corn this time, but what he procured instead was even better for the Virginia Company of London. During his 'businesse' with the local merchants, Argall learned that a special girl, Pocahontas, was sojourning with the Patawomeck community at the time. Seeing in this an opportunity for the company to gain an advantage over the Powhatans, Argall threatened the abrogation of the company's original alliance with his Patawomeck 'friends', if they did not immediately 'betray [her] into my hands'. Ambivalent at first, ultimately the Patawomeck Council decided in favour of Argall, and yielded the girl to

---

<sup>7</sup> William Strachey, in *The Historie of Travaile into Virginia Britannia* (London: The Hakluyt Society, 1849 [1612]), 2-3. This was part of a bigger diatribe against the Spanish claim, for which see 1-22 of *The Historie*.

preserve the alliance.<sup>8</sup> With this special prize, Argall's ship snaked out of their river rapidly to deliver the 'dearest Jewell and daughter' of the powerful Wahunsenacawh – known to the English as 'King Powhatan' – to Jamestown as captive.<sup>9</sup>

Pocahontas would later be manipulated into performing a diplomatic role for the company, the context of which will be explored later, but it is Argall who remains the principal actor for the moment. Upon reaching Jamestown, he was congratulated but encouraged to resume his original efforts. Back north Argall went again, then, to look not for corn but for fish in the seas well beyond the northerly boundaries of chartered Virginia. He knew what he was doing, as these coastlines, off mainland northeastern North America and around the islands as far north as Newfoundland, were the attractant of seasonal fishermen from all over western Europe in this period. Cod abounded here, and the market was a free-for-all. These seas were too vast, and the fishing community was too fleeting, too diverse, and too contemptuous of authority to have imposed upon them the restrictions of any organised corporation – as employees of the London and Bristol Newfoundland Company learned, by many difficult lessons, during the 1610s. The company's paperwork was unsurprisingly, in this period, deemed of no use against the claims of other Europeans to the island. Even West Country Englishmen could openly defy Newfoundland Company Governor John Guy's public renditions of its 1610 charter and continue to fish wherever and however they pleased; moreover, they did their best to sabotage Guy's settlement at Cupid's Cove in the summers that followed, all without any apparent fear of reprimand.<sup>10</sup> Argall's decision, in 1613, not to trade with the London and Bristol Company, but instead

---

<sup>8</sup> Letter of Samuel Argall (June 1613), in Samuel Purchas, ed., *Hakluytus Posthumus, or Purchas his Pilgrimes* (hereafter *HP*) (Glasgow: Glasgow University Press, 1906), 19: 92-3. Argall's ambiguous phrasing in his account of the abduction allows for a number of possible interpretations of the diplomacy of this ultimatum. 'Hee alleaged', wrote Argall of a senior Patowomeck statesman, 'that if hee should undertake this businesse, then Powhatan would make warres upon him and his people; but upon my promise, that I would joyne with him against him [or, one presumes *with him against Powhatan*], hee repaired presently to his brother, the great King of Patowomeck, who being made acquainted with the matter, called his Counsell together : and after some few houres deliberation, concluded rather to deliver her into my hands, then [or, perhaps, *than to*] lose my friendship'. But compare with Ralph Hamor, *A True Discourse of the Present State of Virginia, and the Success of the Affaires There till the 18 of Iune, 1614* (London: John Beale, 1615), 4-8.

<sup>9</sup> The phrase comes from John Smith, *The Generall Historie of Virginia, New England & The Summer Isles* (1624), in *The Travels of Captaine John Smith*, 2 vols (Glasgow: James MacLehose and Sons, 1907), 1: 162.

<sup>10</sup> Richard Whitbourne, *A Discovrse and Discovery of New-Fovnd-Land, With Many Reasons to Proouve How Worthy and Beneficiall a Plantation May There be Made, After Afar Better Manner Than Now It Is [...]* (London: Felix Kingston, 1622), 15; Gillian T. Cell, *English Enterprise in Newfoundland, 1577-1660* (Toronto: University of Toronto Press, 1969), 62; D. W. Prowse, *A History of Newfoundland from the English, Colonial, and Foreign Records* (London and New York: Macmillan, 1895), 99-100.

looked to haul his own catch just south of the region, provides a reasonable indication of how these two competing companies sat in relation to each other in this period. That he also sought out no Basque or West Country fisherfolk, however, seems to provide a better indication of the reluctance of the Virginia Company of London to part with any more of its trade goods than was absolutely necessary during what was still a period of despair back in Jamestown.<sup>11</sup>

In the *Adventure*, Argall with his crew of around sixty men edged northwards along the American coast and reached the Penobscot River in June. They would go no further north, however, for here they made another important discovery. Just off one of the larger islands scattered across the bay, Argall spied the *Jonas*, along with a smaller pinnace, docked near a settlement at the earliest stages of its fortification. Without delay, Argall and his men made for the settlement (called by the French Saint-Sauveur, on the Île des Monts-Déserts). On arriving, the Englishmen stormed the *Jonas*, and quickly moved to take control of Mount Desert Island, slaying three Frenchmen who resisted their approach and causing the flight into the woods of many others. It cannot be known with any certainty who it was that fired the first shot in this affray, but the record is unanimous about the rapidity of the French submission to Argall. Surrender was very quick.<sup>12</sup>

Mayhem followed. The unlucky man in charge of Saint-Sauveur was René le Coq de la Saussaye, who had weaselled an agreeable contract for the job from the syndicate of Jean de Biencourt de Poutrincourt and the Marquise of Guercheville Antoinette de Pons. Now far away from Le Havre, though, La Saussaye found himself in trouble. Sheepishly he boarded the *Jonas*, overrun by Englishmen, to ask why. Argall explained that he found their settlement within the limits of Virginia as declared in the Virginia charters, and prompted La Saussaye to prove what right he had to establish a settlement here. To this, La Saussaye claimed his authority came from his French king, so he should be treated ‘not as a robber, but upon an equal footing’. His proof of this, La Saussaye assured Argall, was

---

<sup>11</sup> Within the space of about a decade, however, it became common for Virginia to send tobacco north to trade for fish from the Newfoundland Company. For the economics of the cod fishery in this period, see Peter E. Pope, *Fish into Wine: The Newfoundland Plantation in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 2004).

<sup>12</sup> British Library (hereafter BL) Cotton MS Otho. E 8: 252-3; Reuben Gold Thwaites ed., *The Jesuit Relations and Allied Documents, 1610–1791* (hereafter *JR*) (Cleveland: Burrows Brothers, 1896–1901), 2: 247-65; 3: 5-7.

the royal paperwork locked away in the chest on the *Jonas*. In front of Argall and his crew, together with those of the French who surrendered (including Maître Charles Fleury of the *Jonas*, and the Jesuit Father Biard from whose relation this story principally derives), La Saussaye removed the keys from his pocket and opened the chest to reveal ‘everything else untouched and in its proper place, but no commission’.<sup>13</sup>

When the mist settled on this farcical scene, Argall saw red. Offended at the blatancy of this French affront to the Virginia Company of London, he made the equation that the French were ‘*forbans & pirates*’ under the authority of nobody special, which meant, therefore, that their booty was claimable for Virginia.<sup>14</sup> He took whatever salt and fishing equipment he could and piled it into the *Adventure*; La Saussaye and some of his crew were crammed onto a meagre fishing boat and pushed in the direction of France; Biard, Fleury, and the rest were carried back to Jamestown as captives on the *Adventure*, which was trailed by the latest addition to the company’s fleet, the *Jonas*.

Upon his return to Jamestown, Argall promptly received another audience with the company’s local governing council. Again they ordered him to head north before the imminent arrival of winter not only to loot from the remaining French, but also, and crucially, to destroy all evidence of French occupation. Time was of the essence. Evidently it was more concerning that the French were fortifying settlements on land than it was that they were habitually fishing just off the coast. They were now fortifying their own claim to the New World by prescription, and in 1613 were just as much of a threat to the Virginia Company of London as the Spanish had been considered in 1607. Argall was obedient to his instructions, outfitting the *Jonas* and the *Capitanesse*, and appointing the captive Frenchmen as his guides. He made again for Saint-Sauveur, reaching the Île des Monts-Déserts in October just as he left it. Here he ordered what remained of Saint-Sauveur to be dismantled, destroying also the French markers at the site. Next, Argall and his fleet moved to the abandoned settlement of Île Sainte-Croix, founded in 1604 by Samuel de Champlain and Sieur de Monts. Here he did the same. Finally, after this, Argall reached Poutrincourt’s personal settlement at Port-Royal, which was somewhat different to the other sites. Here the land was divided into strips and granted to agriculturalist *censitaires* who were

---

<sup>13</sup> *JR* 2: 255-6.

<sup>14</sup> *JR* 4: 9-10; *OC* 5: 774-5.

'habituated to the country', Rameau tells us, 'and determined to stay', under the management of Poutrincourt's son, Charles de Biencourt, from 1610.<sup>15</sup> But, for whatever reason, neither Biencourt nor any of Poutrincourt's *censitaires* were around to defend the settlement at the time of Argall's arrival in early November of 1613. The settlement appeared, instead, to lie improved but vacant before Argall's plunderous crew. If these were rights of ownership, they were clearly being neglected. There were a few horses, which Argall ordered to be led onto the ships, and a small herd of cattle, some of which he had shepherded onboard too, and others he had slain, either to be left to fester or to be drained and carried onboard to be put onto hangs. Likewise, after taking onboard whatever of the grain and vegetables that would keep fresh – which were probably at their ripest, this being at the end of the foreshortened growing season – Argall and his men then destroyed the fields of crops. Finally Argall ordered all the buildings in the young colony to be razed. Leaving Port Royal reaped of its natural bounties and burning in flames, Argall and his fleet pulled out of the port with their loot and made a course home for Jamestown.

But they did not sail far before a fateful storm gathered overhead and erupted to disperse the fleet. Argall in the *Capitanesse* was diverted towards Manhattan Island, where he was surprised to see yet another small European fortification. Upon making his approach to the settlement, he discovered its principal factor to be Hendrick Christiaenszoon: navigator, mapmaker, and fur-trader for the Amsterdam-based Van Tweenhuysen Compagnie. Standing before Christiaenszoon, Argall made the whimsical allegation – entirely lacking any paperwork to prove it – that the entire island was his own personal estate by virtue of a grant from the Virginia Company of London via the English crown. Upon this basis, Argall then insisted that Christiaenszoon pledge loyalty to company and crown both.<sup>16</sup> Possessing no means to resist or dispute, Christiaenszoon graciously submitted to Argall. There would be no bullying or plundering after this, for the Virginians were anxious to get home; the *Capitanesse* pulled out of the Hudson River southbound for

---

<sup>15</sup> Rameau de Saint-Père, *Une Colonie Féodale en Amérique L'Acadie (1604–1881)* (Montréal: Granger Frères, 1889), 1: 50-62, quote at 51; Marcel Trudel, *The Beginnings of New France, 1524–1663*, trans. Patricia Claxton (Toronto: McClelland and Stewart, 1973), 85.

<sup>16</sup> Captain John Mason to Sir John Coke (2 April 1632), NAUK CO 1/6, 129; William Stith, *The History of the First Discovery and Settlement of Virginia* (Williamsburg: William Parks, 1747), 132-3.

Virginia which it reached some time in December.<sup>17</sup> The suffering *Jonas* in the meantime embarked upon a more trying journey. By heavy winds, the vessel was blown far into the Atlantic. Among its passengers were Father Biard and a few other French captives, who became desperate for fresh food and water until necessities were finally provided for at Azores. From there, the weary *Jonas* aimed for England, destined to become the subject of controversy once more.<sup>18</sup>

Of course, this would not be the only time that the English and the French disagreed in the New World over the origin and strength of their respective rights to colonial land, to improvements on that land, and to moveable property on or near it. A similar dispute, though it led to a different outcome, took place at the mouth of the Fleuve Saint-Laurent some years later at the end of the 1620s. By this time, the French presence on the Saint-Laurent and in l'Acadie had grown even more conflicted. Interlopers remained the problem they always had been, but now there were separate companies claiming exclusive rights in the region. This competition should lead none to exaggerate the actual French presence, however. If New France was noisy at times in the summer, when Frenchmen argued over the compatibility or incompatibility of the patents granted them back in France, it was always fairly quiet in the winter, when the river froze up, and only the loyalest and hardest colonists remained in defence of the key settlements of Tadoussac (established in 1603) and Québec (1608).<sup>19</sup>

The winter of late 1627 was the first to descend upon Canada after the creation of the Compagnie de la Nouvelle-France earlier in France that year. Once more in charge of the seventy-odd inhabitants of Québec it was Samuel de Champlain, who emerged with his men from the season desperate for provisions from home.<sup>20</sup> Fortunately, the Compagnie de la Nouvelle-France was outfitting a number of ships to be sent out to him in the new year,

---

<sup>17</sup> Our understanding is plenty hindered by patchy and contradictory evidence. See, for an introduction, George Folsom, 'Expedition of Captain Samuel Argall, afterwards Governor of Virginia, Knight, and to the French Settlements in Acadia and to Manhattan island, A. D. 1613', *Collections of the New York Historical Society* (1841), 1: 333-42.

<sup>18</sup> *JR* 4: 49-75. For the controversy in Europe, see below, 228-38.

<sup>19</sup> Dewar, 'Y établir nostre auctorité', 24-111.

<sup>20</sup> Often lauded as the famous 'founder' of Canada, in reality Champlain spent more time in France than he did actually in New France during his adulthood up to this point. Being too often in the possession of contradicted commissions, and too often under the employ of the ambivalent entrepreneurs paying his way without much of a plan for the New World, his energies were just as necessary in Québec as they were in Paris.

and most of these left Dieppe for Québec in April. Unfortunately for Champlain, however, another fleet of three ships – commanded by the French-born brothers David, Thomas, and Lewis Kirke – had left England for the Saint-Laurent with designs to raid the French settlements just weeks before the departure of the Compagnie’s fleet. With France and England at war at the time – the causes and effects of which will be contemplated later – the Kirkes, with the backing of London financiers, attempted to extend this war far into the western Atlantic, apparently with the letters of marque to do it.<sup>21</sup>

The Kirkes reached America in late May to lurk predatorily in the Saint-Laurent for about four weeks or so. In that time, they collected prisoners from Cap Tourmente and Tadoussac, where they hijacked a handful of ships, including a number of small fishing vessels and, eventually, even one of the vessels laden with precious provisions apparently sent by ‘the New Company’. In early July, David Kirke dropped anchor at Tadoussac, where the signs of French settlement were replaced by Charles I’s coat of arms, and the site claimed for himself and his brothers. From Tadoussac, David Kirke controlled his operations. He ordered a party of ships back downriver to destroy whatever settlements remained and to capture whatever cattle might be found, and at the same time, he ordered one of the captured Basque ships upriver to Québec for the purpose of opening a communication with Champlain.<sup>22</sup> In his letter, dated July 18th of 1628, Kirke tells Champlain:

je vous advise comme j’ay obtenu Commission du Roy de la grande Bretagne, mon tres-honoré Seigneur & Maistre, de prendre possession de ces païs sçavoir Canadas & l’Acadie, & pour cet effect nous sommes partis dix huict navires, dont chacun a pris sa route selon l’ordre de sa Majesté, pour moy je me suis desja saisy de la maison de Miscou, & de toutes les pinaces & chaloupes de cette coste, comme aussi de celles d’icy de Tadoussac où je suis à present à l’ancre, vous serez aussi advertis comme entre les navires que j’ay pris il y en a un appartenant à la Nouvelle Compagnie, qui vous venoit trouver avec vivres & rafraischissements, & quelque marchandise pour la traite, dans lequel commandoit un nommé Norot: le sieur de la Tour estoit aussi dedans, qui vous venoit trouver, lequel j’ay abordé de mon

---

<sup>21</sup> Warrants for Issuing Letters of Marque or Commissions to Take Pirates (17 December 1627), *CSP Domestic: Charles I* (1628-29), 303; and *CMS* 1: 375. Beyond the record of a warrant for letters of marque in the Domestic Calendar of State Papers, and a remark in a document in the papers of secretary of state Sir John Coke, we know little about the formation of the company and the letters of marque received by David Kirke, notwithstanding a handful of red herrings in the footnotes of certain historians. It does not appear to have helped certain other historians that March 25th begins the new year in the old calendar.

<sup>22</sup> *CMS* 1: 374-6.

navire: je m'estois préparé pour vous aller trouver, mais j'ay trouvé meilleur seulement d'envoyer une patache & deux chaloupes, pour destruire & se saisir du bestial qui est au Cap de Tourmente, car je sçay que quand vous serez incommodé de vivres, j'obtiendray plus facilement ce que je desire, qui est d'avoir l'habitation: & pour empescher que nul navire ne vienne je resous de demeurer icy, jusqu'à ce que la saison soit passée, afin que nul navire ne vienne pour vous avictuailer: c'est pourquoy voyez ce que desirez faire, si me desirez rendre l'habitation ou non, car Dieu aydant tost ou tard il faut que je l'aye, je desirerois pour vous que ce fut plustost de courtoisie que de force, à celle fin d'esviter le sang qui pourra estre respandu des deux costez, & la rendant de courtoisie vous vous pouvez asseurer de toute sorte de contentement, tant pour vos personnes que pour vos biens, lesquels sur la foy que je prétend en Paradis je conserveray comme les miens propres, sans qu'il vous en soit diminué la moindre partie du monde.<sup>23</sup>

Unusual here is the centrality of the 'Commission of the King of Great Britain' in Kirke's justification not only for the 'seizure of cattle' and 'boats', but also for the 'taking possession of the land' itself. On this point, Kirke was probably being disingenuous.<sup>24</sup> Conventionally, the function of wartime letters of marque was to facilitate the taking or retaking of moveable property, not immovable property. These, at least, were the conventions of maritime Europe, even if they appeared not to apply to Atlantic America in this case; or, otherwise, the subtlety of any such distinction was lost on Champlain and his closest advisors who, in their response to Kirke, declared 'nous ne doutons point des commissions qu'avez obtenues du Roy de la grande Bretagne'.<sup>25</sup>

In the rest of his deferential reply, Champlain may have conceded that a great honour had been given to the Kirkes to execute these, the 'commandments' of their king Charles I, but Champlain remained defiant in his refusal to surrender. For, he wrote, in 'la mort combattant nous sera honorable'. Downplaying the importance of his losses, and bluffing about an abundance of food reserves in storage at Québec, Champlain was brave in response, but overly optimistic. Clearly he expected imminently the arrival of the rest of the fleet sent by the Compagnie de la Nouvelle-France with its fresh provisions and reinforcements. Understandably, therefore, he was devastated when he learned of their surrender to the Kirkes with only the smallest of shows of resistance.<sup>26</sup>

---

<sup>23</sup> OC 5: 1159-60. July 8th, Old Style.

<sup>24</sup> No copy of this letter of marque exists, and it was not transcribed.

<sup>25</sup> OC 5: 1161-2.

<sup>26</sup> OC 5: 1162-3.

Sooner or later, Captain David Kirke told Champlain, Québec would fall into his hands – but the latter was opted for in this instance. The expedition of Kirke and his brothers had yielded plenty of fruit, and quickly: having only reached the Saint-Laurent in May, by August, Cap Tourmente was destroyed and plundered, Tadoussac was occupied, Québec was seriously threatened, 900 Frenchmen were imprisoned, and some two dozen new ships, along with all their provisions and munitions, were taken as prize. Content with their plunder, and rightly fearful of the arrival of more French backup, the Kirkes decided to leave Champlain in Québec and make their return to England without delay. The brothers convoyed six of the best prize ships, which they hoped to sell upon their return to England if not along the way. A few other ships were disarmed and filled with the French captives, and given the freedom to return home – arriving, as will be seen in a later chapter, in France just as the besieged La Rochelle was reverting to Catholic French control. The rest of the captured fleet – mostly fishing ships – were ignited and left to disintegrate atop the river’s surface.<sup>27</sup>

Québec was spared. But its residents – Champlain and his loyal and hungry comrades – were left to endure a winter even grimmer than the one before, for the Kirkes had ensured that the supplies so desperately needed in 1628 never got to them. Things then got worse for the French of Québec. Expecting replenishment, again, in the spring, Champlain was met, again, by the Kirkes. Sailing in advance of the *Compagnie de la Nouvelle-France* just as they had in 1628, this time the Kirkes, in six ships and two pinnaces, came with the intention of making good on David’s promise from the year before. This time they had come to take possession of the place.<sup>28</sup>

When one of the pinnaces, displaying a white flag, meandered towards Champlain along the Saint-Laurent on the 19th of July, it carried a letter from Captain Lewis Kirke and his Vice-Admiral, Thomas Kirke. ‘Monsieur’, it ran,

en suite de ce que mon frere vous manda l’année passée que tost ou tard il aurait Québec, n’estant secouru, il nous à chargé de vous asseurer de son amitié, comme nous vous faisons de la nostre, & sçachant très bien les necessitez extrêmes de toutes choses ausquelles vous estes, que vous ayez à luy remettre le fort &

---

<sup>27</sup> *CMS* 1: 375. The number of Basque and French fishing ships taken by the Kirkes, as given by Champlain, is nineteen, but fewer appear to have been retained in the possession of the Kirkes, perhaps some figure between four and eight. *OC* 5: 1274-5.

<sup>28</sup> Deposition before the Admiralty court Nov. 17 1629, *CSP Colonial (America and West Indies)* 1: 102-4.

l'habitation entre nos mains, vous assurant toutes sortes de courtoisie pour vous & pour les vôtres, comme d'une composition honneste & raisonnable, telle que vous sçauriez desirer, attendant vostre response nous demeurons, Monsieur, vos très affectionnez serviteurs Louis & Thomas [Kirke].<sup>29</sup>

Reading this, a dejected Champlain had no choice but to declare his impotence to resist the brothers in the manner he had the year earlier. But his surrender, while inevitable, was contingent on a few conditions, he insisted. 'Que', held his first and most important article, 'le sieur [Kirke] nous fera voir la commission du Roy de la grande Bretagne, en vertu de quoy il se veut saisir de ceste place, si c'est en effect par de guerre légitime que la France aye avec l'Angleterre, & s'il a procuration du sieur [Kirke] son frère Général de la flotte Angloise, pour traiter avec nous, il la monstrera'.<sup>30</sup> Just why Champlain was so desperate to see David Kirke's letters of marque, which apparently permitted the naturalised Englishman to 'seize this place' in a wartime gesture, is not to be long guessed at. He clearly hoped that his surrender to the Kirkes would be considered a public, rather than a private, cession back in Europe. For this reason, the response of Lewis and Thomas, who told Champlain that neither of them had any royal paperwork to show him, would have jarred his mind: the brothers claimed – with a bluff, perhaps, of their own – that David kept the 'commission' with him at Tadoussac. Champlain was told not to worry, however, for Lewis and Thomas enjoyed 'every power to treat' with him, 'as you will soon see', they confirmed. Champlain was convinced, apparently, and from this point onwards, his position became one of submission to the Kirkes. He along with several other Frenchmen – some of them representing the new company, others representing the older redundant companies – were taken captive and ferried eastward across the Atlantic by David and Thomas Kirke, who carried the seized furs and munitions with them, leaving Lewis and a trading contingent behind him.

The substance and validity of David Kirke's 'commission' remain something of a mystery. That, following an elaborate ceremony of surrender, both Champlain and David Kirke applied their signatures to Champlain's articles of capitulation suggests that Champlain saw the relevant paperwork and was convinced by what he saw, but this is not

---

<sup>29</sup> OC 5: 1223.

<sup>30</sup> OC 5: 1224.

at all clear from first-hand accounts.<sup>31</sup> For all parties involved in the dispute, it remained to be seen whether or not the surrender of Québec would be acknowledged in a post-war context during the diplomatic negotiations associated therewith, and therefore, by extension, whether or not the settlements of Québec and Tadoussac – along with the 1,713 furs taken during the Kirkes’s occupation – might be restored to the miserably unfortunate Compagnie de la Nouvelle-France via the French crown.<sup>32</sup>

By this time, to the south around Manhattan, the Dutch presence had become formidable. They arrived principally to trade for furs, in open defiance of the claims of the English to the region. Needless to say, therefore, none of Christiaenszoon’s replacements – whether sent by the van Tweenhuysen syndicate, or the 1614-chartered Compagnie van Nieuwnederlant – acknowledged Argall’s made-up claim or paid any tribute to the Virginia Companies or the New England corporations after them. It was no different with the Geoctroyeerde Westindische Compagnie, which was granted its monopoly in 1621, and whose men moved into the region regardless of the presence of nearby English; it also ignored the English claim.<sup>33</sup>

The Westindische Compagnie’s presence consolidated around Fort Orange, on the Noort Rivier (the ‘North’, or Hudson River), and around Manhattan, or New Amsterdam. Established here, the company looked to expand through the neighbouring Varsche Rivier (the ‘Fresh’, or Connecticut River) valley into the Zuid Rivier (the ‘South’, or Delaware River) and its Atlantic bay, for which purpose Fort Nassau was established by the end of the 1620s, with several other small forts following. This whole domain – New Netherlands – was governed for the Westindische Compagnie by Willem Verhulst from 1624, and then, from 1626, by Peter Minuit. In Captain John Mason’s version of the events, the Dutch had set up shop too close to New England, between 1621 and 1622, in spite of the many firm requests ‘not to make any Settlement in those Partes’. As Mason’s story goes, men of the Westindische Compagnie apparently responded to the meagre attempts of the English to prohibit their fortifications ‘with proude and contumacious Answers’, explaining and

---

<sup>31</sup> Articles Demanded by Champlain (19 July 1629), NAUK CO 1/5, 55-8; Collection Concernant la Capitulation de Québec (1629), Libraries and Archives Canada (hereafter: LAC), R9945-0-1-F; OC 5: 1230-1.

<sup>32</sup> Deposition before the Admiralty court Nov. 17 1629, for 1,713 furs, *CSP Colonial (America and West Indies)* 1: 102-4.

<sup>33</sup> Hart, *Prehistory of the New Netherland Company*.

justifying their presence with recourse to their ‘Commission’. This paperwork explicitly permitted the Westindische Compagnie men, apparently, ‘to fight against such as should disturbe their settlement’. In this manner, ‘they did persist to Plant and Trade vilefying [our] Nation to the Indians and extolling their own people & Country of Holland’, Mason lamented, although not from a disinterested position.<sup>34</sup> If, to be charitable to Mason, abundant measures of pride and contumacy accompanied the earliest Dutch displays of bellicose commissions, then the scene had changed by the time 1627 got underway. In that year, Isaac de Rasière for the Westindische Compagnie was more than happy to enter into a polite correspondence with William Bradford, of the New Plymouth Council. Touchingly, the two professed their satisfaction at the ongoing prospect of English and Dutch communities living in peace, trading fairly, and observing the Protestant faith.<sup>35</sup> This seems much closer to reality. New England and New Netherlands were not immediately at odds in the New ‘World’, except of course where the fur trade was concerned, but even then, the former was more cautious than provocative towards the latter. The New Plymouth Corporation and the Massachusetts Bay Company alike watched on, but offered no serious impediment, as more and more ships arrived from the Netherlands with trinkets and men before returning home to Amsterdam laden with furs. An unexceptional example to notice here is the *Eendracht* (‘Unity’), whose departure from Manhattan in 1631 took place free of protest or impediment in America, but whose island-hopping voyage ultimately inspired great consternation back in Europe.<sup>36</sup>

This honeymoon period – with English and Dutch company-planted settlers co-existing begrudgingly but, for the most part, peaceably – only lasted in America until the end of 1632. Thereafter, appeals would be made, by the various interested parties that came to be situated along the competitive coastlines and valleys, to the kind of permissions carried in their respective bits of paperwork, just as France and England had come into disagreement in the St. Lawrence River valley only a few years earlier. Dominion by

---

<sup>34</sup> John Mason to the Lords of the Privy Council (?) (2 April 1632), NAUK CO 1/6, 129-30. Mason’s account was informed by an unclear authority; he penned it clearly in jealousy of the ‘sundry good Returnes of Commodities from thence into Holland’, and in an officially interested capacity fresh upon his acceptance into the Council for New England in Plymouth.

<sup>35</sup> William Bradford, *Of Plimoth Plantation*, ed. William T. Davis (bearing the title *Bradford’s History of Plymouth Plantation, 1606-1646*) (New York: Charles Scribner’s Sons, 1908), 223-7.

<sup>36</sup> For this, see below, 254-9.

donation might still be claimed and refuted cyclically, as ever, but there was a key difference in this context, and that was the intertwining of interests created by the creation of new contractual relationships with indigenous peoples.

On the 22nd of April 1633, the new governor of New Netherlands, Wouter van Twiller, was visited at Manhattan by the *William*. The ship was under the command of Jacob Jacobszoon Eelkens, formerly an employee of the Compagnie van Nieuwnederlant, but now under contract with a company of London merchants made up of William Clobery, David Morehead, and John de la Barre. Making landfall near Fort Amsterdam, Eelkens sent the *William*'s surgeon to open a communication with van Twiller. In response, van Twiller invited Eelkens into the fort to speak with him in person. The invitation was accepted, and Eelkens with some of the *William*'s company walked across the shore and through the door into Fort Amsterdam.

A comical conference transpired, akin to that of two children desperate to outdo each other at every turn. Asked by van Twiller why he had come to the Noort Rivier, Eelkens answered that he had come 'to trade with the natives there'. Asked for his 'Commission', Eelkens declared he was uncompelled to display it, concealing the truth that he lacked any royal paperwork to show. Ingeniously, he directed attention away from his own bluff by immediately asking the same of van Twiller. Where, Eelkens asked, was van Twiller's paperwork? The Dutchman's pockets, it turned out, were empty too. Stalemate reached on this line of enquiry, van Twiller formed a huddle with his council before re-emerging from it to insist that the 'whole countrye' belonged to the Prince of Orange, and not to the King of England. Eelkens, of course, disagreed: it was 'the King of Englands dominions', he told van Twiller. Stalemate reached again, Eelkens left the fort and returned to the *William* until, after a few days – doing what it is unclear – he was invited into the fort again to confer with van Twiller, and this time with the whole ship's company. Van Twiller had not changed his stance. He was just as resolute in his opposition to the presence of the English as he was before. This time, asked by Eelkens if he would obstruct the English in their attempt to head up the river in order to commence a trade with the Indians, van Twiller warned of the grave consequences that would follow any attempt. Evidently failing to convince Eelkens by his words, van Twiller, before the crew of the *William*, ordered the Geoctroyeerde Westindische Compagnie flag to be raised high at Fort

Amsterdam with three shots discharged as a salute to the Prince of Orange. Never, it seems, to be outdone, Eelkens responded by ordering his gunner to return to the ship and do the very same. There, on the banks of Manhattan in front of Fort Amsterdam, the English flag was raised in the *William*. Three shots were discharged as a salute to the King of England. Stalemate, with the smoke of wasted gunpowder drifting into the sky, was reached again.<sup>37</sup>

Eelkens ignored van Twiller's warning and prepared the *William*'s shallop for a voyage up the Noort Rivier towards Fort Orange, in order to achieve the task required of his London employers. Barely had he and his men commenced their truck with the local Indians, though, before they were intruded upon by a *corps* of men from the Westindische Compagnie armed with pikes, swords, and guns. These men, given their courage from 'strongwater' consumed beforehand, and their accompaniment from an offensively bad trumpeter, destroyed the English camp and manhandled both indigenous and English traders in the process: scattering the former and shepherding the latter back downstream towards the Atlantic. Eelkens was reminded, in the process, 'that the land was theirs, they havinge boughte it of the Salvages' – a claim that would reverberate back in England and inspire the rumination of diplomatic men.<sup>38</sup> It was a different time: contract had become greater than charter on the Noort River – an equation which rendered Eelkens the loser in this showdown. He would manage only a final act of defiance. When commanded finally by van Twiller to surrender all the furs he got during his short stay near Fort Orange, Eelkens refused and slipped away, taking his premature exit from America with all of his contraband.

---

<sup>37</sup> See the depositions collected in the Appendix to A. Joachimi to the Staten Generaal (28 May 1634), *Documents Relative to the Colonial History of the State of New York* (hereafter: *CHNY*), ed. E. B. O'Callaghan (Albany: Weed, Parsons, and Company, 1856), 1: 72-82. The event is difficult to fashion into a clean narrative, try as historians have to balance the conflicting testimonies, correct their ambiguous transcriptions, and tone down the braggadocio of both sides. E. B. O'Callaghan, *History of New Netherland; or, New York under the Dutch* (New York: D. Appleton and Co., 1848), 1: 143-7; Oliver Rink, *Holland on the Hudson: An Economic and Social History of Dutch New York* (Ithaca: Cornell University Press, 1989), 117-21; Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge: Cambridge University Press, 1996), 173-4. My feeling, *contra* Rink and *pro* O'Callaghan, is that there were two affrays, the first of which involving Commissary Han Jorissen Houten from Fort Orange, and the latter affray involved Governor Wouter van Twiller.

<sup>38</sup> Appendix (28 May 1634), *CHNY*, 1: 81. The melody of the trumpet can only be guessed at, but it was deemed remarkably offensive to English ears, in spite – or perhaps because – of the strange lack of a tradition of serious composition in the Low Countries compared to the rest of Europe from the baroque right up to the late romantic era. One of the *William*'s company complained that the trumpet was played in a 'triumphinge manner over the Englishe', and another said that it was sounded 'in disgrace of the Englishe'.

My account of this episode may be biased in favour of those who left their depositions on the English side, but the episode itself is not exceptional. Showdowns between Europeans like this became all too common along the Connecticut and the Delaware over the next two decades, although they were increasingly complicated by the creation of private legal relationships between settlers and indigenous people. It will be necessary to introduce this new legal interface, and explore some of the legal rudiments of contract and conquest which allowed for it in the first place, before reconvening with the second half of this story about patents, prescription, and possession.

The story of the *Jonas* makes for a fine tragicomedy about paperwork. On sea, it was confronted by a stronger foreign ship with letters of marque, to which it was forced to yield up its goods. Within weeks, it was issuing a *deffense* to another ship essentially to bring about a similar fate to French interlopers. It then made for Old France, before it would return westward again after an entrepreneurial adventurer in La Havre received a contract to lead it that way. Mere months after the *Jonas* had been docked into the young colony of Saint-Sauveur, it was confronted by a stronger foreign ship again. Not only was the *Jonas* despoiled in this raid, but the settlement itself was entirely destroyed; and these were the appropriate causes of action, so the story goes, because nobody could find any written evidence on board the *Jonas* of the French right to be there in the first place. But there is more to the event than this, and it is best not to be guided by the *Jesuit Relations* alone.<sup>39</sup> It can be assumed that Argall's ransackings would probably have taken place regardless of the royal paperwork.

'*Ransacking*' is perfectly apt here – coming from Old Norse to convey the pillaging of houses. More akin to the Viking raider than to the exacting overlord, Argall performed raids that were only as valuable as the colonial market price of the booty he brought with him back into Jamestown. These spoils of moveable property were an important motivation for his actions, of course, but they were not the most important. What mattered most of all was his prevention of the passage of time requisite, by colonial convention at least, to allow the French claim to be realised through prescription. Neither he personally nor the Virginia

---

<sup>39</sup> *JR* 2: 247-65, 3: 5-7.

Company of London were under any real obligation to obey the terms of a continentally issued commission (whether one existed in the magic trunk in the first place, vanished, or was stolen). The same, for that matter, can be said for an on-the-spot '*deffense*', which was likewise only meaningful to subjects of the King of France, and would never have worked on Argall. For this reason, Champlain's almost paranoid insistence upon inspecting the contents of the letters of marque belonging to the Kirkes begs for some explanation, but this is easily forthcoming: his request made sense in the context of public warfare waged at the time in the Channel.<sup>40</sup>

This chapter can be concluded with a reminder of the demographic reality of Atlantic North America in the period leading up to the start of the 1630s. These were still the early stages of European interventions on the mainland. Insofar as the actions of the Kirkes, or Argall, or any other corporate-sponsored aggressor of the period, made for any deterrent upon Dutch and French companies from carrying out their plans to occupy regions of America along the Atlantic coast, such an effect was only temporary. In this period, none but the coastal indigenous communities could boast of large populations in the region. There were geopolitical and legal consequences to this, and these would add new dimensions to the disputes between European corporations over their claims, created by paperwork and strengthened through time, to bits of land in New World.

---

<sup>40</sup> For this, see below, chapters 9-10.

## Chapter 5: Contract and Conquest in Legal Thought

European newcomers, when confronted with the reality of indigenous occupation, often found the need to generate their property rights locally. To establish a claim against native communities, who by their resistance or obstinacy made this necessary, a contract was written up or a war was waged. These were the two most common ways to create new titles in disputed foreign jurisdictions, and the actors in charge of effecting these programs were not monarchs, parliaments, popes, or their delegations, but competing companies and proprietors, interacting in exotic jurisdictions well beyond Europe. Although it is not how historians are accustomed to tell this story, the main argument of this thesis proposes that the application and sometimes manipulation of contract and war in foreign locales allowed jurisdictionally evasive corporate entities to dispossess indigenous peoples of their land, and then to avail titles to private individuals and public states across the world, in a process that continued into the twentieth century, but began in the sixteenth and seventeenth centuries. Because of the centrality of this argument to this thesis, attention must be turned here to the doctrinal foundation of these legal instruments. Here, contract and war in Roman and canon law, and as they came to be conceived by western Europeans in the late middle ages, will be explored, from which basis the specific deployment of these instruments in the early modern Atlantic may be understood.

The first thoroughgoing attempts to classify voluntary transactions between interests exchanging services or things took place in Ancient Rome, and the formality of the western contract tradition has its origin in these efforts. Justinian (483-565), concerned greatly with the prevention of fraud, had much to say about contracts. The basis of contract law, for Justinian, derived entirely from the terms of agreement.<sup>1</sup> These terms were usually to be written down and then bound with the provision of mutual consent between interests for all contracts of buying and selling (*emptionibus venditionibus*), leasing and hiring (*locationibus conductionibus*), partnership (*societatibus*), and mandate (*mandatis*).<sup>2</sup> The most important of these for our purposes are those contracts which could facilitate *emptio*

---

<sup>1</sup> Justinian, *Digesta*, XVI, 3, 1, 6: ‘contractus enim legem ex conventionem accipiunt’.

<sup>2</sup> Justinian, *Institutiones*, III, 22; Justinian, *Digesta*, XLIV, 7, 2.

*et venditio*.<sup>3</sup> These were regulated in a number of ways. A contract of sale, made in good faith (*bona fide*), involved a bidirectional transfer: the payment of a price (*pretium*) in return for a specific and obvious thing (*merx*), which was to be sold at a reasonable price, sufficiently high to avoid any uncertainty about it being a gift.<sup>4</sup> Delivery of the *merx* did not, alone, transfer the rights of ownership, which took place only upon the payment of the *pretium* or an agreed portion thereof.<sup>5</sup>

The broader *lex contractus* of the Roman Empire was sophisticated, with distinctions between contracts mainly upon the *processes* of their creation (which could be verbal, literal, real, and consensual, which attracted their own kinds of *exceptio* and *stipulatio*), and the *relation* of the contracting interests (distinguishing between purchaser and seller, lessee and lessor, partners, syndicates, third parties, subordinates, and more).<sup>6</sup> The classificatory zeal of the Roman tradition – so thoroughly admired by jurists of a later period – led them to offer perhaps too great an abundance of opinions and guidelines for resolving specific disputes. Only those which became axiomatic in the middle ages did so via the canonists and the glossators of the twelfth and thirteenth centuries, and, from there, were often embellished by natural lawyers to fill in the gaps of what was becoming, according to James Gordley, a discrete ‘contract doctrine’ by the sixteenth century.<sup>7</sup>

An example of the evolution of legal thought can be made of *pretium* in contracts of *venditio*, a concept that would become important within discussions about corporate land purchases in the New World. Justinian had not only argued for unambiguously high prices for sales but, and also in protection of the seller rather than the buyer, the *Codex* contains the suggestion that the seller might cancel his contract if the sale price was reduced to less than half of the just price (*iustum pretium*), a provision which appeared only to apply to the specific example of land (*fundum*).<sup>8</sup> Of course, the tradition of qualitative reflection upon price predated the late Roman Empire. It went back to Ancient Greece. The *Ethics* of

---

<sup>3</sup> Justinian, *Institutiones*, III, 23-4.

<sup>4</sup> Justinian, *Digesta*, XVIII, 1, 7.

<sup>5</sup> Justinian, *Digesta*, XVIII, 1, 19.

<sup>6</sup> Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, Tenth Edition (London: John Murray, 1908), 270-325; Alan Watson, ‘The Evolution of Contract Law: The Roman System of Contracts’, *Law and History Review* 2, 1 (1984), 1-20.

<sup>7</sup> James Gordley, *The Philosophical Origins of the Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), esp. 30-68.

<sup>8</sup> Justinian, *Codex*, IV, 44, 2 and IV, 44, 8.

Aristotle (384-322) is generally considered to contain the first reflections on the notion of a just price; levelling a theory of justice and value in economic exchange, Aristotle identified the virtue of equality between selling and buying interests.<sup>9</sup> By the work of later canonists, a number of other distinctly Aristotelian ideas about the virtue and binding promises made their entry into the *ius commune* through another door, and the notion of the *iustum pretium* was one such idea. Gratian may have been the first of the canonists to use the term ‘just price’, which inspired, as was the way, a number of subsequent decretalists to do the same.<sup>10</sup> But it was Thomas Aquinas (1225-74) who pointed the church in new directions on the principle, by his invocation of Aristotelian precepts during his ambitious attempt to present more practical guidelines on price, which was part of his enquiry into the morality of unfair enrichment, usury, and the concealment of true value.<sup>11</sup> Meanwhile, together, the canonists and the civilians offered detailed contemplation of the circumstances of a seller cancelling a contract based upon an unforeseen or substantial drop in price, from which the concept of *laesio enormis* developed, not only to provide remedy to the seller but increasingly to provide remedy to the buyer. This required additional reflection, from all corners of the medieval legal tradition, upon the independent appraisal of market value in the formulation of a just price.<sup>12</sup> Thus was the *iustum pretium* developed and elaborated in contractual thought after Justinian, and by the time the natural lawyers of the sixteenth and seventeenth centuries got their hands on the concept, the just price had become one of the most versatile concepts in contract law for the deterrence of fraudulent transactions.<sup>13</sup>

A similar passageway into early modern contract of the implied condition of *clausula rebus sic stantibus* (‘things standing as they are’), which allowed for a contract to be dissolved under changed circumstances. Saint Augustinus of Hippo (354-430) may have

---

<sup>9</sup> Roger Crisp, ed., *Aristotle: Nicomachean Ethics* (Cambridge: Cambridge University Press, 1990), bk. 5, 81-102 (esp. 90-1). See also James Gordley, ‘Contract Law in the Aristotelian Tradition’, *The Theory of Contract Law*, ed. Peter Benson (Cambridge: Cambridge University Press, 2001), 265-334.

<sup>10</sup> John W. Baldwin, ‘The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries’, *Transactions of the American Philosophical Society* 49, 4 (1959), 35-58.

<sup>11</sup> Gordley, *Philosophical Origins of Modern Contract Doctrine*, 10-68. See also Gordley, ‘Contract Law in the Aristotelean Tradition’.

<sup>12</sup> Baldwin, ‘Medieval Theories’, 22-9, 42-57. See also Raymond Westbrook, ‘The Origin of *Laesio Enormis*’, *Revue Internationale des Droits de l’Antiquité* 15 (2008), 39-52.

<sup>13</sup> Gordley, *Philosophical Origins of Modern Contract Doctrine*, 94-102, 147-58.

coined the phrase, but his treatment recalls the analogy presented much earlier by Cicero (106-43). ‘Suppose that a person leaves his sword with you when he is in his right mind, and demands it back in a fit of insanity’, Cicero proposed in the third book of *De Officiis*, ‘it would be criminal to restore it to him; it would be your duty not to do so’.<sup>14</sup> From Cicero via Augustinus the idea was also latched upon by Aquinas and the intervening canonists, in their contemplation of contract and performance, leading eventually to the implication of a circumstantial freezing condition in private contracts (much before the idea would be extended, in the latter half of the twentieth century, to apply to public international law, where it figures most prominently today).<sup>15</sup>

It requires little guesswork to determine why the canonists and theologians, starting with Gratian and Thomas Aquinas, were compelled to refine their moral and procedural approach to contracts in the Middle Ages. There was necessity. By the thirteenth century, contracts had become key to the maintenance of Christian institutions. Contracts bound the relationships between bishop and congregation, between father and parishioner, between husband and wife; of course, the entirety of Catholicism can be said to have had its basis upon promises. But it was very much a brave new era in other respects. Not only were ecclesiastical corporations across Christendom accumulating great holdings in land, but they were also monetising their wealth, which led to interactions with other church interests, as well as lay interests, in increasingly complex formats.<sup>16</sup> Contract had become the mechanism for the sustenance of this intricate and lucrative network of church groups.

In this context, canonists diverged from civilians on two main points of concern. Firstly, and beginning with Thomas Aquinas in the *Summa Theologica*, a moral evaluation of contracts was provided. This required an adjudication of contractual content, and ultimately a condemnation not of profit on its own but of shameful profit specifically, as

---

<sup>14</sup> Cicero, *De Officiis*, trans. Walter Miller (Cambridge, MA: Harvard University Press, 1913), 372.

<sup>15</sup> Robert Feenstra, ‘*Impossibilitas* and *Clausula Rebus Sic Stantibus*: Some Aspects of Frustration of Contract in Continental Legal History up to Grotius’, *Daube Noster: Essays in Legal History for David Daube*, ed. Alan Watson (Edinburgh: Scottish Academic Press, 1974), 77-104; Pascal Pichonnaz, ‘From *Clausula Rebus Sic Stantibus* to Hardship’, *Fundamina* 17, 1 (2011), 125-43.

<sup>16</sup> For a look into some of the legal relationships between various members of English parishes, see F. W. Maitland, ‘The Corporation Sole’, *Maitland: State, Trust, and Corporation*, ed. David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2003), 9-31. See additionally, for economic and historical context, the recent essays collected in Giles E. M. Gasper and Svein H. Gullbekk, ed., *Money and the Church in Medieval Europe, 1000-1200: Practice, Morality and Thought* (Farnham: Ashgate, 2015).

Harold Berman has shown.<sup>17</sup> Working with an approach of this kind, canonists and theologians thereafter endorsed the accumulation of goods made in the name of God and for the benefit of His subjects, and in the process made sensibly opportunistic law in support of the use of contracts to generate moral profit. Secondly, as the canonists were restricted by the formalism of Roman contract, they were compelled to offer solutions to provide for the efficiency and enforceability for transactions of the Middle Ages. To this end they stressed the importance of carrying out the requirements of contracts, over and above the process of the contract's creation and the relation between its interests. There had been some tradition to this. The conservation of peace and the protection of pacts had been considered conditional of each other since at least the Council of Carthago's decree in 348, to appease the Bishop Antigonus, that peace should be served and contracts carried out (*'pax servetur, pacta custodiantur'*).<sup>18</sup> Conveniently, this provided the basis in medieval canon law for the hard line that all pacts, however naked, must be carried out (*'pacta quantum cumque nuda servanda sunt'*).<sup>19</sup> This the church put bluntly to the laymen: *all* of their promises were binding before God, to Whom the form of these contracts was of little consequence in the scheme of things. As E. Allan Farnsworth has analogised, salvation had to be pawned and would be redeemable only upon the carrying out of a contract.<sup>20</sup>

This may suggest why canonists differed to civilians on the question of contractual form, and why they were additionally more active to address moral questions of shameful profit and equity. To break a promise, or to conceal the truth with malicious intentions, was to lie and commit mortal sin – and this the church discouraged as far as possible. Precisely, moreover, this is why the canonists, following Thomas Aquinas's equation of promises with *fidelitas*, latched so dogmatically upon the Roman notion of *bona fide*. The *Corpus iuris civilis* abounds with considerations of *contractus bonae fide*, amongst the most important examples of which were offered by Vacarius (1120-1200) to make a general

---

<sup>17</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 1: 247-8.

<sup>18</sup> For this passage and its subsequent modification, see Wim Dekok, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Leiden: Brill, 2013), 122-3.

<sup>19</sup> Johannes Barmann, 'Pacta sunt servanda: Considérations sur l'Histoire du Contrat Consensuel', *Revue Internationale de Droit Comparé* 13 (1961), 35-7.

<sup>20</sup> E. Allan Farnsworth, 'The Past of a Promise: An Historical Introduction to Contract', *Columbia Law Review* 69, 4 (1969), 591.

distinction between actions according to strict law (*ius strictum*) and actions of good faith (*bona fides*).<sup>21</sup> Over and above these applications, the concept of *bona fide* was especially attractive to canon lawyers because it was seamlessly tailored to church doctrine. This was evident in the law of prescription, as it was in the law of contract. Indeed, contract was the key receptacle for the idea. To enter into a contract was a commitment to act in good faith towards each other *and* to act in good faith before God. Good contracts were faithful contracts.

This idea continues, of course, to inform our secular interactions today, which are carried out in declared good faith, *bonne foi*, or as it has been rendered by the Germans in their private law of contract, '*treu und glauben*'. Even if the concept of *bona fide* appeared in medieval contract law in imaginative ways that were hardly consistent with Aristotelean or Justinianic principles – and comparative jurists might still quibble over the meaning of *bona fide* today – it is important to emphasise for the purpose of this study the inescapability of faith in contract during the Middle Ages.<sup>22</sup> For the historian to entertain a literal reading of the term, in such a context, offers no abstraction. That contracts were so determined by faith potentially had jurisdictional consequences. For insofar as the common faith of a contractor or contractee could act as a kind of guarantee for their bargain, then similar interactions with an individual of a foreign faith were clearly riskier to acknowledge let alone, should interests be damaged in a transaction gone awry, to repair. As it was just this kind of interaction that Europeans faced with most indigenous contractees beyond their holy Christian jurisdiction in the age of empire, this aspect of the old law of contract should be important to legal historians of imperialism.

The church technically forbade contracts between baptised and unbaptised subjects, even though the canonists provided little elaboration beyond the specific example of the contract of marriage. On marriage, of course, canon lawyers were unusually elaborate in procedure and strictness, flexing their muscles on a civil matter clearly within their jurisdiction. But for contracts of a commercial nature, beyond the needs of ecclesiastical

---

<sup>21</sup> Baldwin, 'Medieval Theories', 30. For Vacarius, see Peter Stein, 'Vacarius and the Civil Law', *Church and Government in the Middle Ages*, ed. Christopher Nugent, Lawrence Brooke, and Christopher Robert Cheney (Cambridge: Cambridge University Press, 1978), 119-38.

<sup>22</sup> Martin Joseph Schermaier, 'Bona Fides in Roman Contract Law', and James Gordley, 'Good Faith in the Medieval *Ius Commune*', *Good Faith in European Contract Law*, ed. Reinhard Zimmermann and Simon Whittaker (Cambridge: Cambridge University Press, 2000), 63-92, 93-117.

corporations, canonistic guidelines were less compelling – at least, in the first place. It is precisely for this reason why the religiously unspecific *lex mercatoria* had sprung into existence: *pieds poudrés* moved fast, clerical sandals more slowly. It remains difficult, however, to assess the role of faith in this kind of bargaining. Although a secular and civilian conceptualisation of *bona fide* can be detected in parts of the *lex mercatoria* by the end of the Middle Ages, this was a religiously unspecific condition which applied to Jews, Christians, and all other sorts who availed themselves of the merchant courts.<sup>23</sup> Once more, it can be illustrative to consider more closely the language of transactions, in which the security of faith can sometimes at least nominally be identified. From the dominant dialect of Venice – which was the première trading bridge between Europe and the Levant – the common name for a contract of commission was *rogadia* (‘asking God’, or ‘by prayer’).<sup>24</sup>

If proof of religious devotion was less vital to the operation of secular merchant courts than it was to the traditional ecclesiastical courts, this should not lead to the assumption that church powerbrokers were all that happy about it. They could still dispute an interfaith contract if they needed to, for in hardline canon law, all contracts made with those who had not taken the sacrament of baptism, the faithless (*infidels*), were invalid. Covenants between the faithful and the faithless were forbidden throughout Exodus, Deuteronomy, and other parts of the Old Testament, and this emphasis was carried over into the New Testament in the second letter of Saint Paul to the Corinthians: ‘Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness? And what concord hath Christ with Belial? or what part hath he that believeth with an infidel?’<sup>25</sup> Later, Pope

---

<sup>23</sup> Gerard Malynes, *Consuetudo, vel, Lex Mercatoria: Or, The Ancient Law-Merchant*, 3rd edition (London: T. Basset, 1686), 309. See also Rudolf Meyer, *Bona Fides und Lex Mercatoria in der Europäischen Rechtstradition* (Göttingen: Wallstein Verlag, 1994).

<sup>24</sup> Robert S. Lopez, *The Commercial Revolution of the Middle Ages, 950–1350* (Cambridge: Cambridge University Press, 1976), 73-4.

<sup>25</sup> 2 Cor. 6: 14-5 (*KJV*). Belial comes from the Hebrew word בְּלִיַּעַל which is often connoted with the Devil but translates literally as ‘without any value’. For Richard Tuck, these precautions were considered particularly important as Christian rulers engaged in public law alliances of wartime collaboration. Richard Tuck, ‘Alliances with Infidels in the European Imperial Expansion’, *Empire and Modern Political Thought*, ed. Sanhar Muthu (Cambridge: Cambridge University Press, 2002), 61-83. Elsewhere, Tuck makes the claim that the development of the Portuguese imperialism led Catholic theologians no longer to care much about the relations between infidels and Christians from the end of the fifteenth century onwards, suggesting that such a concern was merely a Protestant paranoia in the age of intellectual humanism. This fleeting observation in an otherwise thoroughly considered book risks conflating public and private legal relations, which were separate concerns; it also appears to associate circumstances taking place after the event with

Innocentius IV (1195-1254) was plain in his decree that the Tartars, ‘since they do not possess the true faith, certainly cannot be bound’ to hold their word, for they were fearless of God’s judgement; after him, Giles of Rome (1243-1316) went much further and forbade all rights of property and jurisdiction to infidels, albeit not without attracting a dissenter in William of Ockham (1287-1347).<sup>26</sup> Concerns such as these carried over into New World contexts seemingly devoid of organised religion, where dilemmas about contract and faith were heightened. To eliminate the problem required, simply, the Christianisation of heathens, but the efficacy of the apostolic mission in America and Africa was often difficult to gauge, leading many to doubt the sincerity of opportunistic collaborators. Even after his conversion, for example, the ostensibly Catholic king of Congo was regarded by sixteenth-century Portuguese diplomats as an ‘infidel dog’.<sup>27</sup> By implication, he and others like him were incapable of keeping their word because of a disingenuous commitment to the Christian faith, which rendered them, in the terms of contract anyway, no more fit to enter into a pact than a beast.

Islamic law provides an analogous approach to the same dilemma of interfaith contracts, and in view of the convergence discovered by recent generations of historians of Islamic and Christian law on questions of commerce, the parallel might be revealing here. To allow Christians (or Jews) a civil existence within an Islamic polity required an elaboration of the concept in sharia law of the *dhimma* (considered a public contract between the subjugated *dhimmi* ‘scriptuary’ and the wider Muslim community).<sup>28</sup> Making contracts with a *dhimmi*, while discouraged, appears to have been fairly well accepted in the Islamic empire, for in *Kitāb al-Umm*, the compilation of the Sunni jurist Imām ash-Shāfi‘ī (767-820), Muslims were assured of the validity of their contracts with non-

---

those occurring before it, and finally it understates the extremely divisive strains of Christian thinking about infidels. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 93.

<sup>26</sup> James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian world, 1250-1550* (Liverpool: Liverpool University Press, 1979), 60; Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Michigan: Eerdmans, 2001), 172.

<sup>27</sup> G. V. Scammell, *The World Encompassed: The First European Maritime Empires, c. 800-1650* (London: Methuen, 1981), 276.

<sup>28</sup> Choucri Cardahi, ‘Conflict of Law’, in Majid Khadduri and Herbert J. Liebesny, *Law in the Middle East*, (Washington: Middle East Institute, 1955), 1: 335-40.

believers unless one party had good reason to seek annulment.<sup>29</sup> Making contracts with non-*dhimmi* non-believers appears to have been less acceptable, at least in theory. The tenth-century Andalusian inspector of trade Ibn ‘Abd al-Ra’uf may have warned merchants explicitly to avoid trading with Christians – a rule, he claimed, which went back to Caliph ‘Umar (579-644) – but Muslims carried on without much regard to the rule, and entered into bargains wherever a good deal presented itself.<sup>30</sup> Not to do so would be catastrophic in a place like al-Andalus, for example, which was the home of Muslims, Christians, and Jews, belonging to a Mediterranean trading world where merchants entered into private and informal arrangements all the time, whether they called their contract a *rogadia*, a *qirad*, or something else.

Here the question of language is raised again. With the adoption of a common language of commerce, traders on contract entered agreements with other traders on contract in Mediterranean, Hanseatic and Levantine regions, but communicating was not always simple in these regions. Herein lay a far more practical dilemma for mobile merchants than the absence of a common faith, for agreements were binding only insofar as both interests could understand the obligations they were expected to fulfil. It was for this reason held in Roman law, as in the continental *ius commune*, that mutes, deafs, lunatics, madmen, minors and women were prohibited from making entry into contracts.<sup>31</sup> Such individuals, like beasts, were deemed incapable of understanding the complexity of private law relationships without the help of others. Practically, a language barrier was no different. A shared tongue was just as important as soundness of mind in the Latinate region of western Europe after the collapse of the Roman Empire (including here its Norse, Arabic, Teutonic, Celtic, and Slavic fringes), for land linked languages, thanks largely to the Romans, and so Christendom, for a very long time, remained continentally bound. The language of contract, like the language of Catholicism, was Latin.

---

<sup>29</sup> A. S. Tritton, *The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of ‘Umar* (London: Oxford University Press, 1930), 13.

<sup>30</sup> Olivia Remie Constable, *Trade and Traders in Muslim Spain: The Commercial Realignment of the Iberian Peninsula, 900-1500* (Cambridge: Cambridge University Press, 1996), 64.

<sup>31</sup> William Livesey Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (Rochester, N.Y.: Lawyers Cooperative Publishing Company, 1938), 392-4. See also Phillipe de Remi, Sire de Beaumanoir, *Coutumes de Beauvaisis* (Paris: Picard, 1900 [c.1279-84]), 2: 35, n. 1061.

Great seas, Europeans learned during the age of discovery, split languages apart. Take, for example, the experiences of Venetian explorer Alvise Cadamosto, during his visit of the west African coast in 1456. To the dismay of his Portuguese sponsors, he was forced to turn away from the coast without exploring inland, because, he noted, ‘we would not be able to understand them, nothing worthwhile could be done’.<sup>32</sup> Cadamosto was a slave-raider – an occupation hardly esteemed for its sensitivity towards local customs – but his example serves well to illustrate the necessity of finding interpreters for both sides of an exotic contract, the absence of which anywhere in the non-European world must attract suspicion in early modern contexts.

Distinctions in language and religion might impede contracting interests in the late medieval period, but for mobile traders ensnared by no obvious jurisdiction, the majority of whom seeking only to carry out a fairly simple exchange, such distinctions mattered less than might be expected. The majority of their contracts were designed to facilitate a rapid exchange of chattel, or moveable property; others included those for services, loans, and joint-ventures, which required a longer period of contract but which ultimately came to an end at the resolution of the undertaking and the perfection of the contract. Contracts transferring moveable property were much less sacred than the civil matter of marriage, which remained the principle attractant of both canon and sharia law to the sphere of private contracts, and they were much less conditional and monitored than those transferring immoveable property, which now must be considered.

It is too often overlooked by historians of early modern imperialism just how radical it was to use contracts to transfer full rights to land away from the realm of a common sovereign, over and above the uncertainties of faith before an uncommon God, in the Middle Ages. While true that Justinian explicitly presented a number of hypothetical scenarios featuring contracts for the private trade of immoveable property, and in the process laid the platform for the idea of *laesio enormis*, it cannot be forgotten that the market in land in the Roman Empire, much as it may resemble our very own today, was

---

<sup>32</sup> P. E. Russell, ‘Some Sociolinguistic Problems Concerning the Fifteenth-Century Portuguese Discoveries in the African Atlantic’, *Portugal, Spain, and the African Atlantic, 1343-1590: Chivalry and Crusade from John of Gaunt to Henry the Navigator*, ed. P. E. Russell (Aldershot: Ashgate, 1995), 3.

confined, monitored, and heavily regulated.<sup>33</sup> In its wake, of course, came feudalism and the emergence of absolutist monarchs. In this new context, all land, whether unheld ('waste') or held by the nobility as their grant or inheritance, was held of the ruler. A subject's rights to property in land, whatever form those rights took, came from his sovereign. To contemplate exotic alternatives was unusual, and worse still, treasonous. To presume, on the other hand, the right to purchase land as a foreigner in a new land was suspicious and invariably required special permission, along with oaths of allegiance and fidelity to the new sovereign. Insofar, then, as the fundamentals of the European law of real property were highly specific to the rule of a common overlord – or rather, they were specific to the area within the uncontroversially accepted geographical borders of the demesne – it followed that all transactions for land conducted beyond it were technically inconceivable in law, with the highly conditional and disputable exception, offered only by some renaissance humanists, for common land existing in a 'state of nature'.<sup>34</sup>

Those transactions for land conducted *within* a clearly demarcated European realm or domain, on the other hand, were subject to a variety of procedures. An individual enjoying the freer forms of tenure was allowed to sell parts of his estate, and likewise buy parts of an estate belonging to a similarly tenured neighbour, but alienation like this attracted royal suspicion in the process. The English example turns up a series of laws passed from the reign of Edward I onwards for the purpose of monitoring, restricting, and recording all individual alienations of freehold. The habitual inquisition into *quo warranto* ('by what warrant') began, in English constitutional history, in the countryside, and furnished that country's folklore with memorable villains like Earl Warenne. Ecclesiastical corporations were especially targeted by the English kings, beginning with the Statute of Mortmain in 1279 and carrying right up to the confiscation of church lands by Henry VIII in the 1530s.<sup>35</sup> Land ownership was never a *fait accompli* in England. The French example provided by Philippe de Beaumanoir's incredibly important *Coutumes du Beauvaisis*

---

<sup>33</sup> For an excellent appraisal of the Roman market in land, see Peter Temin, *The Roman Market Economy* (Princeton: Princeton University Press, 2013), 139-56.

<sup>34</sup> Tierney, *The Idea of Natural Rights*, esp. 131-94. See also Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 166-96; Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014), 85-214.

<sup>35</sup> For this, see above, 47-8. For context, consult A. W. B. Simpson, *A History of the Land Law* (Oxford: Oxford University Press, 1986), 1-144.

(compiled between 1279 and 1284) offers the contrasting viewpoint of the continental courts. Though he may have declared boldly, albeit late in the tract and attached to many qualifications, that contracts were stronger than law (*'convenance vaint loi'*) – an axiom offered by Glanvill (d 1190) and was probably accepted commonly across Europe by the late medieval period<sup>36</sup> – the king's court he described was nevertheless one ever ready to investigate and punish inappropriate conveyances of land (*'eritage'*) between gentlemen by contracts (whether *'convenances'* or *'lettres'*). More importantly, the rules of their very conveyance were plenty, Beaumanoir shows, relating not only to ancient procedure, but also to the market value and all interests potentially affected.<sup>37</sup> Here, the English example provides additional nuance. The painstaking research of the historian J. M. Kaye reveals a necessarily complex culture of conveyance from the beginning of the paper trail in the eleventh century up to the end of the fourteenth. Kaye's study reveals how grants in fee, grants in marriage, and grants in alms (among other types of grant), some for years, some for life, and some for generations, entailed different types of contract and procedures.<sup>38</sup> Process alone had made the acquisition of immovable property by contract difficult by the fourteenth century, to say nothing, that is, of disputes among and between interests.

Ornate though it had become by the Renaissance, this market in 'heritage' was open only to the very important who were usually also the very wealthy. The land rights of commoners – so-named because of their majority – had long existed beneath the layer of those available to nobility. Contracts were also instrumental to the conferral of rights in these contexts, even though such contracts never entailed an outright transfer of title; they vested rights and responsibilities in both lord and commoner, and were dissolvable when both wished to end their otherwise hereditarily perpetual association. Involving land impervious to evaluation in a closed market, and using generic and inflexible terms which entrenched not so much any 'rights in property' as they are understood them today but rather a social relationship based upon *status*, these contracts will not be explored too

---

<sup>36</sup> John Beames, *A Transcription of Glanville* (London: A. J. Valpy, 1812), 268. See also Berman, *Law and Revolution*, 1: 629n82.

<sup>37</sup> Beaumanoir, *Coutumes de Beauvaisis*, 2: 1-63, n. 998-1104.

<sup>38</sup> John M. Kaye, *Medieval English Conveyances* (Cambridge: Cambridge University Press, 2009). See also Simpson, *History*, 119-44.

deeply here, beyond making an observation about the importance, again, of faith.<sup>39</sup> Before conveyance became standardised and secular – the transaction bound by the written deed and no longer the acted one – ceremonies of infeudation were symbolically elaborate affairs, key to which was an oath of fidelity (‘fealty’), sworn on Christian relics, to the lord by his vassal. Even this kind of private contract, therefore, was restricted to members of a common faith in the European middle ages, which speaks again to the inconceivability, if only within a *customary* law of property, of transferring land rights from individuals beyond Christendom to those belonging to it in this period.<sup>40</sup>

Indeed, it can easily be shown that an ongoing concern of the faithful with the faithless determined much more of the Western legal-political tradition than just those parts of it concerning contract. Perhaps nowhere was this concern so pressing as it was on the matter of war. Before arriving at the idea of holy war in Christian legal thinking, however, it will be necessary to present the categories into which just war reasoning was allocated in ancient and medieval thought. The extent to which a war could be considered just by the Middle Ages – a ‘*iustum bellum*’ (likewise from Aristotle) – came to be determined on three separate sets of criteria: those circumstances leading up to its declaration (*ius ad bellum*), those of its waging (*ius in bello*), and those of its conclusion (*ius post bellum*).<sup>41</sup> The middle of these was the most practical, developed, and secular of the three. Concerned with the conduct of soldiers, chivalry, martial authority, and the procedure of battle, the *ius in bello* tradition is not for this chapter’s contemplation.<sup>42</sup> Rather, the laws of war starting with *ius ad bellum* and proceeding therefrom will be considered here.

---

<sup>39</sup> Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861), esp. 169-70.

<sup>40</sup> For supporting descriptions, see Berman, *Law and Revolution*, 1: 299, 306; M. T. Clanchy, *From Memory to Written Record: England, 1066-1307*, 2nd edition (Oxford: Blackwell Publishers, 1993), 52.

<sup>41</sup> For the history and ongoing relevance of this tripartite categorisation, see Carsten Stahn, “‘Jus ad Bellum’, ‘Jus in Bello’ . . . ‘Jus post Bellum’? – Rethinking the Conception of the Law of Armed Force”, *European Journal of International Law* 17, 5 (2006), 921-43.

<sup>42</sup> Maurice H. Keen, *The Laws of War in the Late Middle Ages* (New York: Routledge, 1965), 82-155; J. T. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981). For a terrific historical study, consult Matthew Strickland, *War and Chivalry: The Conduct and Perception of War in England and Normandy, 1066-1217* (Cambridge: Cambridge University Press, 1996). Readers are also directed to the regulation of wartime conduct and church property which has been most artfully explored in Rory Cox, ‘A Law of War? English Protection and Destruction of Ecclesiastical Property during the Fourteenth Century’, *English Historical Review* 128, 535 (2013), 1381-1417.

There were great differences of opinion between and among canonists and civilians as to the reasons to wage war in the Middle Ages. These disagreements go back to the great wars of Ancient Greece, which led to some of the first recorded discussions about the purpose for warfare. The most enduring axiom to emerge from this context was the broad suggestion that wars were waged for the purpose of restoring peace, which was shared by Aristotle and Plato, and subsequently adopted by the Romans after Cicero.<sup>43</sup> Furthering the equation of peace with justice, Cicero confirmed that wars were to be fought so ‘that we may live in peace without injustice’.<sup>44</sup> Additionally, Cicero held, if somewhat crudely, that wars could be conducted for the purpose of punishment (*ultio*; for instance, upon those ‘acting badly who prevent foreigners from enjoying their city’), and waged with a subsidiary concern to rule others well in the name of glory.<sup>45</sup> This imperial motivation would prove too radical for most canonists to maintain in his wake, but the notion of justice through restoration stuck. This would receive important refinement at the hands of Saint Augustine, who allowed more specifically for the restitution of *injuriae* while decrying the *libido dominandi* that led to wars for empire.<sup>46</sup> By the fifth century, the Greco-Roman tradition had come to consist, in Rory Cox’s appraisal, ‘of both a restorative element (the restoration of goods stolen or damaged), but also, more importantly, a punitive element, independent from the concept of redress for damage caused by the enemy’.<sup>47</sup>

It was in this tradition that the canonists were immersed during their many enquiries into the reasons to wage war. The first major contribution was offered, and revisited many times since, by the *Decretum* of Gratian. Upholding the classical concern with war for the sake of peace (*bella pacata*), Gratian endorsed war for the prevention of an invasion, for the recovery of property, and to avenge prior injuries.<sup>48</sup> Canonistic thought in Gratian’s wake continued to evaluate potential criteria for the cause of war (*causa*), and as well contemplated the things involved in war (*res*), while developing a much more elaborate

---

<sup>43</sup> Rory Cox, ‘Historical Just War Theory up to Thomas Aquinas’, in *Oxford Handbook of the Ethics of War* (forthcoming 2016).

<sup>44</sup> Cicero, *On Duties*, ed. M. T. Griffin and E. M. Atkins (Cambridge: Cambridge University Press, 1991), bk. 1, c. 35.

<sup>45</sup> Cicero, *On Duties*, bk. 1, c. 38; bk. 2, c. 46-9; bk. 3, 86-7.

<sup>46</sup> Ryan Greenwood, ‘War and Sovereignty in Medieval Roman Law’, *Law and History Review* 32, 1 (2014), 59-60; Cox, ‘Historical Just War Theory’.

<sup>47</sup> Cox, ‘Historical Just War Theory’.

<sup>48</sup> Cox, ‘Historical Just War Theory’.

discussion about those who should wage and be affected by war (*persona*). On the formality of procedure in the *ius ad bellum*, the most principled offerings came from the Polish rector Paulus Vladimiri (1370-1435), who made calls for greater restraint. Vladimiri made the case for *processus doctrinalis*, and the independent mediation of *iudicialis indago*, before any *declaracio legitima* of war. What was radical about this were the doubts he raised in the process of making such a request about the standards of just wars before his time. By suggesting the need for a summary legal examination (*cognicio*) before war, Vladimiri made the implicit criticism of the church for merely assuming the justness of martial cause in the past.<sup>49</sup>

The canonists were pivotal to the formulation of a coherent law of war, but as Ryan Greenwood notes in a recent essay, the contributions of the Roman civilians were not altogether unimportant. Even though the *Corpus iurus civilis* remained, above all, a body of private law, its detailed regard for individual injury and restitution would provide for a distinctly civilian approach, based largely upon analogy and exception, towards the causes for war from the twelfth century onwards. As Greenwood reveals, one of the key contributions of this scholarship, starting with Jacobus de Ravanis (d. 1296) and culminating in the contributions of Paulus de Castro (d. 1441), was the offering that exceptional circumstances could be provided by the lack of judicial authority (*copia superioris*). Denied a civil means for redress through available jurisdiction, secular warfare could be an option to secure the same ends, and even led some, including Paulus, to reconvene with the Ciceronian ideal of conquest for the purpose of governing other populations.<sup>50</sup> This was an ideology perfectly suited to the expansionist tendencies of the Italian city-states.

Still, for the most part, it was the canonists rather than the civilians who had the greater need for a robust theory of just war during the Middle Ages, as they were forced first to justify and later to accept the legacy of explicitly religious warfare. The question of

---

<sup>49</sup> Frederick H. Russell, 'Paulus Vladimiri's Attack on the Just War: A Case Study in Legal Polemics', *Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullmann on his Seventieth Birthday*, ed. Brian Tierney and Peter Linehan (Cambridge: Cambridge University Press, 1980), 237-54. See, for a broader treatment of Vladimiri's importance, Wladyslaw Czaplinski, 'Pawel Wlodkowic (Paulus Vladimiri) and the Polish International Legal Doctrine of the 15th Century', *Baltic Year Book of International Law* 7, (2007), 65-82.

<sup>50</sup> Greenwood, 'War and Sovereignty', 38, 40, 45, 59. Previously, one only found the lack of appropriate judicial authority implied in Innocentius IV, and was never explicitly seen as a *causa belli*.

faith was even more central to this literature than it was in discussions about contract. Contemplation of the justness of war against ‘others’ had a lineage that went back to Ancient Greece though: in *The Republic*, Plato (428-347) made a distinction between the conflicts of barbarians and Greeks, which were properly wars, and ‘hatred’ among Greeks, which was ‘factious’.<sup>51</sup> Yet it was in a much later context, an era of momentous Christian crusades, that jurists much more strenuously grappled with the place of infidels in warfare. Aquinas, who had many reservations about war, left it somewhat open for debate. Innocentius IV, on the other hand, directed mainstream canonistic towards the idea that it was lawful to wage war against infidels in holy Christian land. Of course, this was part of a much bigger global policy; it was on Innocentius IV’s initiative that the Mongols were fenced off from Eastern Europe by Christian missions too.<sup>52</sup> Guidelines endorsing war against infidels in their own countries may have been a touchy subject for canonists, but it was least controversial in holy Christian lands, such as Iberia was made out to be during the *Reconquista* from the eighth century onwards, when this conflict became the attractant of overwhelming Christian concern. Major victories were secured against the Moors by the end of the tenth century, but the war was ongoing until the Granada War and the resultant treaty of 1491. According with the ebbs and flows of this age of the *Reconquista*, canonistic martial thought developed significantly, although not always clearly, as will be seen. One of the pressing questions, in holy war, was about *whom* should engage in warfare. Expectedly, the canonistic position allotted secular authorities to the position of pawns in holy war, with it left only up to the clerics to move them into position. Where, however, such wars could take place – essentially, whether holy wars could be territorially aggressive or defensive in nature – eventually became a more pressing issue as the middle ages progressed. Beyond the Christian world lay Mongol Asia, Muslim North Africa, and upon their discovery, the islands of the Atlantic. In these locales, there developed greater doubts about the lawfulness of war against infidels. Vladimiri would again be provocative in this frame. Principally in the *Tractatus de Potestate Papae et Imperatoris Respectu Infidelium*

---

<sup>51</sup> Plato, *The Republic*, trans. and ed. Paul Shorey, *Plato in Twelve Volumes* (Cambridge, MA: Harvard University Press), book 5, c. 470.

<sup>52</sup> As James Muldoon has shown, Innocentius was pivotal to the elaboration of the church’s hardline position on relations between infidels and Christians more generally. See Muldoon, *Popes, Lawyers and Infidels*, esp. 29-48.

(1415), he argued that wars could not be waged against infidels (*'pagani'*) purely because of their faithlessness, and that, even in a just war, not even the Pope could authorise the seizure of their property in war.<sup>53</sup> These reservations stemmed from the doubts that the church had any *jurisdiction* over those of a foreign faith in foreign land, doubts which were shared by the Dominican Thomas de Vio, Cajetan (1468-1534), in his commentaries on Thomas Aquinas. 'Some infidels', wrote Cajetan, agreeably quoted by Hugo Grotius,

do not fall under the temporal jurisdiction of Christian princes either in law or in fact [...] [T]he rulers of such persons are legitimate rulers, despite the fact that they are infidels and regardless of whether the government in question is a monarchical regime or a commonwealth; nor are they to be deprived of dominion over their own peoples on the ground of lack of faith [...] No king, emperor, not even the Church of Rome, is empowered to undertake war against them for the purpose of seizing their lands or reducing them to temporal subjection. Such an attempt would be based upon no just cause of war. [...] Men of integrity ought to be sent as preachers to these infidels, in order that unbelievers may be induced by teaching and by example to seek God; but men ought not to be sent with the purpose of crushing, despoiling and tempting unbelievers, bringing them into subjection, and making them twofold more the children of hell [...]

It was from this period, the late fifteenth century, that the canonistic assumption of the justice of holy wars (which was by no means straightforward) began to face criticism from the natural lawyers, more about which will be said shortly. For now, it is to be borne in mind how contentious it was, especially from the increasingly secular perspectives of the natural lawyers, to wage war against non-Christians by the late middle ages – and most especially so after the Moorish occupation of Iberia.

Here there is but one final element to consider in the context of *ius ad bellum*, and it is probably the most important in the terms of this dissertation, and that is the notion of *auctoritas*. In hard-line canonistic thought, only the Pope could declare war (or at least he had to be consulted before its declaration by others); in hard-line Roman thought, only the Emperor could (or, as Augustine offered, the highest 'public authority' could, whomsoever

---

<sup>53</sup> See *Tractatus de Potestate Papae et Imperatoris Respectu Infidelium* (1415) in Stanislaus F. Belch, ed., *Paulus Vladimiri and His Doctrine Concerning International Law and Politics* (The Hague: Mouton & Co., 1965), 2: 792-844. For an exploration of Vladimiri within his fifteenth-century intellectual context, see Belch, *Paulus Vladimiri*, 1: 392-483.

<sup>54</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006 [1604-8]), 312-3.

that was at the time).<sup>55</sup> Medieval politics were never so simplistic, however. Europe accommodated a number of splintering polities, it was wracked by denominational crises, and its borderlands were subject to the tyranny of ambitious overlords as well as aspirant sovereigns like Machiavelli's expansionistic *Prince*.<sup>56</sup> Rulers furthest from Rome, like those in France and England, fell in and out of secular war almost incessantly. Necessarily, from the twelfth century jurists began to contemplate, however vaguely at first, wars waged by princes (*princeps*).<sup>57</sup> Insofar as such princes recognised no superior authority, public war (providing its grounds were just) licitly corresponded to one declared on the authority of the Roman Emperor, as the church, especially in Innocentius IV's time, was forced to concede.<sup>58</sup> But princes were not the only authorities declaring war in the Middle Ages. Members of the nobility were known to wage 'private war' upon each other to settle disputes, enlarge estates, or acquire new vassals. This was a Germanic principle of right, embraced to the fullest in France as it was among the more decentralised polities of Western Europe – like Beaumanoir's Beauvaisis – but the phenomenon was gradually phased out of existence between the thirteenth and the sixteenth centuries.<sup>59</sup> Across the same period, the Italian city-states were at their most militaristic. As Greenwood reveals, the Italian civilian tradition, experimenting with analogies found in Roman law for the rights of individuals, worked to justify both the aggressive and defensive wars of cities from the late twelfth century right up to Paulus de Castro in the early fifteenth century.<sup>60</sup> Paulus is of particular importance in this frame, asking his readers to 'return to our primeval rights, by which it is licit for us by every law to pursue our own right, on our own authority

---

<sup>55</sup> Cox, 'Historical Just War Theory'.

<sup>56</sup> Niccolò Machiavelli, *The Prince*, trans. Luigi Ricci (Oxford: Oxford University Press, 1921 [1532]), chs. 3, 6, 7, and 9. See also Walter Ullmann, 'The Development of the Medieval Idea of Sovereignty', *English Historical Review* 44 (1949), 1-33.

<sup>57</sup> Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), 88; Cox, 'Historical Just War Theory'. For the canonist response specifically, see James Muldoon, "'Extra Ecclesiam non est Imperium": The Canonists and the Legitimacy of Secular Power', *Studia Gratiana* 9 (1966), 553-80.

<sup>58</sup> Greenwood, 'War and Sovereignty', 35-7.

<sup>59</sup> Beaumanoir, *Coutumes*, 2: 354-66, n. 1667-89. For the disappearance of private war, see Keen, *Laws of War*, 72-3, 108; Russell, *Just War*, 301, 304. For its triumph, see generally Malcolm Vale, 'Aristocratic Violence: Trial by Battle in the Middle Ages', *Violence in Medieval Society*, ed. Richard W. Kaeuper (Woodbridge: Boydell Press, 2000), 159-82; John Beeler, *Warfare in Medieval Europe, 700-1200* (Ithaca: Cornell University Press, 1971), esp. 31-59, 215-44; Georges Duby, *Guerriers et Paysans au Moyen Âge* (Paris: Gallimard, 1973).

<sup>60</sup> Greenwood, 'War and Sovereignty', 46-60.

[*propria auctoritate*].<sup>61</sup> Within this literature, a defence was developed for the autonomous war-making right of the *corporation*, even if, because the idea was still in flux, the word itself was never used (Baldus de Ubaldis, to take a prominent example, preferred to speak of the juridical personality of the *populus*).<sup>62</sup> In sum, what can be seen in the late medieval context would be crucial in the early modern context in two respects: the first being that the right to wage private war was still cherished among some members of the nobility at the transition of these two epochs, and the second being that it was acceptable for corporate bodies nominally controlled by Rome to wage war without any higher authority in this period. These tenets of *auctoritas* would remain implicit, and for that reason become highly problematic, in Western legal thought throughout the age of discovery.

By comparison to the legal tradition of enquiry into the justness of going to war, the investigations of jurists into the nature of *ius post bellum* were much less developed until the fifteenth century. Just wars to avenge *injuriae* were waged strictly for the purpose of securing equivalent restitution. For other kinds of just war, classical pacifists pressed only for the restoration of peace after war, but there were exceptions. Plato held it ‘moderate and reasonable [...] that the victors shall take away the crops of the vanquished, but that their temper shall be that of men who expect to be reconciled and not always to wage war’.<sup>63</sup> In the Aristotelian political tradition, the reduction of losers to a state of slavery was conventional, if however this received subtle regulation after the establishment, in Justinian’s *Digest*, of a restorative right of *postliminium* for captive soldiers.<sup>64</sup> By the Middle Ages, however, generally the discussion shifted towards the creation of subjects rather than slaves of conquered occupants. Yet it was never so much the civil rights of losers as it was their property rights that became important in this period, as ostensibly ‘just’ wars increasingly involved rights to land and booty. For secular and just warfare conducted among Christians, this issue was highly controversial. The extravagant acquisition of property through these means naturally attracted the suspicion of neighbouring polities as well as the church, and its division was not always clear-cut. With

---

<sup>61</sup> Paulus de Castro, *Consilia* (1582), quoted in and translated by Greenwood, ‘War and Sovereignty’, 54: ‘Caeterum si deficit copia magistratus, quia parum est iura fuisse condita, ex quo non est qui tueatur ipsa [...] ad iura primaeva redimus, quibus omni iure nobis liceat, auctoritate propria ius nostrum consequi’.

<sup>62</sup> For Baldus, see above, 35.

<sup>63</sup> Plato, *Republic*, bk. 5, e. 470.

<sup>64</sup> Justinian, *Digesta*, XLIX, 15.

warfare generally waged, in the medieval period, by contracted regiments of mercenaries and, increasingly, private military companies, it became necessary to contemplate *where* these won rights fell. Generally, by the late Middle Ages, immovable property was regarded to fall to the winning sovereign, leaving it for soldiers instead to develop their claims to the right of looting, but there were never any firm guidelines for this, only conventions.<sup>65</sup> Sovereignty, on the other hand, had to be fleshed out in public treaties after the war, although it would not be until the writings of Alberico Gentili (1562-1608) that any attempt was made to establish guidelines for peacetime alliance and governance after war.<sup>66</sup>

In the sixteenth century, the notion of ‘just war’ and the paired concept of ‘conquest’ became hotly debated like never before. The onset of Spanish imperialism, which saw *conquistadors* loosely sanctioned by Pope and crown to clean up the spoils of war in the New World, was the key catalyst in this respect. Spanish jurists and theologians, especially those affiliated with the Salamanca School, were the most important thinkers in this period, as they contemplated the lawfulness of warfare against infidels in America.<sup>67</sup> Francisco de Vitoria (1483-1546) was the most elaborate and influential on this question. In *De Indis*, Vitoria provided a spirited defence of both the public and the private rights of New World infidels, even granting them a right to enjoy their own customary jurisdiction without hindrance, regardless of the abhorrence of their laws to newcomers. And he condemned the intrusion of the Spanish on grounds of papal, royal, and spiritual authority. From this basis, though, Vitoria proceeded to identify the exceptions that could naturally lead to the conquest of New World infidels by the force of arms. If the Spanish continued to provoke hostility in the face of their peaceful efforts to sojourn, and all that entailed

---

<sup>65</sup> Keen, *Laws of War*, 137-55. See also David Jacoby, ‘The Catalan Company in the East: The Evolution of an Itinerant Army (1303-1311)’, *The Medieval Way of War: Studies in Medieval Military History in Honor of Bernard S. Bachrach*, ed. Gregory Halfond (Farnham: Ashgate, 2015); David Parrott, *The Business of War: Military Enterprise and Military Revolution in Early Modern Europe* (Cambridge: Cambridge University Press, 2012).

<sup>66</sup> See the recent collection of essays in Benedict Kingsbury and Benjamin Straumann, ed., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2011).

<sup>67</sup> See, for a useful summary, Anthony Pagden, ‘Conquest and the Just War: The “School of Salamanca” and the “Affair of the Indies”’, in Muthu, *Empire and Political Thought*, 30-60. See also Anthony Pagden, *Spanish Imperialism and the Political Imagination: Studies in European and Spanish-American Social and Political Theory, 1512-1830* (New Haven: Yale University Press, 1990), 13-36.

(commerce, communication, and the preaching of the Gospel), then a cause for just war arose. Conquest on these grounds alone afforded the despoliation of infidel land and their reduction to subjectivity.<sup>68</sup> But this could only be the last resort. Vitoria was adamant that wars could neither be waged on the authority of a foreign sovereign, nor carried out explicitly for the conquest of people and property, and on these precepts he was by no means alone. His contemporary, the Dominican priest Bartolomé de las Casas (1484-1566), issued a stern warning, in his *Defence of the Indians*, for ‘those who, under the pretext of spreading the faith, invade, steal, and keep the possessions of others by force of arms – let them fear God, who punishes perverse endeavours’.<sup>69</sup> Jurists increasingly concurred. Faithlessness alone, the Salamancan scholars held together after Vitoria, provided no grounds for armed invasion. As Diego Covarruvias Leyva (1512-1577) confirmed, ‘wars waged against infidels just because they are infidels, even upon the authority of the Emperor, or the Pope, cannot be just’. Leyva went even further, sustaining this approach to consider infidel property rights, both private and public, in war: ‘infidelity does not deprive infidels of their dominion, [because dominion] is theirs by natural law [*iure humano*]’; ‘infidels just because they are infidels neither lose the ownership of things [*dominium rerum*] nor their provinces, [both of] which they have acquired by natural law’.<sup>70</sup> Another generation of bloodshed in Spanish America led Luis de Molina to add further qualifications to the kind of war that was licit in the New World in *De Iustitia et Iure* (1593). For Molina, war could only lead to the liberation of infidels, and not to the occupation of their lands, but theory continued to diverge from practice.<sup>71</sup> For want of space, this thesis cannot further explore the Salamancan reappraisal of infidel rights and imperialism more generally. It suffices to emphasise here that, on the eve of corporate

---

<sup>68</sup> Francesco de Vitoria, *On the American Indians*, in *Francisco de Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 231-92.

<sup>69</sup> Bartolomé de Las Casas, *In Defense of the Indians*, trans. Stafford Poole (DeKalb: Northern Illinois University Press, 1992), 181. This point belonged to a wider rejection of the pretension of the church to enjoy jurisdiction over infidels, and an acknowledgement, moreover, of the highly exceptional circumstances in which war may be waged against infidels (esp., 54-97, 154-84).

<sup>70</sup> Didaci Covarruvias a Leyva, *Opera Omnia* (Antverpiae: Apud Ioannem Keerbergiv, 1610), 1: 505-6: ‘bellum aduersus infideles ex co solum quod infideles sint, etiam auctoritate Imperatoris, vel Pape iuste indici non potest [...] nam infidelitas non priuat infideles dominio, quod habent iure humano [...] ergo infideles ex co euod infideles sunt [...] minime amittunt dominium rerum, nec prouinciarum, quas obtinet, iure que humano habuerint’.

<sup>71</sup> For Molina’s engagement with ancient philosophy and early scholasticism, see Tuck, *Rights of War and Peace*, 51-5.

expansion into the New World, doubts were certainly heightened about the place of infidels in both the *ius ad bellum* and the *ius post bellum* by the Salamanca School (however equivocally and ambivalently these doubts were often expressed). The final observation to be made here concerns the relationship between this intellectual tradition and the expulsion of the Muslims from Europe, for this event fed into the late medieval language of conquest in important ways.

The ‘*Reconquista*’, both as an idea and as a word, undoubtedly influenced the development of legal discourses abroad. Yet it remains difficult to illustrate how, because the concept has always been obscure. The Latin infinitive *quaerere*, from which the word is derived, means only ‘to gain by effort’. In early medieval juristic thought, this action could be likened to the personal gain of an estate through means other than inheritance, but by latter-medieval thought the word began to receive a separate association with warfare. Throughout this transformative period, there was a series of Christian wars waged against the Islamic occupants of the Iberian peninsular between 711 and 1492, yet only towards the latter half of this period did the goal become *reconquirere* (interchangeable though that infinitive was with *recuperare*).<sup>72</sup> To some extent, consecutive martial campaigns against infidels in Iberia, in the Atlantic archipelago, and finally in the New World, were seen as part of a continuous holy war, and this was a context in which the common discourse of ‘conquest’ was often invoked. This only makes it all the more remarkable that the meaning of the word remained fluid in Iberia, and indeed across Europe, between the fifteenth and seventeenth centuries. In Portuguese discourse, for example, a distinction between the ‘conquest’ (*conquista*) and the ‘discovery’ (*descoberto*) of the Atlantic islands gradually whittled away after the Pope’s donations, as *conquista* became a word used to explain a notion of territoriality unlinked to war.<sup>73</sup> In Spain, by contrast, there was never any doubt that Mexico was conquered – whatever that meant – after the 1520s, but there was considerable historiographical controversy surrounding the justness of Cortés and the

---

<sup>72</sup> Damian J. Smith, “‘Soli Hispani?’ Innocent III and Las Navas de Tolosa’, *Hispania Sacra* 51 (1999), 496-501; Joseph F. O’Callaghan, *Reconquest and Crusade in Medieval Spain* (Philadelphia: University of Pennsylvania Press, 2003), 7-9.

<sup>73</sup> António Vasconcelos de Saldanha, *Iustum Imperium: Dos Tratados Como Fundamento do Império dos Portugueses no Oriente: Estudo de História do Direito Internacional e do Direito Português* (Lisboa: Fundação Oriente, 1997), 292, and generally 525-50. I am grateful to Lauri Tähtinen for pointing this out. Readers should consult his forthcoming *Ideological Origins of the Portuguese Empire in Brazil*.

conquistadors behind the ‘*conquista de la Nueva España*’.<sup>74</sup> The idea that lands (rather than people) were to be subjected to conquest seems also more agreeable in France, finding support, for example, in an early French commission of 1578, giving Roberval the right to ‘conquer and take certain lands and countries’, admittedly those peopled by non-Christians.<sup>75</sup> Additionally, one also encounters in French discourse the application of the term to Calais (the ‘*pays reconquis*’) upon the eviction of the English in the 1540s.<sup>76</sup> Across the Channel, the term was applied with greater flexibility, though of course it had been flexible from as early as the Angevin invasion of Ireland. In English law, there was never any distinct legal meaning given to ‘conquest’ until *Calvin’s Case* (1608), but that is not to say that the medieval common law was bereft of resources for dealing with the acquisition of territory by force. Rather, it is more accurate to say that, from the time of Guillaume le Bâtard (William the Bastard, whom England saw as ‘The Conqueror’) right up to union of the Scottish and English crowns in 1603, it remained unclear whether conquest carried jurisdictional implications, territorial implications, both, or neither.<sup>77</sup> In Thomas More’s *Utopia* (1516), for example, the peaceable intrusion of the Utopians upon a fictitious country is resisted by its ‘natives’ who, as a result, earn the rebuke of war. ‘Conquest’, for More, was the fate of a people.<sup>78</sup> A few generations later, in Richard Hakluyt’s *Reasons for Colonization* (1585), conquest would be used in clear association with war and acquisition not for a corporation but for a nation:

Yf our nacion doe not make any Conqueste there but onlye use trafique and change of Comodyties by meane the Countrie is not so mightie a nacion as ether ffrance

---

<sup>74</sup> For this, contrast the divergent opinions of Francisco López de Gómara (1511-1566), Bernal Díaz del Castillo (1492–1581), and Bartolomé de las Casas (1484-1566). See Francisco López de Gómara, *La Conquista de Mexico* (Saragossa: Miguel Capila, 1553); Bernal Díaz del Castillo, *Historia Verdadera de la Conquista de la Nueva España* (Madrid: Espasa-Calpe, 1933); Las Casas, *Defense*. For analysis, see Brading, *First America*, 25-93.

<sup>75</sup> Commission for Roberval (15 January 1541), *DJCR* 180; See also Marc Lescarbot, *History of New France*, trans. W.L. Grant (Toronto: Champlain Society, 1907), 1: 146.

<sup>76</sup> Barnabé Brisson, *Coustumes de la Ville de Calais et Pays Reconquis* (Calais: Chez Madame L’Enfant, 1583); Pierre Guenoys (?), *Corps du Droict François Contenant un Recueil de Tous les Édicts, Ordonnances, Stil et Practique Observée tant aux Cours Souveraines qu’ès Justices Inférieurs & Subalternes du Royaume de France* (Paris: Pour Jean de Laon, 1600), livre 2, titre 8, 95. See also Abbé Lefebvre, *Histoire Générale et Particulière de la ville de Calais, et du Calaisis, ou Pays Reconquis* (Paris: Chez Guillaume François Debure, 1766).

<sup>77</sup> Gavin Loughton, ‘Calvin’s Case and the Origins of the Rule Governing “Conquest” in English Law’, *Australian Journal of Legal History* 8, 2 (2004), 143-80.

<sup>78</sup> Thomas More, *Utopia* (London: Cassell, 1901 [1516]). See also Quentin Skinner, ‘Thomas More’s *Utopia* and the Language of Renaissance Humanism’, *The Languages of Political Theory in Early Modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987), 123-57.

or Spayne, they shall not dare to offer us any anoye but suche as we maye easylye revenge wth sufficient Chastisement to the unarmed people there.

Yf they will not suffer us to have any Comodyties of theres without Conqueste wch doethe require long tyme, yet maye we maynteyn our firste voyadges by the Sea fyshinge on the Coastes there, and by retorne of that Comodyties the Chardges shalbe defrayed wch is a matter of consyderacion in enterprises of Chardge.

Yf we fynde any kinges readye to defende their Tirratoryes by warre and the Countrye populous desieringe to expell us that seeke but juste and lawfull Traffique, then by reason the Ryvers be lardge and deepe and we lordes of navigacion, and they without shippinge, we armed and they naked, and at continuall warres one wth another, we maye by the ayde of those Ryvars joyne wth this kinge here or wth that kinge there at our pleasure and soe wth a fewe men be revenged of any wronge offered by them and consequentlie maye yf we will conquere fortifye and plante in soyles moste sweete, moste pleasaunte, moste fertill and strounge. And in the ende to bringe them all in subjection or scyvillitie for yt is well knowen they have bynne contented to submytte them selves and all that wch they possesse to suche as hath defended them againste there Enemyes speciallie againste the caniballes.<sup>79</sup>

By the time Hakluyt wrote his promotional pamphlets, then, the discourse of conquest had become mixed together with discrete issues of discovery, communication, and commerce across Europe, but was still nevertheless associated principally with territorial acquisition by force of arms.

What follows in this thesis is an enquiry into how contract and conquest were used by European corporations to secure their rights to territory along the American and African coastlines of the Atlantic Ocean during the seventeenth century. A number of questions necessarily arose in the New World as a result of the transposition of these European legal resources into foreign contexts. How were contracts of *emptio* and *venditio* framed in foreign territories to facilitate the transfer of immoveable property? How was *pretium* resolved and agreed upon in these unusual markets? How, at the end of these transactions, were contracts advertised by corporations to other interests in the New World? Did the lack of common faith and language impose any difficulties in these transactions? To what extent did a larger medieval controversy over the rights of infidels have any bearing upon corporate territoriality, jurisdiction, and warfare? Upon what *auctoritas* was corporate

---

<sup>79</sup> Pamphlet for the Virginia Enterprise ascribed to Richard Hakluyt (1585), *The Original Writings and Correspondence of the Two Richard Hakluyts*, ed. E. G. R. Taylor (London: Hakluyt Society, 1935), 2: 342.

warfare declared and waged? What could be the *causa* for war against native communities abroad? What kind of *res* would be involved in war, and how would it be divided up in *post bellum* contexts?

Some of these questions were considered more important to raise than others in the Atlantic World. In these jurisdictionally ambiguous regions, where indigenous governments were never considered to operate in a state of parity with imposed corporate regimes, Europeans took plenty of liberty with the standards set out in the law of contract and the law of war. Radically, they were often blended together, both for *de facto* and *de jure* purposes, and without any real threat of reprimand by a superior authority. This was a formidable offence.

## **Chapter 6: Contract and Conquest in Practice, 1607-1631**

Claiming rights of ownership by *praescriptio longi temporis*, and, for support, bureaucratising this intrusion by writing letters, displaying patents, and reading out charters, corporate actors deployed idiosyncratically European and medieval methods of legitimising settler colonialism. These techniques barely even worked on other Europeans abroad; certainly this kind of conduct had no impact upon the rights of non-European populations to things and land in the same space. To address the natural claim, corporations and individuals from Europe had to develop different strategies. The indigenous right to property could be acknowledged, and then transferred to European corporations, through the instrument of contract or the faculty of war. Having already explored some of the legal and ideological contexts of these instruments, this chapter will focus upon developments on the ground.

From early on, the Virginia Company of London explicitly adopted a stance of ignorance towards the pre-existing native claim. It has already been seen how, upon the departure of the first Jamestown settlers, a meeting was convened principally to discuss the likelihood of a Spanish counterclaim at the Chesapeake. There is more still to take from its recorded minutes. At this meeting, the London Council reflected on the nature of the potential indigenous counterclaim with brevity reflective of the topic's presumed importance. Now this represented a very different prospect. Regardless of how the validity of the company's claim would be measured against the preceding Spanish claim, the company's case was regarded 'absolutely to be good agaynst [th]e Naturall people' of Virginia. Towards the local inhabitants of the region, there was a less pressing need to establish a firm 'publique' stance; for as long as possible, it was thought, at least by 'some' in the Council, to be 'better to abstayne from this vnnessisary way of prouication, and reserue ourselues to [th]e defensiuie part'. The native policy of the Virginia Company of London, in sum, was to wait and see how local communities would receive the settlers. As it turned out, this was a policy that the Jamestown administration managed to uphold for only a short period of time.<sup>1</sup>

Unlike the valleys of the Fleuve Saint-Laurent and the Noort Rivier, where the dominant Iroquoian-speakers consolidated into a loose confederacy of 'Five Nations' to lord it over the

---

<sup>1</sup> A Justification for Planting in Virginia (1606-7), *RVCL* 3: 3.

region's Algonquian-speakers, the James River, and the Chesapeake Bay were the gateways onto territories solely comprised of Algonquian-speakers. Most but not all of these communities belonged to a large confederacy called 'the Powhatans' to the English, which was quite different in character to the Five (and later Six) Nations Iroquois. In New France and New Netherlands during the first half of the seventeenth century, Iroquoian communities variously considered to be Mohawk, Oneida, Onondaga, Seneca, or Cayuga associated with each other autonomously and eschewed any centralised government. In Virginia, by contrast, the Algonquian communities of the Powhatan confederacy appeared to profess at least nominal obedience to one powerful ruler, or werowance, known as Wahunsenacawh, who claimed both *imperium* and *dominium* in the region with a justification surprisingly akin to European notions of conquest. These Algonquian geopolitical circumstances – however much they may have been the product of the English imagination – clearly presented the Jamestown administration with a more formidable opponent in the form of Wahunsenacawh than they were expecting to receive in 1606.<sup>2</sup>

But with 'King Powhatan' residing upriver some 120 kilometres from Jamestown, the earliest encounters of the first settlers would not be with him, but with the local Algonquian-speaking communities of 'Pasphehay', upon whose land the first fortifications were constructed. Immediately curious, some of these locals approached the Jamestown settlers in the first weeks after the landing. Gunshot frightened them off, however, thwarting in the process the company's initial attempts to establish good relations with Wowinchopunck, the closest resident werowance to the new settlement. Native resistance thereafter came stealthily and increased steadily with every addition to the principal fort. Arrow wounds killed three settlers and a dog during the summer months of 1607, before a new strategy had to be devised.<sup>3</sup>

Efforts to broker peace with local Algonquian-speakers were reinvigorated over the next year by making recourse to trade. Identifying a demand among the community for copper, the

---

<sup>2</sup> John Smith, *The Generall Historie of Virginia, New England & The Summer Isles* (1624), in *The Travels of Captaine John Smith*, 2 vols (Glasgow: James MacLehose and Sons, 1907), 1: 62, 77, 79; William Strachey, in *The Historie of Travaile into Virginia Britannia* (London: The Hakluyt Society, 1849 [1612]), 55-6, 69-70, 101. For this, see also Andrew Fitzmaurice, 'Powhatan Legal Claims', in *Native Claims: Indigenous Law against Empire, 1500-1920*, ed. Saliha Belmessous (Oxford: Oxford University Press, 2011), 85-104. For context, see Andrew Fitzmaurice, *Humanism and America: An Intellectual History of English Colonisation, 1500-1625* (Cambridge: Cambridge University Press, 2003).

<sup>3</sup> A Relatyon [...] Written [...] by a Gent of ye Colony (May-June 1607), and Sir Walter Cope to Lord Salisbury (12 August 1607), in *The Jamestown Voyages Under the First Charter, 1606-1609*, ed. Philip L. Barbour (Cambridge: Cambridge University Press, 1969), 1: 96-7, 110. See generally Alfred A. Cave, *Lethal Encounters: Englishmen and Indians in Colonial Virginia* (Praeger: Santa Barbara, 2011), 23-44.

company attempted to win over their closest neighbours through bartering. Some success was made throughout 1608, even if the ready availability of copper saw its value decline by the end of the year and necessitated the importation of different items for trade. This restrained no abundance of optimism, however, about the prospects of establishing an everlasting friendship with the locals, and there was even hope of establishing an alliance with outlier communities (including the Manahoac and the Chickahominy) against the Powhatans – just as Champlain had done against the Iroquois.<sup>4</sup> Virginian similarities with New France end here, however, for it was also in this context that the Virginia Company of London was led into its first contemplations about the acquisition of title from Jamestown's native owners through the mechanism of contract.

It should not be surprising that this idea first emerged in discussions about the moral uncertainties of contract and trade with infidels generally, for there was much for Christians to ponder on the topic. In a sermon by the company's London preacher, William Crashaw, on 'the *doubt of lawfulness of the action*' of establishing a colony among non-Christians at the outset of 1610, all concerns were brushed aside. Trade was fine, if done in the right way, and for the right things. 'A Christian may take nothing from a Heathen against his will', Crashaw sermonised, 'except in faire and lawfull bargaine'. A lack of common faith could be put to one side, for the conversion of the locals to 'Civilitie' and 'Christianitie', Crashaw prophesied, would come later. Intercultural trade, in the meantime, was thoroughly endorsed, for 'it is most lawfull to exchange with other Nations, for that which they may spare, and it is lawfull for a Christian to have commerce in civill things even with the heathen'. With this unambiguous sanctioning of private law relationships between the settlers and 'the *Virginians*', Crashaw was careful to propose two conditions. First of all, such contracts could only be entered into with natives fairly, and at least on one side, faithfully: 'we will take nothing from the *Savages* by power nor pillage, by craft nor violence, neither goods, lands nor libertie, much lesse life'. The exemplary inclusion of 'lands' is telling. This was not in error, for the idea was repeated and expanded in the elaboration of

---

<sup>4</sup> Instruccions Orders and Constitucons (May 1609), *RVCL* 3: 19: 'Yf you hope to winne them and to pvide for yor selues by trade, you wilbe decaued for already yor Copper is embased by yor abundance and neglect of prisinge it'. Ralph Hamor, *A True Discourse of the Present State of Virginia, and the Success of the Affaires There till the 18 of June, 1614* (London: John Beale, 1615), 2, 12-5, after which follows Smith, *Generall Historie*, 1: 221-2. For Champlain and the discourse of conquest in New France, see below, chapter seven.

Crashaw's next contractual condition, namely, that the property involved in such contracts was to be transferred free of controversy. 'Secondly', he clarified,

we will *exchange* with them for that which *they may spare*, and we doe neede; and they shall have that which we may spare, and they doe much more neede. But what may they spare first, *land and roome* for us to plant in, their country being not replenished by many degrees: in so much as a great part of it lieth wild & inhabited of none but the beasts of the fieldes [...] but as the present state of *England* stands, we want roome, and are likely enough to want more.<sup>5</sup>

It is no coincidence that William Strachey, who was in Virginia at the time of Crashaw's London sermon, returned to England in 1611 of the same mind. It was his 'praemonition to the reader' in the *Historie of Travaile* (1612), that 'every foote of land which we shall take unto our use, we will bargaine and buy of them, for copper, hatchetts, and such like comodities'.<sup>6</sup>

There are a few tantalising clues that such a practice was already in effect by the time of Strachey's publication. If the Virginia Company of London's promotional tract of 1610 is to be taken at its word, a fair purchase of Jamestown had already taken place sometime in the preceding three years. This – the first mention anyplace of a Virginian land purchase – would provide but one of five reasons in the *True Declaration of the Estate of the Colonie in Virginia* (1610), for why 'it is not unlawfull, that wee possesse part of their land, and dwell with them, and defend our selves from them':

Partlie because there is no other, moderate, and mixt course, to bring them to conversion, but by dailie conversation, where they may see the life, and learne the language each of other.

Partlie, because there is no trust to the fidelitie of humane beasts, except a man will make a league, with Lions, Beares, and Crocodiles.

Partlie because there is roome sufficient in the land (as *Sichem* sometime said) for them and us: the extent of a hundred miles, being scarce peoples with 2000 inhabitants.

Partlie, because they have violated the lawe of nations, and used our Ambassadors as *Ammon* did the servants of *David*: If in him it were a iust cause to warre against the Ammonites, it is lawfull, in us, to secure our selves, against the infidels.

---

<sup>5</sup> William Crashaw, *A Sermon Preached in London before the Right Honorable the Lord Lavvarre, Lord Gouvernour and Captaine Generall of Virginea, and Others of his Maiesties Counsell for that Kingdome* (London: William Welby, 1610), D3-D4.

<sup>6</sup> Strachey, *Historie of Travaile*, 19.

But chieflie because *Paspehay*, one of their Kings, sold unto us for copper, land to inherit and inhabite. *Powhatan*, their chiefe King, reveived voluntarilie a crowne and a sceptre, with a full acknowledgement of dutie and submission.<sup>7</sup>

The references here to the mixed diplomatic fortunes with Powhatan and the resultant prospects of war will be contemplated shortly. For now, the dilemmas of New World contracts represented in this tract require reflection. Language barriers, held the first assertion, and a lack of trust in the absence of a common faith, held the second assertion, combined to render contracts for land in Virginia problematic.<sup>8</sup> Besides, held the third assertion, there was ‘roome sufficient’ for settler society and native society to co-exist without qualm. This fusion here – of the restrictive principles of contract from medieval Christendom with a selective rendering of natural law thinking on occupation – was puzzling enough without the final assertion, which held that the land had been sold to the Virginia Company of London regardless of the stated incompatibilities of the legal interface in place.<sup>9</sup>

It becomes quite difficult to assess the prevalence in Virginia of transactions for ‘land to inherit and inhabite’ after this. According to the tobacco farmer John Rolfe, who wrote in 1616, private land purchases undergirded the farm of every settler by that time. These ‘places or seates are all our owne ground, not so much by conquest, which the Indians hold a just and lawfull title, but purchased of them freely, and they are verie willingly selling it’.<sup>10</sup> Here was a scene hinted at later by Captain John Smith, with his throwaway comment in the *Generall Historie* (1624) presenting Virginia as a ‘deare bought land’.<sup>11</sup> But there is no indication of land purchases in the official records of the company (which are admittedly sparse) until eight years after the publication of *True Declaration*. That comes in May of 1618, when ‘Copper one hundred’ appears in the company inventory ‘for the purchase of the land and corn’. This is followed in November of the same year, by Sir George Yeardley’s gubernatorial instructions establishing

---

<sup>7</sup> Councill of Virginia, *True Declaration of the Estate of the Colonie in Virginia* (London: William Barret, 1610), 10-11.

<sup>8</sup> It is remarkable that these well-known passages about language and faith as impediments to covenant have not yet, in a vast historiography, been considered in relation to the ideas of Roman and canon contract law.

<sup>9</sup> See Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014), 59-84; Fitzmaurice, *Humanism and Empire*, 137-66.

<sup>10</sup> John Rolfe, *Relation of the State of Virginia* (1616), in *Virginia Historical Register and Literary Advertiser* 1, 3 (1848), 106.

<sup>11</sup> Record of a Meeting (18 May 1618), *RVCL* 3: 96; Smith, *Generall Historie*, 1: 232.

that ‘the Lands formerly *conquer’d or purchased* of the Paspheies and of other grounds next adjoining’ were all to be ‘called the Companies land’.<sup>12</sup>

In the absence of any extant written contracts or reliable references thereto, any enquiry into the land purchases conducted in Jamestown during the administration of the Virginia Company of London must be necessarily speculative. The language of these passages above makes for no compelling evidence on its own, but the coupling of conquest and contract seems noteworthy. The conflation of lands ‘conquer’d’ and ‘purchased’ in the company’s instructions for Yeardley might convey the sameness of effect, and in that respect, reflects the early medieval meaning of the word ‘conquest’, akin to acquisition. If the increasingly common meaning of ‘conquest’, in relation to warfare, is meant to be conveyed, then of course, in the ideological context of European colonialism in the Atlantic, this entailed a very different legal process to ‘purchase’. If synonymy rather than alternation was implied by the company here, this was an implication all the more interesting for coming in the wake of Rolfe’s *Relation* of 1616, wherein a firm distinction is made between the two processes, to say nothing of the contemporaneous musings of Champlain in New France, for whom a pressing juxtaposition existed between ‘conversion’ and ‘conqueste’.<sup>13</sup>

If such ambiguity of meaning was not yet anachronistic in Virginia in 1618, it would become so after only a few years. By 1625, things had changed entirely – for it was in this seven-year window that purchase and conquest came to reflect very different methods of establishing foreign titles afresh, not just in Virginia but right across the North American region. To explain this, it will be necessary to explore the diplomacy between the Virginia Company of London and the Powhatan confederacy, from their very beginnings in 1607 right up to 1622, and to take note of the arrival – in the territory located between New France and Virginia – of the Geoctroyeerde Westindische Compagnie.

During the first two years of the Jamestown settlement, John Smith was the Virginia Company of London’s principal envoy to the upriver Powhatans. He was lucky to escape with his life on a few occasions, but unlucky in all of his negotiations. Never did Wahunsenacawh

---

<sup>12</sup> Record of a Meeting (18 May 1618), *RVCL* 3: 96; Instructions to George Yeardley (18 November 1618), *RVCL* 3: 99. This evidence convinces Wesley Craven that ‘the right of settlement’ was ‘purchased’ for Jamestown in this period, but this is perhaps making too much of this language. As Andrew Fitzmaurice explains, this was a ‘spurious’ claim. Wesley Frank Craven, ‘Indian Policy in Early Virginia’, *William and Mary Quarterly* 1, 1 (1944), 68; Fitzmaurice, ‘Powhatan Legal Claims’, 100.

<sup>13</sup> For this, see below, chapter 7.

give Smith his permission for the settlers to remain at Jamestown, nor was Smith offered any permanent military alliance or trade relationship. Unprepared for the diplomacy at hand, Smith was also punching above his weight. The only temptations he could offer Wahunsenacawh, beyond a few copper pots and tomahawks, was English labour to build a new house and, with this, a special ‘Crowne’. As Smith explained, these ‘Presents’ had come from King James, sentiments which elicited only a grim response from Wahunsenacawh: ‘he neither knowing the majesty nor meaning of a Crowne, nor bending of the knee’, the leader of the Powhatans declined to participate in the company’s coronation. As Wahunsenacawh confided to Smith, ‘I am also a King, and this is my land’.<sup>14</sup>

Smith’s account of these interactions in the *Generall Historie* (1624) can only be trusted so much, but his language to convey the scepticism of ‘King Powhatan’ deserves our attention. ‘Some doubt I have of your comming hither’, Wahunsenacawh is said to have told Smith at their final meeting,

that makes me not so kindly seeke to relieve you as I would: for many doe informe me, your comming hither is not for trade, but to invade my people, and possesse my Country, who dare not come to bring you Corne, seeing you thus armed with your men. To free us of this feare, leave aboard your weapons, for here they are needlesse, we being all friends, and for ever Powhatan.<sup>15</sup>

This interchange, according to Smith, was followed a few days later by a great ‘discourse of peace and warre’, in response to which Smith could only assure the Powhatans of his ‘love’. Each was insincere at this stage, preparing instead to ambush the other, though Smith would only learn of Wahunsenacawh’s plans through Pocahontas, who ‘came through the irksome woods’ to warn Smith that her father intended to kill all of them that evening.<sup>16</sup>

Smith and his men then quickly fled to Jamestown, where enthusiasm for future diplomatic engagement with Wahunsenacawh waned to an all-time low. In May of 1609, new orders from the London Council encouraged Governor Gates no longer to open a dialogue with ‘Powhatan’, but to imprison him or otherwise force him into submission, for ‘he loved not our neighbourhood and therefore you may no way trust him’.<sup>17</sup> Just like Québec at the same time,

---

<sup>14</sup> Smith, *Generall Historie*, 1: 141-2.

<sup>15</sup> Smith, *Generall Historie*, 1: 157

<sup>16</sup> Smith, *Generall Historie*, 1: 158-63.

<sup>17</sup> Instrucons Orders and Constitucons (May 1609), *RVCL*, 3: 18-9.

Jamestown lacked the resources to launch offensive campaigns upriver, so violent attention was turned instead to the closest nearby communities, who had come under fresh suspicion of collaborating in ‘Powhatans Subtell Trecherie’. In August of 1610, George Percy received a ‘comission’ from the Council at Jamestown, ‘to take Revendge upon the Paspheans and Chiconamians’. With seventy soldiers and an ‘Indyan guyde’, Percy made for the ‘paspahas town’. Here, as he relates with gory detail in his *Trewe Relacyon* (1625), many men, women, and children were slain.<sup>18</sup> Absent of any considerable motive to embellish his account of the massacre, Percy’s description gives pause to contemplate anew the reference in subsequent company instructions to ‘lands formerly conquer’d or purchased of the Paspheies’: perhaps the fate of this country was not one or the other, but both.

Conflict in this ‘warre’ – if such it could be called – continued for the next two years until Wahunsenacawh’s men managed to thieve most of the company’s ‘swords, peeces, & other tools’, as Hamor account relates.<sup>19</sup> Pocahontas’s capture by Samuel Argall changed the game: Wahunsenacawh’s daughter would be held under ransom until her father could bear no more, before a ‘firme peace (not againe easily to be broken)’ was finally arranged between the company and the confederacy. Key to this peace was the marriage of Pocahontas to John Rolfe in April of 1614.<sup>20</sup> So ended the conflict.

In the wake of this peace, the company conducted its affairs with heightened antagonism towards the indigenous population, aggravating some and displacing others. Presuming a feudal right of inheritance and a clear title to the region, the company exacted tributes in corn from nearby Algonquian communities and granted a number of tobacco farms to new colonists along the James River. New conversions were made but old ‘bargaines’ dissolved. A handful of colonists took to thieving corn from nearby indigenous farmers, which led inevitably to affrays here and there. By the start of the 1620s, the patience of Wahunsenacawh’s youthful and aggressive successor, Opechancanough, was wearing thin. The response of the Powhatan

---

<sup>18</sup> George Percy, *A Trewe Relacyon of the p[ro]cedings and ocurrentes of Momente w[hi]ch have hapned in Virginia from the Tyme S[i]r Thomas Gates was Shippwrackte upon the Bermudes An[n]o 1609 untill my dep[ar]ture owtt of the Cowntrey w[hi]ch was in An[n]o D[omi]ni 1612* (1625), faithfully reproduced with valuable commentary by Mark Nicholls, ‘George Percy’s “Trewe Relacyon”: A Primary Source for the Jamestown Settlement’, *Virginia Magazine of History and Biography* 113, 3 (2005), 212-275, 253.

<sup>19</sup> Ralph Hamor, *A True Discourse of the Present State of Virginia, and the Success of the Affaires There till the 18 of June, 1614* (London: John Beale, 1615), 6.

<sup>20</sup> Hamor, *True Discourse*, 2.

confederacy under his control was to launch a brutal raid on Jamestown at the dawn of spring in 1622, during which some 350 settlers were killed.<sup>21</sup>

The consequences of Opechancanough's resistance campaign were massive. Previously, talk of conquest had only been hypothetical – as for instance in 1609 when Robert Gray speculated that a 'warre uppon barbarous and savage people', to 'make a conquest of them', would be lawful simply *because* they were barbarous and savage (*contra Leyva*).<sup>22</sup> In response to the Powhatan rising, however, the conditions were created for a discourse of conquest to flourish in the colony. Now, there was retaliatory cause for a just war. '[N]ow', John Smith wrote upon learning of the early massacres in 1622, 'we have just cause to destroy them by all meanes possible'. This, in Smith's mind, presented the easiest method at the company's disposal 'to civilize them'.<sup>23</sup>

Smith here was echoing the Jamestonian Edward Waterhouse, who was the strongest advocate of this line of thinking in the wake of the massacre. In his 'Declaration of the State of the Colony and a Relation of the Barbarous Massacre' which he sent to the London company directorate in 1622 – which, presumably, Smith read – Waterhouse explained that 'the way of conquering them is much more easie then of ciuilizing them by faire meanes'. 'Besides that', Waterhouse continued, 'a conquest may be of many, and at once; but ciuility is in particular, and slow, the effect of long time, and great industry'. Mortifying in his description of 'that fatall Friday morning', when the 'Natiues' acted 'contrary to all lawes of God and men, of Nature & Nations', Waterhouse impressed upon his London readers that a great change in the *status quo* was now necessary:

So that we, who hitherto haue had possession of no more ground then their waste, and our purchase at a valuable consideration to their owne contentment, gained; may now by right of Warre, and law of Nations, inuade the Country, and destroy them who sought to destroy vs: whereby wee shall enioy their cultiuated places, turning the laborious Mattocke into the victorious Sword (wherein there is more both ease, benefit, and glory) and possessing the fruits of others labours. Now their cleared grounds in all their villages

---

<sup>21</sup> Alden T. Vaughan, "'Expulsion of the Salvages': English Policy and the Virginia Massacre of 1622", *William and Mary Quarterly* 35, 1 (1978), 57-84; Cave, *Lethal Encounters*, 101-16.

<sup>22</sup> See, for example, Robert Gray, *A Good Speed to Virginia* (Felix Kyngston: London, 1609), 24: '[A]ll Politicians doe with one consent holde and maintaine, that a Christian King may lawfullie make warre uppon barbarous and savage people, and such as live under no lawfull or warrantable government, and may make a conquest of them, so that the warre be undertaken to this ende, to re-claime and reduce those savages from their barbarous kinde of life, and from their brutish and ferine manners to humanitie, pietie, and honestie'.

<sup>23</sup> Smith, *Generall Historie*, 1: 286: '[I]t is more easie to civilize them by conquest then faire meanes; for the one may be made at once, but their civilizing will require a long time and much industry'.

(which are situate in the fruitfulest places of the land) shall be inhabited by vs, whereas heretofore the grubbing of woods was the greatest labour.<sup>24</sup>

Conquest on these terms – for punishment and the acquisition of land, reasons removed from the question of infidelity – became official company policy not long after this. From London in August of 1622 came a strong endorsement of retaliatory violence; this was followed in October with instructions to inflict ‘sharp revenge vppon the bloody miscreants, even to the measure that they intended against vs’, but more, to the extent of ‘rooting them out’ entirely. To the minds of the London directors, it amounted to ‘a Sinne against the dead’ if the Jamestown settlers were merely to ‘abandon the enterprize’ without reclaiming ‘the possession, for w[hich] so many of o[ur] Brethren haue lost their lives’.<sup>25</sup> This was an endorsement of war.

Yet even with this freedom to quell the resistance, it would take some time for the Virginia Council and the company militia to secure a victory. The conflict dragged on until early 1624. Throughout, the Virginia Council remained defiant against its ‘barbarous and p[er]fidious enemys’, leaving holds on none of its bars. As the Council told the London board in January of 1624, the ‘rules of Justice’ no longer applied in Virginia, for:

wee hold nothinge iniuste, that may tend to their ruine, (except breach of faith) Stratagemes were ever allowed against all enemies, but wth these neither fayre Warr nor good quarter is ever to be held, nor is there other hope of their subversione, who ever may informe you to the Contrarie [...] <sup>26</sup>

In this way, the company’s retaliation, the settlers made sure, and the Jamestown and London councils authorised, was to be a war of conquest, shattering whatever claim the Powhatans had left to the Chesapeake. These spoils the crown was all too happy to clean up, as the royal administration authorised by King James I formally assumed the title to the region later in the year.

This was very different to what was happening elsewhere along the coast of Atlantic North America. In that same year, 1624, the Geoctroyeerde Westindische Compagnie appointed its new governor, Willem Verhulst, to Nieuw Nederlandt. A number of colonists also made their

---

<sup>24</sup> Edward Waterhouse, ‘A Declaration of the State of the Colony and [...] a Relation of the Barbarous Massacre’ (1622), *RVCL*, 3: 556-7.

<sup>25</sup> Virginia Company of London to the Governor and the Council in Virginia (1 August 1622), Virginia Company of London to the Governor and the Council in Virginia (7 October 1622), *RVCL* 3: 672-3, 683.

<sup>26</sup> Council in Virginia to the Virginia Company of London (30 January 1624), *RVCL* 4: 450-5.

way across the Atlantic into the region, including a number of Walloon families, with dreams and promises of landholding. Verhulst was charged with the job of constructing good defences, opening up the fur trade, and consolidating the presence of the settlers into one spot. The first set of instructions issued from the Heren XIX emphasised, tellingly, that *contract* would be his most important tool. Foreshadowing a great change in affairs across North America, these instructions require our close observation.

All relations with the locals (*der Indianen*) were to be conducted strictly with ‘friendliness’ (*vriendelyckheyd*). Therefore, strictly ‘all contracts’ (*alle contracten*) were to be entered into with ‘honesty, truthfulness, and sincerity’ (*vromicheyt, ghetrouwicheyt end sinceriteyt*).<sup>27</sup> This was something like good faith, Teutonified. These contracts were to be used to negotiate a number of preferential trade deals with local communities, to ‘exclude foreign nations’ from gaining an entry, which had been the *modus operandi* of the Vereenigde Oostindische Compagnie for some time in the Spice Islands.<sup>28</sup> Less conventional, and more important for our purposes, is a separate function for contracts that was endorsed by the Heren XIX. Land purchases were ordered through contracts, and Manhattan Island was specially earmarked for acquisition. ‘If upon the said island any Indians are living or make a claim thereto, the same applying to other places advantageous to us, that they are not to be driven out with violence or threats, but they with good words [*geode woorden*] should be persuaded or otherwise provide for their satisfaction or let them live beneath us, making up a contract [*contract*] that they can sign in their manner, for such contracts in other circumstances may be very useful to the Company’.<sup>29</sup>

Definitively with these instructions of 1625, a new convention had emerged for companies seeking to take up land in North America. This new convention was to use private

---

<sup>27</sup> Instructie voor Willem Verhulst (January 1625), *De Stichting van New York in Juli 1625: Reconstructies en Nieuwe Gegevens Ontleend aan de Van Rappard Documenten* (hereafter: *SNY*), ed. F. C. Wieder (‘s-Gravenhage: Martinus Nijhoff, 1925), 122.

<sup>28</sup> Instructie, *SNY*, 126.

<sup>29</sup> See Naerdere Instructie voor Willem Verhulst (25 April 1625), *SNY*, esp. 141-2: ‘Inghevalle opt voorsz eylant eenighe Indianen mochten wonen ofte yet daer op pretenderen, als oock op andere plaetsen ons dienstichst zynde, datmen de selve niet met ghewelt ofte dreygemente van daer verdryve, maer haer met goede woorden daer toe persuaderen ofte andersints tot haer ghenoeghen haer yet daer voor geven ofte onder ons laten wonen, maeckende daer van een contract dat sy op haere manieren onderteyckenen, welcke contracten by andere ghelegentheden de Comp seer dienstich kunnen zyn’. Subsequent instructions for Verhulst, issued on April 25th of 1625, confirmed that contract was the only means at his disposal to acquire ‘property’ (*eygendom*) and ‘possession’ (*besith*) of Indian land, not through war, which was considered contrary to the will of God and was an action reserved only for the ‘public’ (*openbaere*) enemies of the Dutch: the Spanish.

contracts to facilitate the transfer of land between indigenous interests and corporate interests. On its own, that premise would make it radical enough, given the popular presumption within private legal thought that contracting interests needed to share a common faith, a common language, and with respect to immovable property, a common jurisdiction. But there is another aspect to these instructions that makes them even more radical, as Francis Jennings was perhaps the first to appreciate as long ago as 1971.<sup>30</sup> The last passage, which declares that ‘welcke contracten by andere ghelegheden de Comp seer dienstich kunnen zyn’, implied an unusual new application for New World contracts. Not only could the Westindische Compagnie’s contracts facilitate the transfer of immovable property in a foreign jurisdiction; now, after 1625, the company could confer upon itself a landholding monopoly in its *own* jurisdiction, which was to be used subsequently to disqualify the arrival of other external interests. In this respect, contracts were ‘very useful’ indeed.

The purchase of Manhattan probably took place in 1626, after Verhulst’s replacement by Peter Minuit, although there is some debate when and how.<sup>31</sup> The circumstantial evidence is fairly clear, however, that the island was purchased in the summer of that year, with news reaching Amsterdam of the all-important contract in November 1626. Several other purchases would follow, none more exemplary than that which Kiliaen van Rensselaer had endorsed by the Raad at Fort Amsterdam on the 13th of August, 1630. The antiquarian language of this contract, translated into English in 1908 by A. J. F. van Laer, is impervious to paraphrasing:

We, the director and council of New Netherland, residing on the island the Manahatas and in Fort Amsterdam, under the jurisdiction of their High Mightinesses the Lords States General of the United Netherlands and the Chartered West India Company, Chamber of Amsterdam, do hereby testify and declare, that on this day, the date underwritten, before us appeared and presented themselves in their proper persons, Kottamack, Nawanemit, Abantzeene, Sagiskwa and Kanamoack, owners and proprietors of their respective parcels of land extending up the river, south and north, from the said fort to a little south of Moeneminnes Castle, belonging to the aforesaid proprietors jointly and in common, and the land called Semesseck, belonging to the aforesaid Nawanemit individually, lying on the east bank from opposite Castle Island to the above mentioned fort; also, from Petanock, the mill creek, north to Negagonse; in extent about three leagues; and declared freely and advisedly that for and on account of certain quantity of merchandise which

---

<sup>30</sup> Francis Jennings, ‘Virgin Land and Savage People’, *American Quarterly* 23, 4 (1971), 529-30.

<sup>31</sup> For the debate, contrast Charles T. Gehring, ‘Peter Minuit’s Purchase of Manhattan Island—New Evidence’, *De Halve Maen* 55, 1 (1980), 6-7; C. A. Weslager, ‘Did Minuit Buy Manhattan Island from the Indians?’, *De Halve Maen* 43 (1968), 5-6. See, more recently, Paul Otto, ‘Real Estate or Political Sovereignty? The Dutch, Munsees, and the Purchase of Manhattan Island’, *Opening Statements: Law, Jurisprudence, and the Legacy of Dutch New York*, ed. Albert M. Rosenblatt and Julia C. Rosenblatt (Albany, NY: State University of New York Press), 67-82.

they acknowledged to have received in their hands and possession before the execution hereof, by virtue and title of sale, they hereby convey, cede and make over to and for the behoof of the Hon. Kiliaen van Rensselaer, absent, for whom we, *ex officio* and with due stipulation, accept the same, namely, the respective parcels of land hereinbefore specified, with the timber, appurtenances and dependencies thereof, together with all the interests, rights and jurisdiction to them the grantors conjointly or severally belonging, constituting and substituting the said Hon. Rensselaer in their stead, place and right and in the real and actual possession thereof, and at the same time giving him, or those who may hereafter acquire his honor's interest, full, absolute and irrevocable power, authority and special command to hold, in quiet possession, cultivation, occupation and use, *tanquam actor et procurator in rem suam ac propriam*, the said land acquired by the aforesaid Hon. Rensselaer; also, to dispose of, do with and alienate it, as his honor or others should or might with his other and own lands and domains acquired by good and lawful title, without the grantors retaining therein, reserving or holding in the least any part, right, interest or authority whether of property, command or jurisdiction, but on the contrary, hereby, desisting from, yielding, giving up and renouncing the same forever, for the behoof aforesaid ; further promising not only forever to hold fast and irrevocable, to observe and to fulfil this, their conveyance, and whatever may by virtue thereof be done, but also to protect against eviction from the aforesaid land, *Obligans et Renunciants A bona fide*. In testimony whereof, this is confirmed by our usual signatures, with the ordinary pendant seal.<sup>32</sup>

Dutch contracts looked good. In time, exception would be taken to them in New England, albeit not, at first, regarding the lands around Hudson River, but instead regarding those lands the Connecticut River. In the months following the debacle of the *William*, and the repulsion of its visit by the Westindische Compagnie's men, the Governor of the Massachusetts Bay Company John Winthrop addressed Westindische Compagnie Governor Wouter van Twiller personally with a reminder that the Connecticut River was the King of England's domain. That it was now a new context, with new rules for the taking up of land, was clear in van Twiller's response (or at least, in the translation one of Winthrop's linguists was able to provide for him):

That w[hi]ch you alleadge Concerneing the use of the River w[hich] you Instance the kinge of England hath graunted to his Subjects and therefore itt seemes strange unto you, that wee have taken possession thereof; It seemes very straunge unto mee, who for my owne [...] Coulede wishe that his Ma[jesty] of England and the Lords of the States Generall Concerneing the Limitts and p[art]ing of theis Quarters, would agree. And as good neighbors wee might Live in these Heathenish Countryes. And therefore I desire you soe longe to Deferr yo[u]r p[re]tence or claim of the said River untill the Kinge of

---

<sup>32</sup> Certificate of Purchase from the Indians of Land on the West Side of the Hudson River from Smacks Island to Moenemin's Castle and of Tract of Land on the East Side opposite Castle Island and Fort Orange (13 August 1630), *VRBM* 166-8.

England and our Superior Magistrates or Governo[rs] bee as (Concerneing the Same) Agreed. I have in the name of the Lords the States gen[eral] and the authorized West India Company taken [...] possession the fore mentioned River And for Testimony thereof have sett upp an howse on the North side of the said River with intent to Plant &c.<sup>33</sup>

About this, van Twiller assured Winthrop, there was no cause for complaint in New England. Contract was only the fairest method of acquiring title for all companies. And this rang true regardless of paperwork or the pretence of their endorsing authorities, be that the King of England or the Staten Generaal in the United Provinces:

Itts not the Intent of the States to take the Land from the poore Natives as the Kinge of Spaine hath done by the Popes Donation but rather to take itt from the said Natives, att some Reasonable and Co[n]venient price, w[hich] god be prayed, wee have done hitherto. In this p[ar]te of the world are Divers Heathen Landes that are Emptye of inhabitants, soe that of a little p[ar]te or portion thereof there needes not any question. I should bee very sorrye that wee should bee Occation that the kinges M[ajesty] of England and the Lords the States gen[eral] should fall into anye contention'.<sup>34</sup>

Winthrop would take some persuading on the question of the king's title, though he would have concurred – in the first place anyway – with the empty land thesis, an idea which will be explored in the next chapter. Here, however, the gradual acceptance of both contract and conquest in New World applications from 1607 to 1631 must be recognised. The critical years were those between 1618 and 1625. In this period, the Virginia Company of London apparently entered into contracts with locals and explicitly waged war against them, both actions performed for the purpose of fortifying a claim to land. These measures were appraised to be just for sundry opportunistic reasons, some of which were fairly radical for the time. Moreover, if a fresh title was availed through conquest as the company assumed, there was no certainty, for a short period anyway, *where* such a title fell. King James removed the need to enquire too deeply into this question when he dissolved the company and established a crown colony in its place.<sup>35</sup> The title went to the crown but only by default, and the issue would arise again. The arrival of the Dutch in a

---

<sup>33</sup> Wouter van Twiller to John Winthrop (4 October 1633 [Sept 24 o.s.]), NAUK CO 1/6, 213. His words were translated by one of Winthrop's Dutch offsidiers, with the original Dutch letter sadly missing. The particularly ambiguous word in this passage I expect is given by the English *covenant*, even if it has been translated as *convenient*.

<sup>34</sup> van Twiller to Winthrop (4 October 1633), NAUK CO 1/6, 213.

<sup>35</sup> Wesley Frank Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (Oxford: Oxford University Press, 1932). See also below, 238-9.

region to the north of Virginia in this period, meanwhile, saw the first implementation of a comprehensive land purchasing programme in America. Barriers of faith and language were pushed to one side. A just price may have been spoken of but it was never evaluated. Crucially, the Dutch gave these contracts an exclusionary function, using them to advertise the Westindische Compagnie's rights to land to European competitors otherwise unobliged to acknowledge its jurisdiction. Both companies established radical precedents, it will be shown, but none so radical as the French companies by their outright ignorance of the native claim, to which this thesis will now turn.

## **Chapter 7: Evasion in Practice, 1562-1663**

The previous chapters reveal the beginnings of what would become a widespread practice of acknowledging an indigenous right to property purely for the sake of transferring titles to European corporations and from there binding them within the intruding jurisdiction. There was an alternative method, however. Sometimes corporations in the seventeenth-century Atlantic never made any attempt to secure their rights of occupation against those of pre-existing communities. Indeed, between outright ignorance and outright recognition, there were great variations in corporate policies towards native title. This chapter will explain some of the causes of these variations, and identify some of the factors which allowed corporations to evade the obligation to extinguish patches of native title by legal methods. It begins with the premise that English and French regimes ignored native land rights for the longest times, and from there it explains what circumstances led to periodic variations. This is somewhat unconventional for the historiography. The mass acquisition of territory cannot, any longer, be accepted as a *fait accompli*; there were pockets where extinguishment took place (through contract and conquest) and there were pockets where it did not (through evasion). For a combination of ideological, political, geographical, and demographic reasons, some corporations just did not transact with organised communities for land in the seventeenth-century Atlantic World. This chapter asks why.

One corporation contemplated in this study was different to the others of the period, insofar as it enjoyed a constitutional reason to avoid the recognition of native title. That corporation was the Irish Society, whose constituent London companies received their land grants directly from the crown. This circumstance – only possible after successive late-medieval waves of English political expansion and legal contraction across the island – makes the Londonderry plantation a stubborn addition to the comparative framework of this study. But the justification of its inclusion should be clear in the minds of historians with a later period of imperial history in mind, when the role of the English officialdom was more direct in the foundation of colonies, and the Crown presumed a foreign title *before* granting a portion of that right to corporations. Similarities, in this respect, might be drawn to Sierra Leone (1789-1808) or Australia and New Zealand (1824-1850), where land companies were installed by Parliament subsequent to grand, if spurious, declarations of

royal ownership.<sup>1</sup> Although it is not for this dissertation to explore these comparisons more closely, it is important to retain Ireland in our focus especially as it provides an interesting contrastive example of how foreign land regimes were considered on the north-east side of the Atlantic, which would be very different to the north-west.

A remarkable series of developments provided James I with the enjoyment, ‘*in demesne* and actual possession’, of all 3,798,000 acres of Armagh, Cavan, Coleraine, Donegal, Fermanagh, and Tyrone.<sup>2</sup> The beginning of this claim can be traced back to Elizabeth I’s wholesale acquisition of title to ‘the country of Tyrone and to other Countries and Territories in Ulster’ by an unusual act of Irish parliament in 1569.<sup>3</sup> In practice, the claim of the crown to the lands of northern Ireland on this basis was specious. Retroactively passed two years after the death of Séan Ó Néill, the Act of Attainder of Shane O’Neill (or ‘the 11th of Elizabeth’ as the unusual law was commonly called in Ireland) forfeited far more to the crown than the area actually under his control, which in any case was an area incredibly contested by those within his own family as well as his neighbours.<sup>4</sup> The effects of this law were only ever real in the minds of English officials posted to Ireland, and were certainly not in the minds of the mostly Gaelic occupants of the region in question. Indeed, to the next generation of the northern Irish dynasty, the Act was considered a most antagonist intervention: ultimately one of many which led to a revolt in the twilight years

---

<sup>1</sup> See, generally, Alan Frost, *The Global Reach of Empire: Britain's Maritime Expansion in the Indian and Pacific Oceans, 1764-1815* (Melbourne: Miegunyah Press, 2003); Richard Wolfe, *A Society of Gentlemen: The Untold Story of the First New Zealand Company* (London: Penguin, 2007); John Manning Ward, *British Policy in the South Pacific, 1786-1893* (Sydney: Australian Publishing Co., 1948); A. L. Meston, *The Van Diemen's Land Company, 1825-1842* (Launceston: Launceston City Council, 1958); James W. St. G. Walker, *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone, 1783-1870* (London: Longman & Dalhousie University Press, 1976); Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989). For a flavour of these statutes of incorporation, compare 31 Geo. III c. 55, 5 Geo. IV c. 86, and 6 Geo. IV c. 39. See also House of Commons Parliamentary Papers (hereafter: HCPP), *Papers Respecting the Free Negroes Sent to Africa* (1789); HCPP (582), *Report from the Select Committee on New Zealand* (1840).

<sup>2</sup> Sir John Davies to Lord Salisbury (5 August 1608), *CSP Ireland, 1608-10*, 17.

<sup>3</sup> An Act for the Attainder of Shane Oneile, and the Extinguishment of the Name of Oneile, and the Entitling of the Queens Majestie, Her Heyers and Successors, to the County of Tyrone, and to Other Countries and Territories in Ulster (1569), *11 Eliz I c. 3.*, in *Statutes at Large, Passed in the Parliaments Held in Ireland* (hereafter: *SAL Irish*) (1786-1804), 1: 322-38.

<sup>4</sup> For a revealing overview of the Act in its context, see Ciaran Brady, ‘The Attainder of Shane O’Neill’, *British Interventions in Early Modern Ireland*, ed. Ciaran Brady and Jane Ohlmeyer (Cambridge: Cambridge University Press, 2005), 28-48.

of Elizabeth's reign, when from 1594, the O'Neills of Tír Eoghain and the Ó Domhnaills of Tír Chonail orchestrated a widespread rebellion.<sup>5</sup>

The war concluded in 1603 with the conditional surrender of Hugh Ó Néill and Rory Ó Domhnaill. For their pledges of loyalty to an English king, the men were rewarded with the earldoms of 'Tyrone' and 'Tyrconnell', though they would only retain them for a few years.<sup>6</sup> It was in this period that Sir John Davies, the Attorney-General for Ireland, led an executive and judicial program of land reform to pave the way for the outright termination of tanistry and gavelkind in Ulster, confirming the extinction of Gaelic tenures in the common law by the end of the first decade of the new century.<sup>7</sup> In the midst of all this, the unexpected Flight of the Earls in September of 1607 gifted James I the opportunity to bolster his title, hitherto based on an overambitious Irish statute and a few re-grants made subsequent to its passage, to an ostensibly Anglicised dominion. That opportunity came about by the organisation – and manipulation – of mass forfeitures in the north. To establish a radical crown title underneath the entire Ulster plantation, all of the lands belonging to Tyrone and Tyrconnell were confiscated. But this was just the first step. Additional measures were required for the 307,208 acres of territory later earmarked to fall into the possession of the companies of the London Irish Society, as this land appeared to fall beyond the borders of the abandoned earldoms.<sup>8</sup> Still it would be through the same mechanism of attainder, but implemented by much different justifications, that allowed this land to fall to the crown as well. To explain this, the focus of this chapter must set briefly

---

<sup>5</sup> The classic treatment remains C. P. Meehan, *The Fate and Fortunes of Hugh O'Neill, Earl of Tyrone, and Rory O'Donel, Earl of Tyrconnell* (Dublin: James Duffy, 1868). For formal assurances to 'the inhabitants of Tyrone and Tyrconnell that they will not be disturbed in the peaceable possession of their lands', see *CSP Ireland (1606-8)*, 263.

<sup>6</sup> The necessity of providing for pacified Irish nobility in such a way shows how incomplete the English 'conquest' of Ireland was at this turn of the century. These and many other 'surrenders' for re-entitlement involved land that was once considered to fall within the area delimited by the Act of Attainder (1569). Clearly it had been difficult to implement the Irish parliamentary land reform program to its very letter in the north. Not only did Irish occupancy and ownership endure the Act – and was implicitly recognised through the requirement of 'surrendering' to have done so – but that occupancy and ownership tended to conform, at least partially if not wholly, to Gaelic tenure.

<sup>7</sup> It was largely Sir John Davies who orchestrated this 'legal conquest of Ireland', so the historian Hans S. Pawlisch tells us in his important study of the period. See Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge: Cambridge University Press, 1985), 55-81.

<sup>8</sup> Figure comes from James Stephen Curl, 'Reluctant Colonisers: The City of London and the Plantation of Coleraine', *History Ireland* 6, 17 (2009), 30.

upon two loyal Irish knights of the north in 1607: Sir Cahir O'Doherty and Sir Donnell O'Cahan.

When Derry was 'refounded' by charter of James I in 1604, it was left under the direction of Sir Henry Docwra, though the land on which it sat, like the wider region more generally, remained heavily disputed.<sup>9</sup> Over the next few years in northerly Donegal, Cathaoir Ó Dochartaigh resided himself to a position of loyalty and appeared to support Docwra's administration of the town, until his patience with the heavy-handed bureaucracy of the English in transition-era Ulster was expended in the months following the flight in 1607. After some minor disagreements with an English military officer in early 1608, the once-loyal Ó Dochartaigh performed a great about-face and organised a small rebellion to lay siege to the town of Derry. Ultimately, his head would be put on a stake for these actions, with death in such a manner guaranteeing a posthumous attainder – felling all of Ó Dochartaigh's lands around Inishowen, or at least those which were not considered Tyrconnell's, to the crown.<sup>10</sup> Relieved, Derry town reverted to the administration of English crown officials, but the land itself remained strongly claimed by Domhnall Ballach Ó Catháin. This was his ancestral land of Coleraine, he protested, and it had been unfairly wrapped up in the crown's delimitation of Ó Néill's Tyrone (and indeed the land in question had been contested since before even the old days of Séan Ó Néill). Voicing his claims throughout 1607, but never to the point of jeopardising his good standing with his English overlords, Ó Catháin was much less complicit in his own demise than Ó Dochartaigh had been with his siege of Derry, but his terrible fate would be little different. In the heightened atmosphere of suspicion during and immediately after 'the rebellion of O'Doghertie', Ó Catháin was apprehended and delivered to Dublin quite out of the blue in February of 1608.<sup>11</sup> From prison, his desperate petitions went unanswered until a royal

---

<sup>9</sup> John McGurk, *Sir Henry Docwra, 1564-1631: Derry's Second Founder* (Dublin: Four Courts Press, 2005). That Ó Dochartaigh took such radical steps to protest the presence of crown administrators in the region gives us an indication of how desperate the situation seemed, to some at least, in the beginning of 1608.

<sup>10</sup> F. W. Harris, 'The Rebellion of Sir Cahir O'Doherty and its Legal Aftermath', *The Irish Jurist* 15, 2 (1980), 298-325. See also Frank W. Harris, 'The Law and Economics of High Treason', *Valparaiso University Law Review* 22, 1 (1987) 88-108.

<sup>11</sup> Brief Relation of the Passages in Parliament Summoned in Ireland (1613), *CCM: James I, 1603-23*, 279. The language of the passage indicates not only that 'escheat' was being applied in an idiosyncratic fashion in Irish legal discourse, but also that this language emerged before the ratification of the forfeitures and redistributions in question: 'By the flight of Tirone, Tirconnel, &c., the rebellion of O'Doghertie, and the

warrant for his arrest was delivered on the basis of six dubious counts of treason, for which he was sent from Dublin to the Tower of London, without trial, to spend the rest of his life.<sup>12</sup> The forfeiture of his land was then abruptly justified in an unusual but functional way – it was definitively considered to have been part of O’Neill’s country all along – thus leaving, on the eve of the Ulster plantation, ‘O’Cahan’s Country’ for the companies of the Irish Society to transform into ‘Londonderry’.<sup>13</sup>

In the two years following Ó Dochartaigh’s death and Ó Catháin’s imprisonment, this area, like the rest of Ulster, was rendered by maps and official rhetoric to be *de facto* ‘escheated’. In the early teens of the seventeenth century, all that remained for James I/VI was the formality of passing a few bills into law in the Irish parliament to confirm the forfeiture of Ó Dochartaigh’s land along with the exaggerated lands of Ó Néill and Ó Domhnaill and their followers.<sup>14</sup> Just in time for the delivery of the Irish Society’s charter in March 1613, the area had become *de jure* the crown’s before passing into the possession of the separate London companies involved in the venture over the course of the following year.

---

traitorous juggling of Sir Neale O’Donnell, O’Cahan, and others, six entire counties in Ulster were escheated’.

<sup>12</sup> For example, see The Humble Petition of Sir Donell O’Cahan to the Lords of the Privy Council (30 March 16[10?]), *CSP Ireland*, (1608-10), 412-3. See also R. J. Hunter, ‘O’Cahan, Sir Donnell Ballagh [Domhnall Ballach Ó Catháin] (d. 1626?)’, *Oxford Dictionary of National Biography* (hereafter: *ODB*), <http://www.oxforddnb.com/index/20/101020479/> (accessed 14 December 2015).

<sup>13</sup> An Abstract of His Majesty’s Title to the Temporal Lands in the County of Coleraine (1610), *CSP Ireland* (1608-10), 562-5. This reveals that no special Act of Attainder was required to ratify the forfeiture of O’Cahan’s Country. Rather, it was more expedient to disregard his original dissenting land claims, and instead consider ‘O’Cahan’s Country’ to have fallen to the crown as a result of the 11th of Elizabeth, and then subsequently, as a result of the Attainder Hugh O’Neill. Thus it was James I’s response to the Flight of the Earls and a retroactive reading of a questionable statute, rather than the alleged treason of Ó Catháin, that facilitated the installation of crown title and, from that, the transfer of the country to the Irish Society. Some of this land was availed to some of O’Cahan’s descendents, but their rebellion and death under similar circumstances put an end to the family’s Coleraine dynasty, by which time anyway the London companies were the controlling interests in the land.

<sup>14</sup> A Most Joyful and Just Recognition of his Majesties Lawfull, Undoubted, and Absolute Right and Title to the Crown of Ireland (1612), and An Act for the Attaindour of Hugh, Late Early of Tyrone, Rory, Late Earle of Tyrconnell; Sir Cahire O Dogherty, Knight, and Others (1612), *11, 12, and 13 James I c. 1 & 4*, in *SAL Irish*, 1: 432-4, 438-41. Escheat was traditionally a lordly device of reversion; forfeiture was the more appropriate job of the crown in the face of high treason. This technicality has been ignored by historians, one only presumes because it was a distinction that went ignored by law officers and officials from the eighteenth century, after which point it seems that ‘escheat’ became the dominant word for ‘forfeiture’, and lordly reversion for a number of plain reasons went out of fashion. See A. W. B. Simpson, *A History of the Land Law* (Oxford: Oxford University Press, 1986), 19-21.

Because of these atypical constitutional circumstances, the Irish Society was under no obligation to recognise the land rights of the pre-existing population, except insofar as they were rights of *tenancy* according to a newly introduced English model of tenure, or otherwise some meagrely reconfigured rights of lordship that were to be enjoyed entirely at the whim of the separate companies. It was a miserable predicament, understandably, for the Irish of the entire Ulster plantation, not just those of ‘Londonderry’. ‘With only two, or perhaps three exceptions, every native landlord, and every native tenant in the bounds of the six counties was dispossessed and displaced’ – writes the classic nineteenth-century historian of Ulster, George Hill – ‘and although a few of both classes were afterwards permitted to share slightly in the great land-spoil, it was only in some other and less attractive localities than their own’.<sup>15</sup>

The crown’s preparatory involvement in Ulster makes the Irish Society look like none of the other seventeenth-century Atlantic enterprises considered in this study, but the company will be unique only within the specific context at hand. Changes both to the role of the crown and to the responsibilities of corporations in British colonial endeavours during the long eighteenth century would combine to generate similar contexts out of drastically different parts of the world in a later period. For the moment though, only the Irish Society could establish itself abroad by grafting its claim onto those of its endorsing sovereign – King James I – rather than the legally disempowered ‘natives of the Kingdom of Ireland’ who, by the language of statute, became subjected to ‘the conquest of this realm by his Majesties most royal progenitors’.<sup>16</sup>

This is not to suggest, however, that all of the other corporations spread out across the Atlantic in this period automatically set out to establish a claim vis-à-vis the native claim. Some dawdled before acknowledging indigenous proprietary interests, as the Virginia Company of London did, while others ignored them outright for the longest time possible. Only a few lucky companies had good reason, grateful to demographic

---

<sup>15</sup> Rev. George Hill, *An Historical Account of the plantation in Ulster at the Commencement of the Seventeenth Century, 1608-1620* (Belfast: McCaw, Stevenson & Orr, 1877), ii.

<sup>16</sup> An Act of Repeale of Diverse Statutes Concerning the Natives of this Kingdom of Ireland (1612), *11, 12, 13 James I. c. 5, SAL Irish*, 1: 441-2: ‘... in former times, after the conquest of this realm by his Majesties most royal progenitors, Kings of England, the natives of this realme of Irish blood, being descended of those that did inhabite and possesse this land before the said conquest, were for the most part in continuall hostility with the English, and with those that did descend of the English, and therefore the said Irish were held and accompted, and in divers statutes and records were called Irish enemies...’.

circumstances, to act in such a way. The Somers Island Company and the English East India Company took no steps towards establishing their claims against pre-existing communities in Bermuda and St. Helena, to take two English examples, because these companies encountered only foreigners on these islands.<sup>17</sup> The syndicate of Jean de Biencourt de Poutrincourt and Antoinette de Pons likewise could likewise claim first possession after La Saussaye stumbled upon the aptly named Île des Monts-Déserts in 1613 – even if their luck was short-lived, as has been shown.<sup>18</sup> Of course, circumstances such as these were unique to the smaller islands of the Atlantic. By contrast, on island formations in the western Atlantic large enough to provide for the subsistence of small communities, the fate of these local people, fenced in by sea, was generally catastrophic – irrespective of the numbers or economic motivations of the newcomers.

To take an island similar in size to that of Ireland, a tragic example is Newfoundland. Here a small population of Beothuk people was antagonised but ultimately avoided by companies during the early stages of European corporate enterprise. The Verenigde Oostindische Compagnie's visit to the island in 1609 was brief and violent, though its details are sadly obscure, and ultimately, are inconsequential, for the company never again took any official interest in Newfoundland after its visits.<sup>19</sup> Much more is known about the activity of the London and Bristol Newfoundland Company from its founding in 1610 up to its destabilisation and ultimate disintegration a decade later. This corporation hoped to dominate the island's cod industry, but was expected to do so without a formal monopoly. Its letters patent were explicit that the company was not to impede the fishing of 'all persons of what nation soever', which even included 'our subjects who do at present or hereafter shall trade to the parts aforesaid for fishing'. Beyond this, the company's charter, delivered on May 2nd of 1610, deserves comment only because of its

---

<sup>17</sup> Jean Kennedy, *Isle of Devils: Bermuda under the Somers Island Company, 1609-1685* (London: Collins, 1971); C. H. Wilkinson, *The Adventurers of Bermuda: A History of the Island from its Discovery until the Dissolution of the Somers Island Company in 1684* (Oxford: Oxford University Press, 1958); Stephen Royle, *Company's Island: St Helena, Company Colonies and the Colonial Endeavour* (London: L. B. Tauris, 2007); William Foster, 'The Acquisition of St. Helena', *English Historical Review* 34, 135 (1919), 281-9; Philip J. Stern, 'Politics and Ideology in the Early East India Company-State: The Case of St Helena, 1673-1709', *Journal of Imperial and Commonwealth History* 35, 1 (2007), 1-23.

<sup>18</sup> For the Île des Monts-Déserts, see above, 115-7.

<sup>19</sup> See, however, *Henry Hudson the Navigator: The Original Documents in which His Career is Recorded*, ed. and trans. G. M. Asher (London: Hakluyt Society, 1860).

unusual discrediting of the Beothuk presence, which by extension seemed, at first, to disqualify the need to seek any consent from them before establishing the fishery. Because Newfoundland was ‘so desolate of inhabitants that scarce any one savage person hath in many years been seen in the most parts thereof’, then it seemed to follow – at least in the court of James I –

that by the law of nature and nations we may possess ourselves and make grant thereof without doing wrong to any other Prince or State, considering they cannot justly pretend any sovereignty or right thereunto, in respect the same is not possessed or inhabited by any Christian or any other whomsoever [...]<sup>20</sup>

Ostensibly distinguishing between a public pretence of sovereignty and private rights of possession, the charter made Newfoundland out to be something of a blank slate onto which the first arrivistes could inscribe property without conundrum. A different reality awaited John Guy, the London and Bristol Company’s stationed governor, upon his arrival on Newfoundland’s ‘English Shore’ in August of 1610. While establishing the Cupid’s Cove settlement there, Guy discovered that the inland was not unpeopled. He had, of course, been warned about a possible encounter with the native community in his official instructions, and was told to avoid them, but he allowed curiosity to get the better of himself when late in 1612 he led an exploratory expedition to nearby Trinity Bay, where he discovered the locals to be ‘diverse’, ‘sundry’, ‘several’, and best of all, friendly.<sup>21</sup> After a week of tentative trade in early November, men from the company united with Beothuk to dance, sing, and exchange gifts, ‘laughing, & making signes of ioy, & gladnes, sometimes strieking the breastes of our companie & sometimes theyre owne’.<sup>22</sup> These auspicious beginnings were sullied only a few weeks after this, however, following an affray between

---

<sup>20</sup> Letters Patent to the Treasurer and Company of Adventurers and Planters of the City of London and Bristol for the Colony or Plantation in Newfoundland (2 May 1610), *CSP Colonial (America and West Indies)* 9: 36-39. See also T. C. *A Short Discourse of the New-found-land Contayning Diverse Reasons and Inducements, for the Planting of That Countrey* (Dublin, 1623), np: ‘Lawfulnessse of the cause, will be made plaine by this: in as much as it cannot be proved, that any part of that country . . . hath ever yet been inhabited either by Christian or Infidell’.

<sup>21</sup> William Gilbert, “‘Divers Places’: The Beothuk Indians and John Guy’s Voyage into Trinity Bay in 1612’, *Newfoundland and Labrador Studies* 6, 2 (1990), 147-67; The Newfoundland Company’s instructions with respect to natives was to avoid them. Instructions to John Guy (26 May 1610), *Newfoundland Discovered: English Attempts at Colonisation, 1610-1630*, ed. Gillian T. Cell (London: Hakluyt Society, 1982), 108-9.

<sup>22</sup> John Guy’s Journal of a Voyage to Trinity Bay (1612), in Cell, *Newfoundland Discovered*, 68-78, quote at 74.

some West Country fisherfolk and the Beothuk, which left John Guy and his replacements with the difficult, and ultimately impossible task of repairing their bond.<sup>23</sup>

The union of the London and Bristol Company began to weaken only a few years later in 1616, with each city's syndicate enduring only a few more years afterwards in the Newfoundland fishing industry. It proved a market too far open; large-scale commercial fisheries here seemed to require more exclusive and anti-competitive market environments. This left the economy of the island to be dominated by transient groups of fisherfolk and the small undertakings of absentee gentleman-proprietors from coastal westerly Europe (one of them being David Kirke) for the next few decades, and so removes the topic of Newfoundland from our contemplation.<sup>24</sup> It sadly suffices to say that native-newcomer relations in Newfoundland never recovered from these dreadful beginnings. While there are reports of both English and French massacres upon the dwindling Beothuk in the subsequent period of Newfoundland's history, for the most part, each group avoided the other: the Beothuk retreated to the forest where their ability to subsist was drastically curtailed, and emerged only to pilfer secretly from the fishing stations; the Europeans, on the other hand, were discouraged from seeking out the Beothuk except for retribution for theft, as the cod industry had little use for indigenous labour, and required only access to the shore and some of its inland rivers.<sup>25</sup>

On the more open geographies of mainland North America, by contrast, where colonising enterprises were more interested in installing settler communities, indigenous populations were typically more numerous and less transient. The avoidance of each other was more difficult as a result of this demographic reality. Such a predicament did not stop several companies from working their claims without seeking the endorsement of local

---

<sup>23</sup> Ingeborg Marshall, *A History and Ethnography of the Beothuk* (Montreal & Kingston: McGill-Queen's University Press, 1996), 38-9.

<sup>24</sup> Peter E. Pope, *Fish into Wine: The Newfoundland Plantation in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 2004); Gillian T. Cell, *English Enterprise in Newfoundland, 1577-1660* (Toronto: UTP Press, 1969).

<sup>25</sup> See, for an example of some of the violence, the Reply to the Answer to the Description of Newfoundland (29 September 1639), NAUK CO 1/10, no. 38, 97-112. See also Marshall, *History and Ethnography*, 25-41; L. F. S. Upton, 'The Extermination of the Beothuks of Newfoundland', *Canadian Historical Review* 58, 2 (1977), 133-53. See generally Charles de la Morandiere, *Histoire de la Peche Française de la Morue dans l'Amerique Septentrionale* (Paris, Maisonneuve et Larose, 1962-6); John Humphreys, *Plaisance: Problems of Settlement at This Newfoundland Outpost of New France, 1660-1690* (Ottawa: National Museum of Canada, 1970); Nicholas Landry, 'Peuplement d'une Colonie de Pêche sous le Régime Français: Plaisance, 1671-1714', *Northern Mariner / Le Marin du Nord* 11, 2 (2001), 19-37.

communities straight away, however. This proved to be a risky and condescending tactic, one that often necessitated the assumption of a stance of unsubtle and discriminating hostility. The companies of New France provide the best entry point into a discussion of the causes and consequences of this tactic.

French companies, from the turn of the century onwards, were attracted to the Saint-Laurent region principally to capitalise on the fur trade, and missionaries followed them into this region for the purpose of saving indigenous souls, but the earliest settlements associated with these initiatives were abortive. Perhaps the first organised settler project got underway when Pierre de Chauvin, the Sieur de Tonnetuit, undertook to plant fifty settlers at the Montagnais site of Totouskak on the insistence of Henri IV. At the junction of the Saguenay and Saint-Laurent rivers, where previously only fur traders and Basque fisherfolk had visited, Chauvin and his collaborators in France proposed to install a seigneurie in 1600. Only sixteen settlers were found to commit to settle at ‘Tadoussac’ however, and those who did quickly regretted it. After a terrible winter, all were forced to ‘take refuge’ with the local Montagnais community, from whom they had no need to seek any permanent land deal, as the five who survived the winter returned to France in the autumn of 1601. If a settler experiment this was, it failed.<sup>26</sup>

With Chauvin’s death in 1603, the torch of New France was passed onto Sieur de Monts and his associates, when the seignorial dream was briefly revived. In August 1604, Poutrincourt was granted Port Royal, although he would take until 1610 to allocate any of it to agriculturalist bachelors. The resident Malicite, Etchemin, and Mi’kmaq do not appear to have disputed the settlement – in any case, not before Samuel Argall destroyed the entire seigneurie at the end of 1614. Hungry and miserable most of the first ‘Acadiens’ returned to France at this time, and the project of settlement was postponed. Poutrincourt’s son Biencourt was transferred his father’s grant to Port Royal in full, not with any dreams

---

<sup>26</sup> Helen Dewar, “‘Y établir nostre auctorité’: Assertions of Imperial Sovereignty through Proprietorships and Chartered Companies in New France, 1598-1663’ (PhD diss., University of Toronto, 2012), 29-31; Henry Percival Biggar, *The Early Trading Companies of New France: A Contribution to the History of Commerce and Discovery in North America* (Toronto: University of Toronto Library, 1901), 43-4.

of becoming a seigneurial overlord but with his sights fixed upon becoming a kingpin of the burgeoning fur trade enterprise of the region.<sup>27</sup>

By this time in New France, the locus of French concern had fixed, with mixed results, upon a small stretch of the Saint-Laurent. The key settlement after 1608 became Québec, formerly Donnacona's village of Stadacona, where in 1615 the first monastery was established by the Récollets. Downstream, the French were still present: Tadoussac remained important as a trading post, whereas Cap Tourmente, a key fishing location, became in 1624 the site of the first serious stock farming experiments under the supervision of the Compagnie de Caën.<sup>28</sup> For the most part throughout the 1610s and 1620s, however, the direction of the French interest was upstream. During this period, it became conventional in New France to avoid establishing any claims to *dominium* as against local communities.

The localised actions and appraisals of Samuel de Champlain require attention, if this is to be explained. Champlain operated within a wider region tensely disputed by Algonquian-speaking peoples and Iroquoian-speaking peoples. His strategy was never to remain neutral in this conflict, but always to side with the former against some of the latter at all costs. His first steps in this direction were taken in May of 1603, when he met with the 'grand Sagamo' of the Montagnais, Anadabijou, and around 100 followers of Montagnais, Algonquin, and Etchemin backgrounds at Tadoussac. At this smoky tabagie, land rights did not come up in conversation, which was dominated instead by the more pressing question posed by 'les Irocois'. Historians can be guided only by Champlain's recollection of the event, which is descriptive but one-sided and, without question, written with his royal audience in mind. But its language, read closely, is revealing of an indigenous policy in the making. The most important phrase of his account has Champlain invoking his king and offering Anadabijou a solemn 'assurance':

L'un des sauvages que nous avons amené commença à faire sa harangue de la bonne réception que leur avoit fait le Roy, & le bon traitement qu'ils avoient receu en France, & qu'ils s'assurassent que saditte Majesté leur vouloit du bien, &

---

<sup>27</sup> Rameau de Saint-Père, *Une Colonie Féodale en Amérique L'Acadie (1604-1881)* (Montréal: Granger Frères, 1889), 1: 51; Marcel Trudel, *The Beginnings of New France, 1524-1663*, trans. Patricia Claxton (Toronto: McClelland and Stewart Ltd, 1973), 85.

<sup>28</sup> Biggar, *Early Trading Companies*, 105; Bruce Trigger, *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered* (Montreal and Toronto: McGill-Queen's University Press, 1986), 324.

desiroit peupler leur terre, & faire paix avec leurs ennemis (qui sont les Irocois), ou leur envoyer des forces pour les vaincre.<sup>29</sup>

A shared pipe then ratified their alliance, and there was nothing more to it; a land cession this incontrovertibly was not. Promising the prospect of peace through the introduction of settlers upon the land, Champlain prophesied a grave untruth.<sup>30</sup>

For the next two decades, Champlain styled himself the Laurentian peacemaker, with ‘a genius for this work and a rare gift for getting on with others’, as only his most recent hagiographer testifies.<sup>31</sup> In September of 1604, to the east of the Fleuve, Champlain entered into a league with local ‘chefs’ Bessabez and Cabahis – ostensibly to pacify the main headmen in vicinity of Poutrincourt’s Port-Royal – before zipping back and forth between Ancien- and Nouvelle-France, ultimately returning to focus on the Saint-Laurent in 1608.<sup>32</sup> In the summer of that year, he reaffirmed his 1603 alliance with the Montagnais against ‘les Irocois’, before embarking on his *Indiana Jones*-like adventures upriver into the lands of fur-bearing Algonquian speakers on his visits to New France over the following years.<sup>33</sup> Informal promises of protection against Iroquoian-speaking enemies (*sans* the Huron) were extended to all fur-trading nations around the Saint-Laurent during these trips, before finally they were confirmed and extended in 1615, when Champlain

---

<sup>29</sup> OC 2: 71. Anadabijou first learned about the French King from discussions with his representatives whom François Gravé du Pont had earlier sent to Paris. See Elsie McLeod Jury, ‘Anadabijou’, *Dictionary of Canadian Biography* (hereafter: DCB), <http://www.biographi.ca/009004-119.01-e.php?BioId=34142> (accessed 21 May 2013).

<sup>30</sup> For Eccles, ‘the French Crown laid claim to the land’ as a result of this interaction at Tadoussac, which, in Marcel Trudel’s view, presents Chief Anadabijou’s ‘general authorisation to inhabit the country’. For Andrée Lajoie and Pierre Verville, the tabagie presented ‘une affirmation des prétensions territoriales du Roi de France sans compter l’espoir de contacts directs avec les populations des l’intérieur grâce à l’accès aux territoires de leurs nouveaux allies’. Similarly, for Camil Girard and Édith Gagné, this ‘alliance’ was the first treaty to reflect what they consider a more assertive French approach to New World territories. W. J. Eccles, ‘Sovereignty-Association, 1500-1763’, *Canadian Historical Review*, 65 (1984), 480; Marcel Trudel, *Histoire de la Nouvelle-France: Les Vaines Tentatives, 1524-1603* (Montreal: Fides, 1963), 268; Andrée Lajoie and Pierre Verville, ‘Les Traités d’Alliance entre les Français et Les Premières Nations sous le Régime Français’, in Andrée Lajoie et al., *Le Statut Juridique des Peuples Autochtones au Québec et le Pluralisme* (Quebec: Les Editions Yvon Blais Inc., 1996), 161; Camil Girard and Édith Gagné, ‘Première Alliance Interculturelle: Rencontre entre Montagnais et Français à Tadoussac en 1603’, *Recherches Amérindiennes au Québec* 25, 3 (1995), 3. See, however, Olive P. Dickason, *Canada’s First Nations* (Norman: University of Oklahoma Press, 1992), 103.

<sup>31</sup> David Hackett Fischer, *Champlain’s Dream* (New York: Simon & Schuster, 2008), 182.

<sup>32</sup> OC 5: 729-30.

<sup>33</sup> Bruce Trigger, *The Children of Aataentsic: A History of the Huron People to 1660* (Montreal: McGill-Queen’s University Press, 1988), 1: 246-330; Eric Thierry, *La France de Henri IV en Amérique du Nord: De La Creation de L’Acadie à la fondation de Québec* (Paris: Honoré Champion Éditeur, 2008), 285-360.

journeyed deeper into Huron country than ever before. In that year, he and a dozen comrades wintered at an allied village to offer a sign of his commitment to the native allies of New France. From here, while acting with predisposed hostility towards Iroquoian communities in the nearby region, he ventured on several excursions to make new peace alliances with other Algonquian communities, all of whom he encouraged to trade at Tadoussac and Québec.<sup>34</sup>

The paradox, here, that Champlain's alliances of 'peace' were consistently and explicitly belligerent towards a deceptively monolithic enemy in the form of 'the Iroquois' cannot be explained solely in relation to the demands of the fur trade alone. While Champlain and his men were very much reliant upon the furs and protection of their own natives in the area ('nos alliez'), there still appears more to it than this. It can be no coincidence that Champlain was in charge of fortifying and expanding the settlement at Québec on a patch of the Saint-Laurent that was regularly frequented by Iroquoian-speakers and formerly called by them Stadacona. It is true that, between 1603 and 1608, Champlain considered this cordoned-off part of the river to be entirely abandoned by the Stadaconan people and other Iroquoian-speakers. But his subsequent experiences with exactly these peoples cast doubt on the veracity of his original assessment of the 'disappearance of the St. Lawrence Iroquois'. Champlain's almost constant struggle with certain Iroquoian-speakers in greater New France after the battle of Lake Champlain in 1609 – a violent conflict which continued to perplex his successors into the 1640s – seems to offer clear evidence that the area was anything but relinquished by indigenous claimants (whatever the character of that claimancy at the time). Encouraging a steady stream of furs from inland communities may have been a key motivation behind the alliances he sought to enter into before 1615, but it was only one motivation; another was clearly to defend New France against the raids of those who disputed its very existence. This appears to explain more satisfactorily why Champlain allied himself to his Huron and Algonquian neighbours – most of whom lived at least 100km away from Québec and Tadoussac, and

---

<sup>34</sup> Biggar, *Early Trading Companies*, 90-100; Trigger, *Children of Aataentsic* (Montreal: McGill-Queen's University Press, 1988), 1: 296-305; A. G. Zeller, *The Champlain-Iroquois Battle of 1615* (Oneida: Madison County Historical Society, 1962). Compare, however, Robert A. Goldstein, *French-Iroquois Diplomatic and Military Relations, 1609-1711* (The Hague: Mouton, 1969), 11-61.

none of whom, according to the historical record at least, laid any claim to the occupied country of New France.<sup>35</sup>

Nothing to do with *dominium*, then, the Compagnie-Huron-Algonquian alliance orchestrated by Champlain was based wholly on exclusive trade terms and mutual protection. Its functioning relied completely upon the alienation of the enemy Iroquois. This is why – only for a very brief period – the whole system looked as though it could fall apart when, out of the blue, some Iroquois sought to enter into the alliance in the 1620s. Moving away from their Dutch allies at the new Westindische Compagnie posts, a small number of Iroquois and Montagnais made a brief alliance in 1622, ‘pour achever de faire cette paix’, as the suspicious Champlain recorded.<sup>36</sup> Two years later, when thirty-five canoes full of Iroquois arrived at the Saint-Laurent to enter into an arrangement of peace, a new *status quo* in the region might have materialised. But the maintenance of this relationship of peace proved unworkable. Good relations on this portion of the river lasted only a few years until a few Montagnais warriors with questionable motivations slaughtered two Iroquois men, opening hostilities once again.<sup>37</sup>

In an atmosphere of almost incessant conflict with ‘the Iroquois’, Champlain would fantasise, on more than one occasion, about the conduction of a just war of conquest. It was a fantasy he always struggled to convert into reality, however. His commission of 1612 may have been emphatic that his job was to achieve the ‘conquete & peuplement’ of the country, but he greatly lacked the resources to carry out this objective, which led him to establish as many alliances as he could with all potential enemies of ‘the Iroquois’ in the

---

<sup>35</sup> Over and above the confusion provided by the preference of Hurons to speak an Iroquoian language, too much, it seems, is made of the so-called ‘disappearance of the St. Lawrence Iroquois’, which took place, according to Bruce Trigger – taking Champlain at his word – ‘sometime between 1542 and 1603’. Trigger, *Children of Aataentsic*, 1: 214. For the strangely elaborate historiography of Iroquois economic, political, and spiritual motivations, start with George T. Hunt, *The Wars of the Iroquois: A Study in Intertribal Relations* (Madison: University of Wisconsin Press, 1972 [1940]). See also Trigger, *Natives and Newcomers*; Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginnings to the Lancaster Treaty of 1744* (New York: Norton, 1984); Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill: University of North Carolina Press, 1992); José António Brandão, “*Your Fyre Shall Burn No More*”: *Iroquois Policy Toward New France and Its Native Allies to 1701* (Lincoln: University of Nebraska Press, 1997). Little is made of the usurpation of the Iroquois from their territories in this literature.

<sup>36</sup> OC 5: 1064.

<sup>37</sup> Biggar, *Early Trading Companies*, 129.

region.<sup>38</sup> By making the most of domestic political resources, Champlain prepared for what he considered to be an inevitable ‘guerre’. The prospect of conquest remained in his mind for some time after this, as the content of his *Voyages*, penned between 1618 and 1622, reveals. Reflecting on the ‘Voyages des François’ from 1504 up to his own time, Champlain was to reach the conclusion that: ‘Ce n’est pas chose nouvelle aux François d’aller par mer faire de nouvelles conquestes’. Into this context, he naturally situated his own endeavours. Observant of his surroundings, Champlain identified ‘un nombre infiny d’âmes sauvages (qui vivent sans foy, sans loy, ny cognoissance du vray Dieu)’. The ‘conversion des infidèles’ may have been a nobler act (‘ceste sainte enterprise’) before the judgement of God than the ‘conqueste des pays’, but Champlain had become persuaded, by recent Spanish experiences in the Americas at least, of the inseparability of these two fates. His ambivalence in his attempts to balance these out for his readers comes through in the following:

Car la prise des forteresses, ny le gain des batailles, ny la conqueste des pays, ne sont rien en comparaison ny au prix de celles qui se préparent des coronnes au ciel, si ce n’est contre les Infidèles, où la guerre est non seulement necessaire, mais juste & sainte, en ce qu’il y va du salut de la Chrestienté, de la gloire de Dieu, & de la défende de la foy, & ces travaux sont de soy louables & tres-recommandables, outre le commandement de Dieu, qui dit, Que la conversion d’un infidèle vaut mieux que la conqueste d’un Royaume.<sup>39</sup>

If, to his French audience, Champlain declared himself to be a great champion of the conversion of ‘les Sauvages’ to the ‘Religion Catholique, Apostolique & Romaine’, on the ground in New France, such a project was only ever extended to his Algonquian and Huron allies. In New France, from Champlain’s time onwards, a distinction was always made between two kinds of infidels: those, like the Algonquians and Hurons, who were to be converted, and those, like the Iroquois, who were to be vanquished. Récollet and Jesuit strategies accorded with this distinction for the most part, as never was the word of God so ardently foisted upon the Iroquois as it was upon the Algonquians and the Hurons. The effect of this, throughout the 1620s, was to sharpen the segregation, in Champlain’s mind at least, of convertible and conquerable infidels in New France. Growing ever more

---

<sup>38</sup> *OC* 5: 890.

<sup>39</sup> *OC* 5: 665-6.

desirous of waging war in this period, Champlain plotted a more offensive approach from Québec. Prevented twice from receiving his expected replenishments by the Kirkes at the end of the 1620s, Champlain's bold new Laurentian strategy was to unite 'les Sauvages' – his Algonquian and Huron allies – for the purpose of leading 'la guerre' against 'les Yrocois'. The first offensive strikes, he planned, could be conducted on a few of the closest (presumably Mohawk) settlements. By seizing these localities and driving out their inhabitants, he could secure the foundation of Québec while availing a new source of food for the Compagnie de la Nouvelle-France, he proposed.<sup>40</sup> At the time, however, as it was his own settlement at Québec that was under siege by foreign intruders – might, as ever in the New World, was right – Champlain was forced to shelve his idea of an Iroquois war and instead prepare his articles of capitulation for the Kirkes.<sup>41</sup>

After his dejected voyage to France in 1629, Champlain returned to New France in 1633 with even greater conviction about the necessity of adopting a militant stance against the Iroquois. His initial motions to strengthen 'une paix generale parmy ces peuples qui ont guerre avec une nation appellés Yrocois', were received well on the Saint-Laurent, leading Champlain again, in the months to follow, to contemplate yet another offensive.<sup>42</sup> In August of 1634, he wrote to Cardinal Richelieu, boastful that his new habitations by the Fleuve had grown to such imposing heights as to inspire terror in his enemies, but realistic enough that this was far from sufficient to extinguish the threat of their incursions. He demanded more manpower and weaponry, proposing, once more, to unite 'avec les Sauvages nos alliez' against the Iroquois, with two potential goals in mind: 'pour les exterminer ou les faire venir à la raison'.<sup>43</sup>

Champlain was dead the following year. There would be no conquest of the Iroquois in his time, and no conquest after it. Yet even if Champlain's successors and those within the ranks of the Compagnie de la Nouvelle-France could never commit to an expensive open war against the Iroquois, his protocol of ignoring indigenous land rights, in the name of a disingenuous peace, remained in place long after his death.

---

<sup>40</sup> OC 5: 1174-5; Trigger, *Natives and Newcomers*, 200.

<sup>41</sup> For Champlain's capitulation, see above, 122-3.

<sup>42</sup> Champlain to Cardinal Richelieu (15 August 1633), *The Works of Samuel de Champlain* (hereafter WSC), ed. H. P. Biggar, trans. W. D. LeSueur (Toronto: Champlain Society, 1936), 6: 376.

<sup>43</sup> Champlain to Cardinal Richelieu (18 August 1634), WSC 6: 379.

Ignorance became entrenched as the ‘colonie françoise’ grew with every year; loosely correlating with this was a sharp increase in the raids of the dreaded ‘Hiroquois’ (whether Mohawk, Oneida, Onondaga, Seneca, or any other nebulous grouping annotated at the time).<sup>44</sup> Before the granting of dozens of seigneuries along the Saint-Laurent around Québec and in the direction of the old Iroquois site of Hochelaga (becoming, after 1640, the seigneurie of St. Sulpice at Montréal), the Compagnie sought to enter contracts with no indigenous communities, Iroquoian or Algonquian. Land grants were conveyed from the company to settlers, never via the native owners.

Catastrophe awaited the unsuspecting new settlers and missionaries to this land. Probably nowhere was the violence more pronounced than at the site of old Hochelaga. Soon after the Société de Notre-Dame de Montreal pour la Conversion des Sauvages received its land grant from the Compagnie de la Nouvelle-France, the settlement became subject to regular raids. The most spectacular onslaughts were delivered during the years of 1660 and 1661, when dozens if not hundreds of Montréal habitants were slain, and ‘even the women fought to the death’, as the historian Charlevoix tells us.<sup>45</sup> ‘[F]rom Montreal to Tadoussac’, he continues, ‘naught could be seen but bloody traces of the passage of these fierce enemies’.<sup>46</sup>

Charlevoix’s picture is evocative, but incomplete. It is true that these Laurentian seigneurial settlements, which were established entirely ignorant of pre-existing native claims, remained the principal focal points of Iroquois aggression during the reign of the Compagnie de la Nouvelle-France.<sup>47</sup> But the expansion of missionaries into the regions of

---

<sup>44</sup> The phrase comes from Champlain to Cardinal Richelieu (15 August 1633), WSC 6: 376. Although the company fell short of the 4,000 colonists it promised to settle within the first 15 years of its foundation, large strides were taken in this direction over the next few decades. On the eve of the crown takeover in 1663, the permanent population of New France had risen to 3,500. Over the course of this period, some 70 seigneuries had been issued by the Compagnie. Of these grants, which ranged from small township concessions to larger agricultural plots with censitaires, 48 seigneuries could be found along a 320km-strip of Laurentian land between Québec and Montréal. See Richard Colebrook Harris, *The Seigneurial System in Early Canada: A Geographical Study* (Kingston and Montreal: McGill-Queens University Press, 1984), 20-5.

<sup>45</sup> JR 46: 1-23; 47: 21-5; Trudel, *Beginnings of New France*, 188-9. The best study of seventeenth-century Montreal remains Louise Dechêne, *Habitants and Merchants in Seventeenth-Century Montreal* (Montreal and Kingston: McGill-Queen’s University Press, 1992 [1974]).

<sup>46</sup> Pierre-François Xavier de Charlevoix, *History and General Description of New France* (New York: John Gilmary Shea, 1868), 3: 35.

<sup>47</sup> For the seigneurial system in this period, see Marcel Trudel, ‘Les Obligations du Censitaire, à l’Époque des Cent-Associés’, *Revue d’Histoire de l’Amérique Française* 27, 1 (1973), 3-41; Harris, *Seigneurial System*.

the Great Lakes and Hudson River during the same period could be just as antagonistic to native communities as the settlements on the Fleuve.<sup>48</sup> Because the Jesuits, just like their fur-trading custodians, preferred to interact with the friendly Hurons and nearby Algonquian-speakers, it is not surprising that they attracted the suspicion of the very same communities declared the ‘enemies’ of the company – and conflict often resulted. A good example of this can be made of the two so-called ‘North American martyrs’, Isaac Jogues and Jean de La Lande. Jogues and a party of Huron converts were captured by hostile Mohawk in 1642, but they were detained only briefly before escaping. Some years later, Jogues made the bold decision to return with Jean Bourdon of the Compagnie de la Nouvelle-France to his captors in an attempt to secure an elusive French-Mohawk peace alliance. If the *Jesuit Relations* are to be taken at their word, some progress was made on this front, before Jogues’s final attempts to seal the deal with his Jesuit colleague La Lande ended in tragedy. These ‘ambassadors of peace’, flying in the face of two generations of company policy, were considered evil sorcerers on their last trip to the Mohawks – and they received their deaths by the hacking of tomahawks in October of 1646.<sup>49</sup>

A state of open hostility between the Compagnie de la Nouvelle-France and the Iroquois continued in spite of the efforts principally of the Jesuits to bring about peace. This conflict would carry far beyond the period of company rule. Right up to 1663, the company resolutely abstained from purchasing privately or seizing land publicly for the entirety of its thirty-six-year administrative existence. In the process, the company established all sorts of conventions – antagonistic principally to the Iroquois – for the French crown to follow in its wake, which it did (similar to what James I/VI had done in Virginia, instead preserving the French company). This legacy can only be of brief concern here, as it concerns a period beyond the scope of this dissertation. It suffices to say that, from the outset of royal rule, the settlement at the Île de Montréal remained ‘the most exposed to the incursions of the Iroquois, our enemies’, in what was considered by the new

---

<sup>48</sup> The missionary presence had exploded onto the Great Lakes, with Sainte-Agnes was established on the southern banks of Lake Ontario, and Les Apôtres, Saint-Joseph, Sainte-Élisabeth, St-Charles, Saint-Esprite, and Sainte-Pierre flanked the shores of Lake Huron. See [Richard] Cole Harris, *The Reluctant Land: Society, Space, and Environment in Canada before Confederation* (Vancouver: UBC Press, 2009), 94.

<sup>49</sup> *JR*, 29: 47-60, 31: 56-144. See also Georges-Émile Giguère, ‘Jogues, Isaac’, and Léon Pouliot, ‘La Lande, Jean de’, *DCB*, [http://www.biographi.ca/en/bio/jogues\\_isaac\\_1E.html](http://www.biographi.ca/en/bio/jogues_isaac_1E.html), [http://www.biographi.ca/en/bio/la\\_lande\\_jean\\_de\\_1E.html](http://www.biographi.ca/en/bio/la_lande_jean_de_1E.html) (accessed 26 March 2015).

administration to be an ongoing ‘war against the Iroquois’, though this was never formally sanctioned by the French crown.<sup>50</sup> An informal war this was, then, and it was one that appeared to require more funds and more manpower to be pledged to the cause throughout the 1660s, just as Champlain had consistently demanded between 1629 and 1635.<sup>51</sup> With the new Minister of Finances Jean-Baptiste Colbert craving economy as much as the old One Hundred Associates had, however, an out-and-out war would never be endorsed against the Iroquois (who in this period were becoming strongly allied to the new Duke of York’s province as well as the corporate and proprietary governments of greater New England).<sup>52</sup> But this story, culminating in the English ‘conquest’ of New France, is not for this dissertation to explore.<sup>53</sup>

When Marc Lescarbot contemplated the legitimacy of the occupation of New France a decade after he had visited the region with Champlain in 1604, he offered not only a justification for the evasion of acknowledging indigenous land ownership, but a suggestion that, from such an obligation, the French were exceptionally exempt.

The earth pertaining, then, by divine right to the children of God, here is no question of applying the law and policy of Nations, by which it would not be permissible to claim the territory of another. This being so, we must possess it and preserve its natural inhabitants, and plant therein with determination the name of Jesus Christ and of France, since today many of our children have the unshakable resolution to dwell there with their families.<sup>54</sup>

Lescarbot’s sentiments, on their own, are unremarkable; colonisers everywhere following the Iberian example were justifying their actions abroad with improvised expressions of

---

<sup>50</sup> Commission de M. de Mézy (23 October 1663), *Ordonnances, Commissions, etc., etc., des Gouverneurs et Intendants de la Nouvelle-France, 1639–1706*, ed. Pierre Georges Roy (Beauceville, Quebec, 1924), 2: 15-6: ‘dans l’isle de Montreal, poste le plus exposé aux incursions des Iroquois, nos ennemis [...]’.

<sup>51</sup> Ordonnance de M de Mézy (4 Février 1664), *Ordonnances, Commissions, etc., etc.*, 2: 16-7: ‘[requesting fifty livres] appliquée pour l’employeur aux choses qui concernent la guerre contre les Iroquois’.

<sup>52</sup> For the fortification of the alliance between the Five Nations and the English of New York, see Daniel K. Richter, ‘Cultural Brokers and Intercultural Politics: New York-Iroquois Relations, 1664-1701’, *Journal of American History* 75, 1 (1988), 40-67.

<sup>53</sup> For contrasting discussions of the impact of the company’s land policy in the period of crown rule, see Edward Cavanagh, ‘Possession and Dispossession in Corporate New France: Debunking a “Juridical History” and Revisiting *Terra Nullius*’, *Law and History Review* 32, 1 (2014), 122-5; Alain Beaulieu, “‘An Equitable Right to be Compensated’: The Dispossession of the Aboriginal Peoples of Quebec and the Emergence of a New Legal Rationale (1760–1860)”, *Canadian Historical Review* 94, 1 (2013), 1-27.

<sup>54</sup> Marc Lescarbot, *History of New France*, trans. W.L. Grant (Toronto: Champlain Society, 1907), 1: 17.

Christian obligation (though few were so bold as to make the case for exemption from *ius gentium* on these grounds alone). What is remarkable, however, is the great passage of time in which this kind of thinking went unchallenged in New France compared to everywhere else. While true that English companies to the south of New France were just as inclined, over the same period, to ignore native proprietary interests as well, none ever managed to pull this tactic off for as long as the French companies.

Take, for instance, the contemporary establishment of Jamestown, where a similarly uneasy combination of selective diplomacy and open hostility combined to buttress the earliest attempts to avoid recognising the existing land claims of the Powhatan confederacy. This situation could not be sustained. Despite the optimistic claims of the Virginia Company of London's propaganda in 1610 that there was 'roome sufficient in the land' for the English just to move in blindly, events transpiring in the twelve years following 1610 led the company to ground its claims to the land upon both contract *and* conquest.<sup>55</sup> A similar kind of optimism emerged at exactly this time in New England, but it was even more short-lived. If, in 1622, Robert Cushman could describe the area to be 'a vast and empty chaos', with Massachusetts Bay Company Governor John Winthrop a few years later going further than this to argue that such an abundance of unused land was '*vacuum domicilium*' which could 'lawfully' be acquired through possession alone, the reality was very different to this discourse.<sup>56</sup> From as early as 1629, as will be seen in the next chapter, the Massachusetts Bay Company resolved upon a policy of purchasing land through contracts which were regulated and monitored after 1634, before circumstances there, too, provided for a military conflict to be promulgated as a war of conquest.

What, therefore, made New France so different? It is not enough to suggest, as some have, that French settler colonialism was exceptionally benign and impervious to dispossession, in whatever fashion this kind of premise may be offered. 'The layered and fragmented attributes of ownership characteristic of feudal tenure', writes Allan Greer most

---

<sup>55</sup> Councill of Virginia, *True Declaration of the estate of the Colonie in Virginia* (London: William Barret, 1610), 10-11.

<sup>56</sup> Reasons and Considerations (attributed to Robert Cushman), in *Mourt's Relation* (1622), among Alexander Young, ed., *Chronicles of the Pilgrim Fathers of the Colony of Plymouth, from 1602-1625* (Boston: Charles C. Little and James Brown, 1844), 245; Robert C. Winthrop, ed., *Life and Letters of John Winthrop* (hereafter: *LLJW*) (Boston: Ticknor and Fields, 1864), 1: 309-17; John Kendall Hosmer, ed., *Winthrop's Journal* (hereafter *WJ*) (New York: James Scribner's Sons, 1908), 1: 129, 294.

recently, 'left ample room for Native possession in most areas. Unlike the English, the French did not need to extinguish Native tenure in order to institute European-colonial tenure'.<sup>57</sup> A conclusion like this places emphasis on scale at the expense of substance, however. Even then, the emphasis is weak. The facts are plain: by 1663, more than 3,000 settlers – seigneurs, censitaires, urban merchants, administrative officials, and entrepreneurs – enjoyed rights of one kind or another to immoveables from which indigenous interests had been erased or ignored. The entire Saint-Laurent was irreversibly transformed during the period of Compagnie administration. How did this happen?

Iroquoian hostility, real or imagined, provided the conditions for dispossession without recognition. Making 'the Iroquois' out to be a constant 'enemy', the companies of New France implicitly removed all possibility of friendly intercourse with the principal landowners of the Saint-Laurent region. That this never amounted to a war of conquest can largely be attributed to the lack of financial and military resources in the colony. 'Corporate New France', if it may be called, was frail, as the Kirke brothers learned not once but twice, and it was equally ill-equipped to deal with the much larger Iroquois Confederacy, of whose broad territorial domain the French had established themselves only upon the fringe. Furthermore, it could be suggested that the lack of any *sustained* efforts by settlers and companies from elsewhere in Europe to move into the region may also have played a part in the particular trajectory of New France. No serious challenges were mounted by Europeans other than the Kirke brothers, and their interests were never really to accumulate immovable property but only to plunder and trade. If more external pressure was placed upon the French *settlers* to justify their claims (instead of just the factory workers at Québec and Tadoussac), a different story might have been told.

Most of all, though, it is important to recognise that the French reluctance to recognise indigenous title had become stubbornly conventional by the end of Champlain's time. Seigneuries had already been granted without purchases or any great war. To introduce a change to this policy, after settlers had already taken up their grants, would have jeopardised the foundations of these rights. The longer native land rights were evaded,

---

<sup>57</sup> Allan Greer, 'Dispossession in a Commercial Idiom: From Indian Deeds to Land Cession Treaties', *Contested Spaces of Early America*, ed. Juliana Barr and Edward Countryman (Philadelphia: University of Pennsylvania Press, 2014), 78.

in other words, the more difficult (and expensive) it would have been to acknowledge them later – an axiom that bears as much truth for New France as it does New South Wales. In both cases, Bain Attwood’s recent call for historians of dispossession to focus most closely upon the ‘first phases of the encounter’ is persuasive and apt in this context.<sup>58</sup> The early phases of dispossession in New France saw an enemy made out of the indigenous Iroquoian-speaking communities, and it saw the first land grants given to settlers solely on the authority of the company. Hostility, coupled with the assumption of pre-emptive rights of conveyance, became conventions unchallenged on the Saint-Laurent – and that made all the difference in the long run.

In Ireland, of course, the story was very different due to constitutional reasons, but the results were just as antagonistic to pre-existing communities. In 1641, the policies of crown and corporation led to a rebellion. Yet another military takeover was ordered, and yet more forcefully were Irish property rights subdued and coerced into an English regime.<sup>59</sup> The cyclical nature of this relationship makes the history of land-holding corporations and dispossession in Irish history so different to the rest. Its character was already made unique by the complex constitutional arrangement explored briefly in this chapter. Additionally, geographic proximity to England, which allowed for regular direct interventions, gave this context a sense of urgency that was not paralleled elsewhere in the extra-European world.

---

<sup>58</sup> ‘The treatment of indigenous rights in land in Australia [...] was not determined by any legal or intellectual discourse espoused at the centre of British imperial power. Rather, it was mostly influenced by the first phases of the encounter between the British and the Aboriginal people, the plans the imperial government had for the colony of New South Wales, the relationship of power between the early colonists and the local people, and the practices that were forged in the early years of settlement for the transfer of land’: Bain Attwood, ‘Law, History and Power: The British Treatment of Aboriginal Rights in Land in New South Wales’, *Journal of Imperial and Commonwealth History* 42, 1 (2014), 171-92, quote at 187.

<sup>59</sup> Jane H. Ohlmeyer, ed., *Ireland from Independence to Occupation, 1641-1660* (Cambridge: Cambridge University Press, 2002). See also John Cunningham, *Conquest and Land in Ireland: The Transplantation to Connacht, 1649-1680* (Woodbridge: Boydell Press, 2011).

## Chapter 8: Patents, Prescription, Contract, and Conquest in Practice, 1631-1655

Up to this point, this dissertation has considered discrete methods of developing claims to land in the North Atlantic world separately. This approach is difficult to sustain after the end of the 1620s, however, as companies on the ground came to blend several ways to justify their rights to forts, ports, and hinterlands. Claims based sometimes upon patents, based sometimes upon prescription, based sometimes upon contract, and based sometimes upon conquest, were often synthesised by corporate actors between 1620 and 1660. Towards the end of this period, some of these methods had clearly become more compelling than others, whether directed towards European competitors or indigenous communities.

The Massachusetts Bay Company will be especially illustrative in this respect. It emerged onto a complicated scene in 1629. The first twenty years of its government in New England saw the fusion of a number of different conventions formerly adopted by corporations in the twenty years beforehand. From the outset of this regime, land purchases were considered inevitable. Official instructions from Gravesend to Massachusetts Bay Company Captain John Endecott in April of 1629 confirmed as much. ‘If any of the salvages pretend right of inheritance to all or any part of the lands granted in our pattent, wee pray you will endeavour to purchase their tytyle, that wee may avoyde the least scruple of intrusion’.<sup>1</sup> The following month, these instructions were elaborated. In the second general letter to Endecott, he was instructed to identify ‘all such p[re]tendors’ who ‘lay clayme to any of the land w[i]thin the teretoryes grautned to us by his ma[jes]t[y]’s charter’, and from there proceed

to make such reasonable composicon w[i]th them as may free vs and yo[u]rselues from any scruple of intrusion, and to this purpose, if it might bee conveyently done, to compound & conclude w[i]th them all, or as many as yow can at one tyme, not doubting but, by yo[u]r discreet ordering of this business, the natives wilbe willing to treat & compound w[i]th yow vpon very easie conditions.<sup>2</sup>

---

<sup>1</sup> Massachusetts Bay Company in London to the Governor and Council in New England (17 April 1629), *Records of the Governor and Company of the Massachusetts Bay in New England* (hereafter: *MBCR*), ed. Nathaniel B. Shurtleff (Boston: William White, 1853), 1: 394.

<sup>2</sup> Massachusetts Bay Company in London to the Governor and Council in New England (28 May 1629), *MBCR* 1: 400.

Not all agreed that such action was necessary. ‘As for the Natives in New England’, wrote Endecott’s replacement John Winthrop, ‘they inclose noe Land, neither have any settled habytation, nor any tame Cattle to improve the Land by, & soe have noe other but a Naturall Right to those Countries. Soe as if we leave them sufficient for their use, we may lawfully take the rest, there being more then enough for them & us’.<sup>3</sup> This is largely how things proceeded at first, as the Massachusetts Bay Company made no attempt to collect together all the ‘pretendors’ in New England for the purpose of a mass contract. There is some evidence that a handful of small-scale bargains were reached however. The passage of a law prohibiting individual land purchases in New England, by the Governor and Council of the Massachusetts Bay Company on March 4th of 1634, offers strong indication that perhaps several purchases had taken place before this.<sup>4</sup> By assuming pre-emptive rights of purchase after this point, however, the company was able to disqualify private land transactions and take control of the land market, or at least that was the idea. Not only was the company sluggish to buy land from locals, but it also continued to experience trouble with individual transactions taking place under its nose. Threatened, over the next few years, with the expected challenge posed by other Europeans (the ‘scruple of intrusion’), along with an unexpected challenge posed by dissenting settlers, and finally confronted with a native uprising, the Massachusetts Bay Company was forced to make a series of modifications to its approach to the land question.

John Winthrop, the most resilient governor of the Massachusetts Bay Company (taking the office in 1629-34, 1637-40, 1642-4, and in 1646-9), was originally unconvinced of the need to buy land from natives.<sup>5</sup> The settler occupants of New England encountered no resistance, and to Winthrop’s mind anyway, the sufficient time had passed to run against the native claim, which also strengthened company’s claims against other Europeans. Winthrop did not, however, make this out to be a prescriptive claim, though this is not surprising. To imply that aboriginal ownership rights at *some* point in time, and then to prescribe against these rights, could easily work against New England, for time, in such a

---

<sup>3</sup> Reasons to be considered for justifieinge the undertakeres of the intended Plantation in New England, & for encouraginge such whose hartes God shall move joyne with them in it (May? 1629), *LLJW* 1: 312.

<sup>4</sup> *MBCR* 1: 112. ‘It is ordered, that no person whatsoever shall buy any land of any Indean without leave from the Court’.

<sup>5</sup> For the life of John Winthrop, see See Francis J. Bremer, *John Winthrop: America’s Forgotten Founding Father* (Oxford: Oxford University Press, 2003).

context, worked decidedly against the newcomers. Exemplary of this kind of thinking is Winthrop's response to the approach of Bradford and Winslow, of the Plymouth Plantation in July of 1634, with their concerns about the Kennebec River ('whether their right of trade there were such, as they might lawfully hinder others from coming there'). Hearing these concerns Winthrop assured his colleagues not to worry: 'their right appeared to be good; for that, besides the king's grant, they had taken up that place as *vacuum domicilium*, and so had continued, without interruption or claim of any of the natives, for divers years; and also had, by their charge and providence, drawn down thither the greatest part of the trade [...] which none of the English had known the use of before'.<sup>6</sup> This kind of thinking was bound to come up against dissent in the colony. Yet it was not his claim by the passage of time so much as it was his reliance upon the 'king's grant' that had become out of place by this period.

From the outset it had been the belief of Winthrop, ever keen to remain in the favour of a petulant monarch in Charles I, that royal charters formed the primary source of authority in New England: from the king's grant, all other rights – against Europeans and natives – flowed. This is precisely why he was out of step with the Westindische Compagnie, who presented something near the opposite opinion: patents provided the right only *to extinguish*, rather than a right *of extinguishment*, and exclusive jurisdiction only followed after this, the Dutch claimed.<sup>7</sup>

Individual colonists living under the Massachusetts Bay Company also emerged to dispute the company's use of royal paperwork. For the first time in colonial North America, an important question was raised in this period: could charters, patents, commissions, and the like generate a title as against the native claim, or did they provide only a burden, upon corporate governments and/or the individual settlers, to extinguish that claim? This was a question raised only in New England for reasons that were unique to New England, stemming from its colonial constitution of old and new charters as also from the uncertain politics and mixed loyalties of Charles I's reign. It was raised at the instigation of Roger Williams, a preacher highly suspicious of the Church of England who demanded the separation of church and state. Throughout 1632, Williams alleged in a series of private

---

<sup>6</sup> *WJ* 1: 128-9.

<sup>7</sup> For this, see above, 166-8.

letters that the Massachusetts Bay Company and the New Plymouth Corporation had taken too many liberties with the Indians in the name of the dead King James. The exact content of these letters is a matter of speculation, but the response of the Governor and Council of the Massachusetts Bay Company at Boston is revealing. They summoned Williams from Salem late in 1633 to record that '[a]mong other things, he disputes their right to the lands they possessed here, and concluded that, claiming by the king's grant, they could have no title, nor otherwise, except [if] they [had] compounded with the natives'. Contract was greater than charter, Williams alleged, but he did not stop there. Additionally, 'he chargeth King James to have told a solemn public lie, because in his patent he blessed God that he was the first Christian prince that had discovered this land'.<sup>8</sup> This was a step somewhat too far for the times. Williams was made to apologise before he was discharged with a firm warning, but these, his deeply held sentiments, could not be repressed. Next year he was implicated in a protest at Salem. As the company reported, 'Mr. Williams of Salem had broken his promise to us, in teaching publicly against the king's patent, and our great sin in claiming right thereby to this country, etc., and for usual terming the churches of England antichristian'.<sup>9</sup> Brought, again, before a company hearing in 1635, Williams delivered four arguments. First he declared: 'That we have not our land by Pattennt from the King, but that the Natives are the true owners of it, and that we ought to repent of such a receiving it by Pattennt'.<sup>10</sup> His next three arguments were different, however: together these concerned the Church of England, which he felt exercised too much control over public and civic life in New England. The conduct of the established church, he boldly alleged, was not only un-Christian, it was 'not lawfull'.<sup>11</sup> For these views combined, he was banished from the colony by the Massachusetts Bay Company at the end of 1635.

For the next few years in nearby Rhode Island, Williams maintained diligently his conflation of what were essentially separate arguments against the Church of England, the King of England, and the Massachusetts Bay Company: the Church he decried for being

---

<sup>8</sup> *WJ* 1: 116-7.

<sup>9</sup> *WJ* 1: 142.

<sup>10</sup> In making this argument against the misuse of royal charters to restrict the rights of indigenous peoples, Williams was now setting his sights upon Charles I's charter for the Massachusetts Bay Company (and rightly too, following the dissolution of the Council of New England in Plymouth in 1635, which represented last vestige of James I's redundant authority in New England).

<sup>11</sup> Roger Williams, *Mr Cottons Letter Lately Printed, Examined and Answered* (London, 1644), in *Complete Writings of Roger Williams* (hereafter: *CWRW*) (New York: Russell & Russell Inc., 1963), 1: 324-5.

modelled upon a politicised and impure rendering of God's word; the King he condemned for being wrong to empower and act through the same Church; the Massachusetts Bay Company he reviled for not fairly acquiring its titles from the Indians by purchase and misconstruing the terms of its royal charter of incorporation to pardon the obligation. The product of his times, Williams was ultimately harmless, as were the 'Anabaptist' settlers who joined with him in his 'Providence Plantation' from this period onwards. With the onset of a period of elongated civil wars back in England in 1642, no corporation or proprietary establishment in New England knew quite what to do with Roger Williams after that, fearful as they were of triggering the same upheavals in America.

Intellectually, the most direct approach upon Williams was taken by John Cotton, a Presbyterian adversary from Boston, who jousting in this period with the Providence dissenter in a series of public letters. The pair disagreed about church and state, theology, the loyalty of New England to the English king, and a great many other things. On the legal *function* of charters, however, only a difference in opinion about the *process* of extinguishment separated the two. For Cotton, by the charters,

it was neither the Kings intendment, nor the English Planters to take possession of the Country by murder of the Natives, or by robbery: but either to take possession of the voyd places of the Country by the Law of Nature, (for *Vacuum Domicilium cedit occupanti*;) or if we tooke any Landes from the Natives, it was by way of purchase, and free consent.<sup>12</sup>

In other words, the Massachusetts Bay Company charter did not establish any proprietary right *as against* the native claim, and wherever a native claimant could not be ignored, a settler claimant could only establish his right to land through consent, in Cotton's appraisal. Williams would have denied only those parts in the above passage respecting 'void' land, which came straight out of Winthrop's lexicon, and the style of 'purchase'. By contrast, in William's appraisal, Indian titles were not only abundant, but equivalent to those of 'the Noble men in England' and 'the King', and could only be bought out with a good price and 'love'. But when it came to the 'the Kings intendment' with the issuance of charters, Cotton and Williams were in complete accord: royal paperwork did not extinguish native title.

---

<sup>12</sup> John Cotton, *A Reply to Mr. Williams His Examination*, in *CWRW* 2: 46.

Williams, of course, went far further than this in his own letters. He told the magistrates of Boston to sail back to England and surrender the charter to Charles I; he maintained ‘that part of the Pattennt which respects the Donation of Land’ to be ‘Evill’; he condemned ‘the sinne of the Pattennts, wherein Christian Kings (so calld) are invested with Right by virtue of their Christianitie, to take and give away the Lands and Countries of other men’. No monarchs, by their paperwork alone, could provide for the dispossession of indigenous communities away from ‘Europe’, he stressed.<sup>13</sup>

These were the conclusions reachable in corporate New England, and they would not have been disputed in Nieuw Nederlant by van Twiller. And every other company in North America would have agreed with these principles at the time, making the only probable exception for the Compagnie de la Nouvelle-France – and not because *commissions* and *lettres* were put to work any differently there, but because French companies never acknowledged indigenous land rights, so there was never any need to establish a claim against them.

In New England, following from the Dutch example, land purchases slowly became the norm. Although Winthrop would not be shaken from his belief in the power of patents alone to confer land rights, he was fighting a losing battle. From the centre of company operations in Boston, he was incapable of enforcing the standing policy of prohibiting individual settlers making their own purchases from indigenous sellers towards the end of the 1630s.<sup>14</sup> Indeed, Winthrop even purchased land for himself in this period; and the Massachusetts Bay Company, which had assumed ownership of Pequot country around the Connecticut River at the end of 1634, found itself compelled to offer ‘fair terms’ to a Narragansett sachem, albeit ostensibly the *wrong* sachem, to confirm this title in 1637.<sup>15</sup>

---

<sup>13</sup> ‘Christendom’ was a word Williams despised for its association with Catholicism and its eschewal of Reformationist ideals.

<sup>14</sup> In 1639, for instance, Winthrop found himself frustrated again by John Wheelwright, whom he had banished from the colony in 1637. Wheelwright claimed to have purchased an area of land, Winicowett, which he refashioned as ‘Exeter’. This ‘dealing’, Winthrop admonished, was ‘against good neighborhood, religion, and common honesty; that, knowing we claimed Winicowett as within our patent, or as vacuum domicilium, and had taken possession thereof by building an house there above two years since, they should now go and purchase an unknown title, and then come to inquire of our right’. *MBCR* 1: 207; *WJ* 1: 294.

<sup>15</sup> *WJ* 1: 139-40, 238. See also Francis Jennings, ‘Virgin Land and Savage People’, *American Quarterly* 23, 4 (1971), 521-2. In another 1637 contract, Mascononomo sold the area of ‘Ipswich’ to the Company as well. For this, see Neil Salisbury, *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643* (Oxford: Oxford University Press, 1982), 200.

The problem with this particular contract, however, was the land in question and the Pequot, Narragansett, Mohegan, and Dutch interests wrapped up in it. A Westindische Compagnie purchase on the Connecticut predated Winthrop's actions. On June 8th 1633, the Westindische Compagnie entered into a purchase with the Pequot, with whom they subsequently arranged peace, in the hopes of maintaining a trading alliance as they had in Long Island with the Mohegans.<sup>16</sup> The Pequots, however, disobeyed their 'treaty' shortly after this, coming into conflict first with the Narragansetts near the newly constructed Fort of Good Hope, and then the Dutch; their contract, however, was separate and could not be undone, and the Westindische Compagnie prepared to use it in order to advertise their claim to neighbouring European governments. The Pequots were left with little option. Having made enemies of the Narragansetts and Dutch on the Connecticut River, the Pequots, under the leadership of Sassicus, approached the Massachusetts Bay Company for support. The Pequot-New England alliance proved abortive, however. It was dealt a severe blow in the summer of 1634, when the trader John Stone was slain by Pequot warriors whom their sachems refused to turn over to the English for punishment.<sup>17</sup> Two years later, another trader, John Oldham, was murdered in similar circumstances, for which the Pequots were again accused, removing all chance of an alliance with the Massachusetts Bay Company, the Plymouth Corporation, and the spontaneously fabricated Connecticut Corporation. With conflict imminent, the Mohegans, who up to this time had bounced between the Dutch, the Narragansetts, and the Pequots, now allied themselves with the governments of New England, which were beginning to assert their presence in the Connecticut region.<sup>18</sup> This intrusion onto the Westindische Compagnie domain, which had come, in van der Donck's words, 'after our Fort of Good Hope had been a long time in existence, and almost all the land on both sides of the river had been bought by our people from the Indians', faced little challenge from the Dutch in the first place, who distanced themselves from the impending showdown.<sup>19</sup> Scuffles were had and scalps were taken in the dying months of

---

<sup>16</sup> Condition and Agreement entered into between Commissary Jacob van Curler and the Chiefs of the Sickenames (8 June 1633), *CHNY* 2: 139-40.

<sup>17</sup> For a revisionist interpretation absolving the Pequot of responsibility for provocation, however, see Alfred A. Cave, 'Who Killed John Stone? A Note on the Origins of the Pequot War', *William and Mary Quarterly* 49, 3 (1992), 509-521.

<sup>18</sup> Salisbury, *Manitou and Providence*, 215. For an accessible and thoughtful treatment of Uncas's life and times, see Michael Leroy Oberg, *Uncas: First of the Mohegans* (Ithaca: Cornell University Press, 2003).

<sup>19</sup> Adriaen van der Donck, *Remonstrance of New Netherland* (1649), in *CHNY* 1: 287.

1636, before preparations for war in New England properly got underway at the end of winter the following year. In the aftermath of the 'Pequot War', the Pequot claim was eradicated from the Connecticut region, though it would remain for some years a place hotly contested by Dutch, English, and native interests.

That the New England companies considered this to be a war of conquest is clear from documentary evidence. On the 28th of April 1637, a special council of the Massachusetts Bay Company was 'assembled for the speciall occation of p[ro]secuting the warr against the Pecoits'. It was the conclusion of these nine men that 'the warrs, haveing bene vndertaken vpon iust ground, should bee seriously p[ro]secuted'.<sup>20</sup> And seriously it was, with the tacit support of the company's neighbouring governments. A court convened on May 1st at the new settlement at Hartford similarly concluded upon the 'Grounds being Just'.<sup>21</sup> John Higginson then addressed Winthrop personally, with the assurance that his military campaign had 'farre more cause to seek to defend [settler] liues and liberties and gossell, then such bloodthirsty wretches haue to invade destroy and take away the same'.<sup>22</sup> This was a radical justification for an offensive pre-emptive war.

Although Winthrop struggled to get the government at Plymouth to commit troops and resources to the war, it was by no means opposed to its progression.<sup>23</sup> As Edward Winslow admitted to Winthrop in April, 'we conceiue it will be simply necessary for you to proceed in the war begun with the Pequots, otherwise the natiues we feare will grow into a stronger confederacy to the further prejudice of the whole English'.<sup>24</sup> Plymouth eventually joined in 'the war against the Pequots', in pursuit of 'revenge' against 'the barbarians', in June.<sup>25</sup> The war had largely wound down by this time, however, following the gruesome slaughter of Pequot families at Mystic River just a few weeks earlier.

The result was utterly devastating for the losers, but enriching for the victors. 'We had formerly concluded to destroy them by the Sword and save the Plunder', wrote Mason of the pivotal battle. 'Thus the Lord was pleased to smite our Enemies in the hinder parts,

---

<sup>20</sup> *MBCR* 1: 192 (18 April 1637 in the Old Style).

<sup>21</sup> John Mason, *A Brief History of the Pequot War: Especially of the Memorable Taking of Their Fort at Mistick in Connecticut in 1637* (Boston: S. Kneeland and T. Green, 1736), x.

<sup>22</sup> John Higginson to John Winthrop (May 1637), *Winthrop Papers* (hereafter: *WP*) (Boston: Massachusetts Historical Society, 1943), 3: 405.

<sup>23</sup> John Winthrop to William Bradford (30 May 1637), *WP* 3: 417-9 (20 May 1637 in the old style).

<sup>24</sup> Edward Winslow to Winthrop (27 April 1637), *WP* 3: 391-2 (17 April 1637 in the old style).

<sup>25</sup> Winslow to Winthrop (15 June 1637), *WP* 3: 428, (5 June 1637 in the old style).

and to give us Their land for an inheritance’, he concluded of its inevitable aftermath.<sup>26</sup> Captain Underhill, on the other hand, likewise engaged in the fighting, was struck by the mismatch of the showdown. The Pequot, he reflected, fought ‘more for pastime, than to conquer and subdue enemies’.<sup>27</sup> The English did things the other way around, of course, definitively vanquishing the Pequot by the end of 1637 and then proceeding to establish a new title to the area. Years later in 1646, John Winthrop Jnr. would refer to the Connecticut as ‘ye conquered country’, ultimately to the enduring dismay of the Mohegans and their supporters, who were squeezed out by the new Connecticut proprietary regime.<sup>28</sup>

The collapse of the Pequot, and the assertion of an English claim in their vacation, triggered a frenzied rush to secure titles from friendly Indians through contract and subsequently issued deeds in the wider region – encompassing Rhode Island, Connecticut, and Long Island – from 1637 up to the end of the 1640s (and beyond). The Dutch had already been busy in this respect, and their efforts did not wane, especially after it became apparent that referring the English to the Westindische Compagnie paperwork was akin to ‘knocking at a deaf man’s door’.<sup>29</sup> New England followed their lead, although individuals took the greater initiative than the governments, leading, once again, to the imposition of a series of restrictions upon private purchasers across the region by the end of the decade.<sup>30</sup> Evidently, the example of Roger Williams, the man who advocated individual contracts with Indians, was much followed in this decade, even to the extent that Williams himself grew wary of the practice. His ears, he later complained, rang with ‘so much sound and noise of purchase and purchasers’, many of whom he rightly regarded to be lacking in good

---

<sup>26</sup> Mason, *Brief History*, 8, 21.

<sup>27</sup> John Underhill, *Newes from America; Or, a New and Experimentall Discoverie of New England* (London: Peter Cole, 1638), 36.

<sup>28</sup> *MBCR* 2: 160. Several enquiries on both sides of the Atlantic would subsequently be launched into the land in question, carrying right up to 1773, the results of which apparently confirming that the corporate conquest had availed a title superior to that of the Mohegans, before the American Revolution of course made the question disappear into the federal assumptions of the young Republic. Much can be gleaned from the documentary evidence collected in *Governor and Company of Connecticut and Moheagan Indians, by Their Guardians: Certified Copy of Book of Proceedings before Commissioners of Review, 1743* (London: W. and J. Richardson, 1769). See also the impeccable treatment of these enquiries in Craig Yirush, ‘Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704-1743’, *Law and History Review* 29, 2 (2011), 333-73.

<sup>29</sup> Van der Donck, *Remonstrance*, 288. Many deeds are collected in *CHNY* 14: 1-51; see also *New York Historical Manuscripts* (hereafter: *NYHM*), *Volumes GG, HH & II: Land Papers*, trans. and ed. Charles T. Gehring (Baltimore: Genealogical Publishing Co., 1980).

<sup>30</sup> See James Warren Springer, ‘American Indians and the Law of Real Property in Colonial New England’, *American Journal of Legal History* 30, 1 (1986), 34-9.

faith.<sup>31</sup> Indeed so accepted was the convention of contract during this period that John Winthrop even looked to buy out the Westindische Compagnie claim to the Connecticut with this method, sending a representative to the Heren XIX in Amsterdam in October of 1641 in order to ask ‘the said Company [to] set a price on their plantation, if they have any intention to part with it’.<sup>32</sup> The Massachusetts Bay Company was told that Connecticut was not for sale, and the dispute was underway again, with the two companies referring each other to their respective contracts and Indian purchases in order to present a superior proof of title.<sup>33</sup> Individuals emulated the corporations. This has been called the ‘deed game’, and it continued apace in New England and New Netherland. Contract provided the rules for this game: Dutch and English contracts with Indian sellers spawned an abundance of deeds (of varying authenticity) that were transferred between settlers through contracts again. This was a game that did not finish playing itself out until the second half of the eighteenth century.<sup>34</sup>

In the region to the south, a similar situation developed on a slight delay, albeit with a few important variations. For this, it is necessary to return to the outset of Wouter van Twiller’s reign in Nieuw Nederland in 1633. It was in this period that the Dutch began to investigate the Zuid Rivier region, hatching plans for its occupation. On his expedition of that year, David Pieterszoon de Vries ran into Sir John Harvey. De Vries appeared in association with the Westindische Compagnie, whereas Harvey represented the king of England in his capacity as governor of the Virginia crown colony.<sup>35</sup> Welcomed into Sir Harvey’s house, situated within the region of ‘My Lord Delaware’s Bay’, de Vries was told that ‘it was the King’s land, and not New Netherland’. But, de Vries protested, ‘for ten years no Englishman had been there, and that we for many years had had a fort there, called Fort Nassau’.<sup>36</sup> Harvey was puzzled at this. Why, he asked, had he seen or heard none of

---

<sup>31</sup> Testimony of Roger Williams Relative to the Deed of Rhode Island, Providence (25 August 1658), *CWRW* 6: 305-6.

<sup>32</sup> Proposals of Mr. Peters to the West India Company (10 October 1641), *CHNY* 2: 150-1.

<sup>33</sup> See generally Edward B. O’Callaghan, *History of New Netherland; Or, New York under the Dutch* (New York: Appleton and Co., 1848), 1: 205-79.

<sup>34</sup> Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (New York: W. W. Norton and Co., 1976), 128-47. See also Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge MA: Harvard University Press, 2005), 49-111.

<sup>35</sup> For the creation of the crown colony, see below, 238-9.

<sup>36</sup> Van der Donck, *Remonstrance*, 290.

these Dutch neighbours? Barely contemplating the answer, Harvey was quick to reflect on why it might even be necessary to ask such a question in the first place. As de Vries recorded the exchange, Harvey reached the telling conclusion that ‘there was land enough.– we should be good neighbours with each other, and that we were in no danger from them, if the people of New England did not come too near us, and dwelt at a distance from us’.<sup>37</sup> In other words, if time spent on the land might sort out the European owners from the European possessors of the Zuid or Delaware River, then space between the domains of New England, New Netherlands, and Virginia would render pointless this kind of sorting in the first place. Of course, these interests *would* eventually need to be sorted out, and physical force ultimately played a far more important role in that process than time or space. But this would only happen after the river in question became congested by a stream of newcomers for the Swerige Söder Compagniet: settlers whose presence was endorsed by bits of royal paperwork from Queen Christina of Sweden.

The *Kalmar Nyckel* (Key of Calmar) and *Fågel Grip* (Griffin) left Sweden in 1637 under the command of Peter Minuit, a man who only a decade earlier could be found in charge of New Amsterdam for the Westindische Compagnie. The fleet reached America around March of 1638, making what appears to have been their first port of call in James City, which reported the coming of ‘a Dutch ship [...] w[i]th a Commission f[rom] ye young Queen of Sweden, & signed by 8 of ye chiefe Lords’. Asked on the shore by James Hawley for ‘any copy of it’, Minuit refused to show his commission, instead telling the Virginian treasurer that he intended ‘to plant Tobacco’ in some of the lands to the north. As his crops would take time to ripen, Minuit made the suggestion that, in the meantime, his men ‘might have free Trade for [Virginia’s] Tobacco to carry to Sweden’. Trade was trade, especially in the eyes of the treasurer, but planting was a different matter, and ‘Contrary to his Ma[jes]ty[’]s Instructions’, Hawley told Minuit. But these words proved no deterrent to Minuit, who pulled out of James City – with or without some tobacco from Hawley it is unclear – to make with his fleet and his seeds to ‘the de la Warre bay’ without delay.<sup>38</sup>

---

<sup>37</sup> David Petersoon de Vries, *Voyages from Holland to America, A. D. 1632-1644*, trans. Henry C. Murphy (New York: Billin, 1853), 50-1 and 58 for when, days later, a similar interchange transpired between de Vries and ‘an Englishman’ as to the voyage of “David Hudson” and the rights associated therewith.

<sup>38</sup> Notes on Virginia, Maryland, Newfoundland (nd), NAUK CO 1/1, 32.

The Dutch were next in line to dispute the Swedish claim. Despite Minuit's former position in the Westindische Compagnie, and regardless of the fact that key investors in the Swedish company were the residents of Amsterdam, Minuit was now a traitor to New Netherland. When the Dutch company's director on the ground, Willem Kieft, received news of the arrival of the Swedes and their establishment of Fort Christina, his rebuke came promptly. In his letter of early May in 1638, not only did Kieft confess his doubts about the nature of the permissions granted by the Swedish queen, but he also threatened retaliation, on his own jurisdictional authority, if established private interests in the region were damaged by their actions. The land in question, he wrote,

has been many years in our possession and secured by us above and below by forts and sealed with our blood, which even happened during your administration of New-Netherland and is well known to you. Now, as you intrude between our forts and begin to build a fort there to our disadvantage and prejudice, which shall never be suffered by us and we are very certain, that her Royal Majesty of Sweden has not given you any order to build fortresses on our rivers or along our coasts [...] We do hereby protest against all damages, expenses and losses, together with all mishaps, bloodsheds and disturbances, which may arise in future time therefrom and that we shall maintain our jurisdiction in such manner, as we shall deem most expedient.<sup>39</sup>

More threats followed in the pair's subsequent correspondence, but these fizzled out when Kieft turned his attention to the more pressing matters on his hands closer to the Connecticut and the Hudson, where the English were beginning to dispute his right. Addressed constantly, with 'divers letters' calling for an independent enquiry into the region, Kieft chose instead to ignore them and allow the diplomats of Europe resolve the dispute.<sup>40</sup> With enemies on all fronts, realised the prudence of neutrality towards the Swedes for the time being. This allowed the Swedish claim to go unchallenged for the next few years. As van der Donck would put it a few years later in his *Remonstrance*:

What right these people have to [occupy the Zuid Rivier], we know not; we cannot comprehend how servants of other powers, as they represent themselves, but by what commission is not known here, make themselves so much masters, and assume authority, over land and property belonging to and possessed by others and

---

<sup>39</sup> Protest of Director Kieft against the Landing and Settling of the Swedes on the Delaware (6 May 1638). *CHNY* 12: 19.

<sup>40</sup> For this, see below, 259-63.

sealed with their blood, independent of the [Geoctroyeerde Westindische Compagnie] Charter.<sup>41</sup>

Certainly, the English would have expressed the same bewilderment towards the content of the Swedish royal paperwork at this moment, but there was no reason yet for them to launch any protest. For as long as the occupation by Swedish hobby gardeners of a small portion of the Delaware River did not expand too far in the direction of the Connecticut and New Haven area, New England would refrain from dissent. For as long as good prices were being paid for Chesapeake tobacco, Virginia would refrain from the same.

So commenced another honeymoon period, then, and it would be no different to any other in America, insofar as it, too, was short-lived. In 1642, a bold new governor, in the person of Johan Prints, left Old Sweden for New with the *Fama* (Fame) and the *Swanen* (Swan). These ships were to be used, from this point onwards, along with the *Kalmar Nyckel*, to carry not only tobacco but also peltries back to Europe. The Swedes were now serious players in the fur trade.

Prints's instructions, which had been issued in August by Queen Christina herself (now a personal interest in the revitalised West Indiske Compagniet i Nya Sverige, rid forever of its Dutch investors), plainly called for a more assertive occupation of the Söder region. 'Contractz' were immediately to be made with natives deemed the '*rättmatige egendombz herrer*', that is, the rightful lords of the property.<sup>42</sup> By contrast, a firm stance was to be adopted towards neighbouring Europeans. Nearby 'English families' were to be brought 'within the jurisdiction of the Swedish Crown', or otherwise, removed 'out of and away from that place in a peaceable manner'. Men from the '*Hollendiske Compagniet*', similarly, were to be removed or retained. In the more expected event of Dutch 'hostility' in resistance, Prints was to insist upon his freedom to make contracts with Indians in the region, and if that failed to pacify them, he was authorised to 'repel such force by force'.<sup>43</sup>

Given this mandate for confrontation, Prints arrived at New Sweden at the beginning of 1643. His first *mêlées* were not with the Dutch, however, but with Englishmen

---

<sup>41</sup> Van der Donck, *Remonstrance*, 291.

<sup>42</sup> *The Instruction for Johan Printz, Governor of New Sweden* (hereafter: *IJP*), ed. and trans. Amandus Johnson (Philadelphia: Swedish Colonial Society, 1930), 67-9. This wonderful resource is paired with the original Swedish transcription and comes with a number of related documents.

<sup>43</sup> *IJP* 74-5.

from the informally put-together Delaware Company of New Haven – a fur-trading concern headed by the experienced New England merchant, George Lambertson. A man contemptuous of any border separating himself from trading Indians, Lambertson was well-known to New Netherland and New Sweden, for he had been shooed away from both sites before this. Come the summer of 1643, when Lambertson was discovered by the Swedish to be trading with Indians just three miles from Fort Christina, there would be no easy getaway during the new governor's reign. When Prints got word of Lambertson's presence – and his supposed plot with 'the Indians' to massacre the Swedes and the Dutch alike – Prints had the English interloper arrested and delivered to the fort. His next step was unusual, establishing a makeshift court to instigate proceedings against Lambertson personally, in which three distinct charges would be raised: first concerned the criminal deed of conspiracy, second concerned Lambertson's use of the land in question and his own personal claim thereto, and third concerned his right to retain personal possessions as a result of his apprehension for illicit trading in the region. This was no conventional suit, brought in a jurisdiction that was more unconventional still.

Heard, albeit in a number of broken languages, on July 10th of 1643, *Johan Prints v Mr. Lambertson* was diligently recorded in a highly Latinised Dutch, the commonest vocabulary of the interests in court. Lambertson would have certainly been confused, were the main line of the court's interrogation not so predictable. Asked for the 'basis' or 'commission' of his right 'to this place', Lambertson – evocative of both the Earl Warrenne ('*Ecce domini mei ecce Warentum meum*') and a later Louis XIV ('*l'état, c'est moi!*') – responded that 'he himself was commission enough'. Asked to justify his defiance of 'Her Royal Majesty of Sweden', he denied the allegation, affirming instead his right to enjoy those lands he had purchased from Indians, which he claimed, without a modicum of proof, to have done two years earlier and with the consent of the Dutch commissary at Fort Nassau.<sup>44</sup> The 'Honourable Governor', in his turn, declared that the land belonged to the Nya Swerige Compagniet by the 'statement and command' of his monarch, and that it had been purchased from Indians, in a contract predating Lambertson's and given acknowledgement by a 'letter' of the same queen. Finally, Prints remarked, that if the

---

<sup>44</sup> Proceedings of a Court at Fort Christina (10 July 1643), *IJP* 231-3, 238.

Swedes had to reach an agreement with anyone about rights of occupation in the region, it was to be reached with the Westindische Compagnie, and not Lambertson, who 'had by right nothing at all to do there'.<sup>45</sup>

Beyond this line of enquiry, only circumstantial hearsay and name-calling captured the attention of the court in relation to the first charge of conspiracy, of which Lambertson was ultimately acquitted. As to the other charges, however, the court ruled that

it has been completely shown, through the documents, that Mr. Lambertson to date has by right had no place of his own, by, in, or around this River, and through the Honourable Court such unreasonable pretensions are taken away from him and here again entirely denied. And his property, since he has brought it here without right and commission, he may (as far as he wishes) again take it from here. It has been shown through the documents and Mr. Lambertson himself has admitted that he without a commission has bought within the territory of Her Royal Majesty of Sweden and the Honourable West India Company, on the streams and trading places, 400 beavers, pretending that he himself was a sufficient commissary, subject to no king, prince or potentate, so that in such a circumstance not only the 400 beavers but also the ship and his property in conformity with all justice could be made a proper prize, but on the request of the plaintiff, the Honourable Court [declares that] as he now has traded for the second time he should pay a double duty on the 400 beavers, on this condition that if he, [against all] hope should [...] trade again a third time, he would forfeit his ship and property.<sup>46</sup>

Lambertson returned to New England and reported all of this to John Winthrop, Governor of the Massachusetts Bay Company, who was inspired to pen a letter of protest in response. 'It is perfectly well agreed as well among others as among the Swedes and the Dutch', wrote Winthrop in Latin to Prints in September of 1643, 'that the kings of England have for a long time by letters patent [*literis patentibus*] [...] inspired and encouraged their subjects to explore these western parts of the world and to settle colonies in the same'. Lambertson, Winthrop wrote, was apprehended and tried in defiance of this convention; it was done 'under pretence of sanction of the Swedish Crown, although we are greatly persuaded that neither the Queen of Sweden nor any of those who sit at the helm of that kingdom would approve it'. Winthrop disagreed with the court's findings and sided firmly with Lambertson, making also the accusation that the Swedes had taken possession of land already bought from the true Indian proprietors at a just price. Or, as it read in the

---

<sup>45</sup> Proceedings, *IJP* 234-5.

<sup>46</sup> Proceedings, *IJP* 242-3.

Winthrop's best Latin: '*Te nimirum possessionem fundi arripuisse quem nostri confederati justo precio ab Indis mercat sunt, penes quos erat vera proprietas, ut ex instrumentis emptorijis extantibus atque authenticis et liquet et liquefiet*'.<sup>47</sup> This was the Roman *lex contractus* to Winthrop's best recollection from his more youthful years reading civil law at Gray's Inn, and it represented a remarkable change in his thinking from his early years at Boston.<sup>48</sup> For Winthrop, *literis patentibus* were still important in establishing English jurisdiction well before Christina's letters of 1642, but contracts were now more important, creating rights in private law for New England subjects which could not be trampled over by any Swedish *arriviste*.

On both points, Prints was stumped, as he was more generally because of the letter's language of Latin (for Prints was a man, by his own admission, who 'more often, for the last twenty-seven years, had the musket and the pistol in my hands than Tacitus and Cicero', and he studied not law but theology).<sup>49</sup> Multilingual frontiers of law and people were a challenge even for the most experienced continental mercenaries, evidently, but more specifically to the point, Prints would have to overcome the intellectual challenge of the precedence of royal patents and contracts, which was no easy task. Naturally, the Swedish governor took plenty of time, until the beginning of the new year in fact, to respond in Latin with his justification for the ruling of the court of New Sweden.

'Her Royal Majesty of Sweden, my most gentle Queen', Prints told Winthrop, had merely authorised the acquisition of land through purchase by a fair price ('*aequo praecio*'), and nothing more: New Sweden, Prints assured Winthrop, would make for a good Protestant colony like New England, and it would be founded on the same bedrock of title secured through contract.<sup>50</sup> Lamberton, though, was a trouble-maker, caught after three warnings trading near 'the fortress of Christina', but never in the possession of any papers authorising him to be there. Contrast, Prints asked Winthrop, the recent visit he received at the Delaware by a ship from a neighbouring colony. These men, Prints said, he was happy to allow into the bay, 'because they showed the credentials of the Governor

---

<sup>47</sup> Winthrop to Printz (18 September 1643), *IJP* 209-11.

<sup>48</sup> Bremer, *John Winthrop*, 89-124.

<sup>49</sup> Report of Governor Printz (11 June 1644), *IJP* 120.

<sup>50</sup> 'non alia intentione praefatam provinciam, precio iusto ordinarie neque sinit, quam eandem christianae Religionis orthodoxae hominibus implet'.

[*Gubernatoris testimonia*]. ‘It is a question’, Prints then raised, as to ‘whether a man, who without some authority and credentials [*diplomate et testimonio*] from some king, duke, governor or prefect, passes either over land or sea and sets himself to exercise trading at foreign places and royal fortresses contrary to the royal command’, does so without fear of imprisonment. To Prints’s mind, the answer to that question was in the negative.<sup>51</sup>

The creation of the court and the proceedings brought against Lambertson may have been perfectly justifiable in this way, but it was easily used against Prints. Winthrop, the Governor of the Massachusetts Bay Company, now enjoyed a free hand to send English subjects into the Delaware valley, for it was hardly a strain for him to apply his signature to parchment bearing the corporation’s stamp now and then. William Aspenwald would be the first test runner, as Winthrop informed Prints on the 22nd of April, being ‘sent with a commission under the public seal to examine the western bounds of our colony’.<sup>52</sup> By adopting the very protocol insisted upon by Prints, then, Winthrop was able to send men into New Sweden at his pleasure. If at first the frustrated Prints colluded with the neighbouring Dutch to prevent Aspenwald from making passage any further than Fort Nassau, he soon accepted the futility of any attempt to block the passage of Englishmen through the region. There would be no stalling the creation of New Haven under the observation of the Massachusetts Bay Company, just as there would be no stalling the creation of the Providence Plantation beyond it.<sup>53</sup>

Part of the reason behind Prints’s powerlessness was obviously owed to the deterioration of his alliance with the nearby Dutch, which ruled out any chance of cross-corporate collaboration from 1647. In that year, Willem Kieft was replaced in his position as governor of New Netherland by the firm and experienced Peter Stuyvesant. The Westindische Compagnie’s policy during the early period of Stuyvesant’s reign was characterised, in northerly New Netherlands, by the cordoning off and fortification of the company’s settlements, and in southerly New Netherlands, by the expansion into the Zuid Rivier region to wrestle back control of the fur trade there. Both of these very different neighbourly approaches to New England and New Sweden would lead to conflict. During

---

<sup>51</sup> Printz to Winthrop (12 January 1644), *IJP* 215-6.

<sup>52</sup> Winthrop to Printz (22 April 1644), *IJP* 209-11.

<sup>53</sup> Printz to Winthrop (29 June 1644), *IJP* 213-6, but see also his notes scribbled on the above letter.

the first few months of his rule, however, Stuyvesant did not act too provocatively. Even though one of his first moves was to charge the commissary of Fort Nassau, Andries Hudde, with the task of building additional fortifications on the fringes of New Sweden from the summer of 1647 onwards, Stuyvesant made no incursion further south than this. Perhaps anticipating that Prints might impede or harm Hudde, Stuyvesant thought it prudent to wait for the Swedish firebrand to make the next move.

Stuyvesant in the meantime made his first enquiries into the legal strength of the Swedish claim, about which both he and his colleague, van der Donck, remained highly sceptical. In the course of this investigation, he turned to the Massachusetts Bay Company, asking of Winthrop whether or not he considered the Swedish claim to be the weakest of all to the Delaware, hoping perhaps to warm up the friendship that had run cold during the Kieft years. Winthrop, in response, welcomed his new Dutch counterpart, and agreed in principle to live in peaceful co-existence with the new Westindische Compagnie administration, but avoided the prospect of any joint offensive directed towards New Sweden.<sup>54</sup> Good relations between the Westindische and the Massachusetts Bay companies did not prove easy after this, despite Winthrop's assurances, with New England and New Netherlands so geopolitically and economically amorphous as they were throughout this period. Stuyvesant could only hold off from antagonising the English until the 12th of October, from which point he and his council adopted a policy of intimidation towards the settlers of New Haven and those in the vicinity of his Fort Good Hope.<sup>55</sup>

In the weeks leading up to this, Stuyvesant had been confronted with the brief and bizarre comeback of New Scotland. At the end of September 1647, Andrew Forrester made his approach to the Dutch governor, to present his case to the Scottish right to Long Island. He had spent a week or so beforehand visiting the English settlers of the wider region, conveying the message that a Scottish takeover was in the making. Stuyvesant was clearly confused by all of this, having heard nothing of it before. Forrester told Stuyvesant that he represented the interest of Mary Dowager of Stirling (formerly the wife of the deceased Sir William Alexander, though now wedded only to his debts). He complained that the Dutch

---

<sup>54</sup> Stuyvesant to Winthrop (25 June 1647), Winthrop to Stuyvesant (17 August 1647), *CHNY* 12: 39-41.

<sup>55</sup> Theophilus Eaton to Stuyvesant (8 October 1647), in *New Netherlands Documents Series* (hereafter: *NNDS*), *Volume XI: Correspondence, 1647-1653*, trans. and ed. Charles T. Gehring (Syracuse: Syracuse University Press, 2000), 11-3.

occupation of the region had damaged Mary Stirling's interest, and claimed to have 'commission to take possession as governor of Long Island and of all the islands situated within five miles thereabouts'. But when Stuyvesant asked 'the said governor to show his commission and instructions', Forrester apparently 'gave for answer that he came here to demand *my* commission and authority'.<sup>56</sup> So it went, as ever, in these overlapping parts of the new world. Stalemated, their discourse broke down.

Forrester stomped off to the town pub, where he remained until Stuyvesant had him apprehended there. Reunited with Stuyvesant, Forrester, in detention, was again told to present his commission. This he did, revealing 'a large parchment, covered with writing, in the form of a commission, to which hung an old broken seal; having no name subscribed, nor any place designated where the commission was issued'. This was a patent of King James, declared Forrester, and it may well have been but Stuyvesant would not be convinced. Surely, Stuyvesant asked Forrester, he might have on him some 'other, or better, commission than the one he now produced'. To this, Forrester could only respond in the negative. Stuyvesant then convened an urgent meeting of his Raad on the 28th of September, which resolved to send 'the pretended governor a prisoner to Holland by the ship *The Valckenier* to vindicate his commission before their High Mightinesses [i.e. the *Heren XIX*]'.<sup>57</sup>

As Forrester made his way not home to his native Dundee but instead to Amsterdam imprisoned aboard the *Valckenier*, relations between the Swedish and the Dutch on the Söder or Zuid Rivier deteriorated. Throughout summer, Prints had made his opposition to the Westindische Compagnie's presence there widely known, 'spread[ing] the report everywhere', grumbled Hudde, 'that [our] Company has nothing to say in this River'. Hudde, as expected of him, acted otherwise. After accepting an invitation in June to dine with Prints at his table, Hudde boasted to the Swedish governor that the Westindische Compagnie's claim to the river was far better than the *Nya Swerige Compagniet*'s claim because it came first. This enraged the short-tempered Prints, who exclaimed in response

---

<sup>56</sup> *NYHM* 4: 442-3. My emphasis.

<sup>57</sup> *NYHM* 4: 444-5. '[...] in order to prevent such and similar mischiefs, it is unanimously resolved and concluded in council, for the sake of our Sovereigns' reputation, the Company's interest, and the prosperity of our nation in these parts, to send the pretended governor a prisoner to Holland by the ship *De Valckenier* to vindicate his commission before their High Mightinesse'.

‘that the [Westindische] Company could not depend on or confirm their old or continuous ownership’. This was a point about prescription which he made by diabolical analogy, remarking that ‘the Devil was the oldest proprietor of Hell, but that he might even admit a younger one’ (which was but one of many ‘other vulgar expressions to the same effect’, about which Hudde complained sometime later). This would be the last time that the two men were ever to share a table together.<sup>58</sup>

Obstinate Hudde resumed his summertime job of building a new fort for the Westindische Compagnie, when he was visited by a contingent of eight armed men sent by Prints to discover by ‘what orders’ and ‘superior authority’ he was there. Asked if he could show ‘any document’ to that effect, Hudde entered into a familiar stalemate. ‘Yes [...] I would give it to him’, he said, but only ‘after [Prints] had first delivered to me a document, to show by what authority he demanded mine’. Prints had been frustrated again. Short of ordering the physical disassembly of Hudde’s constructions, instead the Swedish governor plotted to isolate Hudde from the Atlantic, ‘shutting up the river’ and turning away ships – even those on ‘a respectable commission’, from the Westindische Compagnie.<sup>59</sup> These were foolish actions, because when the ships outfitted for Hudde returned to Stuyvesant carrying the ‘firm protests’ of Prints, the governor of New Netherlands took great offence. His retaliation took the form of ‘10 or 12 ships’, which he led personally to New Sweden. Reaching the bay, Stuyvesant ordered a series of volleys to be fired into the air as a show of force. It marked the beginning of a period of outright hostility between New Netherlands and New Sweden. For the next few years, with an insatiable grudge, Stuyvesant devoted much of the company’s energies to capturing the Nya Sverige Compagniet’s forts and establishing and fortifying a new fort, Fort Casimir, near Fort Christina.<sup>60</sup>

Prints’s deteriorating relations with Hudde, and the retaliation of Stuyvesant this inspired, revealed to the governor of New Sweden, if he did not already know by this time, the impossibility of acting with any authority over the Westindische Compagnie and its forts merely with the commissions of Queen Christina alone. His royal paperwork awarded

---

<sup>58</sup> Report of Andries Hudde, or A Brief but True Report of the Proceedings of Johan Prints (22 September 1646), *IJP* 269. This is the best English edition of this report.

<sup>59</sup> Report of Andries Hudde, *IJP* 273-4.

<sup>60</sup> *JRJ* 151.

him no jurisdiction over Dutch subjects who moved into the land set aside for the Nya Sverige Compagniet.

As Prints prepared to make his departure for Europe at the end of his tenure as governor, the limits of royal authority in New Sweden would be exposed one final time but in very different circumstances, and the result was even further instability for the colony. When Captain Sven Skute declared to the free settlers of New Sweden that his ‘*donationsbrev*’ from Queen Christina, dated August 20th of 1653, vested him with a feudal right of lordship over the entire community (who were now, he said, his tenants [‘*frälsebönders*’]), dissent was quickly their response. It would be up to Prints’s successor, Johan Risingh, to organise the temporary pacification of their dispute in 1654, which he did by explaining to the settlers that ‘Her Majesty meant only to give Captain Skute the land, but neither their labour and the expenditures which they have made upon the land nor their persons’. It all fell quite short of what the settlers expected due them: ‘pieces of land with freedom and perpetual ownership [*Stycken land till Evärdelig egendom och frihet*]’. The matter would sit in abeyance until the adjudication of ‘Her Royal Majesty and the company’ back in Sweden, Risingh told Skute and the settlers, having learned a valuable lesson about the conflict between presumptions of the existing privileges of his own subjects and those granted subsequently in royal instructions.<sup>61</sup>

More pressing to Risingh, at the start of his tenure, was the presence of the Dutch in New Sweden. He resolved to remove them, by expressing a ‘firm insistence upon our rights’ – and only that. In May of 1654, Risingh’s men arrived at Fort Casimir to carry out his commands. The Dutch sergeant in control, Gerrit Bicker, was told by the Swedish envoy how his fort had been created by ‘coercion’, and in conflict with ‘our right to the territory’. Bicker and his men were invited to surrender the fort on this basis, but were told they could remain in the country if they became loyal to the Swedish company and the Swedish Queen. ‘Our rights for this are clear’, the Swedish told Bicker, ‘as our paperwork reveals [*vår råttighet vore där ock klar, och med brev beviselig*]’. Though it came as a surprise to Risingh, Bicker refused to yield. Only when the Swedish governor deviated

---

<sup>61</sup> *JRJ* 170-1.

from his original plan, and resorted to substantiating the Swedish claim by cannon shots, did the fort succumb, and quickly, to a military take-over.<sup>62</sup>

It is amazing how quickly these roles could be swapped and changed at this particular bay. Just a few weeks after this, as Stuyvesant no doubt pondered his next move after the embarrassment of Bicker, Risingh was visited by several Englishmen. The Delaware River was English by right, these men claimed. As the Puritan Virginian Edward Lloyd explained it to Risingh, even if English attempts ‘to take possession’ had been ‘hindered [...] by [Swedish] men’, nevertheless ‘they had discovered it first, and Lord Baltimore had received it as a grant from King James’. Here the governor of New Sweden was presented with an argument for rights based upon paper almost identical to that which he had pointlessly offered to Bickers less than a month earlier; the only difference being that Lloyd’s case was presented with an insistence upon first dibs. Risingh, this time, could call upon his fresh experience, and seeing in the English consort no strength of arms, he told them:

that discovery of land could not give possession [*att upptäckningen av landet kunde ingen possession giva*], for, if so, the English would have no part of America which the Spanish had first discovered. That was especially true about these places and their environs, which were claimed by the Spanish before they were discovered by English seamen. King James’s *Donation* should be considered equal to the *Donation* which the Pope gave to the kings of Castile and Portugal [... for] the Pope granted that which he did not own nor was empowered to give.

[...]

[T]he English, the French, and the Dutch have, in practice, by having occupied and populated large tracts in America, shown that this *Donation* did not have any power. And as they themselves occupied land discovered by others, we Swedes were free to occupy those lands which we could obtain from their [indigenous] owners.<sup>63</sup>

This appeared to do the trick – these Englishmen were parried off – but it was altogether another question whether or not this kind of strategy might work on the militarily superior Westindische Compagnie. The summer of 1655 would provide for the necessary

---

<sup>62</sup> *JRJ* 150-1, 154-5, 156-7.

<sup>63</sup> *JRJ* 178-81. ‘*Donation*’ is the term used in Swedish, and is used instead of ‘*grant*’, which ones finds in Johnson’s translation. This account of his justification is followed by a list of Risingh’s four ways to get title in the New World, for which, see above, 8-9.

showdown. Landing with an armed fleet on the Zuid bay, Stuyvesant reclaimed Casimir for the Westindische Compagnie, and from there, began to orchestrate the capture of Christina. Risingh's diary entry in early September relates some of the measures taken by Westindische Compagnie men in this takeover: 'They killed our cattle, goats, pigs, and poultry, demolished our houses, and pillaged the people of their possessions outside of the fort'.<sup>64</sup> Might had well and truly become right on the bay by this time, even if livestock losses outnumbered human casualties, and personal property remained the most important thing at stake in the encounter. In this context – one so similar to the Virginia Company's raids on French Port Royal – Risingh found himself outplayed by Stuyvesant. As a last resort, he sent, by envoys, something remarkable for how hopeless it was: 'a written commission with which we sought to deter him from further hostilities, protesting against his hostile invasion of our proprietors' rightful ownership without explanation and given reasons'.<sup>65</sup>

This document, however boldly it may have been composed, failed to do the job, as Risingh must surely have expected it would. Forced then 'to yield', in the face of 'such violence against us', Risingh was left with no choice but to present his terms of capitulation to Stuyvesant. This marked the end of the Nya Swerige Compagniet's administration on the Söder Rivier, but the terms of this capitulation, which unambiguously indicated the need to seek restitution later through diplomatic means, flagged that the company's interests would require much different consideration later on the continent.<sup>66</sup> Meanwhile, in Amsterdam, the Heren XIX, for its part, was quick to demand for the reassertion of the Westindische Compagnie's claim to the region. New instructions were issued in 1659 for Stuyvesant regarding the Dutch right to the Zuid River. 'You must be especially careful in all this', they advised, 'that by doing everything according to prescription the burdens of

---

<sup>64</sup> *JRJ* 252-3

<sup>65</sup> *JRJ* 256-7.

<sup>66</sup> *JRJ* 258-9, 262-3: 'For our patrons we reserved the right to receive redress there in the country in a reasonable manner and in due time, as, because of our weakness and destitution, we were forced to yield to such violence against us [...] [A]ll our men thought it best to stand by our earlier capitulation, leaving our case before God and our Most Gracious Sovereign to seek vengeance for the lot which had fallen to us and to rectify the damages suffered, knowing that we had a Gracious Sovereign, who would sooner suffer damages than insults. [...] The Royal protection and the aid of His Royal Majesty Our Most Gracious King [Karl X Gustav after 1654] and Lord is most humbly sought and requested for our redress'.

the Company may be eased and injury prevented'.<sup>67</sup> The Swedes, in other words, were neglectful of their property, and time was now on the side of the Dutch, who could now prescribe against their neighbours if not themselves. The Devil was restored to Hell, in other words, but only for as long as his enjoyment of *dominium* remained undamaged by English military might.

Much, by this point, had changed since 1600. Prescription and paperwork had not become irrelevant by the middle of the century, but for claims to land on either bases to be cognisable to other Europeans, these had to be backed up by the force of arms. There were no clear rules to this, indeed barely any correspondence to Roman tradition and medieval practice beyond the language deployed by corporate governors. Everything was circumstantial among European competitors, and might was invariably right even if it was never all that brutal in comparison to the onslaughts faced occasionally by indigenous communities. Natives could never afford to put a foot wrong in this period. Making the wrong alliance, failing to repent for transgressions, or instigating violence on the peripheries of colonial control all had the potential to trigger the conquering corporation into bloodthirsty existence. This was never the ideal scenario, of course; no company moved into the New World with unconditional premeditations of war. From the 1630s onwards, corporate relations with indigenous people, at least in those areas south of New France, were meant to be based upon contract. These transactions were not always innocent, however. The instrument of contract despoiled natives permanently of great swathes of land, and was then used by settlers to transfer rights in a contained market among only themselves. Contract was therefore catastrophic for indigenous communities and the most efficient method of giving settler property rights a stamp of authenticity, and not only that. Amazingly, contract also became a means of advertising rights of jurisdiction and territoriality to competing interests in the New World. Attributing a public law function to a private law instrument, the Westindische Compagnie firstly and then the Massachusetts Bay Company secondly gave the contract an altogether radical application in America. How all of this was understood in Europe will be the next concern of this thesis.

---

<sup>67</sup> Heren XIX to Pieter Stuyvesant (22 December 1659), *CHNY* 14: 450.

## **Chapter 9: Diplomacy and Private International Law in Europe, Part I, 1603-1635**

A series of great changes in thinking and practice with relation to international legal thought and European diplomacy took place between 1495 and 1756, at the centre of which is a period of history covered in detail by this thesis. At this juncture, there was some uncertainty about the legal personality of the sovereign entity sending his or her ambassador, and there was uncertainty about the particular responsibilities of these ambassadors in foreign courts. Tracing how the extra-European actions of corporations led to legal and political disputes in Europe during the first half of the seventeenth century allows for an interesting perspective upon these particular issues. A modest argument emerges in the next two chapters: that public continental arrangements of *ius post bellum* provided the principal determinant of peacetime trans-jurisdictional restitution in private law (what is called here ‘private international law’), during the period between the rise of European trading competition in the Indian Ocean in the 1590s and the dawn of the ‘age of mercantilism’ in the 1650s.

In order to make this argument, it is important to establish, for the intents and purposes of the next two chapters, the forms which diplomacy actually took in the late-medieval and early-modern period. Helpful here is the first known guidebook for European diplomats, Bernard du Rosier’s *Treatise about Ambassadors* (1436), which remained relevant for the next century at least.<sup>1</sup> The public utility of ambassadors, Du Rosier explained, was immeasurable due to the multiple roles they performed in their representative capacity for their sending authority (*republica*). If some of these roles were principally ceremonial, and others were principally negotiational, in all duties the interests represented were only ever public, and seldom if ever private. An ambassador’s mandate was only to enter into treaties respecting such public affairs as were clearly specified by whichever prince, city-state, kingdom, or community he represented.<sup>2</sup>

---

<sup>1</sup> Bernardi de Rosergio, *Ambaxiator Brevilogus* (1436), in Vladimir E. Hrabar, ed., *De Legatis et Legationibus Tractatus Varii* (Dorpat: Typographeo Mattieseniano, 1905). For context, see also Garrett Mattingly, *Renaissance Diplomacy* (New York: Dover Publications, 1988 [1955]), esp. 25-54.

<sup>2</sup> Rosergio, *Ambaxiator Brevilogus*, cap. iii; cap. xxx.

The next two chapters of this thesis, concerned less with the agents of diplomacy and more so with *the kind of legal issues* they were expected to resolve, reveal that a great change began to take place at the start of the seventeenth century through to its middle decades. It cannot be claimed that diplomacy conducted in pursuit of *ius post bellum* had been ignorant of private interests before this period, as many post-war treaties contained provisions for the restoration of private property damaged or taken in war. The claim can be made, however, that those private legal interests which were cast abroad into foreign waters became dissociated from those of their public sovereigns in the brief windows of peace in this period like never before, and were left, therefore, to be recognised by new legal receptacles. Contrast, to call once more upon the particular example of the anti-Iberian English, the court of James I/VI with the court of Elizabeth I. Robert Beale, when engaging with Mendoza, spoke directly for his queen, the monarch responsible for the actions of her commissioned ‘subject’, Francis Drake.<sup>3</sup> James, by contrast, claimed no responsibility for the actions of the London and Plymouth Companies almost immediately after their incorporation by his seals. The Spaniards complained vehemently in a number of European courts about the Virginia project throughout 1609, a time of formal peace between England and Spain, but ‘his Majesty pleads that the undertaking is a private one’, the Venetian ambassador to England conveyed at the time, ‘and that he cannot interfere’.<sup>4</sup>

By focusing upon ‘private undertakings’ in conflict with one another on distant seas or lands allows for an understanding of the changing relationship between these venturers and official peacetime diplomats in Europe as a result of their conflicts. Through these relationships were the conditions generated for the first attempts to resolve disputes emerging away from Europe through legal and political institutions set within it. The purview of renaissance diplomacy began to expand, slowly taking in diverse issues of a private law nature, additional to more traditional and specific matters of public law. This marks a significant transformation from the types of duties stressed by Du Rosier and his successors, yet it has not been emphasised all that strongly in the historical literature on the origins of diplomacy. It was in this new period that peacetime injuries inflicted by and upon private actors away from the conventional land-based jurisdictions of Western Europe

---

<sup>3</sup> For Beale and Mendoza, see above, 104-8.

<sup>4</sup> Marc Antonio Correr to the Doge and Senate (27 February 1609), *CSP Venice* (1607-1610), 11: 237.

came to demand the attention of ambassadors, jurists, and occasionally even sovereigns themselves, when handed the opportunity for gain in the great seventeenth-century game of one-upmanship.

It will prove counterproductive to keep up any strong distinction between the Indian Ocean and the Atlantic Ocean in any conversation about international political order for the seventeenth-century period. Even if the specific in-depth case studies explored here will be taken only from the Atlantic corporate enterprises featured in earlier chapters of this thesis, this is not to imply that a culture of trans-jurisdictional dispute resolution developed in the Atlantic separately from elsewhere. Indeed, it is conventional, and with good reason, to begin historical studies on the emergence of international law in the Indian Ocean after a highly significant legal dispute there in 1603-4, the outlines of which it will be necessary here to explore, as a means of opening up the analysis which follows.

On February 25th 1603, the *Santa Catarina*, a Portuguese ship, was captured in the straits of Singapore. It was intercepted by Jacob van Heemskerck, the commander of a small fleet of ships sent into the Indies by an Amsterdam *voorcompagnie* of the Vereenigde Oostindische Compagnie. Van Heemskerck was experiencing a miserable trading circuit, beaten by the superior Portuguese at every post he visited. Embittered, desperate for return cargo, and vengeful after a slew of separate annoyances at the hands of Portuguese trading fleets in the few years previous, van Heemskerck and his employers resolved to seize some Portuguese booty at the end of 1602. The Portuguese carrack they resolved upon, the *Santa Catarina*, was not hostile, however. Rationalising its seizure as a type of pre-emptive restitution, van Heemskerck could never have anticipated the worth of the prize aboard the ship to be as high as it was – valued at about three million Dutch guilders (similar to the same amount in French *livres*, or about £300,000) at the time. The Portuguese quickly disputed the legality of the capture, of course, but the admiralty court of Amsterdam, with manifold and opportunistic reasoning, deemed the *Santa Catarina*'s goods to be fair prize in September of 1604. As the historian Martine Julia van Ittersum shows, the court's final ruling borrowed from the Amsterdam company's own justification for the seizure, but additionally mobilised a number of other justifications as well. Interpreting a commission issued by Maurits van Nassau in Holland, which permitted the use of force in acts of 'self-defence', to authorise the waging of a 'just war' in the Indian Ocean, the Amsterdam

admiralty court also conjoined a number of legal ideas from multiple sources of law that were not intuitively compatible. ‘The judges were content’, van Ittersum summarises, ‘to jumble together natural law, *ius gentium*, and the concept of just war, without clarifying what, if any, connections there might be between these legal principles on a theoretical and practical level’.<sup>5</sup> It would ultimately be Hugo Grotius who accepted the invitation to search for these connections after receiving a copy of the admiralty decision in October 1604. In collaboration with the Vereenigde Oostindische Compagnie, Grotius compiled his manuscript on the law of prize and booty, *De Jure Praedae* (1604-1608), responding to, and supporting, the *Santa Catarina* decision.<sup>6</sup> In this context, Grotius developed his argument for the preservation and restitution of private rights irrespective of the lack of effective jurisdiction. What this required was a radical fusion of a the vaguely public ‘laws of nations’ with an assortment of private law analogies and anecdotes from the Roman civic tradition; this fusion he presented from his own secular humanistic position yet, without any contradiction, in the framework of a natural law tradition popular at the time. It represented an unusual intellectual configuration, to be sure. ‘But I believe that new light can be thrown on the matter with a fixed order of teaching’, Grotius opined in 1606, and ‘the right proportion of divine and human law mixed together with the dictates of philosophy’.<sup>7</sup> Alchemy of this kind allowed him simultaneously to hold, among other things, that it was right for corporations and individuals to wage private war in the absence of judicial recourse on the seas, all the while defending and expanding the concept of public authority and sovereignty. Far from any bold new *ius gentium*, this is better to be seen as a bold synthesis of legal thought compiled in the interests of Dutch corporations in the Indies and the relatively youthful United Provinces back in Europe.<sup>8</sup> For Grotius, and much to the

---

<sup>5</sup> Martine Julia van Ittersum, ‘Hugo Grotius in Context: Van Heemskerck’s Capture of the *Santa Catarina* and its Justification in *De Jure Praedae* (1604-1606)’, *Asian Journal of Social Science* 31, 3 (2003), 523.

<sup>6</sup> It emerged after the acquisition of the Grotius papers by the University of Leiden in 1864 that the twelfth chapter of this long-unpublished manuscript formed the basis of *Mare Liberum*, which was published to critical acclaim in 1609. See Martine Julia van Ittersum, ‘Preparing Mare Liberum for the Press: Hugo Grotius’ Rewriting of Chapter 12 of *De Jure Praedae* in November-December 1608’, *Grotiana* 26-8 (2005-7), 246-80.

<sup>7</sup> Hugo Grotius to G. M. Lingelsheim (23 November 1606), in Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006 [1604-8]), 553.

<sup>8</sup> For the thought of Grotius within the context of larger intellectual traditions, see Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999); Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism, and Order in World Politics* (Cambridge: Cambridge University Press, 2004). For Grotius and his involvement with the

satisfaction of the merchant and political interests of the United Provinces, the capture of the *Santa Catarina* was akin to private war, waged by a corporation, but one which could be given the status, automatically and retroactively, of ‘a just war with public authorisation’, simply because of the delegated and implied authority of the Staten Generaal.<sup>9</sup> Corporations could act like a state, because corporations were born of a state, Grotius offered. This the Staten Generaal accepted, while covering their eyes and waiting for the matter to go away. It did.

The seizure of the *Santa Catarina* was a big deal, then. Grotius himself considered it to be ‘representative of all such captures’ in the period, and to his mind, it was surely the most ‘celebrated’.<sup>10</sup> That his two most important publications, *Mare Liberum* (1609) and *De Jure Belli ac Pacis* (1625), were largely modified from his original response to the Amsterdam admiralty court’s decision of 1604, speaks for itself. Long after this, historians still speak plentifully about the affair. For Peter Borschberg, for example, ‘it was to become one of the great moments in the history of early-modern Asia and European colonial expansion’.<sup>11</sup> For scholars of modern political thought, on the other hand, this Asian event is seen to mark not only the beginning of the vibrant scholarly tradition of *ius gentium*, but also the beginning of the development of organised mercantilism and, as well, the beginning of international relations as they are understood today.<sup>12</sup> This chapter does not wish to descend the same jetty here into the Indian Ocean, and identify, as C. H. Alexandrowicz and others have, the spawning of international law in those waters alone.<sup>13</sup> But it does not necessarily take issue with any of those interpretations either. Rather, it

---

VOC and the Dutch state before his imprisonment and exile in 1619, consult Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615* (Leiden: Brill, 2006). But see also Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (Singapore: NUS Press, 2011).

<sup>9</sup> Grotius, *On the Law of Prize and Booty*, 9.

<sup>10</sup> van Ittersum, *Profit and Principle*, 5.

<sup>11</sup> Peter Borschberg, ‘The Seizure of the *Sta. Catarina* Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance’, *Journal of Southeast Asian Studies* 33, 1 (2002), 31.

<sup>12</sup> See, by way of introduction, Tuck, *Rights of War and Peace*, 79-80; Keene, *Beyond Anarchical Society*, 50-2; Koen Stapelbroek, ‘Trade, Chartered Companies, and Mercantile Associations’, *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 338-41; Martti Koskenniemi, ‘International Law and the Emergence of Mercantile Capitalism: Grotius to Smith’, *The Roots of International Law / Le Fondements du Droit International*, ed. Pierre-Marie Dupuy and Vincent Chetail (Leiden: Brill, 2014), 4-9; Hedley Bull et al., ed., *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1992).

<sup>13</sup> See especially C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th Centuries)* (Oxford: Clarendon Press, 1967).

concentrates on the Atlantic side of the same story as a point of contrast to the Oostindische story, which is a much-underrepresented perspective (despite the much larger historiography of the ‘Atlantic World’).<sup>14</sup> By observing how legal issues concerning North American corporate activity inspired uncertainty about extra-territorial jurisdiction and the blurred lines between private law and public law in Europe, one final argument will be presented here in this dissertation, which aims not to contradict but only to complement the Indian Ocean scholarship. This argument is, namely, that the activity of jurisdictionally evasive corporations in the extra-European world increasingly forced a public law tradition of diplomacy to accommodate private law concerns during the first half of the seventeenth century. This argument necessitates a subsidiary enquiry into the factors working for and against the restitution of private interests damaged abroad.

The Amsterdam company which contracted van Heemskerck as the *admiraal* of eight ships in 1601 was, on the eve of its success with the *Santa Catarina*, an independent trading concern. At the encouragement of the Staaten Generaal, however, these interests were soon incorporated into a new ‘united’ (*vereenigde*) company, such that the capture of the Portuguese booty was claimed ultimately by the new Vereenigde Oostindische Compagnie rather than the original Amsterdam merchants (even if the Staten Generaal expressed an optimistic claim of its own). It was amid this confusion that Grotius was approached by the Vereenigde Oostindische Compagnie to sort out the mess, while the ship which had been used by van Heemskerck to execute the seizure at Singapore, the *Witte Leeuw*, ambled back into Amsterdam to little celebration or ceremony. As Grotius got to work on his investigation, this ship, the *Witte Leeuw*, was re-commissioned by a separate coterie of Amsterdam merchants, among them Bernart Berrewijns, Louis del Beque, Hans Francx, Hans Hunger and Jorgen Timmerman (styled the Berrewijns Compagnie). Inspired, no doubt, by the glory of the *Santa Catarina*, this small company, now effectively squeezed out of the Indian Ocean by the powerful Oostindische Compagnie, focused instead upon

---

<sup>14</sup> See also, however, Martine Julia van Ittersum’s argument about the importance of the West Indies in early Grotian thought in Martine Julia van Ittersum, ‘*Mare Liberum* in the West Indies?: Hugo Grotius and the Case of the Swimming Lion, a Dutch Pirate in the Caribbean at the Turn of the Seventeenth Century’, *Itinerario* 31, 3 (2007), 59-94. In this article, van Ittersum identifies and reproduces a deleted reference to the Americas in the autograph manuscript of *De Jure Praedae* (1604-1608).

the Atlantic. Receiving a letter of marque for wartime privateering against the Spanish and Portuguese, which in that respect resembled it to the one Heemskerck received a few years earlier, the merchants sent Hendrick Corneliszoon Lonck westward in the *Witte Leeuw* late in 1605.<sup>15</sup>

If Lonck's capture of the *Jonas* and the *Grégoire* off the Saint Laurence some months later should be seen in continuity with that of the *Santa Catarina* three years earlier, the outcome, it should be acknowledged, was very different. So too were the diplomatic processes the resolution of this dispute required. Learning of the misfortune of the Compagnie de Monts at the hands of Lonck, King Henri IV himself (or, at least, someone writing in his name) assumed responsibility for securing the restitution of the taken goods. This was an 'occasion', he addressed the Staten Generaal, 'd'assister et favoriser le S[ieu]r de Monts'.<sup>16</sup> In the name of free trade, these ships should be restored, demanded the French king. Defending publicly the private rights of his subjects in the absence of any better protocol, Henri embarrassed his allies in the United Provinces. Immediately the Staten Generaal consulted the Admiralty Court at Amsterdam to advise on the legality of the seizure. Ultimately, at the end of the 1607, the court ordered that the furs and munitions taken from the *Jonas* and the *Grégoire* were to be restored to the Sieur de Monts, for Lonck's actions could not be taken to amount to an act of war, and the authority, therefore, of his letters of marque allowed for no such plundering. De Monts then dispatched his *procureur*, Jean Ralluau, to Amsterdam in order to retrieve the cannons and anchors taken from his two ships, which had been sequestered by the Admiralty Court of Amsterdam. The Berrewijns Compagnie denied that these items had ever belonged to the French ships, claiming instead that they were found on a Spanish shipwreck. Admiralty disagreed, restoring the items to Ralluau, who promptly then sold them back to the Berrewijns Compagnie and returned to France.<sup>17</sup> The Amsterdam merchants, of course, grumbled, but were shown clearly to be in the wrong. Well might they have asked why the seizure of Spanish and Portuguese booty was permitted in the name of free trade but the seizure of

---

<sup>15</sup> Simon Hart, *The Prehistory of the New Netherland Company* (Amsterdam: City of Amsterdam Press, 1959), 12-4.

<sup>16</sup> Henry to États du Holland ([January?] 1607), *Recueil des Lettres Missives de Henri IV* (hereafter: *LH4*), ed. M. Berger de Xivrey (Paris: Imprimeri Impériale, 1858), 466.

<sup>17</sup> See Eric Thierry, *La France de Henri IV en Amérique du Nord: De La Creation de L'Acadie à la Fondation de Québec* (Paris: Honoré Champion Éditeur, 2008), 250-1.

the French ships was disallowed in the name of the same. But the Berrewijns collaborators did not form some big chartered monopoly; there had been no provocation by the French in the western Atlantic; at the time, most importantly, the French were allies of the United Provinces. Thus, in this case, private interests were easily made to lose out to public interests. Regardless, therefore, of the importance of the decision reached in the case of the *Santa Catarina*, three years later in 1607 regarding the peacetime losses of the Compagnie de Monts, it would prove no precedent. Evidently, it was considered more prudent to preserve the Franco-Dutch alliance than to lose it over petty plunder.<sup>18</sup> The line between war and peace, in other words, was not so thin in the West Indies as it was in the East Indies.

Perhaps, therefore, the *Santa Catarina* affair (1603), and subsequent publication of *Mare Liberum* (1609), did not beckon a new era in international dispute resolution. Amid this period and indeed right throughout the 1610s and 1620s, opacity and inconsistency, in procedure and doctrine alike, continued to characterise extra-European disputes regarding trade and plunder in times of peace, while the prospect of public war, as ever, overshadowed all of these processes. Diplomats could not, however, deny the discomfort of the corporate pinch in this period, and new standards were obviously required for private law dilemmas. England and France looked increasingly for guidance to the statesmen and scholars of the United Provinces at this time, who only looked to them in return when it suited them, while abroad, in the bays and ports of the American side of the Atlantic, colonial interests continued to clash and to raise new questions of the European legal tradition.

England and the United Provinces began their commercial projects in the extra-European world in something of a parallelistic fashion, which requires some elaboration here, even if the focus of this chapter will momentarily shift towards the politics of the Indian Ocean trade in order to do so. A spate of conflicts in the Spice Islands between 1607 and 1612, which had the Vereenigde Oostindische Compagnie repeatedly attempting to obstruct the English East India Company from trading in the region with a series of ‘unfriendly acts’, led a number of investors from the English side to call for a *modus vivendi*

---

<sup>18</sup> Cornelius Jaenen, ‘Champlain and the Dutch’, *Champlain: The Birth of French America*, ed. Raymond Litalien and Denis Vaugeois (Montreal and Kingston: McGill-Queens University Press, 2004), 239-44.

between the companies. From the merchants of London, as early as November 1611, came complaints of ‘having no means of remedy’ for their misfortunes and losses in the Indies. They begged the Lord High Treasurer, Salisbury, for ‘assistance and mediation with the States for redress, that reciprocal kindness may be received, and that they may enjoy freedom of trade’.<sup>19</sup> Sir Ralph Winwood, England’s ambassador to The Hague, was immediately put to work on the matter. Throughout 1612, he advanced and defended the interests of the English East India Company on multiple occasions, insisting upon a new mutually agreed-upon regulatory framework in the name of the ‘liberté du commerce’ in the Indies.<sup>20</sup> In this context, a radical idea was proposed from the English, ‘to trade joyntlye together without troubling of either *states*’, and before long, there was talk on both sides of the affair of a corporate ‘conjugation’.<sup>21</sup> Such a multinational alliance of organised trading interests was unprecedented, and its orchestration, which forced diplomats, merchants, and juriconsults to share the same bargaining table, proved troublesome.

The novelty of the Anglo-Dutch conferences held in London (1613) and The Hague (1615) has been well acknowledged by historians, none more capably than Martine Julia van Ittersum.<sup>22</sup> A formal agreement proved elusive out of these conferences, but the dialogue itself was not unproductive. English statesmen were introduced to the ideas of Hugo Grotius, eventually going so far as to use parts of his own *Mare Liberum* against him. Immediately, they recognised in him a pioneer of international law, but more than that, they were given an example of how to set an international agenda beyond the realm of public diplomacy. The Dutch, for their part, received confirmation of the same, but also discovered, in England, an important ally against the Iberians in the Indian Ocean (even if England’s treaty obligations ensured that this part of the deal was kept very low key).<sup>23</sup>

---

<sup>19</sup> Petition of the Merchants of London trading to the East Indies to Salisbury (November 1611), *CSP Colonial (East Indies, China and Japan, 1513-1616)* 2: 232.

<sup>20</sup> Sir Ralph Winwood to Salisbury (31 Jan 1612), *Colonial, East Indies, China and Japan, 1513-1616*, 2: 233. See G. Norman Clark, ‘Grotius’s East India Mission to England’, *Transactions of the Grotius Society* 20 (1934), esp. 54-60.

<sup>21</sup> Middleton’s letter (nd), cited by Clark, ‘Grotius’s East India Mission’, 53.

<sup>22</sup> An outstanding treatment of the conferences and the points of law raised can be found in van Ittersum, *Profit and Principle*, 359-484. For the argument, however, that commercial interests remained much less important in this period than the wider political and religious problems of Europe, see John Christopher Grayson, ‘From Protectorate to Partnership: Anglo-Dutch Relations, 1598-1625’ (PhD Thesis, University College, London, 1978).

<sup>23</sup> Hugo Grotius grasped the opportunity to argue in front of his outsmarted English counterparts for the inviolability of the VOC’s contracts with locals of the Spice Islands, but wavered over the extent to which

The definitive burial of the proposal to conjoin the English and Dutch companies was delayed until some years after the second conference in The Hague. Towards the end of 1617, Winwood's replacement as ambassador, Sir Dudley Carleton, looked favourably on the move 'to joyne the two companies of our East India merchants and those of this State'. To Carleton's impatient mind, the international importance of the proposal was never more pressing at this moment, because French intrigue had been inspired by the plans. As he put it in a letter to the Secretary of State, Sir Thomas Lake, from The Hague,

yf we will neither joyne with the French who now seeke us nor with the Hollanders by whom we have beene long sought unto, the French and the Hollanders may happily joyne together to our prejudice [...] [and] whilst we rest thus divided the Spaniard and the Portugals may recover theyr antient possession against us all, out of which they are now only kept by the strength of the Hollanders, the charge whereof it is impossible they should containe without assistance.<sup>24</sup>

Carleton never gave up on the union of the companies, and he made much more progress on this front than has perhaps been fully recognised. His correspondence during the busy middle months of 1619 reveal that the 'proposition for the joyning of the two stockes of the two companies' was nearly accepted by the Dutch investors of the 'Netherland Indie Company'.<sup>25</sup> Ultimately the 'Hollanders' suffered a case of cold feet however, and the great multinational East India company never came into existence. All that could be generated instead was an informal agreement, brokered by the diplomats from each side, to share the Indies trade, and to do so pacifically, from 1619.<sup>26</sup>

---

these could rightly impede the freedom of navigation if not commerce in the region. Van Ittersum's treatment offers an exceptional coverage of the wider legal context, but can still be read with Clark's classic treatment.

<sup>24</sup> Dudley Carleton to Sir Thomas Lake (8 December 1617), Western Cape Archives and Records Services (hereafter: CA) Verbatim Copies (hereafter: VC) 58: 14.

<sup>25</sup> Sir Thomas Edmondson to Sir Dudley Carleton (17 March 1619), CA VC 58: 22: '...we fell upon a proposition for the joyning of the two stockes of the two companies, but the Hollanders pretending that theirs was much greater than ours (though we made it apparent that ours was at the least equall), would allow our men so little part of the trade (for their first proposition was only of a fourth part) as we were constrained to find out another expedient for the accommodating of that difference, which was to declare that the trade of the Indies should be free and equall unto both companies, excepting onely such places as the Hollanders doe possess alone and where they have built forts and made particular contracts [...]'. See also those letters numbered 23-26, all of which originally sourced from the PRO. Carleton was also active during this period in negotiations with the Dutch over the joint establishment of the Lizard Lighthouse for which see David H. Webb, 'Profiting from Misfortune: Corruption and the Admiralty under the Early Stuarts', *Politics, Religion, and Popularity in Early Stuart Britain*, ed. Thomas Cogswell, Richard Cust, and Peter Lake (Cambridge: Cambridge University Press, 2002), 118-9

<sup>26</sup> van Ittersum, *Profit and Principle*, 394-5.

France likewise looked to the United Province for clues to manage their own stakes in overseas trade during the same period. Henri IV's first ambassador to The Hague, Paul Choart de Buzanval, was an active liaison between the Staten Generaal and those Dutch merchants who were favourable to the French connection for this purpose at the turn of the century.<sup>27</sup> A little later, throughout 1605 and 1606, Henri IV sought to encourage collaboration between his own subjects and Dutch merchants, even going so far as attempting to poach former VOC investors in order to lure them into a French company.<sup>28</sup> The plan backfired, however. As van Ittersum shows, 'the spectre of a French East India Company, employing Dutch merchants and mariners', only had the effect of strengthening the bond between Staten Generaal and Heren XVII.<sup>29</sup>

Failing to muster enough support for his Indian Ocean scheme, Henri IV re-focused on the Atlantic, and even contemplated the possibility of a conjoined French and Dutch corporation for the West Indies. Early in 1606, the Dutch lawyer François Francken was invited to Paris to discuss such a possibility. By November, however, Henri appears to have lost interest in what was obviously a chimera.<sup>30</sup> The misfortunes of poor De Monts appear to have confirmed this. The French king now found himself, at the outset of 1607, addressing the Staaten Generaal over the *Witte Leeuw* affair, and representing personally the damaged interests of his own subject. He was, in this respect, successful, securing the restoration of the cargo of the *Jonas* and the *Grégoire* before the end of 1607. What followed this restitution, as Thomas J. Kupp shows through his treatment of the topic, was an enduring but trying relationship between the Staten Generaal and le Roi de France regarding the Atlantic seas. Over the course of these trials, the Dutch grew wary of the French double-standard on questions of trade. As Kupp shows, there was a feeling among the Dutch that the French king had been inclined to place too much value on the power of the commissions granted in his name to Atlantic-bound merchants. If trade was to be free in these waters – and this was the take-home message of Grotius's *Mare Liberum* published

---

<sup>27</sup> Henri IV to Buzenval (1592), *LH4* 8: 450; Baguenault de Puchesse, 'Un Ami et un Ambassadeur de Henri IV, Paul Choart de Buzenval (1551-1607)', *Annuaire-Bulletin de la Société de l'Histoire de France* 46, 1 (1909), 109-118.

<sup>28</sup> van Ittersum, *Profit and Principle*, 152-3. She shows how Oldenbarnevelt felt that it was 'part of a Spanish conspiracy to undermine the Dutch Republic'.

<sup>29</sup> van Ittersum, *Profit and Principle*, 154, 166.

<sup>30</sup> van Ittersum, *Profit and Principle*, 159n70.

in this very year – then merchants from the United Provinces had no obligation to respect any exclusive trading rights found in French royal paperwork. This was, of course, quite right, and the message appears to have sunk in, for in 1609 members of Henri’s council were providing the Staten Generaal with assurances that the charter of monopoly for Sieur de Monts could in no way be read to prevent the Dutch from enjoying the freedom of commerce in the Atlantic.<sup>31</sup> Times had changed since 1606, when Henri advanced his claim to be in cahoots with a Dutch company in the ‘West Indies’; now, at the end of his reign, the king was forced onto the defensive.

Nouvelle-France, with its furs, frigid winters, and mineral poverty, failed in these years to capture the imagination of French merchants to the extent that the Indian Ocean did. Yet the French merchant class, spread out into distinct regionalist economic configurations in the western provinces of the country, lacked both the combined capital and the proclivity for collaboration that would allow them a decent chance in the Spice Islands. In the years following Henri’s replacement by Louis XIII in 1610, a lot more ground was lost to the English and Dutch in the Indian Ocean realm, even though a couple of small French syndicates were optimistic of gaining a foothold. The *Compagnie de Montmorency pour les Indes Orientales* was put together in 1611, which was followed in 1615 by the creation of the *Compagnie des Moluques*, but these companies of small-time merchants and shipowners (mostly from Dieppe, Saint-Malo, and Rouen), bore no resemblance to their main English and French competitors.<sup>32</sup>

What other options lay at Louis XIII’s disposal, beyond granting commissions and the right of incorporation to special companies? Like Henri his predecessor and James his English counterpart, Louis dreamed of a transnationally organised enterprise. Carleton’s communications provide strong enough evidence to suggest that the French began to pursue the English with designs of a corporate conjugation from 1617, and probably earlier. What scarce evidence exists suggests these designs were half-baked. Besides, they were too late. Discovering, by 1619, that the Dutch and the English were coming extremely close

---

<sup>31</sup> Thomas J. Kupp, ‘Quelques Aspects de la Dissolution de la Compagnie de M. de Monts, 1607’, *Revue d’Histoire de l’Amérique Française*, 24, 3 (1970), 374.

<sup>32</sup> Henry Weber, *La Compagnie Française des Indes (1604-1875)* (Paris: Edition Arthur Rousseau, 1904), 51-67; Frédéric Mantiene, *Les Relations Politiques et Commerciales entre la France et la Péninsule Indochinoise* (Paris: Edits Les Indes Savantes, 2001), 1: 18-52.

to forging an exclusive union of interests of their own, the French ambassador to England made an unlikely ally of the Spanish ambassador and began to huff and puff against the creation of such a union.<sup>33</sup> By this time – though neither the Spanish nor the French could have known it – the Anglo-Dutch corporate conjugation was dead in the water, along with any prospect of similar collaboration between English and French trading concerns.

Still the French looked to the example of the United Provinces on matters of foreign commerce. Specifically Hugo Grotius was sought out for his advice regarding the creation of trading opportunities in the Indies. This was expertise with which, at first, the Dutch juriconsult was reluctant to part, for obvious reasons, but there is a twist in this story, and that comes in 1618. Grotius, in that year, was imprisoned for life in the United Provinces for his controversial stance on religion. It was no coincidence that his miraculous escape and subsequent getaway was made through Antwerp into Paris, where he was offered a pension from Louis XIII.<sup>34</sup> While in Paris, Grotius penned *De Jure Belli ac Pacis* (1625), a book which he dedicated to the French king. In this period – some have likened it to ‘France’s Grotian moment’ – the exiled Grotius was confronted with the enthusiastic advances of Cardinal Richelieu, who in the middle years of the 1620s made commerce central to the *raison d’état* in his capacity as the French king’s *premier ministre*, as Erik Thomson shows.<sup>35</sup> Grotius’s influence in this period was crucial. As Thomson reveals, the new charters granted under Richelieu’s supervision – most important being that issued to the Cent-Associés of the Compagnie de la Nouvelle-France in 1627 – were modelled on the Oostindische and Westindische octrooiën, which Grotius had personally translated into French for the Cardinal.<sup>36</sup>

The many charters, commissions, and letters patent issued in France before Richelieu were inconsistent and overlapping devices, it should be remembered here. The period between the grant of monopoly to Sieur de Monts in 1603 and the charter of

---

<sup>33</sup> Sir Dudley Carleton to John Chamberlain (19 March 1619), CA VC 58: 23: ‘both France and Spaine, from whence Ambassadors are going into England, connive in hindering the conjugation of our companies’.

<sup>34</sup> See the long-overdue translation of Henk Nellen, *Hugo Grotius: A Lifelong Struggle for Peace in Church and State, 1583-1645*, trans. J. C. Grayson (Leiden: Brill, 2015), esp. 264-379.

<sup>35</sup> Erik Thomson, ‘France’s Grotian Moment? Hugo Grotius and Cardinal Richelieu’s Commercial Statecraft’, *French History* 21, 4 (2007), 377-394. See also, generally, Étienne Thuau, *Raison d’État et Pensée Politique à l’Époque de Richelieu* (Paris: Armand Colin, 1966); Weber, *La Compagnie Française des Indes (1604-1875)*, 68-98.

<sup>36</sup> Thomson, ‘France’s Grotian Moment?’, 383-5.

incorporation to the Cent-Associés in 1627 was one which saw the courts and *parlements* of France faced with successive suits and enquiries into the many contradictory privileges of merchants and investors with interests in the Atlantic, as Helen Dewar's meticulous research shows.<sup>37</sup> Some of these charters, it is worth remembering, were particularly ambitious. In spite of the assurances offered by Henri towards the Staten Generaal in 1609 regarding the potency of his commissions, the early period of Louis XIII's presented something of a return to the old ways. Extravagant powers in New France paperwork made a comeback in 1612, as evident in the commission granted to Champlain on October 8th, under the authority of Charles de Bourbon, which, if only on paper, marked a departure from the agreement reached between the Dutch and the French in the wake of the *Witte Leeuw* affair.<sup>38</sup> These, of course, were empty powers, the likes of which were always disputed by the United Provinces, yet neither did the Dutch have the opportunity nor the necessity, throughout the 1610s, to challenge the foundation of New France.

Instead, the audacity of French presumptions of jurisdiction in the Atlantic was challenged abroad not by the Dutch but by the English. Having examined some of the dynamics of the peacetime relationship between France, England, and the United Provinces during the first two decades of the seventeenth century, what now must be addressed are Samuel Argall's exploits in 1613 for the Virginia Company of London, and the resultant diplomatic dispute over those ransackings.<sup>39</sup> This analysis comes with a disclaimer, however. As a legal event, this was different to those which had come before it in respect of one crucial distinction. Unlike the property which had been plundered by the *Witte Leeuw* in Singapore in 1603, and later near the St. Laurence in 1606, which had been of a *moveable* nature, by contrast, the property at stake in the Anglo-French corporate dispute in the Atlantic concerned property of an *immoveable* nature as well. Here, in other words, land as much as things was up for grabs in international law – and as ever, the distinctions between public and private were to be blurred in pursuit of interjurisdictional restitution.

---

<sup>37</sup> Helen Dewar, "'Y establir nostre auctorité': Assertions of Imperial Sovereignty through Proprietorships and Chartered Companies in New France, 1598-1663' (PhD diss., University of Toronto, 2012), 24-157. See also Helen Dewar, 'Litigating Empire: The Role of French Courts in Establishing Colonial Sovereignities', in *Legal Pluralism and Empires, 1500-1850*, ed. Lauren Benton and Richard J. Ross (New York: New York University Press, 2013), 49-79.

<sup>38</sup> For this, see above, 107-8, 110-11.

<sup>39</sup> For Argall's ransackings, see above, 113-8.

When news of the loss of the *Jonas* and the abduction of the Jesuits reached France in October of 1613, the outcry was instant. The old and venerated constable of France, Henri de Montmorency, ‘in the name of France’, and on behalf of Madame de Pons, the Marquise de Guercheville, who was ‘particularly interested in this loss’, promptly made three requests directly to King James:

one, that you will command that the two Jesuit Fathers be returned in safety with the other prisoners; the other, that the restitution be made [for this] remarkable plundering [*volerie*], which cost the said Dame more than a hundred thousand livres of loss; and the third, that your Council or Société of Virginia will declare and explicate where they intend to set the boundaries and confines of the said country of Virginia.<sup>40</sup>

Signing off on his letter of solicitude for the Madame de Pons, Montmorency insisted to the English king that the Sieur de Bisseaux, Samuel Spifames, be kept informed of his response. This was sensible. Being the French Ambassador to England, Spifames was ideally situated to pick up the mantle (and, indeed, the ongoing correspondence which Spifames instigated with the French foreign minister, the Marquis de Sillery Pierre Brûlart, on the topic, suggests that he took more than a passing interest in the affair while based in London). That Argall was ‘n’est point ung pirate sans retraite’, but an ‘employé par la compagnie établie pour le trafficq de la Virginie’, gave the incident an intriguing character to Spifames’s mind, besides of course being brashly opposed to the principles of public international law: ‘non seulement contre tout droict d’amitié qui doibt estre deux nations sy voisines et confédérées par tant de traictés, mais mesmes contre le droict des gens, dont le fait est tel’.<sup>41</sup> The matter sat in abeyance until the battered *Jonas* pulled into Pembroke carrying news of the destruction of Port Royal, at which point Spifames resumed his efforts on the matter of restitution. In May of 1614, the ambassador sent a message to Brûlart calling for more pressure to be applied from Louis XIII, for Argall had ‘démoly

---

<sup>40</sup> Henri de Montmorency to James I (28 October 1613), NAUK State Papers (hereafter: SP) 78/61/96, 284 (18 October 1613, Old Style).

<sup>41</sup> That Argall was ‘not a pirate without commission’, but an ‘employee of the company established to traffic into Virginia’, gave the incident an intriguing character, besides of course being ‘not only illegally contrary to the bond of amity between two nations bound by confederations and treaties, but also contrary to the law of nations, as the action clearly is’. Samuel Spifames to Pierre Brulart (19 December 1613), and the Memoire de Samuel Spifames (28 December 1613), Bibliothèque Nationale de France (hereafter: BNF) Ms fr. 15987, 167-8; 400-1. See also *Monumenta Novae Franciae*, ed. Lucien Campeau (hereafter: *MNF*) (Rome: Monumenta Hist. Soc. Iesu, 1967), 1: 295-7.

entièrement, ravy les vivres et autres commodités des pauvres François’, and in the process, he had unlawfully laid waste to ‘Port Royal, ancienne découverte des François, dont ils sont en possession plus de soixante ans avant que lesdicts Anglois congneussent la Virginie’. Sixty years of uninterrupted possession had generated a title, in other words, and the damages inflicted not just upon the *Jonas* but upon the entire settlement demanded restitution to his diplomatic mind (but then again, so did a great many things, of which the catch of the day in the Greenland seas was only slightly the bigger concern of his in this period).<sup>42</sup>

The Lords of the Privy Council acknowledged Spifames’s complaint about the *Jonas*, and met in February, at which it was resolved to summon Argall ‘for restitution and punishment’.<sup>43</sup> A month later, additional pressure came from an unlikely source in the form of René le Coq de la Saussaye, who was sent to London personally to rehearse the complaints of his employer, de Pons, about the *Jonas* and her alleged out-of-pocket loss of 100,000 *livres*.<sup>44</sup>

This figure, which is consistent with the amount originally declared on her behalf by Montmorency back in October and equated to somewhere near £10,000 sterling, is difficult to fathom outside of its proper context. To make sense of this, the politics of French paperwork must be understood in the period leading up to this event. In 1603, Henri IV granted the rights of seigneurie and monopoly in Canada to Pierre du Gua de Monts. De Monts, who had been a regular visitor to the Saint-Laurent in the 1590s, was backed by a corporation made up of merchants from separate situations along the western coast of France, and then subsequently accompanied on his 1604 voyage by Champlain and

---

<sup>42</sup> Spifames to Pierre Brulart (3 May 1614), BNF Ms fr. 15987, 231-5; *MNF* 1: 412: ‘Port Royal, ancient discovery of the French, and in their possession for more than sixty years before the English were cognisant of Virginia, which [the English] entirely demolished, ravishing its produce and other commodities that belonged to the poor French’. Much can be taken from Spifames papers, kept at the Bibliothèque Nationale, Paris. He certainly earned his keep. Almost single-handedly, Spifames appears to have orchestrated a great spike of French complaints in the winter and spring of 1613/4, not only about Acadia and the *Jonas*, but also about the travails of tussling fishermen off the coasts of Newfoundland and Greenland. What is interesting, and cannot easily be explained, is the openness of the English to consider the ‘liberté de la pescherie’ off the coast of Newfoundland but not in the Greenland seas in this period. See for example the Answer to the French Complayntes (1614) NAUK SP 103/9/4, 273-4.

<sup>43</sup> Minutes of the Privy Council (2 February 1614), NAUK Privy Council (hereafter: PC) 2/27, 121 (23 January 1613, Old Style).

<sup>44</sup> *JR* 4: 77-8.

Poutrincourt.<sup>45</sup> Before the dissolution of the union of these interests, Port Royal caught the eye of Poutrincourt, who requested the whole beach and vast hinterland in seigneurie as a ‘don’ from de Monts in August of 1604.<sup>46</sup> A contract to this effect prepared, Poutrincourt then approached the king in early 1606 to have the donation confirmed. This afforded some certainty for him, and his son Beincourt, for little more than a year however, because Henri IV soon changed his mind on the struggling de Monts’s company and revoked the original privileges of 1603.<sup>47</sup> Poutrincourt’s deed to Port Royal was brought into question with this revocation, and was then rendered more questionable still when Henri IV was succeeded by Louis XIII, after the interim regency of Marie de Médicis. In order to realise his dreams of living large in l’Acadie, Poutrincourt was forced to find a new link to the royal court, which he found in the form of Antoinette de Pons, the Marquise of Guercheville, wife of the Duke of Liencourt and Governor of Paris Charles du-Plessis. De Pons was eager to dispatch Jesuit missionaries to Canada for the purpose of converting the indigenous population to Catholicism, for which reason she was a driving force behind the Compagnie de Jesus. In her religious zeal, she was nothing like Poutrincourt, who, for whatever else he may have claimed in order to attract support, was primarily motivated to have the lands in and around Port Royal preserved to his family and left in the custodianship of his son, Biencourt.<sup>48</sup>

These were the circumstances which brought Poutrincourt and de Pons into a singular concern. Such separate motivations were pragmatically united. De Pons being a woman, her ‘contract d’association’ with Poutrincourt was only possible in the presence of her husband, with whose authority their ‘compagnie’ was formed. From Champlain’s account of this transaction – compiled on what authority it cannot be certain – de Pons was highly sceptical of the rights to land Poutrincourt claimed to possess:

Ladite Dame luy demanda qu’il eust à faire paroistre tiltres par lesquels ces Seigneuries & terres luy appartenoient, & comme il possedoit tant de domaine.

---

<sup>45</sup> George MacBeath, ‘Du Gua de Monts, Pierre’, *DCB*, [http://www.biographi.ca/en/bio/du\\_gua\\_de\\_monts\\_pierre\\_1E.htm](http://www.biographi.ca/en/bio/du_gua_de_monts_pierre_1E.htm) (accessed 26 September 2014).

<sup>46</sup> ‘Le sieur de Poitrincourt père ayant obtenu un don du Sieur de Mons, en vertu de sa commission, de quelques terres adjacents au port Royal’. *OC* 5: 766; see also 3: 172-8.

<sup>47</sup> See *Nouveaux Documents sur Champlain et Son Époque* (hereafter: *NDCE*), ed. Robert Le Blant and René Baudry (Ottawa: Publications des Archives Publiques du Canada, 1967) 1: 163, 237, 242-3, 276, 344, 368.

<sup>48</sup> Huia Ryder, ‘Biencourt de Poutrincourt et de Saint-Just, Jean de’, *DCB*, [http://www.biographi.ca/en/bio/biencourt\\_de\\_poutrincourt\\_et\\_de\\_saint\\_just\\_jean\\_de\\_1E.html](http://www.biographi.ca/en/bio/biencourt_de_poutrincourt_et_de_saint_just_jean_de_1E.html) (accessed 22 September 2014).

Mais il s'en excusa, disant que ses filtres & papiers estoient demeurez en la nouvelle France. Ce qu'entendant ladite Dame, se mesfiant de ce que disoit le sieur de Poutrincourt, & voulant se garder d'estre surprise, elle traicta avec le sieur de Mons, à ce qu'il luy retrocedast tous les droicts, actions, & prétentions qu'il avoit, ou jamais eu en la nouvelle France, à cause de la donation à luy faite par feu Henry le Grand.<sup>49</sup>

Neither is it clear what rights de Monts had left to cede in 1611 nor how much the Marquise paid for them, but the endorsement of the purchase by the new king appears to have given some assurance that the title to all of l'Acadie (minus Poutrincourt's claim) was reconstituted and seamlessly affixed to the Guercheville estate.

Now the demand for 100,000 *livres* makes sense. If the initial capital outlay of Poutrincourt and de Pons can be approximated at 750 *livres* each, and, on top of that, the burdens unique to Saint-Sauveur – namely, the costs of mustering and sending out the Jesuits, and the value of the improvements made to the settlement before its demolition – are accounted for charitably, an estimate is reached that remains only a meagre portion of that grand figure.<sup>50</sup> Perhaps the *Jonas* was expected to find gold in New France. Or, what is more likely, to be accounted for on top of this is the compensation requisite to quit the claim to the Île des Monts-Déserts. The suit's origin not with the near-bankrupted Poutrincourt, but with the noblewoman de Pons (whose contract of 1611 apparently gave her title of the land in question), might offer further confirmation that the amount represented a claim for the reimbursement of a failed speculative investment in real estate abroad, rather than just the value of the things damaged or carried off by Argall to Virginia, or otherwise the anticipated returns of the voyage. In that sense, the claim for 100,000 *livres* represented an unusually complicated private request for colonial land restitution, which begged for jurisdiction, but for which in 1614 there was little precedent to insist upon extending.

At the beginning of June, Spifames lost no opportunity to address the new secretary of state, and former ambassador to the Hague, Sir Ralph Winwood – by happenstance, also,

---

<sup>49</sup> OC 5: 770-1.

<sup>50</sup> See the Receipt ('reconnaissance') of René Le Coq, Sieur de la Saulsaye, for the sum of 750 livres received from Jean de Biencourt, Sieur de Poutrincourt, towards half the cost of outfitting a ship for Acadia; the remaining half of the expenses to be borne by the Marquise de Guercheville, a lady-in-waiting to the Queen Regent (17 August 1612), NDCE 1: 228-9.

a director of the Virginia Company of London – on the matter of the *Jonas*.<sup>51</sup> In Winwood’s mind, the battered sloop was a relatively easy matter to decide upon. At first, the secretary of state was blasé in his deflection of the Dame’s demands, telling Spifames that ‘she has no reason to complain, nor to expect any reparation’.<sup>52</sup> But this hard stance was soon softened, for the ship and everything in it was released sometime around the 22nd of June.<sup>53</sup> The claim for 100,000 *livres*, on the other hand, required further contemplation – and it would not go away so easily. In August, Spifames instructed Maître Fleury, now safely in Rouen, to prepare a detailed report on the Saint-Sauveur incident, which was likely compiled to be passed onto the Privy Council shortly afterwards.<sup>54</sup> In October, Antoinette de Pons addressed Winwood personally, with the request that he ‘uphold the reparation of a grand tort’, using legalese which clearly confirmed – if indeed any confirmation was required by those implicated in her allegations – that the matter was one of private law which demanded principled deliberation irrespective of the division between their respective civil jurisdictions. ‘I promise’, de Pons forebode, ‘that I will be obliged to you as a result of what will come from such a just restitution’.<sup>55</sup> Spifames, meanwhile, chivvied enthusiastically for the acknowledgement of ‘the particular interest of madame the marquise of Quiercheville’, which, in his mind, ‘merited recompense’ after the destruction of Saint-Sauveur’s habitations.<sup>56</sup> The issue was very much live and unresolved, therefore, by the end of 1614.

The Virginia Company of London had different ideas about the matter. Sometime amid all of this, an official statement was compiled in London for the directors – maybe by Richard Martin, lawyer to the company from 1612, or perhaps it was William Crashaw, the company’s learned preacher – in response to the enquiries of the Privy Council.<sup>57</sup>

---

<sup>51</sup> Spifames to Sir Ralph Winwood (1 June 1614), BNF Ms fr. 15987, 249-50; *MNF* 1: 423-4. Winwood was an experienced diplomat, a Privy Councillor, and, after his replacement of Robert Cecil as Secretary of State in 1614, a disliked member of the Commons. See M. Greengrass, ‘Winwood, Sir Ralph (1562/3–1617)’, *ODB*, <http://www.oxforddnb.com/view/article/29783> (accessed 11 May 2015).

<sup>52</sup> *CSP Colonial (America and West Indies)* 9: 53-54.

<sup>53</sup> *JR* 4: 77-8; Spifames to Brulart (22 June 1614), BNF Ms fr. 15987, 265-6; *MNF* 1: 429-30. The decision to do so was a straightforward one, in which the part played by la Saussaye as advocate had no obvious consequence.

<sup>54</sup> *Rapport de Charles Fleury, Maitre du Jonas* (27 August 1614), *MNF* 1: 442-4.

<sup>55</sup> De Pons to Winwood (21 October 1614), NAUK SP 78/62/68, 165 (11 October 1614, Old Style).

<sup>56</sup> Spifames to Brulart (19 November 1614), BNF Ms fr. 15987, 359-363.

<sup>57</sup> Martin, who represented the company from 1612 onwards, was also a noted tavern comedian, and probably a co-author of impolite poem, ‘The Parliament Fart’. Robert Zaller, ‘Martin, Richard (1570–1618)’, *ODB*,

Traditional interpretations of this extraordinary document see in it a bold declaration of the extent of English royal authority over the New World, but this kind of reading risks making too much of the overtly loyal language that was conventionally adopted by all English chartered companies during this period (and after it). It is more appropriate, it seems to me, to regard the document to be expressive of the Virginian *corporate* right and responsibility, and from that starting point, proceed to consider the points of law which had to be overcome in order to escape the obligations of restitution.

Without any contradiction, the statement's author is deferential to the company's progenitors yet boldly declaratory of its own individual personality. The most obvious indication of this arises in the company's comprehensive assumption of responsibility for Argall's actions. For both ransacking voyages, Argall held 'severall com[m]issions' from the company, and was under the explicit 'commande of the Gov[ernor] of our Colonye, by his Comission to him given under the Seale of the Colonye, & by virtue of such authoritye as is to him derived from His Ma[jesty's] Great Seale of England'. The French differences, the document's author stresses on no less than a few occasions, were not with Argall personally, and much less with the king's council, but were above all others with the Virginia Company of London, and *its* 'Colonye'.

From this basis, the company offered its rejection of the French claims. Addressing the summer ransacking of Saint-Sauveur, the company admitted to taking a 'french Shipp', but as it was 'taken between 43 and 44 Degrees', it was therefore 'within the Limitts of our Colony [...] wee haveinge granted unto us from 36 to 45 Degrees of no[rth] Latitude, & from E. to W. from one sea to another'. So, the letter ran, when it was discovered that the French intended to 'get Land' and 'plante contrarye to the extente and Priviledge' of the Virginia Company of London, reference had to be made to a 'certaine Clause' of the company's royal paperwork which rendered it 'Lawfull for our Gov[er]nor to resist, displante, & take by force any that shoulde make such attempte'. Placing aside the French allegations of Argall's 'inhumanitye', the company estimated that the value of the goods

---

<http://www.oxforddnb.com/view/article/18206> (accessed 24 Sept 2014). For the parliament part, consult the excellent poetry reference collection of the 'Early Stuart Libels', [http://www.earlystuartlibels.net/htdocs/parliament\\_fart\\_section/C0.html](http://www.earlystuartlibels.net/htdocs/parliament_fart_section/C0.html) (accessed 24 Sept 2014).

stolen from Saint-Sauveur could amount to no more than £200 sterling (approximately 2,000 livres).<sup>58</sup>

Addressing the subsequent ransacking of Poutrincourt's Port Royal, 'Wee saye, it is Likewise true, [tha]t by virtue of another com[m]ission given to him under the Seale of the Colonye [...] hee went to Porte Royall & Demolished such reliques of any fortificac[i]on, or other markes of clayme, or Plantac[i]on to the [said] Porte; beinge in 44 degrees or thereabouts, and within the Limitts, and precincte of our Colonye, and some few yeares before usurped upon by one Mo[nsieur] Potincourt'. But this settlement was 'abandoned by them', the company stressed. Argall had 'found not one' settler at Port Royal. So to perfect 'the Clayme, & tittle of our Sayde Colonye to [tha]t Saide P[orte]', the company insisted that it had been absolutely necessary for Argall, by his orders, to remove 'all such silent p[re]tence & ensig[ns] of Dominion', before departing. These actions were right, the company stressed, not only because the French were temporarily absent from Port Royal, but because they had not been physically present in northeastern America until after the formation of the Virginia Companies. The only exception the company was prepared to concede here was for Québec; apart from their fortification there, the French were without 'any footing' in the region. Reaching conclusion, the company roundly declared that:

the Kinge of France is neither in his Hon[ours] nor tittle any waye injured by the Just Defence of our owne [...] hath Madam de Guercheville any reason to expecte reparac[i]on havinge entered without our Leave, with[in] ou[r] Limitts and dominion, by force to plante, or trade contrarye to the good correspondence, & League of those two most royall Kings.<sup>59</sup>

That completed the company's statement, which dissociated itself outright from any obligation to repair the damaged interest of de Pons. The argument was not without some glaring logical deficiencies. By referring to the privileges afforded to the company by James I of England in this defence, the Virginia Company of London was framing the matter as an international dispute that would have been incredibly difficult, in the period,

---

<sup>58</sup> Response of the Virginia Company of London to the Complaints of the French Ambassador (nd., 1614), British Library (hereafter: BL) Cotton Ms Otho. E8, 232. The emphasis here is in original, where in fact it makes erroneous reference to the latitudinal specifications in the 1606 charter of 'between four and thirty Degrees of Northerly Latitude from the Equinoctial Line, and five and forty Degrees of the same Latitude'.

<sup>59</sup> Response of the Virginia Company (1614), BL Cotton MS Otho. E8, 233.

to have arbitrated. Comparing royal paperwork across monarchies was practically impossible, and besides this, was theoretically pointless on questions of company charters, insofar as documents of the kind established exclusive rights and conditions to be observed only by subjects of the monarch issuing them (as the Dutch had argued all along). In this particular dispute, the job would have been made all the more difficult by la Saussaye's missing commission, which might not have even existed (despite the suggestions of Fleury and Biard to the contrary).<sup>60</sup> Accompanying this fickle argument based on exclusive royal grants was the seemingly contradictory placement of the onus of physical occupation upon the French. It was not considered that this argument, which was mobilised only in application to Argall's second lots of ransackings when the Acadiens were either kept captive or temporarily absent at the time, could just as easily have counted against the Virginia Companies, neither of which had any attachment to the region in this period (regardless of the great fib delivered by Argall to Christiaenszoon the year earlier in Manhattan). There was, therefore, much audacity to the claims of English jurisdiction abroad too; whether the French had the appropriate legal institutions to challenge them was another question.

In the end, Winwood's original assessment that de Pons had no grounds for a claim was upheld. But this was most likely due to the Privy Council declining jurisdiction over such a thorny matter than it was to any principled argument tendered by the Virginia Company of London. The last anything is reported of it comes just before Christmas in 1614, when Sir Thomas Edmondes, the English ambassador to France, told Winwood of his embarrassment for being summonsed before a royal audience in Paris where he was shamed publicly by the French queen over the matter.<sup>61</sup> De Pons was not awarded the sum

---

<sup>60</sup> Fleury, in his report, concluded that Argall must have had seized ('saisis et emparez') the royal paperwork from the chest of the *Jonas*, which tied in quite nicely with Biard's somewhat less ecumenical explanation published in the *Relations* later in 1618, that 'all of us had come into the power of the English Heretic, who, being extremely crafty, secretly abstracted from La Saussaye's trunk the Royal commission'. Rapport de Charles Fleury, Maitre du Jonas (27 August 1614), *MNF* 1: 443; *JR* 2: 254-5. Just why de Pons and Spifames made nothing of the matter throughout all of this – and correspondingly why it was that Argall never had to answer for it – might encourage more speculation that the chest never contained any such commission. It might be telling here that over a similar matter earlier in 1614, Spifames had been warned by the secretary of state not to lay too much emphasis on 'de lettres Patentes du defunct Roy trixchristien'. Answer to the Complaints presented to the King by the Sieur de Buisseau, French Ambassador, at the Court of his Majesty (1614), NAUK SP 103/9/4, 273.

<sup>61</sup> Sir Thomas Edmondes to Winwood (12 December 1614), NAUK SP 78/62/95, 241.

of 100,000 *livres* from the Virginia Company of London. She was left with one option, and that was to encourage her husband to bring an action for his contract with de Monts on her behalf. That no suit of this kind ever materialised ensured that de Pons, for all her Catholic zeal, would become memorable in Canadian history only as the first of many after her to lose out in a high-risk investment in colonial land.

The fortunes of the Virginia Company of London deserve comment and closure here too. The capture of the *Jonas* and the ransacking of Saint-Sauveur granted the company its first international audience before whom it could rehearse its American territorial claims on both grounds of private law and public law. These were rights created out of thin air, both in the interests of the Virginia Company of London as well as King James I/VI – even if historians tend generally to emphasise only the importance of the latter’s claims in respect of this episode.<sup>62</sup> It is more accurate to say that both the company and the king made the most of the opportunity presented by Argall. Hitherto their claims had been flaunted merely by the strategic reception in London of a young Powhatan boy, Namontack, in 1608, apparently to advertise the company’s diplomatic alliance with ‘King Powhatan’ (much to the amusement of Spain’s residing ambassador in England).<sup>63</sup> Now, in a diplomatic episode that confirmed that the limits of private international law would not be stretched to restore Saint-Sauveur, the company’s rights were declared secure – but only against the French. The Virginia Company of London’s biggest threats in this period came from *within*, in Jamestown and also in London. During the lavish reception given to Pocahontas (restyled ‘Rebecca Rolfe’) in England during 1616-7, tragedy struck. She died at Gravesend. When Wahunsenacawh’s death in Virginia followed the year after, the company found itself back to where it started in 1607: without any strong allies in Jamestown, and no puppet sovereigns in London.<sup>64</sup> What concludes this narrative is a somewhat fitting transformation. The force of arms – which had handed the company victory over the French in 1613-4 – was used against the company in Jamestown by its

---

<sup>62</sup> See especially Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006), 194-7.

<sup>63</sup> See Jeffrey Glover, *Paper Sovereigns: Anglo-Native Treaties and the Law of Nations, 1606-1664* (Philadelphia: University of Pennsylvania Press, 2014), 59-61, 75.

<sup>64</sup> A good account of these receptions can be found in Alden T. Vaughan, *Transatlantic Encounters: American Indians in Britain, 1500-1776* (Cambridge: Cambridge University Press, 2006), 42-96. For the argument that the visits of Namontack and Pocahontas represented ‘the extension of a colonial treaty’, see Glover, *Paper Sovereigns*, 27-117.

resident Algonquian-speakers in 1622.<sup>65</sup> The massacre and subsequent war would foreshadow the replacement of the corporate administration in Virginia with crown rule, the constitutional importance of which cannot be underestimated: the first New World ‘crown colony’ in the history of the British Empire, Virginia would rise from territory claimed through purchase and conquest, on which bases it became a royal domain wherein settler land rights could only be issued by the government. This government enjoyed a monopoly of conveyance, rights which were not permitted to the indigenous Algonquians, who were ostensibly dispossessed forever. With this new arrangement upon the revocation of the company’s charter, a radical precedent was established for the rest of the American colonies to follow, with clearer resonances than before of the Irish constitutional predicament.<sup>66</sup>

At this time, the Thirty Years War (1618-1648) was eclipsing Europe and beginning to upset many of the alliances forged during the first two decades of the seventeenth century. By the end of James I/VI’s rule, England’s relationship with Spain had disintegrated, and the English alliance with France was set to do likewise upon the rise of the expansionist Cardinal Richelieu to *premier ministre* in August of 1624 and the succession of Charles I to the English throne in March of 1625.<sup>67</sup> Throughout 1626 and in the early months of 1627, England and France descended piecemeal into conflict, following the differences of opinion between their kings over debt, dowry, and denomination. These were the triggers to a war definitively underway after the attempted English siege of Saint-Martin-de-Ré in the summertime of 1627, and fought principally off the French coast until the Treaty of Suza of April 1629.<sup>68</sup>

---

<sup>65</sup> For this, see above, 161-3.

<sup>66</sup> Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005), 84-149; Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict, and London’s Overseas Traders, 1550-1653* (London: Verso, 2003), 223. But see also Wesley F. Craven, *The Virginia Company of London, 1606-1624* (Charlottesville: University Press of Virginia, 1957), 54-8.

<sup>67</sup> Thomas Cogswell, *The Blessed Revolution: English Politics and the Coming of War, 1621-1624* (Cambridge: Cambridge University Press, 2005); David Parrott, *Richelieu’s Army: War, Government, and Society in France, 1624-1642* (Cambridge: Cambridge University Press, 2004), 1-109.

<sup>68</sup> For this conflict within a wider context, these two monographs should be read together: Victor Lucien Tapié, *France in the Age of Louis XIII and Richelieu*, trans. D McN. Lockie (Cambridge: Cambridge University Press, 1984 [1967]); L. J. Reeve, *Charles I and the Road to Personal Rule* (Cambridge: Cambridge University Press, 1989).

It was within this wartime window that the Kirke family abandoned the wine trade in the Channel and took, instead, to raiding New France – fighting the ‘proxy war’ for Charles I, Andrew Nicholls recently argues, in a ‘paper colony’.<sup>69</sup> With letters of marque issued in December of 1627, the brothers set out for the St. Laurence for the first of two trips early the next year, and a significant bounty was amassed. Their return to England at the end of summer caught the attention of many, but the legality of their prizes went unquestioned – claimed as they were during a period of public war and under the authority of a written commission.

Edward Lord Barrett of Newburgh, the English nobleman of Scotland and one-time ambassador to France, grew particularly excited by all of this. Now, reads a document probably penned by him and called ‘The state of business of Canada’, ‘the whole river is conquered, the trade with the savages asserted, and all the profit of fishing in the Gulf, Bays, and Islands at our command’.<sup>70</sup> Barrett and his partners in Scotland immediately applied for ‘a patent for the sole trade and plantation of those countries’. The grounds for making such a ‘demand’ were telling: ‘It is considerable’, their petition ran, ‘that the grant of all patents for sole trade and plantation is laid upon conquest *or* discovery’ (these terms of art easily lending themselves to conflation in Scotland, it seems, as they had in Iberia). Because English and Scottish investors by their own independent labours had already ‘begun this conquest’, Newburgh thought it prudent ‘to unite both kingdoms in a work that is large enough to spread the glory of it over both’.<sup>71</sup> Available evidence of this project is frustratingly scant, but it seems that an incorporation of such diverse interests, in the end, proved too difficult to make work; they were only ever informally united as an ‘Anglo-Scotch Company’ in early 1629, when the Kirkes and Sir William Alexander the younger sent separate expeditions, with their separate backers, for New France in March of 1629.<sup>72</sup>

These expeditions would be of a different nature to those of the year before. Not long after the fleets departed, the Treaty of Susa was signed on April 24th, foreshadowing

---

<sup>69</sup> Andrew Nicholls, *A Fleeting Empire: Early Stuart Britain and the Merchant Adventurers to Canada* (Toronto and Montreal: McGill-Queens University Press, 2010), 69-86.

<sup>70</sup> The State of the Business of Canada or New France (1628), *CMS* 1: 376.

<sup>71</sup> Propositions of Accommodation for the Settling of the Trade and Plantation in Canada or New France (1628), *CMS* 1: 376-7. My emphasis.

<sup>72</sup> *CSP Colonial (America and West Indies)* 1: 96.

the closure of the Anglo-French War. This treaty rendered subsequent British exertions in New France problematic because of its seventh article, which was unequivocal that

beaucoup de vaisseaux encores en mer avec lettres de marque et pouvoir de combattre les ennemis, qui ne pourront pas si tost entendre cette paix ny recevoir ordre de s'abstenir de toute hostilité, il sera accordé par cét article que tout ce qui se passera l'espace de deux mois prochains apres cét accord fait, ne désrogera, ny empeschera cettedite paix, ny la bonne volonté de ces deux couronnes, a la charge toutes fois que ce qui sera pris dans l'espace de deux mois depuis la signature du traicté sera restitué de part et d'autre.<sup>73</sup>

If the seizure of Québec in the summer of 1629 could be considered a peacetime event, then the way could be made for restitution during the settlement – the culmination of which would be the Treaty of Saint-Germain-en-Laye in March of 1632.<sup>74</sup>

Québec and l'Acadie were, indeed, returned to the French in the celebrated cessions of public law associated with the final treaty, and this has received thorough coverage by historians.<sup>75</sup> While much has been made of the resolve of ambassadorial representatives for both crowns in the negotiations leading up to the treaty, much less, however, has been made

---

<sup>73</sup> Treaty between Great Britain and France signed at Susa and London (24 April 1629), *European Treaties Bearing on the History of the United States and its Dependencies*, ed. Francis Davenport (Washington, D. C.: Carnegie Institute of Washington, 1917), 1: 303-4 (14 April 1629, Old Style). The grace period of two months carried in this provision was wishful thinking. After all, most of the action which transpired on the St. Laurence took place in July and August. Perhaps the framers expected the provision principally to come into effect in the Channel; perhaps they expected the whole of the Atlantic to learn of the Treaty within a few weeks and reform their attitudes accordingly. In any case, it was to be assumed that all attacks and seizures conducted in the name of war after June 1629 were bound be restored similarly too, and the period of two months likely reflects the optimistic timeframes of the French and English monarchs with respect to the inevitable return of the state of peace between them.

<sup>74</sup> For the context and a copy of the Treaty concluded between Great Britain and France at St.-Germain-en-Laye (19/29 March 1632), see Davenport, *Treaties*, 1: 315-23.

<sup>75</sup> See Nicholls, *Fleeting Empire*. But see also Henry Percival Biggar, *The Early Trading Companies of New France: A Contribution to the History of Commerce and Discovery in North America* (Toronto: University of Toronto Library, 1901), 150-66; Macmillan, *Sovereignty and Possession*, 197-201; Francis Parkman, *France and England in North America* (Boston: Little, Brown and Co., 1874), 1: 401-20. Charles I's appointed ambassadors were prepared to guarantee the return of the St. Laurence posts taken by the Kirkes, but only for the right concessions in return; foremost in their mind was the outstanding balance due to England for the dowry of Henrietta Maria. The evacuation of Nova Scotia was ordered much more reluctantly and later, by February of 1631, in spite of the last-ditch attempts of Scottish proprietors and investors to preserve their threatened interests. For this, see the papers collected at BL Egerton 2395, esp. 19-25; and the Discourse Concerning his Majesty's rights and titles to the Port Royall and whole [of] Canada (9 September 1630), NAUK CO 1/5/2, 223-5. The Compagnie de la Nouvelle-France, albeit not without first overcoming a few impediments left by residual proprietary interests, would eventually be handed back the keys to Port Royal. For the purposes of this dissertation, our attention cannot be distracted in this direction. For the Scottish and French points of view, see John G. Reid, 'The Scots Crown and the Restitution of Port Royal, 1629-1632', *Acadiensis* 6, 2 (1977), 39-63; Robert Le Blant, 'La Compagnie de la Nouvelle-France et la Restitution de l'Acadie (1627-1636)', *Revue d'Histoire des Colonies* 42, 146 (1955), 69-93.

of the separate issues of private law involved. Meetings and correspondence of diplomats in France and England during the organisation of a working peace allow historians to piece together only one side of the story. Another side of the story can be presented by balancing out the opinions of solicitors and judges, in the ill-equipped courts of England and France, as they were confronted to repair the civil interests damaged in this ‘conquest of Québec’ in 1629. These matters represented more difficult questions than the public cessions which kept diplomats busy, and they took longer to resolve, principally because of the incapacities, at the time, of existing legal institutions on both sides of the Channel.

When David and Thomas Kirke touched at Dover on their return from New France on October 27th 1629, most of their French captives were released for their home passage to be organised. A handful stayed on, however. Among them was Samuel Champlain. Discovering that his earlier capitulation at Québec had taken place subsequent to the declaration of peace in London and Susa, Champlain now felt a sense of obligation to secure the return of the Laurentinian settlements to the Compagnie de la Nouvelle-France. When he and the others were ferried to London on the 30th, by or against their own volition it is not clear, Champlain immediately sought an audience with the French ambassador, the Marquis de Châteauneuf, with whom he furnished a detailed testimony. On Châteauneuf’s advice, the group then approached Sir Henry Marten, Judge of the High Court of Admiralty, to register their complaints. Formal statements were lodged on the 7th and 9th of November; these catalogued the Compagnie’s miserable stores at the time of the capitulation, but confirmed that good treatment had been afforded by the Kirkes.<sup>76</sup> The Frenchmen also put it on record ‘that no ransom ought to be demanded for their release, as they are not lawful prisoners of war, having been taken upon a plantation’, which confirmed that the private claim warranted consideration outside of the circumstances of war.<sup>77</sup> Shortly after this, Champlain left for Paris to make the case for the Compagnie de la Nouvelle-France before Richelieu and Louis XIII personally.

---

<sup>76</sup> Depositions of Samuel Champlain, Eustacie Boulle, and Nicholas Blundell (9 November 1629), NAUK CO 1/5/34, 89-92; *CSP Colonial (America and West Indies)* 1: 102-3.

<sup>77</sup> Grievances of the French General and Commissary General (November 1629), *CSP Colonial (America and West Indies)* 1: 102. Because of its separate tenor, it may be that this ‘General’ was Émery if not Guillaume de Caën, and not one of Champlain’s associates; their freedom of movement apparently imperilled because of the ‘charges’ requisite for their passage across the Atlantic to England, which ‘may amount to more than they can pay’.

While Champlain actively sought the restoration of New France to the Cent Associés, and liaised with several officials in Paris to achieve that end, the separate matter of the furs came to a head in London. David and Thomas Kirke declared to the Admiralty Court that they had seized into ‘the Companies hands’, after the surrender of ‘the forte of Quebecke’, ‘no more than 1713 Beaver Skinnes in the forte & habitation’; additionally, they claimed to have ‘traded w[i]th the Natives of the Countrye for 4540 Beaver Skinnes’.<sup>78</sup> Those furs apparently acquired through fair trade would not be disputed, for the time being anyway; rather, it was the 1,713 furs, which had been the property not of the Compagnie de la Nouvelle-France, but of its corporate predecessor the Compagnie de Caën, and which had been acquired by the ‘adventurers to Canada’ in an act of privateering of questionable legality, that would spark a controversial dispute between these interests.

As it happened, Émery de Caën had been on his final permitted voyage to New France in the summer of 1629, for the purpose of winding off the old company’s operations and to retrieve its remaining inventory, when he fell victim to the raids of the Kirkes. Learning of his cousin’s misfortune in November the same year, Guillaume de Caën made his way from France to the Thames, optimistic of having his stolen furs restored, if somewhat naïve – as all in his position would have been – of the complicated legal procedures necessary for such a result.

It should be of little surprise that De Caën’s first step in London was to approach the resident ambassador, just as it had been Champlain’s. Châteauneuf, hearing of these new concerns, was then satisfied to collate them with the demands of the Compagnie de la Nouvelle-France into a memorial (written in Latin) for Charles I’s attention sometime in January.<sup>79</sup> In London, the Lords Committee for Foreign Affairs assumed the responsibility of responding to these demands. In their reply to the ambassador, separate investigations were promised into the ‘fort & habitation of Quebic taken by Captayne Kirke’, and the ‘skinnes brought from Canada’.<sup>80</sup> The inevitable return of Québec was all but a *fait accompli* by this stage; but just which court had jurisdiction over the furs, and what kind

---

<sup>78</sup> Depositions of Kirke Brothers (17 November 1629), NAUK CO 1/5/37, 95; *CSP Colonial (America and West Indies)* 1: 103-4.

<sup>79</sup> Memorial of the French Ambassador to King Charles (January[?] 1630), *CSP Colonial (America and West Indies)* 1: 107.

<sup>80</sup> Answers to give severall Memorialls presented by the French Ambassador (1 February 1630), NAUK CO 1/5/2, 121-2.

of jurisdiction, was unclear however. For this reason, a month passed before a special commission of enquiry composed of London's finest lawyers was launched 'to discover what goods, merchandise, and other things have been taken by Capt. David Kirke' – which, evidently, was proving the more complicated question posed by Châteauneuf.<sup>81</sup> Testimonies were again collected, before Whitehall unexpectedly intervened. By an Order of the Privy Council of April 2nd, Sir James Campbell, the Lord Mayor of London, was ordered to auction the disputed furs before only the French and English interests contending for them.<sup>82</sup> Whomsoever was prepared to make the highest 'offer for the Beaver Skins now in question', the Lords confirmed, would receive all the 1,713 furs kept in storage upon payment to the mayor, with the whole process to be supervised by the Judge of the Admiralty.<sup>83</sup> This was hardly a satisfactory outcome for Guillaume de Caën. Because he needed to return to France to give his attention to domestic legal disputes, however, he perceived it to be the best option to register the highest bid and seek the restitution of the requisite funds in a separate suit later, so he tendered 25 shillings per pound and was awarded the prize on April 9th.<sup>84</sup>

Things only got harder for De Caën. After lodging a considerable deposit, he was prevented access to the locked warehouse containing the furs. He therefore had to return to France empty-handed. There was only time, before his ship's departure in mid-April, to give power of attorney to Jacques Reynard and lodge a petition with the Privy Council threatening a new suit for damages and costs. The Kirkes had evidently outplayed De Caën again. When the Lord Mayor, at the end of the auction, asked for the key to the warehouse,

---

<sup>81</sup> Commission to Sir Humphrey May, Sir John Coke, Sir Julius Cæsar, and Sir Hen. Marten (5 March 1630), NAUK CO 1/5/2, 135.

<sup>82</sup> It does not appear – *prima facie* – that this was the result of a formal suit before the London Mayor's Court, even if this court would seem to have enjoyed jurisdiction because the furs in question, as well as the competing claimants, were situated in London. Visiting merchants had, traditionally, made use of this court, which for centuries had ruled according to the customs of *lex mercatoria* (called in England the 'Law Merchant'), but generally it was used for the recovery of small debts of less than £5; in this case, the value of the disputed furs was perhaps a few thousand pounds. For the medieval history of the Mayor's Court, see *Calendar of Early Mayor's Court Rolls*, ed. A. H. Thomas (Cambridge: Cambridge University Press, 1924).

<sup>83</sup> Order of the Privy Council (2 April 1630), CO 1/5/2, 169.

<sup>84</sup> *CSP Colonial (America and West Indies)* 1: 112. Guillaume de Caën's departure was hastened by ongoing suits with the Compagnies de Montmorency, de Rouen et Saint-Malo, and de Nouvelle-France, at the centre of which was 'L'Affair Langlois'. For this, see Helen Dewar, "'Y establir nostre auctorité': Assertions of Imperial Sovereignty through Proprietorships and Chartered Companies in New France, 1598-1663' (PhD diss., University of Toronto, 2012), 207-49; Robert le Blant, 'Les Débuts Difficiles de la Compagnie de la Nouvelle-France: L'Affaire Langlois, 1628-1632', *Revue d'Histoire de l'Amérique Française* 22, 1 (1968), 25-34.

David Kirke refused to hand it over.<sup>85</sup> When a public notary approached him after De Caën's departure and asked for the same, the story had changed; now, David Kirke said, the key was lost, with its last known whereabouts being with his mother, who no longer knew where she had put it.<sup>86</sup> The Kirkes still worked, as they ever had, in a family business! When, two weeks later, the Admiralty intervened and issued a warrant for the Lord Mayor and Sheriffs of London to break into the warehouse and deliver the contents to De Caën's appointed representative, there would be one final act of defiance on the part of the Kirkes.<sup>87</sup> Only around 300 furs were found inside, some 1,400 less than the amount Kirke claimed to have taken from the inventory of the Compagnie de Caën in New France.

Over the next two weeks, it emerged that the furs had been removed from the warehouse. The culprit was Thomas Fittz, who received a mysterious tipoff, and subsequently paid a bargain price for the furs, sometime in April. His apprehension came at the end of the following month. For his 'notorious misdemeanor', Fittz was sent by the Privy Council to the Fleet Prison on July 2nd, and ordered to be examined by the Star Chamber two weeks later.<sup>88</sup> His detention and interrogation were brief affairs. Because Fittz was prepared to disclose the whereabouts of the missing furs to the Attorney General, the Privy Council looked sympathetically upon his complaints of 'great loss', and so granted his freedom on shortly later on July 14th.<sup>89</sup>

Finally, a grand total of 1,713 furs were loaded upon a ship bound for Dieppe, where they were reunited with their rightful owner, Guillaume de Caën, but to whom the matter was anything but finished. He was busy preparing a new suit, which went much further than a simple denial that the cost of recuperating the furs was his burden. Now, in the early months of 1631, he claimed a total of 4,266 furs had been wrongfully accumulated by the Kirkes, and moreover he complained about the appropriation of his trading ships and the general impediments to trade left by the Kirkes after 1629. In pursuit of these new claims

---

<sup>85</sup> James Cambell, Lord Mayor of London, to the Privy Council (28 April 1630), NAUK CO 1/5/87, 183.

<sup>86</sup> Affidavit of Josua Mainet, NAUK CO 1/5/87, 185 (enclosure); *CSP Colonial (America and West Indies)* 1: 114.

<sup>87</sup> Warrant to the Lord Mayor and Sheriffs of London (18 May 1630), NAUK CO 1/5, 79; *CSP Colonial (America and West Indies)* 1: 115-116. This comes from the Admiralty.

<sup>88</sup> Order of the Privy Council for the Attorney General to proceed against Thos. Fittz in the Star Chamber for 'great contempt and affront of all authority and justice' (16 June 1630), NAUK CO 1/5/79, 169; *CSP Colonial (America and West Indies)* 1: 117.

<sup>89</sup> Records of Privy Council (9 July 1630, 14 July 1630), *CSP Colonial (America and West Indies)* 1: 118.

for restitution, De Caën presented the English ambassador to France, Sir Isaac Wake, with his complaints sometime in April. Wake, in his delicate position, seems to have looked favourably on the claim, and he sought clarification on the discrepancy in the number of furs back in England.<sup>90</sup> David Kirke, whose remaining furs had, by this stage, been held under sequestration by the Admiralty, was again summonsed before Sir Henry Marten on May 27th of 1631.<sup>91</sup> For the first time, Kirke was forced onto the defensive. He reiterated his original statements and maintained a firm distinction between furs traded and furs seized. Their ‘Commission under the broad seale of England’, he reminded Marten, had permitted the brothers ‘utterly to expell [the French] from that Country’. After doing so, all the furs they acquired in Québec came into their possession through trade, not by theft.<sup>92</sup> The matter was not, therefore, all that clear-cut.

Back in France, Émery and Guillaume de Caën brought more pressure to bear on the case. Towards the end of 1631, their request for recompense was registered with a mobile French court commissioned especially by Louis XIII to make a record of outstanding grievances before the negotiations of the final peace. Neither the Kirkes nor any of their representatives were present at the relevant hearing of the court, so the figures claimed by the Compagnie de Caën went unchallenged.<sup>93</sup> Getting word of this, the High Court of Admiralty in London prepared to be faced with their request for damages once more. Throughout the winter months of late 1631 and early 1632, duplicates were ordered from the court of the all relevant inventories and testimonies. These, crucially, were provided to the ambassador Wake, whom everyone in England and Scotland increasingly hoped would be able to resolve the affair without further enquiry or investigation.<sup>94</sup> It was, after all, at this period that Wake was consumed with negotiations in Saint-Germain-en-Laye when all matters of restitution, public and private, were finally slated for consideration at this time. In this context, the differences of opinion between the Kirkes

---

<sup>90</sup> Biggar, *Early Trading Companies*, 161-2.

<sup>91</sup> It is unclear when, between late 1629 and early 1631, Kirke’s furs were confiscated by the Admiralty.

<sup>92</sup> Examination of Capt. David Kirke before Sir Hen. Marten. (27[?] May 1631) NAUK CO 1/6, 15. See also Brief declaration of the number of beaver skins brought by Capt. David Kirke (2 May 1631) NAUK CO 1/6, 12; *CSP Colonial (America and West Indies)* 1: 129.

<sup>93</sup> Biggar, *Early Trading Companies*, 162-3.

<sup>94</sup> See, for example, the List of the ‘Marchandises de Traicté’ sent to Quebec, found in the Mary Fortune of London, and taken at Tadousac (1632[?]), NAUK CO 1/6, 50. See also the inventory of Champlain, at NAUK CO 1/6, 49, and compare NAUK CO 1/6, 38.

and the De Caëns were definitively to be addressed not by themselves or by their solicitors but by their diplomatic countrymen.

Wake, apparently sympathetic to the De Caën cousins, resolved to see their claims honoured in these negotiations. Upon the great balance sheet of the profits and losses compiled in this period, he uncritically accepted the figures presented to him by the French and overlooked the original depositions collected back in November of 1629. Naturally, this large claim for damages, which reached a total of £14,330 (£8,270 for furs plus £6,060 for losses in the trade and the appropriation of ships belonging to the Compagnie de Caën), was reputed at home. The Kirkes, for their part, were completely caught off-guard. They and the other 'Canada adventurers' expected Wake to advance their own interests at the bargaining table, not those of the Compagnie de Caën. Instead, as they complained in a long and detailed letter of protest to Wake, their own predicament had been disregarded. They were prepared to admit the need to 'have made restitution' with the French. But to their minds, such restitution needed only to have covered the value of the goods actually taken from the stores of Québec and the ship of Émery de Caën and nothing more.<sup>95</sup>

Though Wake gave his formal assurances to the De Caëns that a large sum would be paid them for compensation, ultimately it was not the Kirkes who were left with the responsibility for covering it. Instead, that responsibility fell to Charles I. For this reason, the Secretary of State, Sir John Coke, and the Chancellor of the Exchequer, Lord Francis Cottington, were likewise surprised to learn of Wake's generosity in the negotiations. The English diplomat to France yielded when he ought not have, they felt, burdening Charles I with a debt considered exorbitantly excessive of the true value of the damages. The king reluctantly authorised the payment – or, more accurately, consented to its deduction from the amount owed him by the French – and the public component of this legal dispute came to an end.<sup>96</sup>

An extraordinary private dispute between the Kirkes and the de Caëns endured beyond the signing of the Treaty of Saint-Germain-en-Laye, however. Émery de Caën, whom Richelieu nominated in 1632 to oversee the withdrawal of the English from Québec,

---

<sup>95</sup> Answer of the Adventurers of Canada to the articles contained in a letter from Sir Isaac Wake, the King's Ambassador in France (30 March/9 April 1632), NAUK CO 1/6/53, 133-4.

<sup>96</sup> Objections [in Sec. Lord Cottington's hand] to certain arrangements, whereby the King is obliged to pay 14,330l. for supposed debts to Du Cane from the Canada merchants (1632), NAUK CO 1/6/45, 118.

was stalled throughout late June and early July by Lewis Kirke and his colleagues. The credentials of De Caën, they argued, were deficient of authority to evict them from New France. His paperwork, in other words, was unconvincing. The Canada adventurers could manage to drag their feet for no longer than a few weeks, though, giving up Québec in mid-July – apparently, however, engulfed in flames. And so the De Caën cousins found themselves once again with another outstanding claim for damages. ‘With time you will find ways to make good your losses’, Richelieu has been quoted in a letter of advice to Guillaume de Caën, ‘which for myself I earnestly desire to see’. But when the Compagnie de la Nouvelle-France was quickly handed the keys to the settlement – which in turn put Samuel de Champlain back in the driving seat – the De Caëns found themselves effectively squeezed out of the picture. As late as 1642, Guillaume was issuing ‘a writ on the Kirkes for the 137,000 *livres* which were owing to him’, as Marcel Trudel has discovered, but nothing appears to have come from this claim.<sup>97</sup> The Kirkes, on the other hand, likewise sought restitution for many years after their humiliation in 1632, but not only that, they sought revenge. Complaining of the costs associated with abandoning the trade, evacuating Québec, and delivering their remaining inventory back to Europe, the brothers registered their demands of more than £4,000 from Guillaume de Caën with Secretary Coke in 1633. Coke seems to have looked sympathetically on their claim, but with the peacetime negotiations well and truly wrapped up by this stage, there was little scope for the suit to be investigated by ambassadors, and no court ambitious enough to exercise jurisdiction either side of the Channel. The next step of the Kirkes was telling: to make several requests between 1633 to 1636 for ‘the King’s letters’, so that they might ‘right themselves’ in Canada. Their efforts on the St. Lawrence and in Newfoundland were barely effective to that end, however.<sup>98</sup>

A tentative conclusion can be offered here, and tested in the following chapter. It is noticeable that affairs of private law were increasingly coming within the purview of

---

<sup>97</sup> This information and Richelieu’s remarks are derived from Marcel Trudel, ‘Caën, Guillaume de’, *DCB*, [http://www.biographi.ca/en/bio/caen\\_guillaume\\_de\\_1E.html](http://www.biographi.ca/en/bio/caen_guillaume_de_1E.html) (accessed 25 May 2015).

<sup>98</sup> Demands of the Canada Adventureres from Wil. De Caen of Dieppe (17 June 1633), NAUK CO 1/6, 75; Petition of George Kirk, David Kirk, William Barkley, Joshua Gallard, and others (1633), *CMS* 2: 42; Sir David Kirke, Will. Berkeley, and John Kirke, to Sec. Coke (22 January 1636) NAUK CO 1/9, 1.

European diplomats during the first decades of the seventeenth century – for all the glaring institutional deficiencies and the uncertainties in process and doctrine characteristic of this period of the history of international dispute resolution. Hitherto an appointment concerned with matters of public law, resident and visiting ambassadors were prompted by monarchs, assemblies, and merchants in this period, for the first time, to think seriously about private legal interests. If it can be said that corporate demands for the restitution of property were becoming politically important questions in Europe at this time, then it also has to be acknowledged that these questions were getting most of their impetus within the context of some *ius post bellum* or other. This finding can be qualified somewhat more. War and peace *together*, perhaps, opened up new pathways for the restitution of private interests damaged abroad, but one or the other on its own – war *or* peace – tended, instead, greatly to impede those pathways. This can be inferred from the contrast just shown between the very different fortunes of Antoinette de Pons and Guillaume de Caën; and likewise might the same be said of the self-declaratory martial activity of the *Witte Leeuw* in the Indies in 1603 in contrast with the peacetime plundering of the same ship in Atlantic waters just three years later. To pursue this argument further, the following chapter will explore the relationship of alliance between the United Provinces and England during the Thirty Years War (1618-1648), and connect the history of Nieuw Nederlandt and New England, thereby extending this necessarily Eurocentric history of diplomacy and private international law.

## **Chapter 10: Diplomacy and Private International Law in Europe, Part II, 1621-1655**

This chapter continues to analyse the diplomatic volleys sent between metropolitan settings in relation to corporate activity abroad. London and The Hague will dominate discussion here, as these cities came to terms with a number of disputes between European companies in the Atlantic. Before turning to this subject, however, it will be necessary to explain the diplomatic relationship between these locales in relation to the Indian Ocean first. Merchant investors from Amsterdam and London were briefly of a common mind, which led to a number of attempts, between 1611 and 1620, to establish not only a state alliance, but also a corporate alliance. These efforts, which culminated in the two Anglo-Dutch conferences of 1613 and 1615, resulted only in a mutual peace agreement of 1619. This arrangement was quickly unworkable in the Indian Ocean, where English and Dutch companies remained suspicious of each other irrespective of metropolitan niceties.<sup>1</sup> Relations became especially spiteful in 1623, when Herman van Speult, the Oostindische Compagnie governor of Ambon, oversaw the slaughter of twenty English East India Company employees with little reason more than a hunch. The ‘Amboina massacre’, which effectively ousted the English from the Moluccas trade, led to much consternation back in England, where demands could still be heard into the 1640s for the ‘satisfaction’ of appropriate restitution to make up for ‘the wrongs and injuries committed by the Dutch’ against the English company.<sup>2</sup>

A somewhat different relationship developed between English and Dutch companies in the West Indies. The Geoctroyeerde Westindische Compagnie, rising from the ashes of failed corporate predecessors, received its charter in July of 1621 and prepared, thereafter, for its westward enterprise.<sup>3</sup> When word of the formation of the new company,

---

<sup>1</sup> K. N. Chaudhuri, *Trade and Civilisation in the Indian Ocean: An Economic History from the Rise of Islam to 1750* (Cambridge: Cambridge University Press, 1985), 80-97; Om Prakash, *European Commercial Enterprise in Pre-Colonial India* (Cambridge: Cambridge University Press, 1998), 72-174.

<sup>2</sup> Karen Chancey, ‘The Amboyna Massacre in English Politics, 1624-32’, *Albion* 30, 4 (1998), 583-98; Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict, and London’s Overseas Traders, 1550-1653* (London: Verso, 2003), 307; Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2011), 71, 142.

<sup>3</sup> For the formation of the Westindische Compagnie, see Jonathan Israel, *Dutch Primacy in World Trade, 1585-1740* (Oxford: Clarendon Press, 1990), 156-71; Oliver Rink, *Holland on the Hudson: An Economic and Social History of Dutch New York* (Ithaca: Cornell University Press, 1986), 24-68.

and the activities of those formerly involved with the Nieuw Nederlandt Compagnie reached the Privy Council towards the end of the year, the reflex action of the Lords was to address Sir Dudley Carleton, ambassador to The Hague, with their concerns about the potential damage sustained by the royal grantees (that is, the Council of New England). ‘His Ma[jes]tie’ Carleton was told in December, ‘hath [...] some years since by patent granted the quiet and full possession unto particular persons; Nevertheless wee understand that the yeare past the Hollanders have entered upon some partes thereof and there left a Colonie and given new names to severall portes appertaining to that part of the country’. James I, learning of these developments, sent ‘his royall commandement to signifie his pleasure that yow should represent these thinges unto the States Generall in His Ma[jes]t[y]’s name (who *jure primae occupationis* hath a good and sufficient title to those parts)’.<sup>4</sup>

Evidently taken with the Privy Council’s Latinate rendering of the rule of ‘first taker’, Carleton worked the phrase into his formal address, in Teutonified French, to the Staten Generaal of February 1622:

On S. M. ayant (*iure primae occupationis*) le tiltre audit pays non subject a contredict ma commande de vous representiv estat du dit affaire & vous requerir en som nom que par vortre autorité non seulement les navires desia equipper pour le dit voyage soyint arresti mais aussy que voltreieuze prosequition de la dite plantation sout expressment deffendue.<sup>5</sup>

Perched at Plymouth, Ferdinando Gorges at the Council of New England eagerly awaited formal assurances that his proprietary designs for New England would not face any challenge from the new Dutch company. He was apparently told sometime later, after he and John Mason received confirmation of the Westindische Compagnie settlement at the Hudson River, that members of the Staten Generaal were ignorant of the Dutch undertaking in that region – ‘that’, they apparently claimed, if ‘there Were any Such [Dutchmen there],

---

<sup>4</sup> Privy Council to Sir Dudley Carleton (15 December 1621), *CHNY* 3: 6.

<sup>5</sup> Sir Dudley Carleton to States General (9 February 1622), *NAUK CO* 1/2, 2. This was a linguistic combination sensible at the time to the officeholding élite of the United Provinces and England alike, although, between the start of the seventeenth century right up to the middle of it, there was inconsistent opinion as to whether English, Dutch, Latin, or French was the most appropriate language of formal correspondence. The legacy of these variations in diplomatic language at a time when international legal discourse was still being fleshed out is worthy of more speculation.

it was out of their private adventures, and not by any authority derived from [us]'.<sup>6</sup> If this represented a true rendering of the Staten Generaal's position on the Westindische Compagnie's activity, it was certainly a disingenuous one. In respectable political discourse, representatives of the United Provinces may well have distanced themselves from the 'private adventures' of the Westindische Compagnie and others, but behind closed doors, the response of the Staten Generaal to Carleton's complaints was greater collaboration with the freshly formed Heren XIX in order to hasten the delivery of settler families into the region and the fortification of the Dutch right there, for the passage of time, as they well knew, ran against all who were ignorant of their rights.<sup>7</sup>

In the years to follow, much in contrast to the East Indies context over the same period, there was still a glimmer of hope for collaboration, if not cooperation, between the United Provinces and England in the West Indies. Allied in the Thirty Years War, their common Iberian enemy kept the possibility of a belligerent corporate alliance in the West alive much after all hope for an Indian Ocean partnership had been abandoned. In this, the Atlantic context can be seen to take a sharp divergence from the Indian, and the United Province was very much behind this move. As the Westindische Compagnie, in its 'infancy', had cause for great caution in America, particularly in regions where the strength of Iberian presence could provide far more of a match than the Dutch could sustain, the Staten Generaal pondered once more the possibility of a trading union with 'Franchrijk en Engeland'. Its resolutions reveal that Dutch enthusiasm peaked during the spring months of 1624 but waned away thereafter.<sup>8</sup> This was largely due to the growth in strength of the Geocroyeerde Westindische Compagnie after what had been a careful but slow start to its operations throughout 1622 and 1623. The security of the company became assured not only in North America – indeed, that is where it was least interested – but in South America, along the African coast, and on the Caribbean islands too, where efforts were often made to enter into formal trade relationships and contracts with local peoples, where they could

---

<sup>6</sup> Sir Ferdinando Gorges to Captain John Mason (18 March 1632), NAUK CO 1/6, 116.

<sup>7</sup> Jaap Jacobs, *New Netherland: A Dutch Colony in Seventeenth-Century America* (Leiden: Brill, 2005), 41-2.

<sup>8</sup> Resoluties (22 March, 9 April, 22 April, 3 May 1624), Nationaal Archief van Nederland (hereafter: NAN), 1.01.02, 5751A; *CHNY* 1: 29, 32.

be found and made agreeable, for potential application against foreign interests (a strategy Grotius had endorsed for the Oostindische Compagnie over a decade earlier).<sup>9</sup>

In England, as the Thirty Years War progressed, calls were often heard from within the walls of the House of Commons for an English version of the Westindische Compagnie to be established, ‘so that the [English] subjects [operating the company] shall make war against the King of Spain and his majesty [Charles] shall have no more to do at sea, but to defend the coasts’. Even if many, during 1626 and 1627, thought that a corporation modelled upon (but not united with) the Dutch would make for the ‘famouesest company in Christendom’, no business plan of this kind ever materialised in London.<sup>10</sup> For the time being, Atlantic trade would generate profits only for those English merchants working with a few small corporations. The Virginia Companies being dissolved, and the Kirkes only beginning to get their act together, that left only three small and regionally specific entities operating in the region: the Council for New England, the Somers Island Company, and the Newfoundland Company. None of these were more indignant about the rising fortunes of the Dutch in the second half of the 1620s than the Plymouth proprietors of the Council, who exhibited a trade jealousy that would become definitive of Anglo-Dutch commercial relations for most of the next century.<sup>11</sup> Formal efforts to deter the Dutch from America were unsatisfactory, inspiring a new course of action to be adopted in English ports in response to the movement of Dutch goods at this time.

Island-hopping on its return from Manhattan to the Netherlands, which was the norm for vessels returning to Europe from America, the *Eendracht* (‘Unity’) pulled into Plymouth sometime in February of 1632 to prepare for its final leg to Amsterdam. The free port at Plymouth was only a short stroll from the regular meeting place of the Council of New England, which learned of the *Eendracht*’s hindered passage through customs with just enough time to kick up a stink about it. The ship had been initially been delayed in

---

<sup>9</sup> See Mark Meuwese, *Brothers in Arms, Partners in Trade: Dutch-Indigenous Alliances in the Atlantic World, 1595-1674* (Leiden: Brill, 2012). A good collection of Westindische Compagnie African contracts for the 1640s can be found at the Leiden University Library (hereafter LUL), MS69.

<sup>10</sup> Sir Benjamin Rudyerd and Sir Dudley Digges (1626 Parliament), quoted in Brenner, *Merchants and Revolution*, 259.

<sup>11</sup> David Ormrod, *The Rise of Commercial Empires: England and the Netherlands in the Age of Mercantilism, 1650-1770* (Cambridge: Cambridge University Press, 2003). See also Jonathan Israel, ed., *The Anglo-Dutch Moment: Essays on the Glorious Revolution and its World Impact* (Cambridge: Cambridge University Press, 2003).

Plymouth port because of a dispute with customs officials in that port over the false information given by the ship's provost (which apparently he provided in boyish protest of his wage conditions). No sooner had this been settled, however, than a shotgun marriage was being arranged on the docks between the ship's pilot and a tantalisingly anonymous woman picked up somewhere *en route* – all of which having the effect of delaying the *Eendracht*'s departure even more.<sup>12</sup> It was in this window of time that John Mason, Ferdinando Gorges, and the Secretary of State, John Coke, conspired to have the ship stayed for additional scrutiny of its cargo, which James Bagg – the crooked Devonshire powerbroker with immense influence over customs at the port, and membership also in the Council for New England – was apparently happy to organise.<sup>13</sup>

Some time near the end of March in 1632, the Staten Generaal learned of the detention of the *Eendracht*. Apparently it was seized on the grounds that its cargo of furs 'were bought within the jurisdiction or district belonging to his Majesty of Great Britain'. Charles I, for this, was addressed personally with a request that the ship be released in accordance with the law of nations; their ambassador to England, Albert Joachimi, was instructed to set about achieving the same.<sup>14</sup> What these efforts combined to inspire instead was an ardent attempt, on the part of the English king's lords and commissioners, to shift the terms of debate from one of prize to one of dominion. Beginning with their telling rejection, at the outset of their counterclaim, to reject the 'public law' approach of the Dutch to prize – because 'our civilians are in doubt on the matter' – what followed was an argument pulled from the same legal toolbox used by the Dutch. Beginning with the explicit association of colonially acquired moveable property with colonially based immovable property – the furs acquired by the *Eendracht* in 'the north parts of Virginia' were confiscable on the grounds that the Dutch *land* claim was invalid there – the king's lawyers could then attend to the reasons *why* the Dutch claim to the Hudson River was defective. In a telling departure from the rapidly accepted colonial convention of

---

<sup>12</sup> States General to Ambassador in England (7 April 1632), *CHNY* 1: 46-7.

<sup>13</sup> Gorges to Mason (18 March 1632), NAUK CO 1/6, 116; Mason to Coke (2 April 1632), NAUK CO 1/6, 51. See also Andrew Thrush, 'Bagg, James II (c.1592-1638)', *The History of Parliament: the House of Commons 1604-1629*, ed. Andrew Thrush and John P. Ferris (Cambridge: Cambridge University Press, 2010).

<sup>14</sup> States General to Ambassador in England (7 April 1632), *CHNY* 1: 46-7; Remonstrance of the Ambassadors of the States General to King Charles I (April 1632), *CHNY* 1: 57.

purchasing land from Indians by the early 1630s, which the Dutch were especially busy to normalise in North America at this time, the English king's respondents rejected any claim that the Westindische Compagnie had harmonised its title with that of the indigenous population for two reasons:

first, it is denied that the Indians were *possessors bonae fidei* of those countries, so as to be able to dispose of them either by sale or by donation, their residences being unsettled and uncertain, and only being in common; and in the second place, it cannot be proved, *de facto*, that all the Natives of said country had contracted with them at the said pretended sale.<sup>15</sup>

By contrast, the perfection of the English claim to North America owed to a very familiar bundling of consequences: 'justified by first discovery, occupation and the possession which they have taken thereof, and by the concessions and letters patents they have had from our Sovereigns, who were, for the above reasons, the true and legitimate proprietors thereof in those parts'.<sup>16</sup> From this basis – which was essentially a denial that the Indians were a source of title in America – Charles I's lawyers proffered the remarkable claim that the grounds for complaint over the *Eendracht* matter lay not with the Dutch company but with the English crown. What this claim required was a blending of a number of disparate legal ideas into a bold concoction, the sum of which greater than its parts – that the 'injustice' of the *Eendracht's* expedition, it was stressed on the English side, had been 'committed as well against the goods as against the lives of his Majesty's subjects; of having wronged us in our trade; of having dispossessed us of divers countries in the East and West Indies, where our right was indubitable'.<sup>17</sup>

The table had clearly turned since the colonial conferences of 1613 and 1615, but the questions brought to bear upon it now appeared somewhat more complicated by the question of land rights abroad. Few if any of the Staten Generaal would have anticipated Charles I's lawyers to make a peacetime claim to *dominium* in the face of their own original complaint of wrongs in tort on behalf of the Westindische Compagnie. A careful response to the English crown was therefore necessary. To assist with its preparation, the Staten

---

<sup>15</sup> Response of the King and the Lords, his Commissioners (April 1632) *CHNY* 1: 58.

<sup>16</sup> Response (April 1632) *CHNY* 1: 58.

<sup>17</sup> Response (April 1632) *CHNY* 1: 59.

Generaal called upon the Heren XIX to clarify the company's claim to the New Netherlands. This statement, in turn, was delivered on May 5th, 1632.

The Heren XIX began its rebuttal by noting that the geographical situation of the company's settlements, planted between New England and Virginia, provided no impediment upon the territorial rights of either. But, anticipating the English to insist otherwise, what was next to be decided – and implicitly in the Westindische Compagnie's favour – was the kind of jurisdiction which could be said to extend from Europe over subjects in America merely by the phrasing of English royal paperwork. This approach to the question bore fruit (or, more to the point, furs); for, 'inasmuch as the [native] inhabitants of those countries are freemen, and neither [the subjects of] his Britannic Majesty nor [the Staten Generaal], they are free to trade with whomsoever they please', the Heren XIX alleged, discounting entirely the international ambition of charters and grants issued to date. That the English king was capable 'in all justice, [to] grant his subjects by charter the right to trade with any people, to the exclusion of all others, *his subjects*', was not denied, for

your High Mightinesses [the Staten Generaal] have a right to do [the same] by yours. But, that it is directly contrary to all right an reason, for one potentate to prevent the subjects of another to trade in countries whereof his people have not taken, nor obtained actual possession from the right owners, either by contract or purchase.<sup>18</sup>

It was this final point, regarding the process of acquiring title, that the company wanted impressed upon the Staten Generaal most strongly. A defective jurisdiction was one thing, the acquisition of title another; the question of the furs themselves, incidentally, was somewhat beside the point. As the Heren XIX put it, the company's servants had 'acquired the property [in land], partly by confederation with the owners of the lands, and partly by purchase'. This new title had originated from native title, which then generated a right to property that could not be affected by external interests, in other words. Closer to the pulse of a Grotian jurisprudence than the lawyers of Charles I, the Heren XIX then concluded their statement deferentially to the Staten Generaal, in the interests of 'the maintenance of your sovereignty and the freedom of trade by sea, and alliances with distant nations, who

---

<sup>18</sup> West India Company to the States General (5 May 1632), *CHNY* 1: 52.

are not, naturally, the subjects, nor have become the property, of any other person, by conquest'.<sup>19</sup>

The Staten Generaal, careful not to antagonise the Heren of both Oostindische and Westindische companies in this period, passed the statement without amendment immediately onto their ambassador in London, Joachimi, who was 'again admonished to exert and exercise all possible means for the release of the aforesaid ship', and ordered to ensure 'that the merchant-men of the West India Company may in future be saved from such like annoyances'.<sup>20</sup> Joachimi, reportedly 'earnest' in this undertaking, made quick progress. By June, the ship and its cargo were released under the orders of Charles I. Though its freedom from Plymouth came with a statement – written on a single piece of paper – upholding 'His Majesty's right to the territories whence they came' and a warning that 'if the Dutch remain there without [the king's] licence, they shall impute it to themselves if hereafter they suffer', the *Eendracht* affair represented unequivocally a Dutch triumph.<sup>21</sup>

What made the *Eendracht* unique was the opportunity it provided Charles I to test the extent of his territorial supremacy, which, in the end, fell far short of the overly optimistic estimates of his legal advisors. The entire affair had not been about pelts at all; it was about *dominium* abroad, and a private law claim had to be contorted to perform such a service. This much was explicitly confirmed to Joachimi two years later, by 'A noble Lord' of the king's court, who admitted off the record that the affair 'did not arise because the persons were suffering any injury, the one from the other, but in order to pick a quarrel with the Dutch about the possession of New Netherland'. On this issue, the English king's actions were hardly altruistic: he 'quarrelled' not to defend the chartered rights of his subjects abroad, but to acquire additional crown revenue from a colonial source (which, it must be said, represented a far more inventive means of fundraising in the early seventeenth century than it was in the more controversial mid-eighteenth century).<sup>22</sup> In the words of

---

<sup>19</sup> West India Company to the States General (5 May 1632), *CHNY* 1: 52.

<sup>20</sup> States General to their Ambassadors in England (5 May 1632) *CHNY* 1: 53.

<sup>21</sup> Minutes (June 1632) *CSP Colonial (America and West Indies)* 1: 154.

<sup>22</sup> To bring into the analysis is the New England Commission-era changes to taxation from abroad, hinted at by Winthrop here: 'It is perfectly well agreed as well among others as among the Swedes and the Dutch that the kings of England for a long time by letters patent and more recently by grant of immunity from taxes and by sundry other privileges have inspired and encouraged their subjects to explore these western parts of the

Joachimi's lordly informant, what the English sought in the *Eendracht* affair was 'some acknowledgement' of the English claim, for which the Westindische Compagnie might then be expected 'to pay the King of Great Britain [...] for what they occupy there'. Joachimi, reporting this conversation to the Staten Generaal, assured them that 'I cut him off from all hope of that'.<sup>23</sup> Joachimi's response to his English offsideer must have come quite naturally. Over and above the Westindische Compagnie's singular sovereign debt of allegiance to the United Provinces, the irrelevance (if not, the economic backwardness) of the feudalistic suggestion of any tributary relationship for New World land rights reeked far too much of the Burgundian and Habsburgian worlds of favouritism and patronage that the Dutch had done so much work, after the 1550s, to escape.<sup>24</sup>

A similar legal dispute between the United Provinces and England broke out in the months following the *Eendracht's* release from port, although the roles were somewhat switched. When, in the beginning of 1633, a company of London merchants made up of William Clobery, David Morehead, and John de la Barre organised a fur-trading expedition bound for the apparently unclaimed region between New England and Virginia, they knew from experience that the area fell within the bounds of New Netherland, ill-defined though such bounds were at the time.<sup>25</sup> What made the plan of the Londoners all the more cunning was their choice of crew. Jacob Jacobszoon Eelkens, formerly an employee of the Compagnie van Nieuwonderlant, was appointed to the *William*, and contracted for the London company to use his insider knowledge to direct that ship and its captain (William Trevor) towards Fort Amsterdam in March. As will be recalled, Wouter van Twiller of the Westindische Compagnie did his best to prevent Eelkens from remaining in the country. Although Eelkens did not return empty-handed, the spoils he managed to collect from the region amounted to far less than his London backers expected.

---

world and to settle colonies in the same'. See Winthrop to Printz (18 September 1643), *IJP* 209; Proceedings (10 March 1642/3), *MBCR* 2:34.

<sup>23</sup> Albert Joachimi to the States General (27 May 1634), *CHNY* 1: 72.

<sup>24</sup> See Jonathan Israel, *The Dutch Republic: Its Rise, Greatness, and Fall, 1477-1806* (Oxford: Clarendon Press, 1995), 55-231.

<sup>25</sup> Earlier, these men had been involved in an abortive colonial investment on the Isle of Kent (Maryland), but were turfed out of the region by Lord Baltimore, whose trumping patent awarded sole rights to the region. See their Memorandum (16 May 1631), and their Petition (October 1634), at NAUK CO 1/1, 4, 1/8, 32; See also *CSP Colonial (America and West Indies)* 1: 129, 191.

When the *William* returned to London some time in the second half of 1633, it triggered international legal processes that were more dignified than the gun-firing, gin-swinging fanfare of its Hudson River reception. Formality, however, did not necessarily translate into functionality, when there remained the pressing question of jurisdiction in the portside courts of Europe. Where could the London company take their complaint of mistreatment? Their first steps were in the direction of the Admiralty Court – in London, not Amsterdam – which was initially responsive. English depositions were duly collected by Dr. William Sames on behalf of Sir Henry Marten, judge of the High Court of Admiralty, throughout the middle of November in 1633. For ‘injury and wrongs’, variably estimated at several thousands of pounds, a private suit was put together.<sup>26</sup> But this was done in the presence of no representatives of the Westindische Compagnie, who could not be summoned to take any notice of the court. Diplomatic pressure would need to be applied to give claims any teeth, the opportunity for which, in this period of alliance between the states during the Thirty Years War, remained somewhat lacking.<sup>27</sup>

As matters stood in the beginning of 1634, therefore, the suit brought by Clobery, Morehead, and de la Barre was non-justiciable in English courts. The Londoners had little choice, at this juncture, but to attempt – themselves – to hasten some diplomatic recognition of the case. Their first step was to approach Joachimi personally. Providing him with a copy of the depositions, the merchants asked the Dutch ambassador to arrange a settlement with the Westindische Compagnie on their behalf, threatening the Dutch ambassador that Charles I and his council would soon be involved in the matter if quick intervention did not follow. Alarmed only in the slightest, Joachimi told the London merchants he would personally have no part to play in the matter, and instead he passed the claim for damages and accompanying evidence onto both the Staten Generaal and the Westindische Compagnie for their deliberation.<sup>28</sup>

The next step of the disappointed London merchants was to mobilise the support of the more important lords in their acquaintance and hope to catch the king on a bad day. This they seem to have tried, without much success, while the Staten Generaal waited on

---

<sup>26</sup> Appendix (28 May 1634), *CHNY* 1: 72-82.

<sup>27</sup> See Peter H. Wilson, *Europe's Tragedy: A History of the Thirty Years War* (Cambridge, MA: Harvard University Press, 2009), 424-543.

<sup>28</sup> Mr. A Joachimi to the States General (28 May 1634), *CHNY* 1: 72.

the Heren XIX to craft the necessary legalese in response to the English claim and its accompanying depositions.<sup>29</sup> The Westindische Compagnie put together an elaborate justification of their rights abroad at this point, responding, as the company did only a couple of years earlier over the *Eendracht* affair – and as the Virginia Company of London had in 1614 – to the rare opportunity to secure the acknowledgement and potential confirmation of its rights in North America.

The Heren XIX explained that the region surrounding their forts had come into the possession of the company due to a combination of prescriptive right and contract. As they put it, with the passage of time, ‘these countries had passed into the hands of the incorporated West India Company, [and] not only were the above named forts renewed and enlarged, but said Company purchased from the Indians, who were the indubitable owners thereof’. And these rights were not limited to the island of ‘Manhattes’ or even to the Noort Rivier:

likewise on the South river, and others lying to the east of the aforesaid North river, divers natives and inhabitants of these countries, by the assistance of said Company, planted sundry Colonies, for which purpose were also purchased from the chiefs of the Indians, the lands and soil, with their respective attributes and jurisdictions.

What is more, the Westindische Compagnie had the relevant paperwork to prove it – not in the form of charters or patents, but in their registry of ‘divers deeds of conveyance and cession, executed in favor of the Patroons of the Colonies by the Sachems and Chief Lords of the Indians, and those who had any thing to say therein’.<sup>30</sup>

These may have been coherent grounds to develop a claim to land in a foreign jurisdiction, but the Heren XIX had bigger ideas. Additionally they insisted that this land claim conferred onto them a local jurisdiction, inside which the company could police its own trade monopoly. This jurisdiction had been enforced in Nieuw Nederlandt since the passage of the charter, it was claimed, and trade policy had been developed within this jurisdiction without any challenge or complaint until the coming of Eelkens. ‘And although our Governor and officers there advised the aforesaid Jacob E[e]lkens, in a friendly manner, to refrain from trading within their jurisdiction, yet he went, notwithstanding, higher up the river, and having pitched his tent on the shore, beg[a]n to trade with the

---

<sup>29</sup> Resolution of the States General (20 June 1634), *CHNY* 1: 82.

<sup>30</sup> Heren XIX to the States General (25 October 1634) *CHNY* 1: 94.

Indians, the Company's allies'. Not only had Eelkens come too late, the company pointed out; he also failed 'to exhibit, when demanded, by our agents, his Majesty's Instruction or Commission'. Therefore, the company had been within its grounds to 'expel him from the said river', as they did.

With anyone, therefore, the need for redress belonged with the Westindische Compagnie, for, as the Heren XIX put it:

the Company hath by such arrival, suffered serious damage, and their trade has been thereby spoiled.

And injurious seeds of division sown between the Indians and our people, who had previously lived together in good union.

And other serious mischiefs have proceeded therefrom, such as killing of men and cattle

[...]

So that we have great cause of complaint against, and serious losses and damages to claim from, the employers of Jacob E[e]lkens, of which, on the contrary, they complain against us, and pretend their losses are very great.<sup>31</sup>

This, the company's counterclaim, may have been offered in strong terms, but it was also tellingly uncertain about the means by which the dispute may 'be settled in a friendly manner'. Hampered by a familiar jurisdictional uncertainty of peacetime restitution in matters between private interests in the Atlantic, the Heren XIX found themselves clueless as to procedure and absent of any precedent. Naturally, they nominated Joachimi to defend their case – but what case? There was no action yet – 'inasmuch as no suit as, so far as we know, been entered, up to the present time, against the Company, [and no] complaint has been made to his Majesty on the subject'. In conclusion, therefore, the Heren XIX's statement was ambivalent about the scope for redress, and wound off dissonantly with a flippant remark about the twin threats of Spanish takeover and native rebellion.<sup>32</sup>

The statement was presented to the Staten Generaal, which in response to the company immediately adopted a non-confrontational stance on the matter. For the Dutch, there was no point damaging relations with England over strongwater and trumpeting. So

---

<sup>31</sup> Heren XIX to the States General (25 October 1634) *CHNY* 1: 94-5.

<sup>32</sup> Heren XIX to the States General (25 October 1634) *CHNY* 1: 95.

long as no pressure would be exerted from the English side, then, there would be no pressure exerted from the Staten Generaal. Thus it was ‘resolved and concluded that this State cannot by any means interfere therein’; instead, they would ‘leave the aforesaid matter to take its course’.<sup>33</sup> Take its course the matter did – but into obscurity. No courts could be found to keep it alive. Legal thinkers in England and the Netherlands, for their part, being much distracted by the seemingly bigger question about the freedom of the seas, could spare little thought for a few hundred furs anyway. A rigorous debate between Hugo Grotius, John Selden, and Seraphino de Freitas was once again proving, in these years, that private legal disputes in the Atlantic region could easily be overshadowed by conflicts in the northern fisheries and Indian Ocean trading region – conflicts in which public legal issues relating to oceanic sovereignty and maritime jurisdiction tended to dominate the discourse.<sup>34</sup>

After a period in abeyance, the suit threatened to rear its head again in May of 1638. This caught Joachimi by surprise, who felt that the matter had long been ‘abandoned or had died’ by that time. When Clobery, Morehead, and de la Barre marched upon the Dutch ambassador in London, they interrogated him about the outcome of their outstanding claim for damages, but only hinted at a proper action in law. ‘From their language’, he wrote, ‘I could infer that they had spoken with some Lords of Council’. Briefly, the Dutch ambassador became fearful that ‘[m]ore than one suit will arise out of this, if the matter be not arranged’, but the Londoners were either bluffing about their conversations with the Law Lords or had otherwise failed to impress upon them the pressing nature of their demands.<sup>35</sup>

The English context deserves our attention briefly here in isolation. Because Charles I was faced with a series of domestic crises throughout the 1630s, his attention was drawn away from international justice, and instead towards financial concerns at home. His royal prerogative was exploited to the fullest in this period, allowing for a style of ‘personal

---

<sup>33</sup> Resolution of the States General (25 October 1634), *CHNY* 1: 95.

<sup>34</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006 [1604-8]); Seraphino de Freitas, *De Iusto Imperio Lusitanorum Asiatico* (Valladolid: Hieronymi Morillo, 1625); John Selden, *Of the Dominion and Ownership of the Seas*, trans. Marchamont Nedham (London: William Du-Gard, 1652 [1635]). See especially Mónica Brito Vieira, ‘*Mare Liberum vs. Mare Clausum*: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas’, *Journal of the History of Ideas* 64, 3 (2003), 361-377.

<sup>35</sup> Joachimi to States General (22 May 1638), *CHNY* 1: 108.

rule' that was antagonistic to many, which relied upon a series of contentious methods of harvesting revenue.<sup>36</sup> Parliament was only able to object to the establishment of new taxes until 1629, when the king closed it down and refused to summon members for a decade.<sup>37</sup> London merchants, some of them accustomed to the favouritism of previous monarchs, faced the brunt of the king's neediness in this period, starting with the 'Forced Loan' of 1626 and carrying well into the 1630s (even if, in spite of this, most refrained from rallying against the king).<sup>38</sup> At this juncture, Charles I made an opportunity of corporations. Seeing in the corporate form a loophole which would allow him to contravene certain guidelines set out in the *Statute of Monopolies* (1624), he granted a series of new patents to companies in return for revenue throughout the 1630s.<sup>39</sup> Additionally, he foisted loans and taxes upon established companies – like the City of London itself, and those big and small situated within it, many from Edward III's time, and some even older than that.<sup>40</sup>

The City of London and the Irish Society, both of which had come under criticism in the latter years of James I's reign for their apparent lack of progress in the Anglicisation of the Londonderry plantation, could not escape from the reaching grasp of Charles after 1625. Londonderry rents and revenues were sequestered late in that year, after the Privy Council's conditions of reform, which had been issued after a commissioned investigation in 1624, were unmet. This sequestration was withdrawn in July of 1627 after difficulties were encountered harvesting sums from the London companies, on whose behalf the City and the Irish Society submitted formal protests.<sup>41</sup> After another special commission, and the sequestration of rents once more, the Attorney-General, Sir Robert Heath, received

---

<sup>36</sup> Reeve, *Charles I and the Road to Personal Rule*; Kevin Sharpe, *The Personal Rule of Charles I* (New Haven: Yale University Press, 1996).

<sup>37</sup> See, generally, Conrad Russell, *The Causes of the English Civil War* (Oxford: Clarendon Press, 1990); Austin Woolrych, *Britain in Revolution, 1625-1660* (Oxford: Oxford University Press, 2002), 9-84.

<sup>38</sup> Brenner, *Merchants and Revolution*, 204-5, 224-36, 240-7, 265-315. Foreign merchants represented a bolder target, which goes a long way to explaining the *Eendracht* affair.

<sup>39</sup> For the Statute of Monopolies, see Chris Dent, "'Generally Inconvenient': The 1624 *Statute of Monopolies* as Political Compromise", *University of Melbourne Law Review* 33 (2009), 415-53. For Charles I's patent spree, see Pauline Gregg, *Charles I* (Berkeley and Los Angeles: University of California Press, 1981), 215-22.

<sup>40</sup> For the relationships between merchant, municipal, and judicial interests in London, and the politics of early Stuart England, see Robert Ashton, *The City and the Court, 1603-1643* (Cambridge: Cambridge University Press, 1979), which is best paired with Ashton's *The Crown and the Money Market, 1603-1640* (Oxford: Clarendon Press, 1960).

<sup>41</sup> T. W. Moody, *The Londonderry Plantation, 1609-41: The City of London and the Plantation in Ulster* (Belfast: William Mullan and Son, 1939), 222-37.

advice to present a suit against the city on behalf of the crown in the Court of Star Chamber at the start of 1631.<sup>42</sup> More evidence was collected and the crown's allegations were clarified over the next few years. The Irish Society had failed to meet the conditions of its charter, and the City had failed to carry out the articles of agreement, and this is why they were both made to answer for Ulster transgressions. Regional infrastructure was too basic, private customs officers were too greedy, British settlers were too few in numbers, and the main towns were lacking in suitable houses. It all begged for punishment, the esteemed counsel for the crown put forward, and the form of punishment, as deemed most suitable by the Lords Justice of the royal court of Star Chamber in 1635, was monetary. Early negotiations got underway for a fine of £70,000 (flat) or £100,000 (through installations), neither of which would have been possible at that time to meet. Thus was the Irish Society forced to negotiate itself out of existence, surrendering its outstanding rents, all deeds to real property in Londonderry, and all future customs revenue to the crown, which amounted to a far greater value than £100,000 but succeeded only in bringing the fine down to £12,000 (flat). This amount was assumed by the City of London (£4,000) and divided among the fifty-six individual companies involved (£8,000). The final death knell was delivered to the Irish Society when, after a writ of *scire facias* summonsed the corporation and its principal constituent companies to show why they should retain their original charter, no formal submission was made and all privileges were revoked in 1638.<sup>43</sup>

Charles was losing popularity rapidly at this moment, as larger questions over the organisation of religion in England became hotly political, and unrest gripped the countryside.<sup>44</sup> By the time Parliament was allowed, in an act of kingly desperation, to meet again in April of 1640, Charles I's base of political supporters had drastically dwindled, notwithstanding the last-ditch efforts of the loyalist Lord Deputy of Ireland, Thomas Wentworth, to rekindle support for the king.<sup>45</sup> Wentworth's hands, however, were too

---

<sup>42</sup> Moody, *Londonderry Plantation*, 238-66.

<sup>43</sup> Moody, *Londonderry Plantation*, 375-89.

<sup>44</sup> John Morrill, *Revolt in the Provinces: The People of England and the Tragedies of War, 1630-1648*, 2nd ed. (New York: Routledge, 2012), 24-122; Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (Harmondsworth: Penguin Books, 1991); Conrad Russell, *The Fall Of The British Monarchies 1637-42* (Oxford: Clarendon Press, 1991).

<sup>45</sup> Russell, *Fall of the British Monarchies*, 262-302, 381-7; Nicholas Canny, 'The Attempted Anglicisation of Ireland in the Seventeenth Century: An Exemplar of "British History"', and Jane H. Ohlmeyer, 'Strafford,

bloody: he had stirred upon malcontents in Ireland during the 1630s, and was now accused of treason at home. Charles was clearly in trouble. By his manipulation of the London corporate sphere, and his mismanagement of Irish affairs, the king had erred too far. In 1641, Parliament passed a bill for the attainder of Wentworth and, additionally, ordered the abolition of the Star Chamber. Thus came to an end the medieval history of that unusual court and the life, too, of Thomas Wentworth. The companies of the Irish Society would not, however, be restored to Londonderry until heavy-handed state efforts to reorganise the country followed the pacification of a bloody rebellion in Ireland.<sup>46</sup> England also descended into conflict, with Civil War definitively breaking out in 1642, after which point the formidability of the domestic challenge to the king's rule was so widely acknowledged across Europe that many resident ambassadors were pulled one by one from London. Revolution apparently beckoned.<sup>47</sup>

The remarkably ancient Joachimi, representing the United Provinces, stayed on for most of the 1640s, even if these exceptional political circumstances dictated that his capacity would be more of a foreign correspondent than that of a diplomat. He could still be marshalled, on occasion, to hear the complaints of Englishmen though, as an example relevant to Chapter Eight of this thesis reveals. Throughout 1642, Joachimi was confronted with several complaints about the Westindische Compagnie's pretended title to Connecticut. The English disputed that the Dutch could have purchased land from the Pequots, for they 'had no just, but [only] an usurped title' to begin with.<sup>48</sup> Joachimi, as he was now accustomed to do, deferred the matter to the Staten Generaal; its equally customary response, back in the United Provinces, was to allow the English proprietary claims for redress to fade into nothingness. That these questions came not from London merchants but from the English nobility, whose outraged cries could be heard not only in the ports of the Thames but instead echoing throughout Westminster, would not make much difference in the end. That these questions were posed at a time of great upheaval in England, a nation skewered by its own internal conflict until 1651, would have a much

---

the "Londonderry Business" and the "New British History", *The Political World of Thomas Wentworth, Earl of Strafford, 1621-1641*, ed. J. F. Merritt (Cambridge: Cambridge University Press, 1996), 157-86, 209-29.

<sup>46</sup> See the essays collected in Jane H. Ohlmeyer, ed., *Ireland from Independence to Occupation, 1640-1661* (Cambridge: Cambridge University Press, 1995).

<sup>47</sup> See Lawrence Stone, *Causes of the English Revolution* (London: Routledge, 1972).

<sup>48</sup> Joachimi to States General (31 July 1642, 8 August 1642), *CHNY* 1: 128, 131.

greater bearing on the strength of these claims for restitution. With domestic affairs continuing to divert English attention away from the disputes of private international law in America, consequently the Westindische Compagnie was let off the hook again.

The Staten Generaal, hoping to stay well out of the English conflict in this period, soon found itself confronted with the complaints of another foreign group of aggrieved private interests. These would be the Swedish, whose ‘West Indiske Compang. Nya Swerige’ was now emancipated from its Dutch controllers, and was ready to cash in on the European demand for furs and tobacco. Leaving New Sweden in the summer of 1644, the *Fama* and the *Kalar Nyckel* neared Gothenburg in September, but with fresh hostilities between Sweden and Denmark, they pulled into Amsterdam instead.<sup>49</sup> The *Fama* arrived first, ‘to be unloaded and discharged in due course of trade’, but this was refused by customs officials and Westindische Compagnie men, who levied an exorbitant tax on the ship. When Peter Spiring, an Amsterdam-based investor who had been involved with the Swedish company from very early on, refused to pay the rate asked of him, the ships and their cargoes were sequestered by the Amsterdam Admiralty Court. About this, Spiring complained directly to the Staten Generaal on October 8th of 1644.<sup>50</sup> This was bold indeed. The resolution of the Staten Generaal, in response, was to chide Spiring for approaching them directly. It was an affront that such an enquiry came not from an official representative of the Swedish queen but was rather left up ‘to private individuals, or to a private company or Board, or whatever else it may be called, totally unknown, in these premises, to her Royal Majesty’.<sup>51</sup> Transnational merchants enjoyed no stake in private international law, the Dutch claimed, but this was beside the point. As the Staten Generaal confirmed, the Amsterdam customs officers were right to levy the regular import duty, along with the additional 8% fee payable to the Westindische Compagnie, on first the *Fama* and then the *Kalmar Nyckel*, whose duties were to be exacted no differently to ‘those of the French, English, Danish and other foreign nations that bring and discharge such or similar cargoes here’.<sup>52</sup>

---

<sup>49</sup> Report of Governor Printz (11 June 1644), *IJP* 105.

<sup>50</sup> Peter Spieringh Silvercroen to States General (8 October 1644), *CHNY* 1: 143.

<sup>51</sup> Resolution of Staten Generaal (15 October 1644), *CHNY* 1: 143.

<sup>52</sup> Resolution of Staten Generaal (15 October 1644), *CHNY* 1: 144.

Spiring, now styling himself official ‘Resident’ and ‘her Majesty’s minister’ in response to the Staten Generaal, denied the applicability of the precedent, largely because of the queen’s personal stake in the cargo. As he put it, ‘it might be found that such French, English and Danes were mere private persons, and then, still, mere inhabitants of these countries, who, in comparison with her Royal Majesty’s ship, her Royal Majesty’s property, could not come into any consideration’. It was Spiring’s expectation that ‘greater respect would be paid her Royal Majesty than to place her on an equality with private individuals’. Besides, he declared, Westindische Compagnie ships were not treated like this in Sweden, so it was unfair for the Swedish company’s ships to be treated in such a way in Amsterdam.<sup>53</sup> It amounted to an extraordinary plea for exception at customs, which Spiring bolstered by offering an argument about land rights. As he put it,

these ships had traded to, and came from, a country which her Royal Majesty had rightfully purchased, and obtained possession of, from the right owners; where, previously, her Royal Majesty had found neither ships, commerce, nor trade, but had established them, and had erected her arms there, and thus had, first, reduced every thing to order.<sup>54</sup>

The Staten Generaal remained unconvinced – even if a similar argument had been levelled by the Heren XIX against the English in similar circumstances a decade earlier. Months passed and the ships remained stayed at Amsterdam, until July, when Spiring paid the relevant import duties to the Board of Admiralty (249 florins, along with 6,300 lbs of tobacco from the *Fama* and 4,698 lbs of tobacco from the *Kalmar Nyckel*), thus releasing the ships although not, it seems, without a few last-minute hitches.<sup>55</sup>

The Swedes were smarting from their treatment by the Westindische Compagnie and the Staten Generaal, but things only got worse for them. On the Delaware, Pieter Stuyvesant’s forces had utterly embarrassed the Nya Swerige Compagniet in 1655. These events foreshadowed a period of crippling European warfare for the Swedes, which would eventually lead to the disintegration of the great but short-lived Swedish Empire. And

---

<sup>53</sup> Spieringh to the States General (29 October 1644), *CHNY* 1: 146, 147: ‘[...] that her Royal Majesty should pay the same as other inhabitants of these countries, the Resident would consider very strange, as an attempt to place a Sovereign and Crowned head on a level with inhabitants of this States; the Resident expected greater respect would be paid her Royal Majesty than to place her on an equality with private individuals’.

<sup>54</sup> Spieringh to the States General (29 October 1644), *CHNY* 1: 147.

<sup>55</sup> States General to the Heren 19 (21 April 1645), and Spieringh to States General (31 July 1645), *CHNY* 1: 156, 159.

although Johan Risingh, New Sweden's ardent believer in the power of the written word, made a number of heartfelt requests to his 'gracious superiors' for 'merciful redress' at the time of his eviction from America, the Delaware colony had become irrelevant by the time that negotiations got underway for the Treaties of Roskilde (1658) and Copenhagen (1660). These great moments of public international law had ramifications only for the land rights and borders of Europe, not America.<sup>56</sup>

This juncture saw the emergence of state-orchestrated mercantilism in Western Europe, at which point this chapter winds off. A final word, however, must be offered on the Scotsman, Andrew Forrester. His experience, and the fate of the Scottish claim more generally, provide a useful glimpse into the period of North American history beyond which this thesis cannot far extend. Forrester, it will be recalled, saw out the end of Stuyvesant's patience in Long Island in 1647 when he was apprehended for flaunting an apparently dodgy charter. The Westindische Compagnie hard-man ultimately sent 'the pretended governor a prisoner to Holland by the ship *The Valckenier* to vindicate his commission'.<sup>57</sup> Forrester would never have the opportunity, however. *En route* to Amsterdam, he made his escape, returning to Scotland with little to show for himself. The Scottish claim of Alexander to the region would be overlooked for over a decade more, until the circumstances for its re-acknowledgement were provided by war. Stuyvesant's capitulation, in the face of English ascendancy on the Hudson River, was becoming imminent in 1663. It was in this frame that the old and unusual Scottish claim to Long Island was bought out for £3,500 by the Duke of York who, the following year, would receive a fresh patent from Charles II for his personal proprietary colony – thus discontinuing the history of the Westindische Compagnie in Nieuw Nederlandt, and commencing the history of New York.<sup>58</sup>

---

<sup>56</sup> *JRJ*, 262-3, 274-5, 276-7: 'The Royal protection and the aid of His Royal Majesty Our Most Gracious King and Lord is most humbly sought and requested for our redress [...] Consequently, as such has befallen us, we submit ourselves to the protection of our most gracious superiors for aid in the reparation of injustices, damages, and affronts suffered. We have experienced these, not on the ground of just causes, but chiefly because of the ill will which the Dutch bear for our undertaking [...] most merciful redress is requested of Our Most Gracious Superiors'.

<sup>57</sup> *NYHM* 4: 444-5.

<sup>58</sup> Edmund F. Slafter, *Sir William Alexander and American Colonization* (Boston: Prince Society, 1873), 90-1.

There is much more to be said about Anglo-Dutch diplomacy around this period, but room and the overarching concerns of this thesis with the strategies developed by corporate entities to resolve private disputes makes that impossible. However, it cannot go unnoticed that a change of great importance in the relationship between the United Provinces and England began to take place after 1651. England emerged from its Civil War with new concerns about Protestantism and patriotism, which translated into a re-evaluation of trade and its organisation.<sup>59</sup> Again, conversations were had between London and The Hague over a possible union of trade and even of constitution, which invariably broke down as the two fell in and out of war with each other between 1652 and 1674. *Mercantilism* became the defining point of political difference between these two states after Oliver Cromwell's Rump Parliament developed a new method to confront Dutch commercial supremacy by passing the first of several protectionist 'navigation acts' in 1651.<sup>60</sup>

Under mercantilism, English and Dutch corporations found themselves pushed and pulled into specified regions with specific market objectives. Under mercantilism, the sovereignty of English and Dutch states manifested strongest in their claims to control all matters of foreign trade. Under mercantilism, the Westphalian tradition of statehood flourished, residing corporations to a subordinate position in the making of international order. Under mercantilism, the development of more efficient and independent institutions for the organisation of trade and the resolution of disputes in private international law was required, relegating maritime matters, the distinction of which was increasingly made between *civil* and *prize*, to the admiralty courts.

These last two chapters have explored how the 'private undertakings' of corporations in the Atlantic World during the first half of the seventeenth century made new demands of

---

<sup>59</sup> Steven C. A. Pincus, *Protestantism and Patriotism: Ideologies and the Making of English Foreign Policy, 1650-1668* (Cambridge: Cambridge University Press, 2002). See also Philip J. Stern and Carl Wennerlind, ed., *Mercantilism Reimagined: Political Economy in Early Modern Britain and Its Empire* (Oxford: Oxford University Press, 2014).

<sup>60</sup> Simon Groenveld, 'The English Civil Wars as a Cause of the First Anglo-Dutch War, 1640-1652', *Historical Journal* 30, 3 (1987), 541-566; Jonathan Israel, 'England's Mercantilist Response to Dutch World Trade Primacy, 1647-1674', *State and Trade: Government and the Economy in Britain and the Netherlands since the Middle Ages*, ed. Simon Groenveld and Michael Wintle (Zutphen: Walburg Pers, 1992), 50-61. See also Ormrod, *Rise of Commercial Empires*.

conventional European diplomacy. Corporations extending themselves beyond their home jurisdictions into the extra-European world knowingly took a risk, investing pools of capital into expeditions bound for unpredictable and largely unknown markets, where indigenous populations of varying political power could be traded with or taken over, and/or new populations could be installed to transform the local economy. Of course, the risk of this investment was heightened by a significant variable: namely, the presence of other Europeans. A competitive trade made life more difficult for companies in the New World, but so it did everywhere; what was unique to the distant reaches of the Atlantic and Indian oceans in this period was the absence of local and unbiased avenues for redress in the event of damages incurred upon the particular European interests operating there. This jurisdictional deficiency was disadvantageous to all corporations abroad, even if the more substantive kind of ‘company-state’ bore less of this burden than the smaller companies did. None, however, could be confident that others would respect their rights to moveable and immoveable property in the New World – a reality which, this thesis argues, led to the earliest distinctions between private international law and public international law in Europe.

That Europe between 1585 and 1674 was afflicted by prolonged spasms of civil and international warfare, which gave temporary justification, if not – and more especially after the publication of *De Iure Praedae* in wake of the *Santa Catarina* affair – default state responsibility for acts of violence and plunder on foreign lands and seas ensured that there would develop a serious need for restitution on the continent in the wake of key conflicts. There was at least some European tradition to this; after all, medieval motivations towards the *ius post bellum* had always been directed towards the restoration of peace and the reconstitution, as far as possible, of organised society. There was much less precedent, however, when dealing with the peacetime disputes of corporate actors in foreign countries. European states were doctrinally, procedurally, and institutionally deficient to resolve the very issues of private international law that emerged from within their own empires in the early modern period.

This thesis has argued that corporations were key drivers behind the introduction, into the European legal tradition, of foreign issues of private law, and it has highlighted the instrumentality of resident diplomats in the process of dispute resolution more generally.

Corporate agency was still crucial in Europe, of course: for their wrongs to be righted, their demands had to be persistent enough to capture the attention of their foreign ambassadors, their courts, their lords, their legislature, or even, sometimes, their sovereign personally. In return, company directors had to be ready to conjure up the right kind of legalese – heavy on the Roman law – whenever asked for their formal submissions of a claim. Beyond this, however, corporate claims to land and things abroad were collated in Europe for disputes the resolution of which was fully beyond their ability or control. Thus it may be concluded that the conditions for a fully sovereign ‘company-state’ were only ever possible in the extra-European world, insofar as the private interests making up the body corporate in Europe remained reliant upon state actors to rehearse their claims for damages through the appropriate organs. Even then, there was never any guarantee of the restitution of moveable property, immoveable property, or payment in the relevant currency to a corresponding value.

## Chapter 11: Case Study – The Cape of Good Hope, 1611-1675

Atlantic and Indian Oceans meet at the temperate and well-watered Cape of Good Hope. Here, in 1652, the Vereenigde Oostindische Compagnie established a refreshment station to outfit and supply its trading fleet on their way to and from more important ports established, or in the process of fortification, at Ambon, Banda, Ceylon, Coromandel, Jakarta, Makassar, Melaka, and Ternate. Before long, the Cape of Good Hope assumed a different character to these Indies locales, however. Coinciding with its fortification came attempts to secure a local food source. At first this entailed trading (mostly copper and tobacco) with locals for sheep to be kept by the company, and after 1657, granting farms to agriculturalist smallholders (*vrijburghers*) to farm for the company. Not long after this, came the development of pastoralism by settler graziers (*trekboere*), and with that, the expansion of the frontier of settlement to the north, northeast, and east. So a settler colony was made of the Cape of Good Hope, initially to support the Indies trade, but eventually to transform into a significant colony on its own.<sup>1</sup>

The formation of the Oostindische Compagnie predated the Westindische Compagnie by over a generation. In years following 1595, small companies with limited paid-up capital in Amsterdam, Rotterdam, and Zeeland outfitted ships for expeditions into the Indies one at a time. These were the *voorcompagnieën*, which were eventually united into a singular ‘united’ (*vereenigde*) corporation by an *octrooi* of March, 1602. Its operation was divided among ‘chambers’ (*kamers*), which were the principal hubs of the old *voorcompagnieën*: Amsterdam, Delft, Enkhuizen, Hoorn, Middelburg, and Rotterdam. The direction of the company was steered by its ‘Seventeen Lords’ (*Heren XVII*), wherein the presence of the Amsterdam clique was strongly felt.<sup>2</sup> De Kaap de Goede Hoop was a convenient midway point, so it was occupied; there is little romance or exceptionality to the story. It was one of several sites strategically occupied by the company. *Vrijburghers*

---

<sup>1</sup> Robert Parthesius, *Dutch Ships in Tropical Waters: The Development of the Dutch East India Company (VOC) Shipping Network in Asia, 1595-1660* (Amsterdam: Amsterdam University Press, 2010); Gerrit Schutte, ‘Company and Colonists at the Cape, 1652-1795’, *The Shaping of South African Society, 1652-1840*, ed. Richard Elphick and Hermann Giliomee (Middletown: Wesleyan University Press, 1989), 284-93.

<sup>2</sup> The standard work remains F. S. Gaastra, *De Geschiedenis van de VOC*, 2nd ed. (Zutphen: Walburg Pers, 1991). Gaastra presents an accessible overview of the company’s origins and organisation (in English), at [http://www.tanap.net/content/voc/organization/organization\\_intro.htm](http://www.tanap.net/content/voc/organization/organization_intro.htm) (accessed 10 September 2015).

were installed in Jakarta (Batavia), Ceylon, and Melaka too. What made the Cape develop differently to these other settlements, however, was the expanse of the region, situated at the southerly tip of the African continent and on the fertile fringe of exceptional grazing land, and also the lack of any exportable trade goods, with livestock being the only commodity of value to the company.<sup>3</sup>

By no means were the Heren XVII the only Europeans to contemplate the creation of a Cape colony. English, Portuguese, and French trading bodies had also pondered a similar type of settlement there. Dias may have been the first European to sail past and spy the Cabo da Boa Esperança in the late fifteenth century, but his sponsors established no settlement there to allow his claim any endurance. Although the Portuguese predated all other Europeans in the southern African region, they attached themselves only to the Congo and Kwanza rivers on the Atlantic coast and to Delagoa Bay (modern Maputo) on the Indian coast.<sup>4</sup>

The French, by contrast, harboured designs to the Cap de bonne Esperance from the early seventeenth century right up to the 1670s, but these were mostly abortive. In 1607, King Henri IV nominated Charles, Comte de l'Hospital, to lead a fleet to southern Africa, and settled upon Saint-Malo as its point of departure. This decision immediately alarmed the merchant community at Saint-Malo, however, none of whom had any desire to be associated with a provocative expedition into the South Atlantic and the Indies, as they feared this would damage their neutral relationship with Iberian fleets. Henri IV was left with no choice but to relocate the port, and the following year, issued *lettres patentes* to l'Hospital, authorising his 'conquest' and 'possession' of the Cape – but nothing in the end came of the voyage.<sup>5</sup> In the period following the reign of Henri IV, French sights gradually shifted towards and settled upon the Madagascar as the station to establish en route to the Indies, but progress was slow. In 1642, the Compagnie pour la Colonisation de Madagascar

---

<sup>3</sup> Carla van Wamelen, *Family Life onder de VOC: Een Handelscompagnie in Huwelijks- en Gezinszaken* (Hilversum: Verloren, 2014); Schutte, 'Company and Colonists at the Cape'.

<sup>4</sup> Ilídio do Amaral, *O Reino do Congo, Os Mbundu (ou Ambundos), O Reino dos "Ngola" (ou de Angola) e a Presença Portuguesa, de Finais do Século XV a MEados do Século XVI* (Lisboa: IICT, 1996); Beatrix Heintze, *Angola nos Séculos XVI e XVII: Estudos Sobre Fontes, Métodos e História* (Luanda: Kilombelombe 2007).

<sup>5</sup> See Adrien Delmas, 'A Plan by the French King Henri IV to Conquer the Cape of Good Hope at the Beginning of the 17th Century', *Quarterly Bulletin of the National Library of South Africa* 62, 3 (2008), 115-27, which contains a copy and two transcriptions of the 1608 letters patent.

was formed in France, but it too was abortive.<sup>6</sup> Only after the formation of the *Compagnie des Indes Occidentales* in 1664 and the rise to power of Jean-Baptiste Colbert were southern African designs (centred upon Madagascar and the Mascareignes) seriously explored again. A fleet of ten ships finally made for southern Africa out of La Rochelle in 1666.

The English East India Company had been interested in the Cape of Good Hope from the early century too. In 1613, the company's directors, seeing potential in the Cape and Robben Island, deposited several convicts there, and contemplated the establishment of a formal penal station for the next four years or so before abandoning the idea.<sup>7</sup> After 1613, it will be recalled, the corporate conjugation remained strongly on the cards, with neither yet to make a formal claim to South Africa, but both fancying Saldanha Bay – just a hundred kilometres north of Table Bay – for that purpose. In January of 1620, William Hoare landed at the Cape and made his way to Saldanha, where he apparently found 'letters'. Months later, in June and July, the Bay was visited by Dutch and English fleets in amity, maybe in union. Andrew Shillinge and Humphrey Fitzherbert took related how, on July 1st, they took 'quiet and peaceable possession of the Bay of Saldania aforesaid', which they formalised a couple of days later by collecting some stones and putting them into a pile they called 'by the name of King James His Mount'.<sup>8</sup> It is a matter of much curiosity that one of the 'stones of inscription', according to these very same Englishmen, was 'ingraven Nicholas van Bakune Commander of a sayle of Shippes of the States bound for Bantam in June 1620. On the backside of which you shall find three letters, O: V: C'.<sup>9</sup> The English East India Company had clearly been beaten, but beaten, potentially, by their own colleagues, so there would be no disrespectful vandalism of the Dutch marker. The Englishmen too sailed for Bantam the following month, where their fleets traded pacifically alongside one another until the chatter in Europe about conjugation faded away and the massacre at Ambon removed all possibility of collaboration.

---

<sup>6</sup> For this, see Fr. Olivier-Martin, *L'Organisation Corporative de la France D'ancien Régime* (Paris: Librairie du Recueil Sirey, 1938), 262-3; Henry Weber, *La Compagnie Francaise des Indes (1604-1875)* (Paris: Librairie Nouvelle de Droit et de Jurisprudence, 1904), 73-7.

<sup>7</sup> Thomas Koridge (sp?) to East India Company (12 March 1613), CA VC 58, 12. See generally Nigel Worden et al., *Cape Town: The Making of a City* (Cape Town: David Philip, 1998), 11-84.

<sup>8</sup> Deposition of sundry Englishmen (7 July 1620), Deposition of Shillinge and Fitzherbert (3 July 1620), CA VC 58, 33, 34 (copies of which also reside in the India Office records, BL).

<sup>9</sup> Deposition of Fitzherbert and Shilling[e] (7 July 1620); CA VC 58, 35.

Notwithstanding a few murmurs about convicts in 1613 and 1617, the English East India Company never entertained any serious intention to establish a plantation or settlement around the Cape region, prioritising instead other loci of the south Atlantic. Eventually it was the dilapidated and unpeopled island of Saint Helena that became the East India Company's cherished lily pad for its fleets to and from the Indies after 1654, an island which it was first ceded from the Oostindische Compagnie at the end of the Anglo-Dutch War in 1654, and then which it held without interruption from 1673 right up until the early nineteenth century.<sup>10</sup>

From the mid-1670s, the intermittent challenges of other European corporations to the Cape began to die down, allowing the reign of Dutch corporate government at the Cape to extend over a considerably long period. Only in 1795 did the British crown (and then Batavia, then the British crown again) assume control of the Cape colony. But before that – for 143 years – the Oostindische Compagnie laid the foundations of settler society in South Africa. During this period, the company enjoyed rights to a region of its choice without, for the most part, entertaining seriously the idea that local peoples enjoyed rights to the same.

The Cape region of southern Africa, inland of both oceanic coastlines, was home to indigenous societies both diverse and populous. Archaeologists, ethnologists, and historians alike are inclined to group these peoples into three main clusters for this period: the hunter-gatherer San, the pastoralist-hunter-gatherer Khoekhoen, and the agro-pastoralist Bantu-speaking communities (of whom the Indian-coastally located amaXhosa were closest to Table Bay). All of these names have superseded, respectively, former appellations Bosjesmans, Hottentots, and Caffers (and variations, including the Khoe words *Cochona* and *Briqua* for populous peoples to the east and the north respectively). Irrespective of how much emphasis is placed on the variations in heritage, language, economy, and mobility of San, Khoekhoen, and amaXhosa, it is convenient here simply to

---

<sup>10</sup> The EIC's designs to 'settle, fortifie, and plant' Saint Helena were elaborate. While Saint Helena never attracted significant English emigration – it was slightly out of the way and too small – it did remain an English East India Company refreshment station without interruption from 1673 right up until the early nineteenth century. William Foster, 'The Acquisition of St. Helena', *English Historical Review* 34, 135 (1919), 281-9; Philip J. Stern, 'Politics and Ideology in the Early East India Company-State: The Case of St Helena, 1673-1709', *Journal of Imperial and Commonwealth History* 35, 1 (2007), 1-23; Stephen Royle, *Company's Island: St Helena, Company Colonies and the Colonial Endeavour* (London: L. B. Tauris, 2007).

acknowledge that the Oostindische Compagnie and its settlers were the last on the scene, making a mess of the indigenous geopolitical diversity by which they were confronted, first at the Cape (where amaXhosa, of the three aforementioned groups, were not resident at the time of contact).<sup>11</sup>

Disputes between settlers and natives about land in the earliest period of company occupation were common, amid much land confiscation and two wars. At first, when settlement was contained to the confines of the Cape, the main local to protest the company's presence was a man known to the Oostindische Compagnie as 'Harry' ('Herrij'), or Autshumao. During the 1650s, Harry became an important leader among a community of Khoekhoen known to the Dutch as Caepmans or Kaapmans (a name worth taking seriously for its indication of place, and by implication nativeness to that place).<sup>12</sup> The Caepmans, or 'Harry's people', were key players alongside other local Khoekhoe groups, the Gorachouquas and Goringhaiquas (and, indeed, it appears that these communities formed a kind of alliance after the conflict of the late 1650s).<sup>13</sup> Harry himself, however, was apparently a Goringhaicona, or 'Strandloper' (lit. 'beach walker'; a coastal hunter-gatherer community at the Cape, the other of the Cape's hunter-gatherers being the mountain-dwelling Soaquas or Sonquas).<sup>14</sup> Beyond this, he was a remarkable and

---

<sup>11</sup> Peter Mitchell, *The Archaeology of Southern Africa* (Cambridge: Cambridge University Press, 2002); H. J. Deacon and Janette Deacon, *Human Beginnings in South Africa: Uncovering the Secrets of the Stone Age* (Cape Town: David Philip, 1999); M. van Wyk Smith, "'The Most Wretched of the Human Race": The Iconography of the Khoikhoin (Hottentots), 1500-1800', *History and Anthropology* 5, 3-4 (1992), 285-330; Simon Hall, 'Farming Communities of the Second Millennium: Internal Frontiers, Identity, Continuity and Change', *Cambridge History of Southern Africa, Volume 1: From Early Times to 1885*, ed. Carolyn Hamilton, Bernard K. Mbenga and Robert Ross (Cambridge: Cambridge University Press, 2010), 112-67.

<sup>12</sup> Historian Richard Elphick dislikes the term Caepmans, 'which was used by the Dutch in Van Riebeeck's period but was rather ambiguous in its reference'. The same may be said for all names used by the VOC, however. Elphick's alternative is the name 'Peninsular Khoikhoi'. See Richard Elphick, *Kraal and Castle: Khoikhoi and the Founding of White South Africa* (New Haven: Yale University Press, 1977), 91n3. Tellingly, in 1666, former Commander Wagenaar informed incumbent Commander van Quaelbergen that 'the Goringhaiquas, or the Caepmans, [are] thus called because they at first made pretensions to a right of property in this Cape land'. Extracts of a Memorandum (24 September 1666), *The Record, or a Series of Official Papers relative to the Condition and Treatment of the Native Tribes of South Africa* (hereafter: *Record* (Cape Town: A. A. Balkema, 1960 [1838-1841]), 1: 291.

<sup>13</sup> By 1661, 'Caepmans' was often used interchangeably with 'Goringhaiquas' (see also fn. above), although beforehand they were considered separate. The Gorachouquas were also considered separately, and were nicknamed the 'Tobacco Thieves', due to their inclination to raid the VOC's supply of tobacco.

<sup>14</sup> Ethnic affiliation of early Khoekhoe will remain matters of much uncertainty, regardless of the confidence of some scholars when it comes to the disaggregation of historical communities. The best scholarly treatment of Khoekhoe diversity remains Elphick, *Kraal and Castle*. A historically significant survey remains George Stow, *The Native Races of South Africa: A History of the Intrusion of the Hottentots and Bantu into the Hunting Grounds of the Bushmen, the Aborigines of the Country* (London: Swan Sonnenschein & Co., 1905),

provocative individual. He lost and regained the trust of both his Khoekhoe followers and the Oostindische Compagnie over and over again, while surrounding chiefs – or ‘captains’ – in the wider Cape region despised him. Yet he was by far the most outspoken about dispossession, and in Dutch, no less, a language he was one of the first Khoekhoen to perfect at the Cape, even though this was his second European tongue, having picked up English around 1630 during his travails with the English East India Company at Robben Island and Bantam.<sup>15</sup>

Key source material for this period is restricted primarily to a few collections. Of which, the much-used journals of the Oostindische Compagnie’s first governor at the Cape reveal some of the most important details about Harry and the Caepmans during the early stages of company rule, when settlement was largely confined to the Table Bay region. This chapter uses these journals primarily to reveal the disputes between the corporation and Khoekhoen over Cape land rights. This approach prepares the way to other lines of enquiry about corporate territoriality in seventeenth-century South Africa, in which it becomes necessary to make a distinction between the deliberations of the Oostindische Compagnie’s metropolitan directors and the actions of the local legislating machine at the fort of Good Hope and various governors.

During the first half century of Oostindische Compagnie rule at the Cape, the Heren XVII felt it more serious to defray competing corporations – ‘de Compagnie uyt Engelant’, and ‘de Fransche Compagnie’ – than to extinguish the Khoekhoe claim. This is important, but should not be too surprising. After all, the Oostindische Compagnie wished not only to participate in, but to dominate the Indies trade, which required a foothold in the most important ports from Amsterdam to the Pacific. At the same time, the Oostindische Compagnie had no desire to be marshalled by the Staten Generaal and made to enter into the diplomatic disputes of Europe, just as the Westindische Compagnie had been made to account for its tussles with Swedish and English competitors in mid-century America. It was just thought easier, by the Heren XVII, to prevent tussles of this sort from taking place

---

of which Elphick is fairly critical. Much can also be gleaned from a close reading of Van Riebeeck’s Journals, which are readily available and translated into at least three languages, and which comprise singularly the most important primary resource for the 1650s Cape. See *Journal of Jan van Riebeeck* (hereafter: *VRJ*), ed. H. B. Thom, 3 vol. (Cape Town: A. A. Balkema, 1952-1958).

<sup>15</sup> Nigel Penn, ‘Robben Island, 1488-1805’, *The Island: A History of Robben Island, 1488-1990*, ed. Harriet Deacon (Cape Town: David Phillip Publishers, 1996), 13-14.

in the first place by removing European competition entirely from the Cape, and indeed from all of the areas in which the company established itself – a policy which had important precedents in the massacre of twenty-one English East India Company men at Ambon in 1623, and of course the capture of the *Santa Catarina* in 1603 (neither of which were remotely to do with the rights of indigenous populations).

This chapter focuses most closely upon the policy of the stationed regime at the Cape, comprised of the Politieke Raad (Council of Policy) and led by an appointed company governor. It is immediately obvious that the first governors sent out to the Cape by the Heren XVII made use of the same legal resources considered throughout this thesis during their earliest communications with Khoekhoen and in their tussles with other Europeans, as they went about the task of strengthening the company's claim to the region. It is all the more noteworthy that there appears to have been no explicit directions for these governors to adopt such a discourse. By the mid-seventeenth century, and for this kind of colonial enterprise, it seemed to go without saying that contract and conquest were the principal mechanisms to use, or at least make a serious show of using, for the purpose of creating a *prima facie* justification for the corporate occupation of the Cape region. Over time, however, fewer and fewer Europeans were prepared to dispute the Oostindische Compagnie's occupation of the Cape, as the company began to expand inland, sending explorers and graziers who were the first to make contact with a diversity of Khoekhoen. With these developments, there came a correlative change in the stance of the Raad and local governors towards indigenous populations.

In May 1652, Oostindische Compagnie Commander Jan van Riebeeck's expedition to Table Bay was complete. Immediately upon disembarking, his men set about building fortifications and habitations. By August, 't *Fort de Goede Hoop* had become the locus of the Politieke Raad, which immediately assumed the role designed for it, and began governing the colony.<sup>16</sup> The construction of the fort was not undertaken without hitches; it had to be progressed under close surveillance, imperilled, as it was, by the 'crafty' locals. As van Riebeeck complained, 'whenever these natives see an opportunity, they cannot, on

---

<sup>16</sup> Resolusies (13 August 1652), CA C1: 16.

account of their thievish nature, refrain from stealing and carrying away whatever they can lay hands on without hindrance'.<sup>17</sup> But if the opinions of the Oostindische Compagnie men towards pre-existing understandings of property may were low, then it is fair to assume that the opinions of local inhabitants towards the newcomers were much lower still. Neither the fort nor the accompanying habitations alongside were constructed with the permission of local inhabitants. Van Riebeeck's instructions from the Heren XVII contained nothing about buying land from the local inhabitants of the Cape, only a brief desire to 'reconcile them in time to your customs, and attach them to you'.<sup>18</sup> Accordingly, diplomatic intercourse was meagre during the first few months as construction got underway, and was only really commenced in order to open up a trade with the locals. Indeed, this remained the trend for at least the next two years, during which period it was evidently the gubernatorial assessment of van Riebeeck that indigenous land rights at the Cape were to be ignored.

This misjudgement brought the company and its men into the first of many conflicts with the local inhabitants at the Cape, but this took a short time to precipitate. The western Cape's hunters and herders had been familiar with visiting traders for well over a hundred years, and at first probably presumed that Jan van Riebeeck's fleet were trading sojourners like those who came before him. After a little over two years, however, it had become clear to local Khoekhoen that the Dutch presence would be more enduring than that of the Portuguese and English visitors who came before them. Finally, on the evening of 9 February in 1655, a party of 'about 50' Goringhaiquas protested – for the first time in South African history – against the occupation of their land by Europeans. As Jan van Riebeeck explained, 'these natives wanted to put up their huts close to the banks of the moat of our fortress, and when told in a friendly manner by our men to go a little further away, they declared boldly that this was not our land but theirs and that they would place their huts wherever they chose'. The Goringhaiquas, who were eager more to monopolise access to the Dutch by restricting competing Khoekhoen access than to make new neighbours of the Dutch, then protested against what they considered the company's unauthorised improvements in the form of the fort. They offered a simple bargain: either they be allowed

---

<sup>17</sup> *VRJ* 1: 196, 335.

<sup>18</sup> Instructions (25 March 1651), in Moodie, *Record*, 1: 8.

to construct their huts, or ‘they would attack us with the aid of a large number of people from the interior and kill us’. They threatened that ‘the ramparts were only constructed of earth and scum, and could easily be surmounted’, indicating furthermore that ‘they also knew how to break down the palisades, etc.’.<sup>19</sup>

The Oostindische Compagnie had come to stay, it had become clear, especially to Harry. Until this period, Harry’s behaviour had been somewhat erratic, as he bounced between the Dutch, the ‘Saldanhars’ (the Dutch name for Khoekhoen who lived inland) and the Goringhaiquas. But, come June, he approached the fort for a different purpose. He now sought confirmation of Dutch intentions, with a view to siding with them as a permanent ally. He attempted to explain that, at first,

he did not know how he stood with us, whether we intended to settle here permanently or perchance depart at any moment. [...] But as now he sees that we are permanently settled he would be able to rely on us more completely and with more assurance than he had hitherto dared to.<sup>20</sup>

Harry was an upwardly mobile captain-in-the-making, who sought to increase his influence over neighbouring peoples by any means possible. His arrangement with the Oostindische Compagnie, however, proved more to the company’s benefit than to Harry’s. He was immediately put to work in a professional capacity as translator, collaborator, diplomat, and negotiator, although things did not operate smoothly for long.

As Dutch pastoralism expanded, local Khoekhoen became unimpressed that they were losing access to the grassy, well-watered Cape, where formerly they had grazed their own cattle and sheep without hindrance. Theirs were often big herds: in 1655 van Riebeeck estimated that ‘about 20 thousand head’ of sheep and cattle grazed in the area, mostly owned by the Goringhaiquas, Gorachouquas, and Caepmans. The Oostindische Compagnie was desperate to trade for livestock, but to the company’s misfortune, almost all of these were not for sale.<sup>21</sup> Despite sustained efforts to tempt stockkeeping Khoekhoen to trade, the company struggled to secure a consistent supply. In the first few years, it had only managed to keep a few hundred, most of them on Robben Island. But, eventually, the Company came to accumulate stock (mostly from the Saldanhars), and thereby required

---

<sup>19</sup> *VRJ* 1: 292-3.

<sup>20</sup> *VRJ* 1: 323.

<sup>21</sup> *VRJ* 1: 372.

more grassland at the Cape. This led to the first serious tussles between van Riebeeck and Harry concerning not only the issue of improvements, but also the issue of the exclusive access rights to tracts of pasturage. On 2 May 1656, the Caepmans approached the fort with their stock, to seek permission 'to camp behind the Lion's Rump'. That they even required permission is illustrative of the presumption by the corporation of some kind of jurisdiction over indigenous peoples at the Cape; likewise, too, is the corporation's response, for cattle in return for permission to rest there. But the Caepmans, as usual, refused to part with much of their stock and offered only some of their old and scabby. In response, then,

[t]hey were told that as they were not prepared to sell their cattle, we would prefer them rather to stay further away from us as the pasturage around here was insufficient for both their stock and that of the Company. They persisted in their request, however, although we showed them that we should not like it very much unless they also sold us cattle as the Saldanhars did.<sup>22</sup>

Less than two weeks passed before the issue arose again. When Harry and the Caepmans, with their stock, attempted to camp and graze in the region regardless of the company's request to the contrary, 'they were kindly told to move further behind the Lion Mountain and to graze their animals out of sight of the Company's settlement, as we needed the grass for our own animals'. The Caepmans would not trade with the Dutch, and therefore, explained representatives of the company, they were to be expelled in favour of those who did. However 'kindly' they reportedly issued this demand, it did not go down well at all. Harry grew angry and made a declaration of aboriginal title. And though he 'maintained that the land of the Cape belonged to him and the Caepmans', again he was told 'that the Company also required pasturage for its cattle'. Evidently requiring more convincing, van Riebeeck explained that 'his claim to ownership of this Cape could not be entertained as the Honourable Company had fortified it so as to retain it in her own possession'.<sup>23</sup> 'This', apparently, 'he conceded, but', van Riebeeck cautioned, 'he is a sly rogue and will have to be closely watched and treated with caution'.<sup>24</sup> The more Harry protested the Dutch occupation and claimed ownership of the region, the less trusted by the company he became.

---

<sup>22</sup> *VRJ* 2: 32.

<sup>23</sup> *VRJ* 2: 32.

<sup>24</sup> *VRJ* 2: 32-3.

With few options at his disposal, Harry developed a scheme to secure his access to the Cape's pastures: by preventing those he considered foreign – the Saldanhars – from visiting to trade, and therefore restricting the company's stock numbers. Throughout the second half of 1656, he tried his hardest to scare off visiting Khoekhoe, before eventually he was accused of stealing from the company and conspiring with the Sonqua, 'who are robbers, and are enemies to [the Saldanhars] and all the Caepmans'.<sup>25</sup> He was banished from the Cape – for the first time, but not the last – and by the end of 1656, he 'squatted below the forest in the valley', behind Table Mountain. Upon the land which he felt belonged to himself and the Goringhaiquas, Harry had now become a squatter.<sup>26</sup>

Early the next year, the company decided to encourage agriculture. A small expedition was sent to inspect potential farmland for the first *vrijburghers* when, as he pointed his finger around the beautiful Cape region, van Riebeeck was approached by a small party of Khoekhoen. Among them were Harry and Gogosa (Captain of the Goringhaiquas), about the intentions of the Dutch.

[S]eeing us looking about and hearing us say that we intended building houses here and there etc. [... Harry and Gogosa] asked where they were to go should we build houses there and cultivate the land. This they saw was our intention, for they were encamped at the spot where some of the freemen had selected their sites. We answered that they might live under our protection and that there was everywhere room enough for grazing their animals. We would use the land in order to make bread and tobacco, of which we would as good friends give them a share. They were satisfied with that, but it was evident that it was not entirely to their liking.<sup>27</sup>

On the very next day, the Raad established land tenure for nine *vrijburghers*, who would be apportioned into two settlements: 'Stevens Colonie' and 'Harmans Colonie'. Each settler received a small plot of thirteen morgen 'in vollen eijgendom' – full freehold – along with some farming equipment and a tax-free embargo for three years, on the condition that the land be improved and made productive, with all produce availed exclusively to the company who would buy it at a price of its establishment. Moreover, *vrijburghers* were prohibited from trading with Khoekhoe for stock, 'on pain of having all their local

---

<sup>25</sup> *VRJ* 2: 42-3, 49-51, 68.

<sup>26</sup> *VRJ* 2: 80, 87.

<sup>27</sup> *VRJ* 2: 89.

possessions confiscated’, marking the start of an ongoing and largely impossible policy to monopsonise the livestock industry.<sup>28</sup>

Within two years, the *vrijburghers* conveyed the first of many complaints to the Commander via an impetuous petition dated December 22nd, 1658. The conditions of the grant had proven too tough for them. Struggling to produce as much as would be hoped, they now wanted to barter and trade, while farming how and what they wanted with prices fixed at a better rate.<sup>29</sup> These complaints, coming as they did with threats of sedition and rebellion, the company took very seriously, even if little was done immediately to ameliorate the plight of the settlers.

The outstanding complaints of Harry, however, went ignored. In late February 1657, just five days after the Council of Policy deliberated upon the land tenure of *vrijburghers*, Harry was told again to move aside for the Saldanhars. This time, though, he grew more frustrated than usual. ‘He maintained’, van Riebeeck related, ‘that the Saldanhars were not Cape people, that the land belonged to his people and they would therefore not allow others to occupy their pastures’. To this, van Riebeeck told Harry:

Let them come to us to sell cattle. In the meantime you can come under our protection and use the pastures behind the Lion and Table Mountains towards the sea, until we have obtained sufficient cattle. After the Saldanhars have left, you can again have the use of those pastures, etc.<sup>30</sup>

In July, again, Harry’s concerns about the *vrijburghers* compelled him to complain about land rights again. With several followers, he visited the fort, ‘and asked where he and the Caepmans were to live and graze their cattle now that we were ploughing the land everywhere’. The Oostindische Compagnie told them to stay put, ‘in the country towards the mountain range in the interior, mostly towards the east and also towards the north, about 8 or 10 hours from here on foot’, and he was refused access to key pastures to the west of the fort.<sup>31</sup> Ironically, in the same conversation, Harry ‘was told that the Hollanders were not a nation to rob another of its property and wished to live and trade in friendship with all men, etc’ – an assertion, van Riebeeck related, that ‘did not seem to please them’.<sup>32</sup>

---

<sup>28</sup> Resolusies (21 February 1657), CA C1: 209-16.

<sup>29</sup> *VRJ* 2: 391-401.

<sup>30</sup> *VRJ* 2: 96.

<sup>31</sup> *VRJ* 2: 135-6.

<sup>32</sup> *VRJ* 2: 136.

Harry was offered new conditions: in return for permission to graze in a small area of the Cape, he was forced to sell a certain quantity of cattle annually.<sup>33</sup> Obviously displeased with this, he reverted to his old method of deterring other Khoekhoen from visiting the Cape, and on top of this, began warning surrounding communities that the Dutch were murderous thieves who would do them no good.<sup>34</sup> This led to the gradual emergence of unrest in the wider region, and the first significant raiding attacks on the company and its settlers. Both stock and slaves were stolen from the Oostindische Compagnie. To this, the Raad maintained a pacific stance. While organising its first expeditions to the Saldanhars, the company hoped in the meantime to pacify its suspicious Khoekhoe neighbours, so that the stock trade could be secured and the region be restored to tranquillity. In July 1658, the Raad brought in the local Khoekhoe captains to declare a state of peace, to absolve past crimes, to establish separate jurisdictions, and to establish boundaries around lands owned exclusively by the Oostindische Compagnie. An agreement was arranged between the Commander and Council and the Caepmans, the Gorachouquas, and Goringhaiquas, represented by Gogosoa and several important men, the terms of which ‘both parties promis[ed] to abide by [...] permanently and inviolably’.<sup>35</sup> This did not amount to an explicit purchase of land, as some have suggested, though land – or, more specifically, who belonged where – was certainly discussed.<sup>36</sup> Critically, clause 3 established that

The Caepmans shall permanently dwell on the eastern side of the Salt River and the fresh river Liesbeek, as the pastures on this side are not even sufficient for our own

---

<sup>33</sup> *VRJ* 2: 142.

<sup>34</sup> *VRJ* 2: 169.

<sup>35</sup> *VRJ* 2: 300.

<sup>36</sup> Presumably, O. F. Mentzel was referring to this event when he wrote the following passage: ‘The worthy Van Riebeeck, who was the first to take possession of the valley lying between and about the Devil, the Table, and the Lion Mountain, still known as Table Valley, gave the natives goods to the value of f1,000 in return’. It is possible that the author was mistakenly referring to the purchases of 1672 between Aernout van Overbeke and local Khoekhoe, for which, see below, 293-6. Nothing in Mentzel’s account, which he received ‘from a book-keeper in the Company’s office, and he was well acquainted with all details in connection with this matter’, correlates with Council of Policy books or van Riebeeck’s own journals. Mentzel also alleged that, from the outset, van Riebeeck, ‘flattered and cajoled all of the natives, without exception, to induce them to let him settle in their midst. They agreed thereto, more especially because they knew that there was plenty of room in their vast country and that there were broader and richer pasture grounds for their cattle elsewhere’. O. F. Mentzel, *A Geographical and Topographical Description of the Cape or Good Hope*, trans. H. J. Mandelbrote (Cape Town: Van Riebeeck Society, 1921 [1785]), 48-51.

needs; except only if natives from the interior attack them, when they may proceed past the fort and retire behind the Lion Mountain under our guns.<sup>37</sup>

Even if brandy was drunk and gifts were exchanged, it is remarkable that the Caepmans consented to their confinement in this region. Harry, of course, would have been furious about it, but his voice was silenced. Considered by van Riebeeck and Doman, one of the Oostindische Compagnie's new translators, to be the cause of all the interior unrest, Harry was banished to Robben Island, along with 'Jan Cou' and 'Boubo', his co-conspirers.<sup>38</sup> To clog the power vacuum, Gogosa and Schacher were then 'made chieftains over all', but the desired effect, to keep the Cape in a state of peace, was not achieved.<sup>39</sup> The region slowly descended into a conflict far more threatening than before. The Caepmans, Goringhaiqua, and Gorachouqua continued to carry out Harry's designs to stir up and deter the Cochoqua, then under the rule of Captain Oedaso, with whom van Riebeeck was desperate to establish a trade relationship. Much worse, they also raided the *vrijburghers*, jolting the Raad into action. In retaliation, it sent a commando for the 'Caepmans Hottentoots' in May 1659.<sup>40</sup> So beckoned the first VOC-Khoekhoe war, which persisted in the form of intermittent skirmishing for the rest of the year.<sup>41</sup>

After a few months, the Oostindische Compagnie acquired the upper hand in the war, and the first peace negotiations were tentatively underway in the beginning of 1660. The definitive conclusion of the war, which resulted in a victory for the company, would not be reached until April, however. By this time, Harry had made his way back to the Cape – it is not clear whether he escaped or was brought back – and his participation in the peace settlement is intriguing. Why the Oostindische Compagnie felt obliged to include an outlawed conspirator like Harry in this treaty is not certain; perhaps his presence during the resolution of the war was greater than the record suggests. More detectable, and important for our purposes, is his presence at the negotiating table. 'Mutual promises were given that the one would no longer molest the other', van Riebeeck summated, overlooking 'the stolen cattle', which were to be forgiven and left with the Caepmans suspected of

---

<sup>37</sup> *VRJ* 2: 301

<sup>38</sup> *VRJ* 2: 309

<sup>39</sup> *VRJ* 2: 311

<sup>40</sup> Resolusies (19 May 1659), CA C1: 423-8.

<sup>41</sup> Elphick, *Kraal and Castle*, 110-6. Elphick, however, prefers the term 'Khoi-Dutch War'.

taking them. These discussions were punctuated by the most spirited oration of an argument about land rights ever recorded in the first few generations at the Cape, delivered, presumably, by the indefatigable Harry.<sup>42</sup> Van Riebeeck's transcription can only be quoted in full:

They strongly insisted that we had been appropriating more and more of their land, which had been theirs all these centuries, and on which they had been accustomed to let their cattle graze, etc. *They asked if they would be allowed to do such a thing supposing they went to Holland*, and they added: "It would be of little consequence if you people stayed here at the fort, but you come right into the interior and select the best land for yourselves, without even asking whether we mind or whether it will cause us any inconvenience". They therefore strongly urged that they should again be given free access to this land for that purpose. At first we argued against this, saying that there was not enough grass for their cattle as well as ours, to which they replied: "Have we then no reason to prevent you from getting cattle, since, if you have a large number, you will take up all our grazing grounds around them? As for your claim that the land is not big enough for us both, *who should rather in justice give way, the rightful owner or the foreign intruder?*" They thus remained adamant in their claim of old-established natural ownership.<sup>43</sup>

This was a claim based upon time and nature, and therefore resembled nothing like the kind of claim made by the company to the region. In order to extinguish this aboriginal claim, Van Riebeeck adopted the rationale of conquest. The Goringhaiquas and Caepmans had waged war, he reiterated, and now, 'because they could not be induced to restore the stolen cattle which they had unlawfully taken from us without any reason', a bargain had to be reached. The company, van Riebeeck maintained, had been victorious in a conflict not of its own making. And so, Harry and Gogosa, along with 'all the principal men, numbering about 40 persons in all', were told that '[t]heir land had thus justly fallen to [the Oostindische Compagnie] in a defensive war, won by the sword, as it were, and we intended to keep it'. 'Against this they complained bitterly', but the details of these complaints are only partially related in the journals and official correspondence.<sup>44</sup> The Oostindische Compagnie stood firmly by the conquest argument, threatening the Goringhaiquas and the Caepmans with more dispossession if they refused to respect *vrijburgher* property rights. 'If they were not satisfied with that', van Riebeeck bargained,

---

<sup>42</sup> *VRJ* 3: 195.

<sup>43</sup> *VRJ* 3: 195-6. My emphases.

<sup>44</sup> See also Extracts of a Despatch from Commander van Riebeeck and Council to Heren XVII (4 May 1660), in *Record* 1: 206-7.

but preferred every time to take their revenge by means of robberies and thefts such as those mentioned, peace could never be maintained between us, and then *by right of conquest we would take still more of their land from them*, unless they were able to drive us off. In such a case they would, by virtue of the same right, become the owners of the fort and everything and would remain the owners for as long as they could retain it. If this alternative suited them, we would see what our course of action would be.<sup>45</sup>

Bitterly, all parties then resolved to establish ‘routes to use and the limits beyond which [each] were to remain’. These routes were reiterated in strong terms a number of times over the next few months, and only if the Caepmans provided annual livestock (far more than they could ever afford to part with), or, it was even suggested, with the rent payment of harvested beeswax, would they be allowed to graze their stock within the Cape boundaries, but as neither condition was upheld in the years that followed, they were restricted access to pasture lands in the area.<sup>46</sup>

The rich account of these spirited debates over land abruptly ends as Jan van Riebeeck’s journals run out of pages, by which point conquest appears to have become the dominant rationale for the rights of possession at the Cape of Good Hope. Harry died in 1663 probably thinking as much; and, the nearby Cochoqua Captain Oedaso had even begun justifying his own claim to the Cape region in a similar fashion, if with a fair amount of fancy.<sup>47</sup> But conquest does not appear to have remained the fashion at the Cape for long, though this cannot be attributable to the actions of Khoekhoen. While true that the company’s expansion in the early 1660s, and the building, from 1666, of the Castle of Good Hope – the most significant construction hitherto attempted at the Cape – certainly would have caught the attention of visiting Khoekhoe, there are no reports of any re-emergence of Harry’s kind of questions about Khoekhoe usufruct and unlawful improvements. Instead, a number of external developments led the company to rethink its occupation of the Cape.

---

<sup>45</sup> *VRJ* 3: 196. My emphasis.

<sup>46</sup> *VRJ* 3: 279, 281, 371, 436-7, 441, 445-6.

<sup>47</sup> Only seven months after the April peace agreement, the nearby Cochoqua Captain Oedaso was justifying his claim to the Cape region in a similar fashion. Oedaso sent a message with interpreter to Jan van Riebeeck stating that ‘the Kaapmans and the Gorachouquas did not deserve such mercy from him or from us for they had robbed us so wantonly two years ago and had never returned any of the stolen stock, but had, in lieu thereof, ostensibly ceded the land which we occupied, for they had known only too well that there was no hope of their recovering it’: *VRJ* 3: 443.

For most of this period, European ships on their way to and from the Indies floated past the Cape in either direction as they pleased. England and the United Provinces descended into conflict between 1652 and 1654, but this warfare was mostly waged in the Channel and the North Sea, even if the imperial stakes were significant: extra-European policy had been one of the major differences of opinion between the two states in the lead-up to the fight, and extra-European spoils were parcelled out in its resolution. Receiving, at this juncture, the stopping station of St. Helena, the English East India Company no longer had much compulsion to stop into Table Bay or for that matter to investigate Saldanha Bay (where the two companies made their claims with rocks and inscriptions during the cooler months of 1620). Friendly English ships passed by the Cape until, after 1664, with the outbreak of the second Anglo-Dutch War, these ships were likely to be carrying letters of marque and reprisal to authorise plunder, so the Oostindische Compagnie raised its guards. News then reached the Raad that, on the other side of the hemisphere, the Geotroyeerde Westindische Compagnie had been evicted by the English from New Netherlands (which was eventually replaced by the English proprietary colony of New York). This was not an example the Oostindische Compagnie wanted to follow at the Cape.

It was not the English who posed the greatest threat to the Dutch in southern Africa at this period, however. The formation of the Compagnie des Indes Occidentales in 1664 marked the renewal of French interest in the region. Between 1666 and 1671, the new French company put together a number of Africa-bound expeditions, in which Madagascar was always deemed the main prize, but Saldanha Bay was also to be investigated thoroughly with a view to staking a claim as well. The problem was, however, that the Oostindische Compagnie considered the area to fall under its territorial control in the period.<sup>48</sup>

When first French expedition, led by François de Lopo, Marquis des Mondevergue, neared southern Africa in November 1666, the ships leading the fleet split apart. The *Saumacque* peeled off to investigate Saldanha, leaving the *St. Jan* and the *Admiral* to float into Table Bay, which were followed by the rest. Mondevergue was desperate for

---

<sup>48</sup> Carl H. Sobocinski, 'The Travails of Madagascar: Rennefort's *Relation du Premier Voyage de la Compagnie des Indes Occidentales*', *Distant Lands and Diverse Cultures: The French Experience in Asia, 1600-1700*, ed. Glenn Joseph Ames and Ronald S. Love (Westport: Praeger, 2003), 97-110.

replenishments, which he could not have expected to receive, but happily did from the Oostindische Compagnie governor, Commander Cornelis van Quaelberg. Perhaps too generous with his hospitality, van Quaelberg nevertheless kept a close eye on the crew. Over the course of his interactions with them, he learned of the intention of the Compagnie des Indes Occidentales to take Saldanha Bay. As soon as the niceties were done with in mid-December, van Quaelberg quickly convened a meeting of the Raad to plan his response to the French plot to take ‘possession [*possessie*]’ of the bay.<sup>49</sup>

Much can be gleaned from the language of this council’s resolution. Saldanha was a ‘place in our possession’, the Raad declared, which was ‘daily frequented by freemen in the Company’s name and under our protection [*protexie*]’. The Oostindische Compagnie’s ‘right of property [*recht van eigendom*]’ was generated, they claimed, by a number of close inspections made by the company over a period of a decade or so, during which period its claim had been ‘maintained by its issued Commission’ [*verleende Commissien*]. Now, these flimsy pretences of ownership were under threat. Tellingly, the obliteration of this threat demanded an armed ship to advance on the bay and make a physical showing of force. Why? Because, the Raad confessed, back ‘in Europe’, the Oostindische Compagnie might not be able to sustain its claim to Saldanha against that of the ‘Fransche Oost Indische Comp[agni]e’ upon the grounds of ‘protexie’ and ‘commissien’ alone. The *Bruijt* was promptly dispatched to surprise and repel, which it did, but not without some foreplay.<sup>50</sup>

Throughout late December and into January, the Dutch and the French eyed each other off at Saldanha Bay. They nearly came to fisticuffs once: when Mondevergue erected a marker of possession in great ceremony, pacifying the gullible Oostindische Compagnie’s protesters with the lie that he had the permission of ‘Monsieur Quaelbergh’ to do so. ‘Ludovico Decimo-quarto regnante, Franciscus Lopus Montevergius in Orientem

---

<sup>49</sup> *Precis of the Archives of the Cape of Good Hope* (hereafter: *Precis*), ed. H. C. V. Liebbrandt (Cape Town: W. A. Richards and Sons, 1896), 14: 203-4; R. Raven-Hart, *Cape Good Hope 1652-1702* (Kaapstad: A. A. Balkema, 1971), 94-6; Jose Burman, *The Saldanha Bay Story* (Cape Town and Pretoria: Human & Rousseau, 1974), 29-30.

<sup>50</sup> Resolusies (16 December 1666), CA C4: 48-50. A different translation to my own can be found in *Precis*, 14: 205-6. For the kind of inspections undertaken at Saldanha Bay, see the Memorandum (24 Nov 1659), VRJ 3: 156-7.

Legatus posuit anno 1666', read the marker, although it would only stand a year before an embarrassed Raad at Table Bay ordered it to be uprooted and burned.<sup>51</sup>

A brief period of quiet anxiety followed until the next expedition of the Compagnie des Indes Occidentales made for the Cape of Good Hope from La Rochelle at the beginning of 1670. This time a fleet of eleven ships sailed under the command of Admiral Jacob Blanquet de la Haye, who carried the explicit instructions of Colbert that the 'baye de Saldanha, où les François ont esté autrefois establis, ensuite tous les autres lieux dudit cap où l'on pourroit faire quelque establissement'.<sup>52</sup> In July, De la Haye separated his fleet as they neared the Cape, just as Mondevergue had on his approach a few years earlier. What was different this time around, however, was the Dutch presence. At this very moment, the Oostindische Compagnie fort at Saldanha Bay was receiving additional fortifications under the direction of Corporal Hans Michael Calmbach, setting the scene for a showdown to ensue during the next two months.<sup>53</sup>

In the *Europe*, De la Haye aimed for Table Bay in early August. At first, his communications with van Qaelberg's replacement, Commander Pieter Hackius, were curt but, on the whole, pacific. Hackius in this window received clear confirmation of what he already suspected: that the French were on their way to Saldanha Bay. But at first he had no immediate reason to suspect that the French intended to do anything more than seek replenishments there, which is, of course, what they hoped to receive at the Cape. On August 23rd, Hackius conditionally permitted the entry of the *Europe* into Table Bay to take in water, but refused to accept any French currency or trade goods during the next few weeks. Just the day before this but unbeknownst to Hackius, the heavily-armed *St. Jean Bajou* had reached Saldanha Bay, where its crew were sheepishly greeted by the overwhelmingly outnumbered Calmbach. Three days later, three more ships followed the *St. Jean Bajou* into the bay, to which Calmbach could do no different but allow entrance as well. Two weeks passed, when an envoy of five men from the Compagnie des Indes Occidentales finally confronted Calmbach. They pulled down a post bearing the Oostindische Compagnie's arms, doing so, as they claimed, with the authorisation of 'de

---

<sup>51</sup> *Precis*, 14: 210-12; Raven-Hart, *Cape Good Hope*, 96.

<sup>52</sup> Colbert's Instruction pour M. de la Haye (4 December 1669), in *Lettres, Instructions et Mémoires de Colbert* (hereafter: *LIMC*), ed. Pierre Clément (Paris: Imprimerie Imperiale, 1865), 3, 2: 463.

<sup>53</sup> Daghregister (1670), NAN Vereenigde Oostindische Compagnie (hereafter: VOC), 1807.

Croon Vranckrijck'.<sup>54</sup> Not long after this, back at Table Bay, Hackius began to doubt the benevolent assurances of the De la Haye, and dispatched one of his senior men, Jieronymus Cruse, overland to Saldanha to support the besieged outpost.

When Cruse arrived to assess the desperate situation, the 'fraansche overloopers' responded with a showing of their intention to take ownership of the bay by making recourse to a combination of aggression and paperwork. On September 30th, men from the *Admiral* under the direction of someone apparently named d'Hortie apprehended the Oostindische Compagnie's dozen or so stock-traders on the water, before storming the Dutch company's fort on the ground. When Cruse protested, d'Hortie demanded Cruse present a copy of 'his orders' to be there, and to yield in the absence of such documents. Cruse was then presented with a protest authorised under the commission of De la Haye (formally, the Compagnie des Indes Occidentale's 'Governor of Madagascar'). These complaints appealed, at the same time, to private rights and public authority: responding to the ill-treatment of Frenchmen ('under [de la Haye's] jurisdiction' but who sailed in a 'King's ship' into Table Bay), while decrying the refusal of the 'liberty of commerce' to individuals universally bound to the 'law of nations' (irrespective of the particular claim of a particular 'Sovereign' or other).<sup>55</sup> Reading this and having no official letter of his own to hand over, Cruse was apprehended, powerless to prevent the French from destroying part of the fort. Then the French replaced the Oostindische Compagnie's flag with their own flag to the resounding chants of 'Vive l'Roi de France'. The armed occupation of Saldanha Bay was underway.<sup>56</sup>

Cruse somehow escaped to return overland to the Cape with a copy of the letter for Hackius in early October. It called, again, for the actions of the Raad: reports were filed, translations were made, and a draft letter of protest was prepared and then delivered to the French, when out of the blue, De la Haye decided to release the Dutch prisoners, rendering all local diplomacy pointless. The Compagnie des Indes Occidentale's fleet left Saldanha for Madagascar before the end of October, leaving the shell-shocked Dutch behind to

---

<sup>54</sup> Pieter Hackius to Monsier de la Haye (9 August 1670), and De La Haye to Hackius (31 August 1670), NAN VOC 1807.

<sup>55</sup> Letter À bord de l'Admiral (30 September 1670); NAN VOC 1807, and NAN 1.01.02, 12563.49. See also *Precis*, 14: 332-3, but the English translation is sketchy in some places.

<sup>56</sup> Appended Report, Pieter van Dam to Staten-Generaal (19 September 1671), and Extract uijt Cappse brief boeck (1670-1671), NAN 1.01.02, 5740, and 1.01.02, 12563.49.

scratch their heads at the brashness of an attack that had come in spite of the apparent good relationship between Holland and the ‘Majestijt van Vrachrijck’ in Europe.<sup>57</sup>

Saldanha Bay was left without any French inhabitants for slightly over three months, when the Raad ordered finally that the Oostindische Compagnie ensign be restored, the company’s flag raised again, and its fort readied for further interaction with hostile French fleets. In this anticlimactic kind of way, possession – or, at least, *European* possession – reverted to the Vereenigde Oostindische Compagnie.<sup>58</sup> Indigenous possession had suddenly become another question, on the other hand, and this was no coincidence. French interest in the Cape between 1666 and 1671 was alarming to the Oostindische Compagnie, and this was principally because the basis of their claim to the Saldanha region sat on the weak foundations of prescription and paperwork, as the Raad frankly admitted to the Heren XVII late in 1666.

In this context, the Oostindische Compagnie changed its stance towards the aboriginal claim at the wider Cape region from what it had been based at the end of Jan van Riebeeck’s tenure. Whereas, in 1660, *conquest* had offered the company its sole justification for the seizure of land from Khoekhoen, *contract* would be used for this purpose additionally after 1672. The instigator of this change of policy was Aernout van Overbeke, who arrived for a brief and decisive visit to Table Bay in the crucial juncture of March 18th, 1672: following the French aggression at Saldanha, right on the brink of the Franco-Dutch War in Europe.<sup>59</sup> An experienced merchant and a noted comedian, van Overbeke also possessed a bright legal brain. He had come into the possession of a doctorate of law at Leiden in 1655, and afterwards established a practice for himself at Den Haag from 1659. Here he practised until 1668, when he was offered a position in the Oostindische Compagnie’s Raad van Justitie (Council of Justice) in Batavia.<sup>60</sup> It was in this capacity that van Overbeke made his first extended visit to the Cape in 1672, when high among his priorities was to strengthen his employer’s claim to it.<sup>61</sup> He had been there for

---

<sup>57</sup> Daghregisteer (7 November 1670), NAN VOC 1807.

<sup>58</sup> Resolusies (16 February 1671), CA C7: 24-32.

<sup>59</sup> Journal Extracts (1672), *Record* 1: 317.

<sup>60</sup> Rudolf Dekker et al., ed., *Aernout van Overbeke, Anecdota sive Historiae Jocosae: Een Zeventiende-eeuwse Verzameling Moppen en Anecdotes* (Amsterdam: P. J. Meertens Instituut, 1991), ix-xi; George McCall Theal, *Chronicles of Cape Commanders* (Cape Town: W. A. Richards & Sons, 1882), 178-9.

<sup>61</sup> See also H. C. Bredekamp, ‘Die Grondtransaksies van 1672 tussen die Hollanders en die Skiereilandse Khoikhoi’, *Kronos* 2 (1980), 1-10.

barely a couple of weeks before he was motioning to an agreeable Raad that purchases of land from local Khoekhoe be made immediately. These contracts, to be made with ‘Hottentot Captain Manck’kagou, alias Sacher [or Schacher]’, and ‘other neighbouring Hottentots’, were to be designed explicitly to ‘declare us to be the right and lawful possessors of this Cape district’, the Council’s transcriptions make clear.<sup>62</sup>

Six days later, the first of these ‘accordts’, between van Overbeke, representing the company, and Manck’kagou, identified Captain or ‘Prince’ of all surrounding Khoekhoe (probably including some who did not recognise his authority), and T. Tachou, ‘chief person next to the Prince’, took place. ‘Prince Schacher promises’, so runs the first clause,

for himself, his heirs, and descendants, in full property, perpetual and hereditary, to give, to vacate, and to sell, as he does in this sale, to the [Oostindische] Company, the whole district of the Cape of Good Hope, beginning from the Lion Hill, and extending along the coast of Table Bay inclusive of the Hout and Saldanha bays, with all the lands, rivers, creeks, forests, and pastures therein situated and comprised [...] so that everywhere may be built upon and possessed [...]<sup>63</sup>

This was a large area to be ceded. Within it, Saldanha Bay was perhaps the most ridiculous inclusion. This area – the coastal region home to Goringhaicona ‘fishermen’, with the wider pastures used intensively by the stockkeeping Cochoqua – was far out of Manck’kagou’s jurisdiction. Its inclusion within the contract only strengthens the link between van Overbeke’s purchases and the French incursions.

Half of this contract, which facilitated the formal alienation of land, imposed obligations on the ceding interest. The second clause demanded that Manck’kagou’s people ‘shall never again cause any annoyance, injury, offence, loss, or damage, directly or indirectly to the Company or her subjects or servants’; the third suggested that they ‘shall

---

<sup>62</sup> Resolusies (13 April 1672), CA C8: 7-9.

<sup>63</sup> Accoort by den E. H. Commissaris Arnout van Overbeeck en den Raadt den Cabo de boa Esperance wegens de Generale Nederlantsche Geoctroyeerde Oostindische Copm. Tusschen deselve en den Hottentosen Prins Manckragou alia Schagher, erffheer van den lande de Cabo de boa Esperance (19 April 1672), NAN VOC 1809; transcribed in the *Corpus Diplomaticum Neerlandico-Indicum: Verzameling van Politieke Contracten en Verdere Verdragen door de Nederlanders in het Oosten Gesloten, van Privilegiebrieven, aan hen Verleend* (hereafter: *Corpus Diplomaticum*), ed. J. E. Heeres (Leiden: Martinus Nijhoff, 1931), 2: 466-9. ‘Prince Schacher voor hem ende syne erven en nacomelingen in vollen eygendom eeuwich en erflyck over teg even, in te ruijmen en te vercoopen, gelyck hij overgeeft en vercoopt mits desen, aen de gemelde Comp. het geheele district van d’Cabo de boa Espeerance, beginnende van den Leeuwenbergh rondsom aen den soom der Tafelbay met d’Hout- en Saldanhiabaeij incluys, nevens alle langeryen, rivieren, inhammen, boschagien en velden, darinne gelegen en begreepen, met den cleven van dien, omme ‘t selve overal te mogen bebouwen en possedeeren [...]’. My translation differs slightly to that provided in *Record* 1: 317-8.

endeavour to drive away and expel by force of arms any foreign European power which may, in the course of time, try to settle in the said district'; the fourth 'that he and his descendants, to the last of time, shall be, and continue to be the Company's good friends and neighbours, and the enemies of all, without any exception, who would hurt, offend, or injure her subjects in their property or otherwise'. The other half of the contract introduced the terms of remuneration. The Oostindische Compagnie offered, 'for this surrender and sale of the whole Cape district, as is now given and presented, once for all, a sum of four thousand reals of 8, in sundry goods and articles of merchandize, this day delivered to his contentment'. With this came a promise of peace, and the establishment of a yearly tribute, entailing some of Manck'kagou's stock in exchange for 'an entertainment at the expense of the Company'.<sup>64</sup>

The contract accomplished its objective, and within just a few weeks, was used as a template for a similar purchase from the 'minor Prince D'houww, hereditary lord of the country called by us Hottentoes Hollandt, and its dependencies, assisted by the Hottentot chief Dack'kay (alias Cuyper) stadhouder and guardian of the prince, and the captain Oyth'key, his counsellor and representative'.<sup>65</sup> The area ceded in this contract included 'Hottentot Holland', which comprised the coastal area of the Cape District, as well as 'Cape False', 'Bay False', and '[Simon's] Bay'.<sup>66</sup> In both instances, the goods traded with the Captains 'were estimated at 4000 reels', which subsequent correspondence showed to amount to far short of this figure (a sum 'so inconsiderable that the matter should not have been so long postponed').<sup>67</sup>

These were the local ramifications of the French incursions. What requires reflection, now, are the European ramifications of the same. Upon learning of the friendly reception given to the French by Commander Cornelis van Quaelberg, the Heren XVII was

---

<sup>64</sup> Accoort (19 April 1672), *Corpus Diplomaticum* 2: 468-9, as translated by Moodie in *Record*, 1: 318.

<sup>65</sup> Accordt by den Albert van Bruegel, coopman en secunde, mitsgaders den Raadt aan Cabo d'boa Esperance, wegens de Vrije Verenigde Nederlantsche G'octroyeerde Comp. ter eenre en den Hottentosen overste Dack'kay (alias Cuyper), stadhouder en vooght van den minderjarigen prince Dhouww, erffheer van de landen, by ons genaamt Hottentoes Hollandt, met den aenleve van dien, mitsgaders den Capiteyn Oyth'key, Raat en gevolmagtigde van voorschreven prince, ter ander sijde aangegaan (3 May 1672), *Corpus Diplomaticum* 2: 470-3

<sup>66</sup> Accordt (3 May 1672), *Corpus Diplomaticum* 2: 472.

<sup>67</sup> Extract of a Despatch from Governor Isbrand Goske and Council to Chamber XVII (10 May 1673), in *Record* 1: 325.

livid. His conduct of ‘civility’ was ‘inexcusable’, and what was somewhat more important, ‘in direct opposition to all military law’.<sup>68</sup> For this reason, in November of 1667, van Quaelberg was sacked by the company, and replaced by Jacob Borghorst. The new commander was instructed to refuse entry to other European ships and allow them instead ‘to drift upon their own fins’, and, furthermore, promptly to pull down the marker left by Mondevergue at Saldanha.<sup>69</sup> This of course was done, but the French threat did not disappear.

News of the French advances upon Saldanha between August and October of 1670 reached the Heren XVII sometime in the middle months of 1671. Their relevant dispatch to Hackius at Table Bay, dated 29th August, warrants our attention:

You did well to remove their flag and arms [...] but it would have been more conformable with our orders had you done so instantly on their departure. And therefore, should they come again and drive away our people, you must see that they do not remain there, but dislodge them by force if they will not attend to written protests, employing for this purpose all the force at your command [...] They can advance no pretension to a right either of property or of possession; particularly as we have done so, long before them, and have constantly frequented the bay, where we have subsequently kept a garrison, more especially at the very time when the French were last there.

Time was crucial to the claim of possession at Saldanha: less of it should have passed between the departure of the French and the removal of their markers from the bay; too much of it had passed between the earliest habitual ‘frequencing’ of the bay by the Dutch and the coming of the French. Letters still played a role: correspondence was to be polite but, if ignored, was to be replaced by the force of arms. Prescription and paperwork, flanked by shows of force and ceremony, formed the default response to the French incursion. Now was the time for diplomacy, to seek assurances from the French that this would not recur: ‘We have not failed to bring the matter to the knowledge of the State[n Generaal]’, Hackius was told, ‘and as soon as our present session is over, shall represent it more fully’.<sup>70</sup>

---

<sup>68</sup> Heren XVII to Commander Borghorst and Council (20 November 1667), *Record 1*: 299.

<sup>69</sup> Heren XVII to Borghorst (20 November 1667), *Record 1*: 300.

<sup>70</sup> Heren XVII to Commander Hackius and Council (29 August 1671) *Record 1*: 311.

Pieter van Dam, a lawyer from the Oostindische Compagnie's Amsterdam Chamber, was given the task of compiling a report of enquiry into the activity of French ships in the 'Jurisdictie' of the company at the Cape. This was passed onto the Staten Generaal, with extracts of relevant correspondence, in a 'Remonstratie' of September 19th, 1671.<sup>71</sup> The Staten Generaal were mounting considerable evidence of French hostility around this time, and the matter was allowed to sit in abeyance, until the inevitable war broke out in spring the following year, when the matter disappeared off the state radar completely. By 1677, the threat of a French invasion of the Cape region was believed to have passed, even if the Raad continued to receive instructions from the Heren XVII to 'be at all times prepared against such attacks'.<sup>72</sup> Van Dam, for his part, remained embittered for some time, but at least began to speak about the Saldanha Bay affair in the past tense. As he put it to his readers in the *Beschryvinge van de Oostindische Compagnie* (ca. 1693-1701): 'if, somehow, the erection of this pole was any measure of [French] possession, this [Dutch] Company can clearly prove the same, that many years before the French had even been there, not just a signpost but the armed occupation of the Company was the sign of the jurisdiction had there'.<sup>73</sup>

The French side of the story can only be treated here briefly. Among the printed Colbert correspondence can be found a letter from Louis XIV to De la Haye sent in 1673, strongly commendatory of his efforts to annoy 'les Hollandois'.<sup>74</sup> But that was fairly typical of Louis, who had begrudged the Dutch since at least the late 1660s. Colbert himself, on the other hand, appears to have been reluctant to mix his mercantilism up with Louis XIV's state militancy, and hoped, at least during the initial stages of the war, to separate trade from the conflict for as long as possible.<sup>75</sup> Much more research needs to be undertaken to account for maritime disputes of private law during the period of incipient Colbertism,

---

<sup>71</sup> Remonstratie (19 September 1671), and Peter van Dam to the Staten Generaal (19 September 1671), NAN, 1.01.02, 12563.49. See also NAN 1.01.02, 5740.

<sup>72</sup> Heren XVII to Governor and Council (11 May 1677), *Record* 1: 350.

<sup>73</sup> Pieter van Dam, *Beschryvinge van de Oostindische Compagnie* (s'Gravenhage: Martinus Nijhoff, 1927-1954), 1: 2: 620: 'En dat met byvoeginge, dat, indien het opregten van eel paal en daaruyt possessie af te meten, genoeg soude sijn, dese Compagnie klaerlijck kan bewysen, dat sy vele jaeren, eer de Franschen daar eens sijn geweest, niet alleen een paal met het wapen van de Compagnie tot een teyken van jurisdictie daar heeft gehad'. It is telling that the matter of jurisdiction here was separated from the matter of title, which van Dam downplays throughout the *Beschryvinge*.

<sup>74</sup> Louis XIV to de la Haye (31 August 1673), *LIMC* 3: 2: 561-4

<sup>75</sup> See Colbert to A. M. Chamillart (Intendant at Caen) (15 April 1672), *LIMC* 2: 1: 250.

which sadly cannot fit within the scope of this thesis.<sup>76</sup> It suffices to conclude by noting that the matter did not register in the peace arrangements of 1678, and little wonder: the Compagnie des Indes Occidentales neither maintained a presence in Saldanha nor ever returned again, and besides, the corporation had been dissolved and ceased to exist after 1674.<sup>77</sup>

The Oostindische Compagnie would remain for over a century more, but the Caepmans sadly vanish from the historical record about this point, and they would be followed a few decades later by the Goringhaiquas and Gorachouquas, whose tribal coherence appears not to have sustained much longer either. Their territories had been ceded and their claims extinguished, if not in the first place by a crushing war of conquest than decisively in the second place through contract.

Yet no sooner had Table Bay and its pastures securely come under the ownership of the Dutch company than the wider region beyond it was embroiled in yet another violent war.<sup>78</sup> Trigger to the conflict was the massacre of some company-authorized hippo hunters in the middle of 1673. For this, the Politieke Raad now had an excuse to direct hostilities towards the Cochoqua, no longer under Oedasoa but his successor Gonnema, a Captain long viewed with suspicion by the company. Allying neighbouring Khoekhoe to its cause, the Oostindische Compagnie launched a prolonged and one-sided offensive against the Cochoqua, until, in June 1677, the Second VOC-Khoekhoe War came to an end, when Governor van Herentals accepted Gonnema's request for peace. Confiscating a great amount of property – Elphick suggests at least 1,765 cattle and 4,930 sheep<sup>79</sup> – the company had won another war decisively, but land was not involved.<sup>80</sup> Victory in this war was not, as it was in the earlier war, used to rationalise occupation of the Cape as the spoils of a conquest because a new approach was to be adopted towards Khoekhoe and San land rights. The company, instead, adopted a policy of evasion, leaving no action necessary to rationalise the annexation of territory, but to coerce the compliance of the indigenous

---

<sup>76</sup> See, however, C.-G Picavet, *La Diplomatie Francaise au Temps du Louis XIV (1661-1715): Institutions, Moeurs et Coutumes* (Paris: Librairie Félix Alcan, 1930), 283-7.

<sup>77</sup> Marie Ménard-Jacob, 'Autopsie d'une Liquidation: L'échec relatif de la première Compagnie des Indes Orientales (1664-1706)', *Revue d'Histoire d'Outre-Mers*, 101, 378-379 (2013), 233-249.

<sup>78</sup> My reading of this war follows Elphick's excellent coverage in *Kraal and Castle*, 126-34.

<sup>79</sup> Elphick, *Kraal and Castle*, 133.

<sup>80</sup> *Corpus Diplomaticum* 3: 58-9.

communities within it. This was a shift of major importance which requires emphasising. The Table Bay pocket, clinically extinguished of the Khoekhoe title, was appended in the next few decades to a much bigger domain which did not appear to require extinguishment through the tried and true methods of contract and conquest. From 1679, new land grants would be issued from the company to settlers in lands not formally included within the purchased region, discouraging settlers from looking to the Khoekhoe for individual purchases thereafter.<sup>81</sup> As in New France, no explicit doctrine would be mobilised to support this evasion of indigenous land rights, but an important precedent was established in the process, which would have geopolitical ramifications for centuries to come.<sup>82</sup>

For Gerrit Schutte, whose translated essay in *The Shaping of South African Society* remains a key English-language publication on the early political history of the Vereenigde Oostindische Compagnie at the Cape, the corporation strove to create ‘good relations’ with ‘indigenous peoples’, which was ‘practical’ and ‘logical’ policy. For Schutte, ‘empire-building was contrary to the mentality of Dutch merchant-regents’.<sup>83</sup> Across many colonial historiographies, appraisals of companies like these are common. My argument is, to the contrary, that corporations like the Oostindische Compagnie should any longer neither be seen as unobtrusive colonial forces nor the handmaidens for the imperialism of a distant metropole. The corporation at Table Bay was very much a power unto itself. It extended the geographical boundaries of a settler project of its own creation, and its policies towards indigenous peoples laid the framework for what came later in South Africa. Most important of all, it was the first of all the other European interests to make a serious claim to the locale – a claim that had to be foisted upon the local population and defended against intruding Europeans.

A serious challenge was mounted by the Compagnie des Indes Occidentales. The foundation of Dutch claim to Saldanha was weak, being based only upon prescription (‘*protexie*’ of many years) and paperwork (‘*commissien*’), without a thought given to Jan

---

<sup>81</sup> Resolusies (5 August 1679), CA C14: 78-9.

<sup>82</sup> This is not the view shared by Eduard Fagan, for whom the land transactions at Table Bay are representative of what happened across the entire colony. See Eduard Fagan, ‘Roman Dutch Law in its South Africa Context’, *Southern Cross: Civil Law and Common Law in South Africa*, ed. Reinhard Zimmerman and Daniel Visser (Cape Town: Juta and Co., 1996), 36-7.

<sup>83</sup> Schutte, ‘Company and Colonists at the Cape’, 292.

van Riebeeck's victory 'by the sword' (suggesting that the war of 1660 only generated a claim against local Cape Khoekhoe in the company's mind). And the Politieke Raad knew that the company's claim to Saldanha was weak, confessing to the Heren XVII that they would expect their rights to be disregarded in Europe if diplomacy hastened any enquiry into the matter. Thankfully for the Oostindische Compagnie, no such diplomacy resulted. In the meantime, a radical new policy was put into place by Aernout van Overbeke, and that new policy was contract – not only given a local function, but ostensibly given an external function, as had been the norm for Dutch companies in America and the Indies for several decades after *Mare Liberum* (1609).

Harry asked whether or not his fellow Caepmans might be allowed to lay a claim to estates of the United Provinces in a similar fashion. But conquest silenced his rebuttals, allowing Jan van Riebeeck the first opportunity to rationalise the company's possession of the Cape – and the dispossession of the western Cape Khoekhoe – in legal terms, although just what standard this established for future annexations would remain to be seen. With contemporaries following this lead – starting perhaps with Francois Valentyn's analysis of aboriginal title in 1762 – and historians following suit, it may become timely for scholars to reflect critically upon the constitutional necessity of proving and reproving military defeat to justify permanent occupation.<sup>84</sup> It may also become necessary to reflect on the factual inaccuracy of such a justification in the first place. Conquest, in combination with some contracts, only applied to a small portion of the western Cape; most land at the Cape and beyond was treated as something like a *terra nullius* – a place where the claims of natural occupants were ignorable – during the VOC regime.<sup>85</sup>

---

<sup>84</sup> Francois Valentyn, *Description of the Cape of Good Hope with the Matters Concerning It* (Cape Town: Van Riebeeck Society, 1971-3 [1762]), 2: 165-7: 'In the earliest days Heer van Riebeeck also bought (as we have said) some estates or lands for the Hon. Company, but later, after we had trouble with the Hottentots, our folk no longer observed this first treaty, and forced the Hottentots, now our enemies, to hand over various lands to us, from which we drove them out: which, however, was not done too easily [...] When in the year 1659 he distributed some lands to various freemen in accordance with the orders of the Lords and Masters, and these lovely pastures, previously occupied by various Hottentots, were ploughed up without even asking their leave, and they were driven further inland, the Kaapmans and the Gorinhayquaas (whose lands these were) could not let this pass unavenged, but thought good in this same year to wage war on us with their allies, the Tobacco-Thieves, advising us that their reason for this was, that this land had been theirs for many centuries, and that to rob them of it was the greatest injustice in the world'. Then, he writes, 'they had [...] lost this land by the intervening wars'.

<sup>85</sup> This may even be kept in mind today, as the land question, which has split into disparate concerns about redistribution, restitution, and reform, continues to feature in South African politics. See Edward Cavanagh, *Settler Colonialism and Land Rights in South Africa* (Basingstoke: Palgrave Macmillan, 2013).

## Conclusion

Claims by European corporations to territorial rights in non-Christian parts of the world were always radical, as a slight to the kingship of the monarch whose charter they bore or as an implicit and rivalrous challenge to the state under whose flag they traded. These claims carried assertions of corporate political authority overseas that often sat uneasily beside the sovereign status of the European prince or polity whose law had constituted companies now boldly claiming and, in many cases, actually exercising such rights beyond home shores. By situating this early modern phenomenon within a much broader Western legal and political tradition, this thesis has identified several other reasons why the actions of those jurisdictionally evasive corporations abroad were radical.

Corporations in the seventeenth-century Atlantic World, like the Virginia Company of London, the Compagnie de la Nouvelle-France, and the Geotroyeerde Westindische Compagnie, were institutionally coherent and individually motivated entities and, at the same time, they were the pivotal instruments of European empires. This thesis has argued that neither of these twin capacities can be examined in isolation from medieval legal and economic history, which allows for a new interpretation of the ‘business of empire’ – a business most thriving in the portside towns along an oceanic corridor stretching from Lisboa to St. Petersburg, and dominated, by the middle of the seventeenth century, by English, Dutch, and French commercial interests.<sup>1</sup>

This economic and institutional framework is necessary to establish before engaging with a careful and widespread reading of the relevant legal and political thought. The starting point, in those parts of this thesis concerned with intellectual history, is the corporate form itself. Coming to terms with the corporation – ancient, medieval, modern – on its own terms requires that historians eschew any presentist adoption of contemporary models of corporate governance. A person and a government, as much private as public, the corporation was a political entity which changed the face of Europe, from the days of Rome’s deliberate collectives, through to Innocentius IV’s endorsement of the legal fiction giving rise to the corporate form in 1254 (*‘collegium in causa universitatis fingatur una persona’*).<sup>2</sup> This was

---

<sup>1</sup> For this, see above, chapters 2-3.

<sup>2</sup> *Apparatus*, c. 57 X 2.20, quoted in J. P. Canning, ‘The Corporation in the Political Thought of the Italian Jurists in the Thirteenth and Fourteenth Centuries’, *History of Political Thought* 1, 1 (1980), 17.

a moment when ecclesiastical corporations were amassing land in huge quantities in France and England. This was the age of the great Italian city-states, corporate polities broken apart from the *Imperium Romanorum*, and unsurprisingly the domiciles of civil lawyers prepared to extend the limits of corporate power. In this context, those critical attributes of the juridical personality of the medieval corporation become identifiable: its rights and responsibilities, its landholding and governmental capabilities, its regulation, its exceptional mortality, and the means of its formation and dissolution. Understanding all of this enables historians to appreciate how and why entities of this kind were considered appropriate acquiring interests of land in the New World at the end of the medieval period. This provides a new way to present the intellectual history of sovereignty, property, and empire.<sup>3</sup>

If, as this thesis argues, corporate activity and the claims that came with it were radical, what then made them so, over and above the lack of sovereignty enjoyed by the company? In the first place, chartered rights were often amplified and mobilised abroad. By exploring the medieval culture of bureaucracy which gave rise to the widespread adoption of written legal instruments, it becomes apparent that these documents were jurisdictionally specific devices, functional only within a given realm or domain, as foreign potentates and subjects were under no obligation to acknowledge their contents.<sup>4</sup> Corporations referring their European competitors to charters overseas, therefore, represented a departure from this convention. If it can still be held that charters and the like were documents which carried ‘public’ and ‘international’ ramifications, it seems that such an application was trialled only briefly and by very few corporate governments, and only until the period of New Sweden’s failure, when it became customary in the New World to disregard the outward ambitions of European official paperwork.<sup>5</sup>

Corporations also justified their foreign holdings in forts, ports, and hinterland by invoking the idea of ‘prescription’ (that is, the creation of a legal entitlement by the passage

---

<sup>3</sup> See, however, for the fullest treatment, Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014).

<sup>4</sup> This follows from the observations of M. T. Clanchy, *From Memory to Written Record: England, 1066-1307*, 2nd ed. (Oxford: Blackwell Publishers, 1993).

<sup>5</sup> For this argument about ‘paperwork’, see above, 88-94, 110-28, 191-215. Compare, however, Ken MacMillan, ‘Common and Civil Law? Taking Possession of the English Empire in America, 1575-1630’, *Canadian Journal of History* 38 (2003), 409-23.

of time, typically but not always necessarily against an antecedent claimant).<sup>6</sup> The legal history of *longi temporis praescriptio* from Justinian to Grotius presented in this thesis reveals the prevalence of doubt among jurists about the applicability of prescription in public and common land, and the inconceivability of using prescription to impede upon foreign jurisdictions. Prescription was thus an opportunist device lacking traction in the civil legal tradition from which the secular corporation itself had spawned. On the ground, its application had mixed results, and always its enforcement was more often than not contingent upon the use of brute strength by the acquiring interest.

Alternatively, corporations could establish a fresh claim – before their home authorities and against native claimants – through contract or war. From as early as Justinian, however, contracts of purchase and sale required the measurement of price against a perceptible market value, the likes of which could not be appraised in the New World. Within medieval European jurisdictions, moreover, the usage of contracts to transfer immoveable property rights was highly regulated, as sovereigns drew their power from the division of land rights and were therefore compelled to obstruct foreign subjects and ecclesiastical corporations from amassing titles. Moreover, in the European *ius commune*, barriers of faith and language presented serious impediments to entry into contractual relations.<sup>7</sup> Therefore, land purchases abroad were never so straightforward as the Dutch Oostindische and Westindische Compagnies (exemplarily but not uniquely) made them out to be. Crashaw, in his sermons, may have been the first in the European intellectual tradition to engage seriously with these dilemmas for the purposes of championing land purchases in Virginia, by permitting contracts with ‘Heathens’ if ‘in faire and lawfull bargaine’.<sup>8</sup> But it was Hugo Grotius who authored the most internationally reputable juristic reflection on contracts

---

<sup>6</sup> For prescription in medieval and early modern legal thought, see above, 94-104. Compare, however, Patricia Seed, ‘Taking Possession and Reading Texts: Establishing the Authority of Overseas Empires’, *William and Mary Quarterly* 49, 2 (1992), 183-209.

<sup>7</sup> For contract in legal thought, see above, 129-41. See also John W. Baldwin, ‘The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries’, *Transactions of the American Philosophical Society* 49, 4 (1959), 35-58; Richard Tuck, ‘Alliances with Infidels in the European Imperial Expansion’, in *Empire and Modern Political Thought*, ed. Sankar Muthu (Cambridge: Cambridge University Press, 2012), 61-83.

<sup>8</sup> William Crashaw, *A Sermon Preached in London before the Right Honorable the Lord Lavvarre, Lord Gouvernour and Captaine Generall of Virginea, and Others of his Maiesties Counsell for that Kingdome* (London: William Welby, 1610), D3-D4.

abroad.<sup>9</sup> Endorsing these interfaith and foreign contractual relations, Grotius in the process influenced the development of European political thought: contract provided the key to all social and political relations, and offered the best way, collectively and individually, to advance from the state of nature through turmoil towards political modernity. Thinkers as different as Thomas Hobbes (1588-1679), Jean-Jacques Rousseau (1712-1778), and Henry Sumner Maine (1822-1888) would each riff differently on a similar idea.<sup>10</sup>

Territorial conquest through war was equally problematic as contract but for separate reasons. Today, at least since the Hague Conventions and *Re Southern Rhodesia* (1919), the war-waging corporation seems an obviously startling prospect.<sup>11</sup> But in the late-medieval period it was not remarkable, for this was an era of organised mercenary warfare, expansionist city-states, and regular ‘private war’ among the nobility.<sup>12</sup> Within the European ‘just war’ tradition of this period, this thesis has argued, there were a number of doubts attending a vicarious form of warfare conducted by, and through, corporations rather than directly and authoritatively by a recognised sovereign. Additionally, there was uncertainty about the extent to which moveable and immoveable property could be despoiled in the

---

<sup>9</sup> Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005 [1625]), 2: 729-67.

<sup>10</sup> Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of A Commonwealth Ecclesiasticall and Civil* (London: Andrew Crooke, 1651); Jean-Jacques Rousseau, *Du Contrat Social, ou Principes du Droit Politique* (Amsterdam: Marc Michel, 1762); Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861). See also Victoria Kahn, *Wayward Contracts: The Crisis of Political Obligation in England, 1640-1674* (Princeton: Princeton University Press, 2004); Patrick Riley, ‘Social Contract Theory and Its Critics’, *Cambridge History of Eighteenth-Century Political Thought*, ed. Mark Goldie and Robert Wokler (Cambridge: Cambridge University Press, 2006), 347-78; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 109-225; David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), 6-85, 223-4.

<sup>11</sup> See *Special Reference in the Matter of Southern Rhodesia between the British South Africa Company, the Crown, the Elected Members of the Legislative Council of Southern Rhodesia, and the Natives Re Southern Rhodesia* [1919] AC 212, which was the last time in the English common law that a war-waging corporation was recognised – in order to be disqualified. The Hague Conventions of 1899 and 1907, for their part, ostensibly established norms for signatory nations and optimistically, by consequence, their subordinated corporations. See *The Hague Peace Conferences of 1899 and 1907*, ed. James Brown Scott (Baltimore: Johns Hopkins Press, 1909). See also Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996).

<sup>12</sup> See generally Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965). But see also David Parrott, *The Business of War: Military Enterprise and Military Revolution in Early Modern Europe* (Cambridge: Cambridge University Press, 2012); Philip Jones, *The Italian City-State: From Commune to Signoria* (Oxford: Clarendon Press, 1997); Tom Scott, *The City-State in Europe: Hinterland, Territory, Religion* (Oxford: Oxford University Press, 2012); Malcolm Vale, ‘Aristocratic Violence: Trial by Battle in the Middle Ages’, *Violence in Medieval Society*, ed. Richard W. Kaeuper (Woodbridge: Boydell Press, 2000), 159-82.

process of war, and even more uncertainty as to whether such gains went to the companies engaged in battle or to their distant and often uncommitted (financially as well as militarily) sovereign master. Finally, European jurists, many working within or influenced by the canon law tradition, consistently held that few liberties were to be taken with infidels in lands beyond the Christian world.<sup>13</sup> Corporations seeking territorial acquisition or community subordination through conquest in non-Christian parts of the world (as the Virginia Company of London and the Massachusetts Bay Company did in America, as the Vereenigde Oostindische Compagnie did in South Africa, and as the Compagnie de la Nouvelle-France could only dream of doing on the Saint-Laurent), therefore, defied the sundry guidelines that had been explicitly articulated by legal intellectuals in courts, councils, and universities long before the age of Hugo Grotius. After him, again, the story was different. Not only did Grotius offer his famous retroactive and automatic means of implying public authorisation to all private wars waged by corporations abroad (in response to the *Santa Catarina* affair between 1604 and 1606), but in the 1625 edition of *De Iure Belli ac Pacis* Grotius could even hold it lawful to wage war ‘against those who kill Strangers that come to dwell amongst them’.<sup>14</sup> With that, on paper anyway, companies were given a right to declare war upon indigenous people who resisted corporate intrusions.

To narrate the claims of corporations to foreign lands on the grounds of prescription, paperwork, contract, and conquest, and the playing out and resolution of legal conflicts arising from these claims and foreign torts more generally, documentary evidence, sourced from archives and printed manuscript material from across the globe, supports a narrative of possession and dispossession that proceeds uncontroversially from the intellectual history. Reflecting on the combined energies of English, French, Dutch, and Swedish corporations in the early modern Atlantic World, a few observations should be offered in conclusion. Firstly, private law devices (especially contract) found more traction in New World contexts than other devices, and spurious public law ‘doctrines’ were the least persuasive. Overall, however, those corporations which developed the most recognisable territorial claims in this period did so by adopting a combination of strategies, and backing these up, crucially,

---

<sup>13</sup> For ‘conquest’ in legal thought, see above, 141-52.

<sup>14</sup> Grotius, *Rights of War and Peace*, 2: 1022n7. See also Tuck, *Rights of War and Peace*, 78-108; Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615* (Leiden: Brill, 2006).

through force. Little is to be gained from searching for a cleaner formula than this, for when it came to the acquisition of territory by European corporations outside of Europe in the seventeenth century, opportunism prevailed over doctrine.

How things worked in the New World, and how things looked in the Old, were very different matters, though, whatever the nebulous *ius gentium* was thought to suggest about land rights and the treatment of infidels. For this reason, this thesis presents a close consideration of the ramifications of these claims by non-state actors in a European community ever mindful of the sovereign dignity as well as the theatricality of diplomacy as an instrument of statecraft.<sup>15</sup> No legal history of the Atlantic World has been presented the corporate perspective so closely for the purpose of contrast to the European political context. The result of such an approach is a new way to consider the precursors and origins of modern diplomacy and international law in world history.

The middle chapters of this thesis tap into a rich but conflicted legal history: torts were committed in foreign estuaries, imbalanced restitution was exacted for illegitimately seized property, and disputes were had over private property rights in American and African immoveables. Many of these conflicts led to suits brought in admiralty courts by disaffected individuals or raised by diplomats on their behalf, and they often resulted in skewed adjudications, but *results* nonetheless. This was novel. From the mid-fifteenth century genesis of organised ambassadorial diplomacy in Europe until the capture of the *Santa Catarina* off the straits of Singapore in 1603, diplomats were seldom if ever given charge of anything but the resolution of specific public law matters. After this period, however, an important change occurred. Representing corporate actors, at times of peace, in civil disputes arising from within uncertain (or non-existing) jurisdictions, the early modern diplomat was different from the renaissance diplomat because of his brand new mandate: namely, private international law.

If we are to see corporations in the extra-European world as analogous to ‘states’ (as Philip J. Stern has), or as ‘mediate territorial sovereigns’ (of a type pondered by foundational international lawyer John Westlake), the case is made in this thesis that even the most powerful early-modern corporations were forced to operate under the conditions of a treaty-

---

<sup>15</sup> For diplomacy and private international law, see above, chapters 9-10. See also Garrett Mattingly, *Renaissance Diplomacy* (New York: Dover Publications, 1988 [1955]).

bound and statute-observant Europe, where diplomacy was crucial to the resolution of their damaged interests abroad.<sup>16</sup> Still, if the vicissitudes of public diplomacy in Europe remained the most important factor behind the resolution or avoidance of thorny overseas disputes, the development of private international legal thinking, in nascent form, was the natural result of the recurrence of such disputes in the first place – and this is of great significance. Well then might we speak of the corporate origins of private international law in disputes over vessels like the *Witte Leeuw*, the *Eendracht*, and the *Kalmar Nyckel*. Well might we say even more. Had the great plans of ‘corporate conjugation’ gone ahead in the 1610s and 1620s, then international relations may have taken a very different form after the Treaty of Westphalia. Were it not for mercantilism – were it not for the state assuming, in this period, all the *responsibilities* of trade and war while leaving the *rights* to the same for specified agencies – then the corporation may have taken an even more prominent place in global political order during the eighteenth and nineteenth centuries. But that is to gaze for too long into a crystal ball.

---

<sup>16</sup> Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2011); *The Collected Papers of John Westlake on Public International Law*, ed. L. Oppenheim (Cambridge: Cambridge University Press, 1914), 196.

## BIBLIOGRAPHY

### Archives:

- BL: *British Library. London, UK.*  
Cotton MS; Egerton MS.
- BNF: *Bibliothèque Nationale de France. Paris, France.*  
Fr. 15987 MS.
- CA: *Western Cape Archives and Records Services. Cape Town, South Africa.*  
C 1-231.
- LAC: *Libraries and Archives Canada. Ottawa, Canada.*  
R9945-0-1-F.
- LUL: *Leiden University Library. Leiden, The Netherlands.*  
69 MS.
- NAN: *Nationaal Archief van Nederland. The Hague, The Netherlands.*  
1.01.02; 1.04.01; 1.05.01; VOC (MF).
- NAUK: *National Archives of the United Kingdom. Kew, London, UK.*  
CO (Colonial Office) 1/1-10; SP (State Papers) 78/, 103/;  
PC (Privy Council) 2/.
- PWDRO: *Plymouth and West Devon Record Office. Plymouth, UK.*  
277/15.

### Published Primary Materials:

- CCM:* *Calendar of the Carew Manuscripts*. 6 Volumes. London: Longmans, Green, Reader, & Dyer, 1867-71.
- CHNY:* *Documents Relative to the Colonial History of the State of New York*. 15 Volumes. Differing Editors. Albany: Weed, Parsons, and Company, 1853-1887.
- CMS:* *The Manuscripts of Earl Cowper*. 2 Volumes. Historical Manuscripts Commission. London: Her Majesty's Stationery Office, 1888.
- Corpus Diplomaticum:* *Corpus Diplomaticum Neerlandico-Indicum: Verzameling van Politieke Contracten en Verdere Verdragen door de Nederlanders in het Oosten Gesloten, van Privilegebrieven, aan hen Verleend*. 6 Volumes. Edited by J. E. Heeres et al. Leiden: Martinus Nijhoff, 1907-1955.
- CSP:* *Calendar of State Papers*. Multiple Volumes. Series consulted include: *Domestic; Colonial (West Indies and America); Colonial (East Indies, China and Japan); Venice*. Multiple Editions. 1509-present.
- CWRW:* *Complete Writings of Roger Williams*. 7 Volumes. New York: Russell & Russell Inc., 1963.
- DJCR:* *A Collection of Documents Relating to Jacques Cartier and the Sieur de Roberval*. Edited by Henry Percival Biggar. Ottawa: Public Archives of Canada, 1930.
- HCPP:* *House of Commons Parliamentary Papers*. Multiple Volumes. London: Government Printer. 1801-present.
- HP:* *Hakluytus Posthumus, or Purchas his Pilgrimes*. 20 Volumes. Edited by Samuel Purchas. Glasgow: Glasgow University Press, 1906.
- IJP:* *The Instruction for Johan Printz, Governor of New Sweden*. Edited and Translated by Amandus Johnson. Philadelphia: Swedish Colonial Society, 1930.
- JR:* *The Jesuit Relations and Allied Documents, 1610-1791*. 71 Volumes. Edited by Reuben Gold Thwaites. Cleveland: Burrows Brothers, 1896-1901.
- JRJ:* *The Rise and Fall of New Sweden: Governor Johan Risingh's Journal 1654-1655 in its Historical Context*. Edited by Stellan Dahlgren and Hans Norman. Stockholm: Almqvist & Wiksell, 1988.
- KJV:* *King James Version (Bible)*.

- LH4:* *Recueil des Lettres Missives de Henri IV*. Edited by M. Berger de Xivrey  
Paris: Imprimerie Impériale, 1858.
- LIMC:* *Lettres, Instructions et Mémoires de Colbert*. 8 Volumes. Edited by Pierre Clément. Paris: Imprimerie Impériale, 1865.
- LLJW:* *Life and Letters of John Winthrop*. 2 Volumes. Edited by Robert C. Winthrop. Boston: Ticknor and Fields, 1864.
- MBCR:* *Records of the Governor and Company of the Massachusetts Bay in New England*. 5 Volumes. Edited by Nathaniel B. Shurtleff. Boston: William White, 1853.
- MNF:* *Monumenta Novae Franciae*. 9 Volumes. Edited by Lucien Campeau. Rome: Monumenta Hist. Soc. Iesu, 1967-present.
- NDCE:* *Nouveaux Documents sur Champlain et Son Époque*. Edited by Robert Le Blant and René Baudry. Ottawa: Publications des Archives Publiques du Canada, 1967.
- NNDS:* *New Netherlands Documents Series*. 20 Volumes. Translated and Edited by Charles T. Gehring. Syracuse: Syracuse University Press, 1977-2012.
- NYHM:* *New York Historical Manuscripts. Land Papers*. Translated and Edited by Charles T. Gehring. Baltimore: Genealogical Publishing Co., 1980.
- OC:* *Oeuvres de Champlain*. Written by Samuel de Champlain. 5 Volumes. Second edition edited by C.-H Laverdière. Québec: Imprimé au Séminaire, 1870.
- Precis:* *Precis of the Archives of the Cape of Good Hope*. 17 Volumes. Edited and Translated by H. C. V. Liebbrandt. Cape Town: W. A. Richards and Sons, 1896-1906.
- Record:* *The Record, or a Series of Official Papers relative to the Condition and Treatment of the Native Tribes of South Africa, in three sections*. 3 Volumes (1, 3 and 5; others never published). Edited by Donald Moodie. Cape Town and Amsterdam: A. A. Balkema, 1960 (1838-1841).
- RVCL:* *Records of the Virginia Company of London*. 4 Volumes. Edited by Susan Myra Kingsbury. Washington: Government Printer, 1906-35.
- SAL Irish:* *Statutes at Large, Passed in the Parliaments Held in Ireland*. 21 Volumes. Dublin: George Grierson, 1786-1804.
- SNY:* *De Stichting van New York in Juli 1625: Reconstructies en Nieuwe*

- Gegevens Ontleend aan de Van Rappard Documenten*. Edited by F. C. Wieder. 's-Gravenhage: Martinus Nijhoff, 1925.
- VRBM:* *Van Rensselaer Bowier Manuscripts*. Translated by Arnold J. F. van Laer. Albany: State University of New York, 1908.
- VRJ:* *Journal of Jan van Riebeeck*. 3 Volumes. Edited by H. B. Thom. Cape Town: A. A. Balkema, 1952-1958.
- WJ:* *Winthrop's Journal*. 2 Volumes. Edited by John Kendall Hosmer. New York: James Scribner's Sons, 1908.
- WP:* *Winthrop Papers*. Several Volumes. Boston: Massachusetts Historical Society, 1943-7.
- WSC:* *The Works of Samuel de Champlain*. 7 Volumes. Edited by Henry Pervical Biggar. Translated by W. D. LeSueur. Toronto: Champlain Society, 1922-36.
- Asher, G. M. ed. *Henry Hudson the Navigator: The Original Documents in which His Career is Recorded*. London: Hakluyt Society, 1860.
- Balbus, Johannes Franciscus. *Tractatus de Praescriptionibus*. Cologne: Gymnicum, 1590.
- Barbour, Philip L. ed. *The Jamestown Voyages Under the First Charter, 1606-1609*. 2 vols. Cambridge: Cambridge University Press, 1969.
- Beames, John ed. *A Transcription of Glanville*. London: A. J. Valpy, 1812.
- Beaumanoir, Phillipe de Remi. *Coutumes de Beauvaisis*. 2 vols. Paris: Picard, 1900 (c. 1279-84).
- Bracton, *De Legibus Et Consuetudinibus Angliae* (c. 1230-1260). *Bracton on the Laws and Customs of England*, ed. Thorne.
- Bradford, William. *Of Plimoth Plantation* (1651). Edited by William T. Davis (bearing the title *Bradford's History of Plymouth Plantation, 1606-1646*). New York: Charles Scribner's Sons, 1908.
- Brisson, Barnabé. *Coustumes de la Ville de Calais et Pays Reconquis*. Calais: Chez Madame L'Enfant, 1583.
- Cambdeno, Guilielmo [William Camden]. *Annales Rerum Anglicarum, et Hibernicarum Regnante Elizabetha*. Francofurti: Ioannis Bringeri, 1616.
- Cell, Gillian T. ed. *Newfoundland Discovered: English Attempts at Colonisation, 1610-1630*. London: Hakluyt Society, 1982.

- Cicero, *De Officiis*. Translated by Walter Miller. Cambridge, MA: Harvard University Press, 1913.
- Cicero, *On Duties*. Edited by M. T. Griffin and E. M. Atkins. Cambridge: Cambridge University Press, 1991.
- Council of Virginia. *True Declaration of the Estate of the Colonie in Virginia*. London: William Barret, 1610.
- Cleirac, Estienne. *Us et Coustumes de la Mer*. Bordeaux: Guillaume Millanges, 1647.
- Crashaw, William. *A Sermon Preached in London before the Right Honorable the Lord Lavvarre, Lord Gouvernour and Captaine Generall of Virginea, and Others of his Maiesties Counsell for that Kingdome*. London: William Welby, 1610.
- Crisp, Roger ed. *Aristotle: Nicomachean Ethics*. Cambridge: Cambridge University Press, 1990.
- Davenport, Frances Gardiner ed. *European Treaties Bearing on the History of the United States and its Dependencies to 1648*. 4 vols. Washington, DC: Carnegie Institution, 1917.
- de Freitas, Seraphino. *De Iusto Imperio Lusitanorum Asiatico*. Valladolid: Hieronymi Morillo, 1625.
- de Gómara, Francisco López. *La Conquista de Mexico*. Saragossa: Miguel Capila, 1553.
- de Las Casas, Bartolomé. *In Defense of the Indians*. Translated by Stafford Poole. DeKalb: Northern Illinois University Press, 1992 (1550).
- del Castillo, Bernal Díaz. *Historia Verdadera de la Conquista de la Nueva España*. Madrid: Espasa-Calpe, 1933 (1568).
- de Rosergio, Bernardi. *Ambaxiator Brevilogus (1436). De Legatis et Legationibus Tractatus Varii*, edited by Vladimir E. Hrabar. Dorpat: Typographeo Mattieseniano, 1905.
- de Vries, David Petersoon. *Voyages from Holland to America, A. D. 1632-1644*. Translated by Henry C. Murphy. New York: Billin, 1853.
- Friedberg, Emil ed. *Corpus Iuris Canonici*. 2 vols. Graz: Akademische Druck-u. Verlagsanstalt, 1959.
- Gage, Thomas. *A New Survey of the West-Indies*. London: A. Clark, 1677.
- Gentili, Alberico. *Du Jure Belli*. Translated by John C. Rolfe. Oxford: Clarendon Press,

1933 (1589).

- Glanvill, *Tractatus de Legibus et Consuetudinibus Regni Angliae* (1188). *A Transcription of Glanville*, ed. Beames.
- Godolphin, John. *A View of the Admiral Jurisdiction*. London: W. Godbid, 1661.
- Gratian, *Liber Extravagantium Decretalium*, found in *Corpus Iuris Canonici*, ed. Friedberg.
- Gray, Robert. *A Good Speed to Virginia*. Felix Kyngston: London, 1609.
- Grotius, Hugo. *Commentary on the Law of Prize and Booty*. Edited by Martine Julia van Ittersum. Indianapolis: Liberty Fund, 2006 (1604-8).
- Grotius, Hugo. *The Rights of War and Peace*. 3 vols. Edited by Richard Tuck. Indianapolis: Liberty Fund, 2005 (1625).
- Guenoys [?], Pierre. *Corps du Droict François Contenant un Recueil de Tous les Édicts, Ordonnances, Stil et Practique Observée tant aux Cours Souveraines qu'ès Justices Inférieurs & Subalternes du Royaume de France*. Paris: Pour Jean de Laon, 1600.
- Hamor, Ralph. *A True Discourse of the Present State of Virginia, and the Success of the Affaires There till the 18 of Iune, 1614*. London: John Beale, 1615.
- Hobbes, Thomas. *Leviathan, or the Matter, Forme and Power of A Commonwealth Ecclesiasticall and Civil*. London: Andrew Crooke, 1651.
- Johnson, Robert. *Nova Britannia Offering Most Excellent Fruites by Planting in Virginia: Exciting All Such as be Well Affected to Further the Same*. London: Samuel Macham, 1609.
- Justinian, *Codex, Digesta, and Institutiones*, found in *Corpus Iuris Civilis*, ed. Mommsen and Krueger.
- Klotz, Reinhold ed. *M. Tullii Ciceronis Scripta quae Manserunt Omnia*. Leipzig: Bibliotheca Teubneriana, 1853.
- La Popelliniere, Lancelot-Voisin. *L'Amiral de France et par Occasion, de Celuy des Autres Nations, tant Vieiles que Nouvelles*. Paris: Chez Thomas Perier, 1584.
- Lefebvre, Abbé Leon. *Histoire Générale et Particulière de la ville de Calais, et du Calaisis, ou Pays Reconquis*. Paris: Chez Guillaume François Debure, 1766.
- Lescarbot, Marc. *History of New France*. 3 vols. Translated by W.L. Grant. Toronto: Champlain Society, 1907 (1618).
- Leyva, Didaci Couarrvvas a. *Opera Omnia*. Antverpiae: Apud Ioannem Keerbergiv, 1610.

- Machiavelli, Niccolò. *The Prince*. Translated by Luigi Ricci. Oxford: Oxford University Press, 1921 (1532).
- Malynes, Gerard. *Consuetudo, vel, Lex Mercatoria: Or, The Ancient Law-Merchant*. 3rd edition. London: T. Basset, 1686.
- Mason, John. *A Brief History of the Pequot War: Especially of the Memorable Taking of Their Fort at Mistick in Connecticut in 1637*. Boston: S. Kneeland and T. Green, 1736 (1677).
- Mentzel, O. F. *A Geographical and Topographical Description of the Cape or Good Hope*. Translated by H. J. Mandelbrote. Cape Town: Van Riebeeck Society, 1921 (1785).
- Mommsen, Theodor, and Paul Krueger ed. *Corpus Iuris Civilis*. 3 vols. Dublin: Apud Weidmannos, 1968.
- More, Thomas. *Utopia*. London: Cassell, 1901 (1516).
- Oppenheim, L. ed. *The Collected Papers of John Westlake on Public International Law*. Cambridge: Cambridge University Press, 1914.
- Pagden, Anthony, and Jeremy Lawrance ed. *Francisco de Vitoria: Political Writings*. Cambridge: Cambridge University Press, 1991.
- Parisiensis, Matthæi [Matthew Paris]. *Chronica Majora*. Edited by Henry Richards Luard. London: Longman & Co., 1877 (1259).
- Percy, George. *A Trewe Relacyon of the p[ro]cedings and ocurrentes of Momente w[hi]ch have hapned in Virginia from the Tyme S[i]r Thomas Gates was Shippwrackte upon the Bermudes An[n]o 1609 untill my dep[ar]ture owtt of the Cowntrey w[hi]ch was in An[n]o D[omi]ni 1612* (1625), faithfully reproduced with valuable commentary by Mark Nicholls, 'George Percy's "Trewe Relacyon": A Primary Source for the Jamestown Settlement', *Virginia Magazine of History and Biography* 113, 3 (2005), 212-275.
- Rolf, John. *Relation of the State of Virginia* (1616). *Virginia Historical Register and Literary Advertiser* 1, 3 (1848).
- Rothwell, Harry ed. *English Historical Documents, Volume III: c. 1189-1327*. Abingdon: Routledge, 1996.
- Rothwell, Harry ed. *The Chronicle of Walter of Guisborough*. London: Royal Historical Society, 1957 (1312).
- Rousseau, Jean-Jacques. *Du Contrat Social, ou Principes du Droit Politique*. Amsterdam: Marc Michel, 1762.

- Roy, Pierre Georges ed. *Ordonnances, Commissions, etc., etc., des Gouverneurs et Intendants de la Nouvelle-France, 1639-1706*. 2 vols. Beauceville: L'éclaireur, 1924.
- Saint German, Christopher. *Doctor and Student*. Edited by William Muchall. Cincinnati: Robert Clark and Co., 1886 (1518).
- Scott, James Brown ed. *The Hague Peace Conferences of 1899 and 1907*. Baltimore: Johns Hopkins Press, 1909.
- Selden, John. *Of the Dominion and Ownership of the Seas*. Translated by Marchamont Nedham. London: William Du-Gard, 1652 (1635).
- Shorey, Paul ed. *Plato in Twelve Volumes*. Cambridge, MA: Harvard University Press.
- Smith, John. *The Generall Historie of Virginia, New England & The Summer Isles* (1624), in *The Travels of Captaine John Smith*, 2 vols. Glasgow: James MacLehose and Sons, 1907.
- Strachey, William. *The Historie of Travaile into Virginia Britannia*. London: The Hakluyt Society, 1849 (1612).
- T. C. *A Short Discourse of the New-found-land Contaynig Diverse Reasons and Inducements, for the Planting of That Countrey*. Dublin, 1623.
- Taylor, E. G. R. ed. *The Original Writings and Correspondence of the Two Richard Hakluyts*. 2 vols. London: Hakluyt Society, 1935.
- Thomas, A. H. ed. *Calendar of Early Mayor's Court Rolls*. Cambridge: Cambridge University Press, 1924.
- Thorne, Samuel E. ed. *Bracton on the Laws and Customs of England*. 4 vols. Cambridge, Mass: Harvard University Press, 1968.
- Underhill, John. *Newes from America; Or, a New and Experimentall Discoverie of New England*. London: Peter Cole, 1638.
- Valentyn, Francois. *Description of the Cape of Good Hope with the Matters Concerning It*. 2 vols. Cape Town: Van Riebeeck Society, 1971-3 (1762).
- van Dam, Pieter. *Beschryvinge van de Oostindische Compagnie*. 7 Volumes. s'Gravenhage: Martinus Nijhoff, 1927-1954.
- Vasqvii Menchacensis, D. Fernandi [Vázquez Menchaca]. *Controversiarvm Illvstrivm*. Venice: Franciscum Rampazetum, 1564.

Vladimiri, Paulus. *Tractatus de Potestate Papae et Imperatoris Respectu Infidelium* (1415).  
*Paulus Vladimiri*, ed. Belch, 2: 792-844.

Whitbourne, Richard. *A Discoverse and Discovery of New-Fovnd-Land, With Many Reasons to Proouve How Worthy and Beneficiall a Plantation May There be Made, After Afar Better Manner Than Now It Is [...]*. London: Felix Kingston, 1622.

Young, Alexander ed. *Chronicles of the Pilgrim Fathers of the Colony of Plymouth, from 1602-1625*. Boston: Charles C. Little and James Brown, 1844.

#### **Case law:**

*Governor and Company of Connecticut and Moheagan Indians, by Their Guardians: Certified Copy of Book of Proceedings before Commissioners of Review, 1743*. London: W. and J. Richardson, 1769.

*Johnson & Graham's Lessee v. McIntosh*, 21 US 8 Wheat 1823, 580.

*Special Reference in the Matter of Southern Rhodesia between the British South Africa Company, the Crown, the Elected Members of the Legislative Council of Southern Rhodesia, and the Natives Re Southern Rhodesia*. 1919, AC 212.

*Swayne's Case*. 1609, 8 Co. Rep., 64.

#### **Published Secondary Material:**

Alexandrowicz, C. H. *An Introduction to the History of the Law of Nations in the East Indies*. Oxford: Clarendon Press, 1967.

*The European-African Confrontation: A Study in Treaty-Making*. Leiden: Sijthoff, 1973.

Allmand, Christopher. *The Hundred Years War: England and France at War c.1300–c.1450*. Cambridge: Cambridge University Press, 1988.

Ames, Glenn Joseph, and Ronald S. Love ed. *Distant Lands and Diverse Cultures: The French Experience in Asia, 1600-1700*. Westport: Praeger, 2003.

Anderson, M. S. *The Rise of Modern Diplomacy, 1450-1919*. London: Longman, 1993.

Andrén, Anders. 'State and Towns in the Middle Ages: The Scandinavian Experience'. *Theory and Society* 18 (1989), 585-609.

- Andrews, Charles M. *The Colonial Period of American History*. 4 vols. New Haven: Yale University Press, 1934-8.
- Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. Cambridge: Cambridge University Press, 2004.
- Anton, A. E. *Private International Law*. Third edition of Paul Beaumont and Peter McEleavy. Edinburgh: W Green & Son, 2011.
- Armitage, David and Michael J. Braddick, ed. *The British Atlantic World, 1500-1800*. Basingstoke: Palgrave Macmillan, 2002.
- Armstrong, Lawrin et al. ed. *Money, Markets and Trade in Late Medieval Europe*. Leiden and Boston: Brill, 2007.
- Arnold, John H. *The Oxford Handbook of Medieval Christianity*. Oxford: Oxford University Press, 2014.
- Ashton, Robert. *The Crown and the Money Market, 1603-1640*. Oxford: Clarendon Press, 1960;
- The City and the Court, 1603-1643*. Cambridge: Cambridge University Press, 1979.
- Attwood, Bain. 'The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society'. *History Compass* 2 (2004), 1-30.
- 'Law, History and Power: The British Treatment of Aboriginal Rights in Land in New South Wales'. *Journal of Imperial and Commonwealth History* 42, 1 (2014), 171-92.
- Axtell, James. *The Invasion Within: The Contest of Cultures in Colonial North America*. Oxford: Oxford University Press, 1985.
- Baker, John H. 'Deeds Speak Louder than Words: Covenants and the Law of Proof, 1290-1321'. *Laws, Lawyers and Texts*, ed. Jenks et al., 177-99.
- An Introduction to English Legal History*. 4th ed. London: Butterworths, 2002.
- Bakewell, Peter. 'Mining in Colonial Spanish America'. *Cambridge History of Latin America, II*, ed. Bethell, 105-51.
- Baldwin, John W. 'The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries'. *Transactions of the American Philosophical Society* 49, 4 (1959), 35-58.
- Ball, J. N. *Merchants and Merchandise: The Expansion of Trade in Europe, 1500-1630*. London: Croom Helm, 1977.

- Banner, Stuart. *How the Indians Lost Their Land: Law and Power on the Frontier*. Cambridge, MA: Harvard University Press, 2005.
- Barmann, Johannes. 'Pacta sunt servanda: Considérations sur l'Histoire du Contrat Consensuel'. *Revue Internationale de Droit Comparé* 13 (1961), 18-53.
- Barr, Juliana and Edward Countryman ed. *Contested Spaces of Early America*. Philadelphia: University of Pennsylvania Press, 2014.
- Basile, Mary Elizabeth, et al. ed. *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife*. Cambridge: Ames Foundation, 1998.
- Beaujon, Anthony. *The History of the Dutch Sea Fisheries: Their Progress, Decline and Revival*. London: William Clowes and Sons, 1884.
- Beaulieu, Alain. "“An Equitable Right to be Compensated”: The Dispossession of the Aboriginal Peoples of Quebec and the Emergence of a New Legal Rationale (1760–1860)". *Canadian Historical Review* 94, 1 (2013), 1-27.
- Beeler, John. *Warfare in Medieval Europe, 700-1200*. Ithaca: Cornell University Press, 1971.
- Beer, George Louis. *The Origins of the Old Colonial System, 1578-1660*. New York: Macmillan, 1908.
- Belch, Stanislaus F. ed. *Paulus Vladimiri and His Doctrine Concerning International Law and Politics*. 2 Vols. The Hague: Mouton & Co., 1965.
- Belich, James, John Darwin, Margret Frenz, and Chris Wickham, ed. *The Prospect of Global History*. Oxford: Oxford University Press, 2016.
- Belich, James. *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld*. Oxford: Oxford University Press, 2010.
- Bellomo, Manlio. *The Common Legal Past of Europe, 1000-1800*. Translated by Lydia G. Cochrane. Washington, DC: Catholic University of America Press, 1995 (1989).
- Belmessous, Saliha ed. *Native Claims: Indigenous Law against Empire, 1500–1920*. Oxford: Oxford University Press, 2012.
- ed. *Empire by Treaty: Negotiating European Expansion, 1600-1900*. Oxford: Oxford University Press, 2015.
- Bély, Lucien ed. *L'Invention de la Diplomatie*. Paris: Presses Universitaires de France, 1998.

- Bély, Lucien. *Les Relations Internationales en Europe, XVIIe-XVIIIe siècles*, 4th ed. Paris: Presses Universitaires de France, 2007.
- Benedict, Philip. *Rouen during the Wars of Religion*. Cambridge: Cambridge University Press, 1981.
- Benedictow, Ole J. *The Black Death, 1346-1353: The Complete History*. Woodbridge: Boydell Press, 2004.
- Benson, Peter ed. *The Theory of Contract Law*. Cambridge: Cambridge University Press, 2001.
- Benton, Lauren and Benjamin Straumann. 'Acquiring Empire by Law'. *Law and History Review* 28, 1 (2010), 1-38.
- Benton, Lauren and Richard J. Ross, ed. *Legal Pluralism and Empires, 1500-1850*. New York: New York University Press, 2013.
- Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge: Cambridge University Press, 2002.
- A Search for Sovereignty: Law and Geography in European Empires*. Cambridge: Cambridge University Press, 2010.
- 'Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction'. *International Journal of Maritime History* 23, 1 (2011), 1-15.
- 'Possessing Empire: Iberian Claims and Interpolity Law'. *Native Claims*, ed. Belmessous, 19-40.
- Berggrev, Lars, et al. ed. *Cogs, Cargoes and Commerce: Maritime Bulk Trade in Northern Europe, 1150-1400*. Toronto: Pontifical Institute of Mediaeval Studies, 2002.
- Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition*. 2 vols. Cambridge, MA: Harvard University Press, 1983-5.
- Bethell, Leslie ed. *Cambridge History of Latin America, Volume II: Colonial Latin America*. Cambridge: Cambridge University Press, 1984.
- Bethencourt, Francisco and Diogo Ramada Curto, ed. *Portuguese Oceanic Expansion, 1400-1800*. Cambridge: Cambridge University Press, 2007.
- Biggar, Henry Percival. *The Early Trading Companies of New France: A Contribution to*

- the History of Commerce and Discovery in North America*. Toronto: University of Toronto Library, 1901.
- Bilder, Mary Sarah. *The Transatlantic Constitution: Colonial Legal Culture and the Empire*. Cambridge, MA: Harvard University Press, 2008.
- Bill, Jan and Birthe Clausen, ed. *Maritime Topography and the Medieval Town*. Copenhagen: University of Copenhagen, 1999.
- Bill, Jan. 'The Cargo Vessels'. *Cogs, Cargoes and Commerce*, ed. Berggrev et al., 92-112.
- Black, Antony. *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*. Ithaca: Cornell University Press, 1984.
- Black, Jeremy. *A History of Diplomacy*. London: Reaktion Books, 2010.
- Blackstone, William. *Commentaries on the Laws of England*. Oxford: Clarendon Press, 1765-1769.
- Bloch, Marc. *Feudal Society*. 2nd ed. 2 vols. London: Routledge, 2014 (1965).
- Borschberg, Peter. 'The Seizure of the *Sta. Catarina* Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance'. *Journal of Southeast Asian Studies* 33, 1 (2002), 31-62.
- Hugo Grotius, the Portuguese, and Free Trade in the East Indies*. Singapore: NUS Press, 2011.
- Bosher, John. 'The Political and Religious Origins of La Rochelle's Primacy in Trade with New France, 1627-1685', *French History* 7 (1993), 286-312.
- Bothwell, James, P. J. P. Goldberg and W. M. Omrud, ed. *The Problem of Labour in Fourteenth-Century England*. York: York Medieval Press, 2000.
- Boucher, Philip P. 'Revisioning the "French Atlantic": Or, How to think about the French Presence in the Atlantic World, 1550-1625'. *The Atlantic World and Virginia*, ed. Mancall, 274-306.
- Braddick, Michael J. *State Formation in Early Modern England, c. 1550-1700*. Cambridge: Cambridge University Press, 2000.
- Brading, D. A. *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867*. Cambridge: Cambridge University Press, 1991.
- Bradshaw, Brendan. *The Dissolution of the Religious Orders in Ireland Under Henry VIII*. Cambridge: Cambridge University Press, 1974.

- Brady, Ciaran and Jane Ohlmeyer ed. *British Interventions in Early Modern Ireland*. Cambridge: Cambridge University Press, 2005.
- Brady, Ciaran. 'The Attainder of Shane O'Neill'. *British Interventions in Early Modern Ireland*, ed. Brady and Ohlmeyer, 28-48.
- Brandão, José António. "*Your Fyre Shall Burn No More*": *Iroquois Policy Toward New France and Its Native Allies to 1701*. Lincoln: University of Nebraska Press, 1997.
- Braudel, Fernand. *The Mediterranean and the Mediterranean World in the Age of Philip II*. Translated by Siân Reynolds, in 2 vols. London: Collins, 1972-3.
- Bredenkamp, H. C. 'Die Grondtransaksies van 1672 tussen die Hollanders en die Skiereilandse Khoikhoi'. *Kronos* 2 (1980), 1-10.
- Bremer, Francis J. *John Winthrop: America's Forgotten Founding Father*. Oxford: Oxford University Press, 2003.
- Brenner, Robert. *Merchants and Revolution: Commercial Change, Political Conflict, and London's Overseas Traders, 1550-1653*. London: Verso, 2003.
- Brett, Annabel. *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. Princeton: Princeton University Press, 2011.
- Brigham, William ed. *The Compact with Charter and Laws of the Colony of New Plymouth*. Boston: Dutton and Wentworth, 1836.
- Britnell, R. H. *The Commercialisation of English Society, 1000-1500*. Cambridge: Cambridge University Press, 1993.
- Brook, Timothy. *Vermeer's Hat: The Seventeenth Century and the Dawn of the Global World*. New York: Bloomsbury Press, 2008.
- Brooke, Christopher. *Churches and Churchmen in Medieval Europe*. London: Hambledon Press, 1999.
- Brundage, James A. *Medieval Canon Law*. Abingdon and New York: Routledge, 2013.
- Buck, A. R., John McLaren, and N. E. Wright, ed. *Land and Freedom: Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001.
- Buckland, W. W. *A Text-Book of Roman Law: From Augustus to Justinian*. 3rd ed. Revised by Peter Stein. Cambridge: Cambridge University Press, 2007.
- Bull, Hedley et al. ed. *Hugo Grotius and International Relations*. Oxford: Clarendon

- Press, 1992.
- Burdick, William L. *The Principles of Roman Law and their Relation to Modern Law*. Rochester NY: Lawyers Co-operative Publication Company, 1938.
- Burman, Jose. *The Saldanha Bay Story*. Cape Town: Human & Rousseau, 1974.
- Burns, Patricia. *Fatal Success: A History of the New Zealand Company*. Auckland: Heinemann Reed, 1989.
- Butler, W. F. T. 'The Policy of Surrender and Regrant'. *Journal of the Royal Society and Archaeological Society of Ireland* 3 (1913), 47-65, 99-128.
- Byrne, Eugene H. *Genoese Shipping in the Twelfth and Thirteenth Centuries*. Cambridge, MA: Mediaeval Academy of America, 1930.
- Calderón, María Teresa and Clément Thibaud. *La Majestad de los Pueblos en la Nueva Granada y Venezuela (1780-1832)*. Bogotá: Universidad Externado de Colombia, 2010.
- Canning, Joseph P. 'The Corporation in the Political Thought of the Italian Jurists in the Thirteenth and Fourteenth Centuries'. *History of Political Thought* 1, 1 (1980), 9-32.
- A History of Medieval Political Thought: 300-1450*. London: Routledge, 1996.
- Canny, Nicholas. 'The Ideology of English Colonisation: From Ireland to America'. *William and Mary Quarterly* 30, 4 (1973), 575-98.
- The Elizabethan Conquest of Ireland: A Pattern Established, 1565-1576*. New York: Barnes and Noble, 1976.
- Making Ireland British, 1580-1650*. Oxford: Oxford University Press, 2001.
- 'The Attempted Anglicisation of Ireland in the Seventeenth Century: An Exemplar of "British History"'. *Political World of Thomas Wentworth*, ed. Merritt, 157-86.
- Caplan, Jane and John Torpey, ed. *Documenting Individual Identity: The Development of State Practices in the Modern World*. Princeton: Princeton University Press, 2001.
- Cardahi, Choucri. 'Conflict of Law', *Law in the Middle East*, ed. Khadduri and Liebseny, 1: 334-49.
- Carr, Cecil T. ed. *Select Charters of Trading Companies, A.D. 1530-1707*. London: B. Quaritch, 1913.
- Carus-Wilson, E. M. *Medieval Merchant Venturers: Collected Studies*. London: Methuen

- & Co., 1954.
- Cavanagh, Edward. 'A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company'. *Canadian Journal of Law and Society* 26, 1 (2011), 25-50.
- Settler Colonialism and Land Rights in South Africa*. Basingstoke: Palgrave Macmillan, 2013.
- 'Possession and Dispossession in Corporate New France: Debunking a "Juridical History" and Revisiting *Terra Nullius*'. *Law and History Review* 32, 1 (2014), 97-125.
- Cave, Alfred A. 'Who Killed John Stone? A Note on the Origins of the Pequot War'. *William and Mary Quarterly* 49, 3 (1992), 509-521.
- Lethal Encounters: Englishmen and Indians in Colonial Virginia*. Praeger: Santa Barbara, 2011.
- Cawston, George and A. H. Keane. *The Early Chartered Companies (A.D. 1296-1858)*. London: Edward Arnold, 1896.
- Ceard, Jean and Jean-Claude Margolin, ed. *Voyager à la Renaissance*. Paris: Maisonneuve et Larose, 1987.
- Cell, Gillian T. *English Enterprise in Newfoundland, 1577-1660*. Toronto: UTP Press, 1969.
- Cesar, Floriano Jonas. 'Popular Autonomy and Imperial Power in Bartolus of Saxoferrato: An Intrinsic Connection'. *Journal of the History of Ideas* 65, 3 (2004), 369-81.
- Chancey, Karen. 'The Amboyna Massacre in English Politics, 1624-32'. *Albion* 30, 4 (1998), 583-98.
- Chaplais, Pierre ed. *English Diplomatic Practice, Part I*. 2 vols. London: PRO, 1982.
- Charlevoix, Pierre-François Xavier de. *History and General Description of New France*. 6 vols. New York: John Gilmary Shea, 1868.
- Chartier, Roger. *The Order of Books: Readers, Authors, and Libraries in Europe Between the Fourteenth and Eighteenth Centuries*. Cambridge: Polity Press, 1994.
- Chaudhuri, K. N. *Trade and Civilisation in the Indian Ocean: An Economic History from the Rise of Islam to 1750*. Cambridge: Cambridge University Press, 1985.
- Chavarot, Marie-Claire. 'La Pratique des Lettres de Marque d'après les Arrêts du

- Parlement (XIIIe-début XVe siècle)'. *Bibliothèque de l'École des Chartes* 149, 1 (1991), 51-89.
- Chevedden, Paul E., Donald J. Kagay and Paul G. Padilla, ed. *Iberia and the Mediterranean World of the Middle Ages*. 2 vols. Leiden: Brill, 1995-6.
- Clark, Charles E. *The Eastern Frontier: The Settlement of Northern New England, 1610-1763*. Hanover and London: University Press of New England, 1970.
- Clark, G. Norman. 'Grotius's East India Mission to England'. *Transactions of the Grotius Society* 20 (1934), 45-84.
- Classen, Peter ed. *Recht und Schrift im Mittelalter*. Sigmaringen: Thorbecke, 1977.
- Cogswell, Thomas, Richard Cust, and Peter Lake, ed. *Politics, Religion, and Popularity in Early Stuart Britain*. Cambridge: Cambridge University Press, 2002.
- Cogswell, Thomas. *The Blessed Revolution: English Politics and the Coming of War, 1621-1624*. Cambridge: Cambridge University Press, 2005.
- Cohn, Samuel. 'After the Black Death: Labour Legislation and Attitudes Towards Labour in Late-Medieval Western Europe'. *Economic History Review* 60, 3 (2007), 457-485.
- Collins, James B. *Classes, Estates, and Order in Early-Modern Brittany*. Cambridge: Cambridge University Press, 1994.
- Colish, Marcia L. 1998. *Medieval Foundations of the Western Political Tradition, 400-1400*. New Haven: Yale University Press, 1998.
- Constable, Olivia Remie. *Trade and Traders in Muslim Spain: The Commercial Realignment of the Iberian Peninsula, 900-1500*. Cambridge: Cambridge University Press, 1996.
- Cook, Noble David. *Born to Die: Disease and New World Conquest, 1492-1650*. Cambridge: Cambridge University Press, 1998.
- Cooke, C. A. *Corporation, Trust, and Company: An Essay in Legal History*. Cambridge, MA: Harvard University Press, 1951.
- Cox, Rory. 'A Law of War? English Protection and Destruction of Ecclesiastical Property during the Fourteenth Century'. *English Historical Review* 128, 535 (2013), 1381-1417.
- 'Historical Just War Theory up to Thomas Aquinas'. *Oxford Handbook of the Ethics of War*, forthcoming 2016.

- Cramsie, John. 'Commercial Projects and Fiscal Policy of James VI and I'. *Historical Journal* 43, 2 (2000), 345-64.
- Craven, Wesley Frank. *Dissolution of the Virginia Company: The Failure of a Colonial Experiment*. Oxford: Oxford University Press, 1932.
- The Virginia Company of London, 1606-1624*. Charlottesville: University Press of Virginia, 1957.
- 'Indian Policy in Early Virginia'. *William and Mary Quarterly* 1, 1 (1944), 65-82.
- Croix, Alain. *L'âge d'or de La Bretagne, 1532-1675*. Éditions Ouest-France: Rennes, 1993.
- Cromartie, Alan. 'The Idea of Common Law as Custom'. *The Nature of Customary Law*, ed. Perreau-Saussine and Murphy, 203-27.
- Cumming, Charles S. 'The English High Court of Admiralty'. *Tulane Maritime Law Journal* 17 (1992-3), 209-56.
- Cunningham, John. *Conquest and Land in Ireland: The Transplantation to Connacht, 1649-1680*. Woodbridge: Boydell Press, 2011.
- Curl, James Stephen. 'Reluctant Colonisers: The City of London and the Plantation of Coleraine'. *History Ireland* 6, 17 (2009).
- Curtis, Daniel. 'What Kind of Horseman? Plague and Urbanization in the Low Countries, 17th Century', Unpublished Paper (2015).
- Czaplinski, Wladyslaw. 'Pawel Wlodkowic (Paulus Wladimiri) and the Polish International Legal Doctrine of the 15th Century'. *Baltic Year Book of International Law* 7, (2007), 65-82.
- Dahlgren, Stellan. 'New Sweden: The State, the Company and Johan Risingh'. *JRJ*, 1-43.
- Davies, Kenneth Gordon. *The North Atlantic World in the Seventeenth Century*. Minneapolis: University of Minnesota Press, 1974.
- de Alencastro, Luiz Felipe. 'The Economic Network of Portugal's Atlantic World'. Translated by Marguerite Itamar Harrison. *Portuguese Oceanic Expansion*, ed. Bethencourt and Curto, 109-37.
- De la Morandiere, Charles. *Histoire de la Peche Française de la Morue dans l'Amerique Septentrionale*. 3 vols. Paris, Maisonneuve et Larose, 1962-6.
- De Lavie, Jean-Charles. *Des Corps Politiques et de Leurs Gouvernements*. 2 vols. Chez Pierre Duplain: Lyon, 1764.

- De la Morinière, Noël. *Histoire Générale Des Pêches Anciennes et Modernes*. 2 vols. Paris: L'imprimerie Royale, 1815.
- De Lubac, Henri Cardinal. *Corpus Mysticum: The Eucharist and the Church in the Middle Ages*. Translated by Gemma Simmonds et al. Notre Dame, IN: University of Notre Dame Press, 2010 (1949).
- De Puchesse, Baguenault. 'Un Ami et un Ambassadeur de Henri IV, Paul Choart de Buzenval (1551-1607)'. *Annuaire-Bulletin de la Société de l'Histoire de France* 46, 1 (1909), 109-118.
- de Roover, R. 'The Organisation of Trade'. *The Cambridge History of Europe, III*, ed. Postan, et al., 46-59.
- De Saint-Père, Rameau. *Une Colonie Féodale en Amérique L'Acadie (1604–1881)*. 2 vols. Montréal: Granger Frères, 1889.
- De Saldanha, António Vasconcelos. *Iustum Imperium: Dos Tratados Como Fundamento do Império dos Portugueses no Oriente: Estudo de História do Direito Internacional e do Direito Português*. Lisboa: Fundação Oriente, 1997.
- de Vries, Jan. *European Urbanization: 1500-1800*. Cambridge, MA: Harvard University Press, 1984.
- Deacon, H. J., and Janette Deacon. *Human Beginnings in South Africa: Uncovering the Secrets of the Stone Age*. Cape Town: David Phillip, 1999.
- Deacon, Harriet ed. *The Island: A History of Robben Island, 1488-1990*. Cape Town: David Phillip Publishers, 1996.
- Deagan, Kathleen. 'The Archaeology of the Spanish Contact Period in the Caribbean'. *Journal of World Prehistory* 2, 2 (1988), 187-233.
- Dean, Trevor and Chris Wickham, ed. *City and Countryside in Late Medieval and Early Renaissance Italy: Studies Presented to Phillip Jones*. London: Hambledon Press, 1990.
- Dechêne, Louise. *Habitants and Merchants in Seventeenth-Century Montreal*. Montreal and Kingston: McGill-Queen's University Press, 1992 (1974).
- Dekker, Rudolf et al. ed. *Aernout van Overbeke, Anecdota sive Historiae Jocosae: Een Zeventiende-eeuwse Verzameling Moppen en Anecdotes*. Amsterdam: P. J. Meertens Instituut, 1991.
- Dekok, Wim. *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)*. Leiden: Brill, 2013.

- Delage, Denys. *Bitter Feast: Amerindians and Europeans in Northeastern North America, 1600-64*. Translated by Jane Brierly. Vancouver: UBC Press, 1993.
- Delmas, Adrien. 'A Plan by the French King Henri IV to Conquer the Cape of Good Hope at the Beginning of the 17th Century'. *Quarterly Bulletin of the National Library of South Africa* 62, 3 (2008), pp. 115-27.
- Dent, Chris. "'Generally Inconvenient": The 1624 *Statute of Monopolies* as Political Compromise'. *University of Melbourne Law Review* 33 (2009), 415-53.
- Dewar, Helen. "'Y establir nostre auctorité": Assertions of Imperial Sovereignty through Proprietorships and Chartered Companies in New France, 1598-1663'. PhD dissertation, University of Toronto, 2012.
- 'Litigating Empire: The Role of French Courts in Establishing Colonial Sovereignities'. *Legal Pluralism and Empires*, ed. Benton and Ross, 49-79.
- Días, Manuel Nunes. *Fomento e Mercantilismo: A Companhia Geral do Grão Pará e Maranhão (1755-1778)*. Belém: Universidade Federal do Pará, 1970.
- Dicey, A. V. *A Digest of the Law of England with Reference to the Conflict of Laws, with notes of American Cases by John Bassett Moore*. London: Stevens and Sons, 1896.
- Dickason, Olive P. *Canada's First Nations*. Norman: University of Oklahoma Press, 1992.
- Dijkman, Jessica. *Shaping Medieval Markets: The Organisation of Commodity Markets in Holland, 1200-1450*. Leiden: Brill, 2011.
- Do Amaral, Ilídio. *O Reino do Congo, Os Mbundu (ou Ambundos), O Reino dos "Ngola" (ou de Angola) e a Presença Portuguesa, de Finais do Século XV a MEados do Século XVI*. Lisboa: IICT, 1996.
- Dorsett, Shaunnagh and Ian Hunter, ed. *Law and Politics in British Colonial Thought: Transpositions of Empire*. Basingstoke: Palgrave Macmillan, 2010.
- Dorsett, Shaunnagh and John McLaren, ed. *Legal Histories of the British Empire: Laws, Engagements and Legacies*. New York: Routledge, 2014.
- Drew, Katherine Fischer. 'The Barbarian Kings as Lawgivers and Judges'. *Life and Thought in the Middle Ages*, ed. Hoyt, 7-29.
- du Plessis, Paul. 'Property'. *Cambridge Companion*, ed. Johnston, 175-98.
- Duby, Georges. *Guerriers et Paysans au Moyen Âge*. Paris: Gallimard, 1973.

- Duff, P. W. *Personality in Roman Private Law*. Cambridge: Cambridge University Press, 1938.
- Dupuy, Pierre-Marie and Vincent Chetail ed. *The Roots of International Law / Le Fondements du Droit International*. Leiden: Brill, 2014.
- Eccles, W. J. 'Sovereignty-Association, 1500-1763'. *Canadian Historical Review* 65 (1984), 475-510.
- Elbl, Ivana. 'The King's Business in Africa: Decisions and Strategies of the Portuguese Crown'. *Money, Markets and Trade*, ed. Armstrong et al., 89-118.
- Elliott, J. H. *The Old World and the New, 1492-1650*. Cambridge: Cambridge University Press, 1992.
- Empires of the Atlantic World: Britain and Spain in America, 1492-1830*. New Haven: Yale University Press, 2006.
- Elphick, Richard, and Hermann Giliomee ed. *The Shaping of South African Society, 1652-1840*. Middletown: Wesleyan University Press, 1989.
- Elphick, Richard. *Kraal and Castle: Khoikhoi and the Founding of White South Africa*. New Haven: Yale University Press, 1977.
- Epstein, S. R. ed. *Town and Country in Europe, 1300-1800*. Cambridge: Cambridge University Press, 2001.
- Epstein, Steven A. *Wage Labour and Guilds in Medieval Europe*. Chapel Hill: University of North Carolina Press, 2001.
- An Economic and Social History of Late Medieval Europe, 1000-1500*. Cambridge: Cambridge University Press, 2009.
- Esmein, Adhémar. *Cours Élémentaire d'Histoire du Droit Français*. 3rd edition. Paris: Société du Recueil Sirey, 1920.
- Evergates, Theodore. *The Aristocracy in the County of Champagne, 1100-1300*. Philadelphia: University of Pennsylvania Press, 2007.
- Fagan, Eduard. 'Roman Dutch Law in its South Africa Context'. *Southern Cross*, ed. Zimmerman and Visser, 33-65.
- Farnsworth, E. Allan. 'The Past of a Promise: An Historical Introduction to Contract'. *Columbia Law Review* 69, 4 (1969), 576-607.
- Fassbender, Bardo, and Anne Peters. *The Oxford Handbook of the History of*

- International Law*. Oxford: Oxford University Press, 2012.
- Feenstra, Robert. 'Impossibilitas and Clausula Rebus Sic Stantibus: Some Aspects of Frustration of Contract in Continental Legal History up to Grotius'. *Daube Noster*, ed. Watson, 77-104.
- Fernandez-Armesto, Felipe. *Before Columbus: Exploration and Colonization from the Mediterranean to the Atlantic, 1229-1492*. Philadelphia: University of Pennsylvania Press, 1987.
- Fischer, David Hackett. *Champlain's Dream*. New York: Simon & Schuster, 2008.
- Fisher, F. J. 'Commercial Trends in Sixteenth-Century England'. *Economic History Review* 10, 2 (1940), 95-117.
- Fitzmaurice, Andrew. *Humanism and America: An Intellectual History of English Colonization, 1500-1625*. Cambridge: Cambridge University Press, 2003.
- 'Powhatan Legal Claims'. *Native Claims*, ed. Belmessous, 85-104.
- 'Discovery, Conquest, and Occupation of Territory'. *Oxford Handbook*, ed. Fassbender and Peters, 840-61.
- Sovereignty, Property, and Empire, 1500-2000*. Cambridge: Cambridge University Press, 2014.
- Foisneau, Luc. 'Elements of Fiction in Hobbes's System of Philosophy'. *Fiction and the Frontiers of Europe*, ed. Scholar and Tadié, 71-86.
- Folsom, George. 'Expedition of Captain Samuel Argall, afterwards Governor of Virginia, Knight, and to the French Settlements in Acadia and to Manhattan island, A. D. 1613'. *Collections of the New York Historical Society* (1841), 1: 333-42.
- Ford, Lisa. *Settler Sovereignty: Jurisdiction and Indigenous People in Australia and America, 1788-1836*. Cambridge, MA: Harvard University Press, 2010.
- Forrest, Ian. 'Continuity and Change in the Institutional Church'. *The Oxford Handbook of Medieval Christianity*, ed. Arnold, 186-98.
- Foster, William. 'The Acquisition of St. Helena'. *English Historical Review* 34, 135 (1919), 281-9.
- Frankot, Edda. *'Of Laws of Ships and Shipmen': Medieval Maritime Law and its Practice in Urban Northern Europe*. Edinburgh: Edinburgh University Press, 2012.
- Friedman, John Block and Kristen Mossler Figg, ed. *Trade, Travel, and Exploration in the Middle Ages: An Encyclopedia*. Routledge: New York, 2000.

- Frost, Alan. *The Global Reach of Empire: Britain's Maritime Expansion in the Indian and Pacific Oceans, 1764-1815*. Melbourne: Miegunyah Press, 2003.
- Fulton, Thomas Wemyss. *Sovereignty of the Seas: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters*. Edinburgh: W. Blackwood, 1911.
- Gaastra, F. S. *De Geschiedenis van de VOC*. 2nd ed. Zutphen: Walburg Pers, 1991.
- Gade, John Allyne. *The Hanseatic Control of Norwegian Commerce during the Late Middle Ages*. Leiden: Brill, 1951.
- Ganshof, François-Louis. *Feudalism*. Translated by Phillip Grierson. New York: Harper and Row, 1964.
- Gasper, Giles E. M. and Svein H. Gullbekk, ed. *Money and the Church in Medieval Europe, 1000-1200: Practice, Morality and Thought*. Farnham: Ashgate, 2015.
- Gasquet, Francis Aidan. *Henry VIII and the English Monasteries*. 2 vols. London: J. Hodges, 1888-9.
- Gehring, Charles T. 'Peter Minuit's Purchase of Manhattan Island—New Evidence'. *De Halve Maen* 55, 1 (1980), 6-7.
- Gelderblom, Oscar. *Cities of Commerce: The Institutional Foundations of International Trade in the Low Countries, 1250-1650*. Princeton, NJ: Princeton University Press, 2013.
- Gemmill, Elizabeth. *The Nobility and Ecclesiastical Patronage in Thirteenth-Century England*. Woodbridge: Boydell Press, 2013.
- Giguère, Georges-Émile. 'Jogues, Isaac'. *Dictionary of Canadian Biography*.
- Gilbert, William. "'Divers Places': The Beothuk Indians and John Guy's Voyage into Trinity Bay in 1612'. *Newfoundland and Labrador Studies* 6, 2 (1990), 147-67.
- Girard, Camil and Édith Gagné. 'Première Alliance Interculturelle: Recontre entre Montagnais et Français à Tadoussac en 1603'. *Recherches Amérindiennes au Québec* 25, 3 (1995), 3-14.
- Glete, Jan. *Swedish Naval Administration 1521-1721: Resource Flows and Organisational Capabilities*. Leiden: Brill, 2010.
- Glover, Jeffrey. *Paper Sovereigns: Anglo-Native Treaties and the Law of Nations, 1606-1664*. Philadelphia: University of Pennsylvania Press, 2014.

- Goldie, Mark, and Robert Wokler ed. *Cambridge History of Eighteenth-Century Political Thought*. Cambridge: Cambridge University Press, 2006.
- Goldstein, Robert A. *French-Iroquois Diplomatic and Military Relations, 1609-1711*. The Hague: Mouton, 1969.
- Gönnenwein, Otto. *Das Stapel- und Niederlagsrecht*. Weimar: Verlag Hermann Böhlau Nachf., 1939.
- Goodfriend, Joyce D. ed. *Revisiting New Netherland: Perspectives on Early Dutch America*. Leiden: Brill, 2005.
- Gordley, James. 'Contract Law in the Aristotelian Tradition'. *Theory of Contract Law*, ed. Benson, 265-334.
- The Philosophical Origins of the Modern Contract Doctrine*. Oxford: Clarendon Press, 1991.
- 'Good Faith in the Medieval Ius Commune'. *Good Faith in European Contract Law*, ed. Zimmermann and Whittaker, 93-117.
- Górecki, Piotr. *Parishes, Tithes, and Society in Earlier Medieval Poland c. 1000 – c. 1250*. Philadelphia: American Philosophical Society, 1993.
- Gottlieb, Manuel. *A Theory of Economic Systems*. New York: Academic Press, 1984.
- Grayson, John Christopher. 'From Protectorate to Partnership: Anglo-Dutch Relations, 1598-1625'. PhD Dissertation. University College, London, 1978.
- Greene, Jack P. *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788*. Athens: University of Georgia Press, 1986.
- Greengrass, M. 'Winwood, Sir Ralph (1562/3–1617)'. *Oxford Dictionary of National Biography*.
- Greenwood, Ryan. 'War and Sovereignty in Medieval Roman Law'. *Law and History Review* 32, 1 (2014), 31-63.
- Greer, Allan. 'Dispossession in a Commercial Idiom: From Indian Deeds to Land Cession Treaties'. *Contested Spaces of Early America*, ed. Barr and Countryman, 69-93.
- Gregg, Pauline. *Charles I*. Berkeley: University of California Press, 1981.
- Griffiths, Percival. *A Licence To Trade: The History of English Chartered Companies*. London: Ernest Benn Ltd, 1974.

- Groebner, Valentin. 'Describing the Person, Reading the Signs in Late Medieval and Renaissance Europe: Identity Papers, Vested Figures, and the Limits of Identification, 1400–1600'. *Documenting Individual Identity*, ed. Caplan and Torpey, 15-27.
- Groenveld, Simon, and Michael Wintle ed. *State and Trade: Government and the Economy in Britain and the Netherlands since the Middle Ages*. Zutphen: Walburg Pers, 1992.
- Groenveld, Simon. 'The English Civil Wars as a Cause of the First Anglo-Dutch War, 1640-1652'. *Historical Journal* 30, 3 (1987), 541-566.
- Grossberg, Michael and Christopher Tomlins, ed. *The Cambridge History of Law in America*. Cambridge: Cambridge University Press, 2008.
- Guldi, Jo and David Armitage. *The History Manifesto*. Cambridge: Cambridge University Press, 2015.
- Haggenmacher, Peter. *Grotius et la Doctrine de la Guerre Juste*. Paris: Presses Universitaires de France, 1983.
- Halfond, Gregory ed. *The Medieval Way of War: Studies in Medieval Military History in Honor of Bernard S. Bachrach*. Farnham: Ashgate, 2015.
- Hall, Hubert ed. *A Formula Book of English Historical Documents*. Several vols. Cambridge: Cambridge University Press, 1908.
- Hall, Simon. 'Farming Communities of the Second Millennium: Internal Frontiers, Identity, Continuity and Change'. *Cambridge History of Southern Africa 1*, ed. Hamilton, Mbenga, and Ross, 112-67.
- Hallam, Henry. *View of the State of Europe During the Middle Ages*. 3 vols. London: J. Murray, 1818.
- Hamilton, Carolyn, Bernard K. Mbenga, and Robert Ross ed. *Cambridge History of Southern Africa, Volume 1: From Early Times to 1885*. Cambridge: Cambridge University Press, 2010.
- Harris, Frank W. 'The Rebellion of Sir Cahir O'Doherty and its Legal Aftermath'. *The Irish Jurist* 15, 2 (1980), 298-325.
- 'The Law and Economics of High Treason'. *Valparaiso University Law Review* 22, 1 (1987) 88-108.
- Harris, Marshall. *Origin of the Land Tenure System in the United States*. Ames: Iowa State College Press, 1953.

- Harris, Richard Colebrook. *The Seigneurial System in Early Canada: A Geographical Study*. Kingston and Montreal: McGill-Queens University Press, 1984.
- The Reluctant Land: Society, Space, and Environment in Canada before Confederation*. Vancouver: UBC Press, 2009.
- Hart, Simon. *Prehistory of the New Netherland Company*. Amsterdam: City Archives of Amsterdam, 1959.
- Hartmann, Wilfried and Kenneth Pennington, ed. *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*. Washington, D. C.: Catholic University of America Press, 2008.
- Hassan, Abdullah Alwi Haji. *Sales and Contracts in Early Islamic Commercial Law*. Selangor: Other Press, 2007.
- Hecksher, Eli F. *An Economic History of Sweden*. Translated by Göran Ohlin. Cambridge, MA: Harvard University Press, 1968.
- Heidecker, Karl ed. *Charters and the Use of the Written Word in Medieval Society*. Turnhout: Brepolspublishers, 2000.
- Heintze, Beatrix. *Angola nos Séculos XVI e XVII: Estudos Sobre Fontes, Métodos e História*. Luanda: Kilombelombe 2007.
- Helmholz, R. H. *The Spirit of Classical Canon Law*. Athens, GA: University of Georgia Press, 1996.
- The Ius Commune in England: Four Studies*. Oxford: Oxford University Press, 2001.
- Herbert, Thomas Arnold. *The History of the Law of Prescription in England*. Cambridge: Cambridge University Press, 1891.
- Herbert, William. *The History of the Twelve Great Livery Companies of London*. London: William Herbert, 1837.
- Herlihy, David. *The Black Death and the Transformation of the West*. Cambridge, MA: Harvard University Press, 1997.
- Hickford, Mark. *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire*. Oxford: Oxford University Press, 2012.
- Higman, B. W. *A Concise History of the Caribbean*. Cambridge: Cambridge University Press, 2011.
- Hill, Christopher. *The World Turned Upside Down: Radical Ideas During the English Revolution*. Harmondsworth: Penguin Books, 1991.

- Hill, David Jayne. *A History of Diplomacy in the International Development of Europe*, 3 vols. New York: Longmans, Green, and Co., 1905-1914.
- Hill, Rev. George. *An Historical Account of the Plantation in Ulster at the Commencement of the Seventeenth Century, 1608-1620*. Belfast: McCaw, Stevenson & Orr, 1877.
- Hilton, Rodney H. *English and French Towns in Feudal Society: A Comparative Study*. Cambridge: Cambridge University Press, 1992.
- Bond Men Made Free: Medieval Peasant Movements and the English Rising of 1381*. New York: Routledge, 2003.
- Hocker, Frederick M. 'Technical and Organizational Development in European Shipyards, 1400-1600'. *Maritime Topography and the Medieval Town*, ed. Bill and Clausen, 21-32.
- Holdsworth, William Searle. *A History of English Law*. 5th ed. Multiple volumes. London: Methuen & Co., 1942-.
- Horning, Audrey. *Ireland in the Virginian Sea: Colonialism in the British Atlantic*. Chapel Hill: University of North Carolina Press, 2013.
- Howell, Martha C. *Commerce before Capitalism in Europe, 1300-1600*. Cambridge: Cambridge University Press, 2010.
- Hoyt, Robert S. ed. *Life and Thought in the Middle Ages*. Minneapolis: University of Minnesota Press, 1957.
- Hübner, Rudolf. *A History of Germanic Private Law*. Translated by Francis S. Philbrick. Boston: Little, Brown and Co., 1918.
- Humphreys, John. *Plaisance: Problems of Settlement at This Newfoundland Outpost of New France, 1660-1690*. Ottawa: National Museum of Canada, 1970.
- Hunt, Edwin S. and James M. Murray. *A History of Business in Medieval Europe, 1200-1550*. Cambridge: Cambridge University Press, 1999.
- Hunt, Edwin S. *The Medieval Super-Companies: A Study of the Peruzzi Company of Florence*. Cambridge: Cambridge University Press, 1997.
- Hunt, George T. *The Wars of the Iroquois: A Study in Intertribal Relations*. Madison: University of Wisconsin Press, 1972 (1940).
- Hunter, Ian. 'Natural Law, Historiography, and Aboriginal Sovereignty'. *Legal History* 11 (2007), 137-67.

- Hunter, R. J. 'O'Cahan, Sir Donnell Ballagh [Domhnall Ballach Ó Catháin] (d. 1626?)'. *Oxford Dictionary of National Biography*.
- Hyams, Paul R. 'Warranty and Good Lordship in Twelfth Century England'. *Law and History Review* 5, 2 (1987), 437-503.
- Ibbetson, David. 'Custom in Medieval Law'. *The Nature of Customary Law*, ed. Perreau-Saussine and Murphy, 151-75.
- Israel, Jonathan. *Dutch Primacy in World Trade, 1585-1740*. Oxford: Clarendon Press, 1990.
- 'England's Mercantilist Response to Dutch World Trade Primacy, 1647-1674', *State and Trade*, ed. Groenveld and Wintle, 50-61.
- The Dutch Republic: Its Rise, Greatness, and Fall, 1477-1806*. Oxford: Oxford University Press, 1995.
- ed. *The Anglo-Dutch Moment: Essays on the Glorious Revolution and its World Impact*. Cambridge: Cambridge University Press, 2003.
- Jacobs, Jaap. *New Netherland: A Dutch Colony in Seventeenth-Century America*. Leiden: Brill, 2005.
- Jacoby, David. 'The Catalan Company in the East: The Evolution of an Itinerant Army (1303-1311)', *The Medieval Way of War: Studies in Medieval Military History in Honor of Bernard S. Bachrach*, ed. Gregory Halfond (Farnham: Ashgate, 2015); 153-82.
- Jaenen, Cornelius J. 'French Sovereignty and Native Nationhood during the French Regime'. *Native Studies Review* 2 (1986), 83-113.
- James, Alan. *The Navy and Government in Early Modern France, 1572-1661*. Woodbridge: Boydell Press, 2004.
- James, Sidney V. *Colonial Rhode Island: A History*. New York: Charles Scribner's Sons, 1975.
- Jenks, Susanne, Jonathan Rose, and Christopher Whittick, ed., *Laws, Lawyers and Texts: Studies in Medieval Legal History in Honour of Paul Brand*. Leiden: Brill, 2012.
- Jennings, Francis. 'Virgin Land and Savage People'. *American Quarterly* 23, 4 (1971), 519-41.
- The Invasion of America: Indians, Colonialism and the Cant of Conquest*. New York: W. W. Norton and Co., 1976.

- The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginnings to the Lancaster Treaty of 1744*. New York: Norton, 1984.
- Johanek, Peter. 'Zur Rechtlichen Funktion von Traditionsnotiz, Traditionsbuch und Früher Siegelurkunde', *Recht und Schrift*, ed. Classen, 131-62.
- Johnson, J. T. *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. Princeton: Princeton University Press, 1981.
- Johnston, David ed. *The Cambridge Companion to Roman Law*. Cambridge: University Press, 2015.
- Jolowicz, H. F. and Barry Nicholas. *Historical Introduction to the Study of Roman Law*. 3rd ed. Cambridge: Cambridge University Press, 1972.
- Jones, Dorothy. *Licence for Empire: Colonialism by Treaty in Early America*. Chicago: University of Chicago Press, 1982.
- Jones, Michael ed. *The New Cambridge Medieval History: VI, 1300-1415*. Cambridge: Cambridge University Press, 2015.
- Jones, Philip. *The Italian City-State: From Commune to Signoria*. Oxford: Clarendon Press, 1997.
- Kaeuper, Richard W. ed. *Violence in Medieval Society*. Woodbridge: Boydell Press, 2000.
- Kahn, Victoria. *Wayward Contracts: The Crisis of Political Obligation in England, 1640-1674*. Princeton: Princeton University Press, 2004.
- Kantorowicz, Ernst H. *The King's Two Bodies: A Study in Medieval Political Theology*. Princeton, NJ: Princeton University Press, 1957.
- Karsten, Peter. *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora: The United States, Canada, Australia, and New Zealand, 1600-1900*. Cambridge: Cambridge University Press, 2002.
- Kaye, John M. *Medieval English Conveyances*. Cambridge: Cambridge University Press, 2009.
- Keen, Maurice H. *The Laws of War in the Late Middle Ages*. London: Routledge, 1965.
- England in the Later Middle Ages: A Political History*, 2nd ed. New York: Routledge, 2003.

- Keene, Edward. *Beyond the Anarchical Society: Grotius, Colonialism, and Order in World Politics*. Cambridge: Cambridge University Press, 2004.
- Keller, Arthur S. et al. *Creation of Rights of Sovereignty through Symbolic Acts, 1400–1800*. New York: Columbia University Press, 1938.
- Kennedy, Jean. *Isle of Devils: Bermuda under the Somers Island Company, 1609-1685*. London: Collins, 1971.
- Kerling, Nelly Johanna Martina. *Commercial Relations of Holland and Zeeland with England from the Late 13th Century to the Close of the Middle Ages*. Leiden: Brill, 1954.
- Keutgen, Fredrich W. E. *Urkunden zur Städtischen Verfassungsgeschichte*. Berlin: Felber, 1901.
- Khadduri, Majid and Herbert J. Liebesny, ed. *Law in the Middle East*. 2 vols. Washington: Middle East Institute, 1955.
- Kingsbury, Benedict and Benjamin Straumann, ed. *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Oxford: Oxford University Press, 2010.
- Kirke, Henry. *The First English Conquest of Canada*. 2nd ed. London: Sampson Low, Marston & Co., 1908.
- Korman, Sharon. *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*. Oxford: Clarendon Press, 1996.
- Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge: Cambridge University Press, 2004.
- ‘International Law and the Emergence of Mercantile Capitalism: Grotius to Smith’. *Roots of International Law / Fondements du Droit International*, ed. Dupuy and Chetail, 3-37.
- Kowaleski, Maryanne. ‘The Commercialization of the Sea Fisheries in Medieval England and Wales’. *International Journal of Maritime History* 15, 2 (2003), 177-231.
- Kupp, Thomas J. ‘Quelques Aspects de la Dissolution de la Compagnie de M. de Monts, 1607’. *Revue d’Histoire de l’Amérique Française*, 24, 3 (1970), 357-74.
- Kupperman, Karen Ordahl. *Roanoke: The Abandoned Colony*. 2nd ed. Lanham: Rowman and Littlefield, 2007.
- Kuran, Timur. ‘The Absence of the Corporation in Islamic Law: Origins and Persistence’. *American Journal of Comparative Law* 53, 4 (2005), 785-834.

- Laing, Lionel H. 'Historic Origins of Admiralty Jurisdiction in England'. *Michigan Law Review* 45, 2 (1946), 163-82.
- Lajoie, Andrée and Pierre Verville. 'Les Traités d'Alliance entre les Français et Les Premières Nations sous le Régime Français'. *Le Statut Juridique des Peuples Autochtones au Québec et le Pluralisme*, ed. Andrée Lajoie et al. 143-217.
- Lajoie, Andrée et al. ed. *Le Statut Juridique des Peuples Autochtones au Québec et le Pluralisme*. Quebec: Les Editions Yvon Blais Inc., 1996.
- Landry, Nicholas. 'Peuplement d'une Colonie de Pêche sous le Régime Français: Plaisance, 1671-1714'. *Northern Mariner / Le Marin du Nord* 11, 2 (2001), 19-37.
- Langdon, George D Jnr. ed. *Pilgrim Colony: A History of New Plymouth, 1620-1691*. New Haven: Yale University Press, 1966.
- Lauterpacht, Hersch. *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*. London: Longman, Green and Co., 1927.
- Law, John E. and Bernadette Paton, ed. *Communes and Despots in Medieval and Renaissance Italy*. Farnham: Ashgate, 2010.
- Lawrence, C. H. *The Friars: The Impact of the Early Mendicant Orders on Medieval Society*. Revised edition. London: I. B. Tauris, 2013.
- Le Blant, Robert. 'La Compagnie de la Nouvelle-France et la Restitution de l'Acadie (1627-1636)'. *Revue d'Histoire des Colonies* 42, 146 (1955), 69-93.
- 'Les Débuts Difficiles de la Compagnie de la Nouvelle-France: L'Affaire Langlois, 1628-1632'. *Revue d'Histoire de l'Amérique Française* 22, 1 (1968), 25-34.
- Leeson, Peter T. ed. 'An-arrgh-chy: The Law and Economics of Pirate Organization'. *Journal of Political Economy* 115, 6 (2007), 1049-94.
- Lesaffer, Randall. 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription'. *European Journal of International Law* 16, 1 (2005), 25-58.
- 'Alberico Gentili's *Ius Post Bellum* and Early Modern Peace Treaties'. *Roman Foundations of the Law of Nations*, ed. Kingsbury and Straumann, 210-40.
- European Legal History: A Cultural and Political Perspective*. Cambridge: Cambridge University Press, 2009.

- Levasseur, E. *L'Histoire du Commerce de la France, Première Partie: Avant 1789*. Paris: Librairie Nouvelle de Droit et de Jurisprudence, 1911.
- Linebaugh, Peter and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic*. Boston: Beacon Press, 2000.
- Lloyd, T. H. *England and the German Hanse, 1157-1611: A Study of Their Trade and Commercial Diplomacy*. Cambridge: Cambridge University Press, 2002.
- Lockhart, James. 'Encomienda and Hacienda: The Evolution of the Great Estate in the Spanish Indies'. *Hispanic American Historical Review* 59 (1969), 411-29.
- Lopez, Robert S. and Irving W. Raymond, ed. *Medieval Trade in the Mediterranean World: Illustrative Documents Translated with Introductions and Notes*. Oxford: Oxford University Press, 1955.
- Lopez, Robert S. *The Commercial Revolution of the Middle Ages, 950-1350*. Cambridge: Cambridge University Press, 1976.
- Loughton, Gavin. 'Calvin's Case and the Origins of the Rule Governing "Conquest" in English Law'. *Australian Journal of Legal History* 8, 2 (2004), 143-80.
- Lublinskaya, A. D. *French Absolutism: The Crucial Phase, 1620-1629*. Translated by Brian Pearce. Cambridge: Cambridge University Press, 1968.
- MacBeath, George. 'Du Gua de Monts, Pierre', *Dictionary of Canadian Biography*.
- MacMillan, Ken. 'Common and Civil Law? Taking Possession of the English Empire in America, 1575-1630'. *Canadian Journal of History* 38 (2003), 409-23.
- Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640*. Cambridge: Cambridge University Press, 2006.
- Maine, Henry Sumner. *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*. London: John Murray, 1861.
- Maitland, Frederic William. *Township and Borough*. Cambridge: Cambridge University Press, 1897.
- 'The Corporation Sole (1900)', in Maitland, ed. Runciman and Ryan, 9-31.
- Mallett, Michael E. and Christine Shaw. *The Italian Wars 1494-1559: War, State and Society in Early Modern Europe*. New York: Routledge, 2011.
- Mancall, Peter C. *The Atlantic World and Virginia, 1550-1624*. Chapel Hill: UNC Press, 2007.

- Mancke, Elizabeth and Carole Shammass, ed. *The Creation of the British Atlantic World*. Baltimore: Johns Hopkins University Press, 2005.
- Mancke, Elizabeth. 'Chartered Enterprises and the Evolution of the British Atlantic World'. *The Creation of the British Atlantic World*, ed. Mancke and Shammass, 237-62.
- Mantienne, Frédéric. *Les Relations Politiques et Commerciales entre la France et la Péninsule Indochinoise*. 2 vols. Paris: Edits Les Indes Savantes, 2001.
- Marshall, Ingeborg. *A History and Ethnography of the Beothuk*. Montreal & Kingston: McGill-Queen's University Press, 1996.
- Martin, John Frederick. *Profits in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth Century*. Chapel Hill: UNC Press, 1991.
- Marx, Karl. *Capital: A Critical Analysis of Capitalist Production*, 3 vols. Moscow: Foreign Languages Publishing House, 1954-62 (1887).
- Mathew, K. S. 'Trade in the Indian Ocean and the Portuguese System of Cartazes'. *First Portuguese Empire*, ed. Newitt, 9-36.
- Mattingly, Garrett. *Renaissance Diplomacy*. New York: Dover Publications, 1988 (1955).
- Mauro, Frederic. 'Merchant Communities, 1350-1750'. *The Rise of the Merchant Empires*, ed. Tracy, 255-86.
- McGurk, John. *Sir Henry Docwra, 1564-1631: Derry's Second Founder*. Dublin: Four Courts Press, 2005.
- McHugh, Paul G. 'The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past'. *Saskatchewan Law Review* 61 (1998), 393-429.
- Aboriginal Societies in the Common Law: A History of Sovereignty, Status, and Self-Determination*. Oxford: Oxford University Press, 2004.
- Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*. Oxford: Oxford University Press, 2010.
- McLaren, John, A. R. Buck, and Nancy E. Wright, ed. *Despotic Dominion: Property Rights in British Settler Societies*. Vancouver: UBC Press, 2005.
- McLeod Jury, Elsie. 'Anadabijou'. *Dictionary of Canadian Biography*.
- McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.

- Meehan, C. P. *The Fate and Fortunes of Hugh O'Neill, Earl of Tyrone, and Rory O'Donel, Earl of Tyrconnel*. Dublin: James Duffy, 1868.
- Ménard-Jacob, Marie. 'Autopsie d'une Liquidation: L'échec relatif de la première Compagnie des Indes Orientales (1664-1706)'. *Revue d'Histoire d'Outre-Mers*, 101, 378-379 (2013), 233-249.
- Merritt, J. F. ed. *The Political World of Thomas Wentworth, Earl of Strafford, 1621-1641*. Cambridge: Cambridge University Press, 1996.
- Meston, A. L. *The Van Diemen's Land Company, 1825-1842*. Launceston: Launceston City Council, 1958.
- Meuwese, Mark. *Brothers in Arms, Partners in Trade: Dutch-Indigenous Alliances in the Atlantic World, 1595-1674*. Leiden: Brill, 2011.
- Meyer, Rudolf. *Bona Fides und Lex Mercatoria in der Europäischen Rechtstradition*. Göttingen: Wallstein Verlag, 1994.
- Michaud-Quantin, Pierre. *Universitas: Expressions du Mouvement Communautaire dans le Moyen-Age Latin*. Paris: Libraire Philosophique J. Vrin, 1970.
- Miller, Robert J., Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*. Oxford: Oxford University Press, 2010.
- Milsom, S. F. C. *The Legal Framework of English Feudalism*. Cambridge: Cambridge University Press, 1976.
- Miskimin, Harry A. *The Economy of Later Renaissance Europe, 1460-1600*. Cambridge: Cambridge University Press, 1977.
- Mitchell, Peter. *The Archaeology of Southern Africa*. Cambridge: Cambridge University Press, 2002.
- Moatti, Claudia and Wolfgang Kaiser, ed. *Gens de Passage en Méditerranée de l'Antiquité à l'Époque Moderne: Procédures de Contrôle et d'Identification*. Paris: Maisonneuve et Larose, 2007.
- Mollat, Michel. *Le Commerce Maritime Normand à la Fin du Moyen Age*. Paris: Plon, 1952.
- ed. *Histoire des Pêches Maritimes en France*. Toulouse: Bibliothèque Historique Privat, 1978.
- Europe and the Sea*. Translated by T. L. Fagan. Oxford: Blackwell, 1993.

- Montaño, John Patrick. *The Roots of English Colonialism in Early Modern Ireland*. Cambridge: Cambridge University Press, 2011.
- Moody, T. W. *The Londonderry Plantation, 1609-41: The City of London and the Plantation in Ulster*. Belfast: William Mullan and Son, 1939.
- Morin, Michel. *L'Usurpation de la Souveraineté Autochtone: Le Cas des Peuples de la Nouvelle-France et des Colonies Anglaises de l'Amérique du Nord*. Montréal: Boréal, 1997.
- Morrill, John. *Revolt in the Provinces: The People of England and the Tragedies of War, 1630-1648*, 2nd ed. New York: Routledge, 2012.
- Muldoon, James. "‘Extra Ecclesiam non est Imperium’: The Canonists and the Legitimacy of Secular Power". *Studia Gratiana* 9 (1966), 553-80.
- Popes, Lawyers and Infidels: The Church and the Non-Christian world, 1250-1550*. Liverpool: Liverpool University Press, 1979.
- The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century*. Philadelphia: University of Pennsylvania Press, 1994.
- ‘Discovery, Grant, Charter, Conquest, or Purchase: John Adams on the Legal Basis for English Possession of North America’. *Many Legalities of North America*, ed. Tomlins, 25-46.
- Muthu, Sankar ed. *Empire and Modern Political Thought*. Cambridge: Cambridge University Press, 2012.
- Nellen, Henk. *Hugo Grotius: A Lifelong Struggle for Peace in Church and State, 1583-1645*. Translated by J. C. Grayson. Leiden: Brill, 2015.
- Nelson, William E. *The Common Law in Colonial America, Volume 1: The Chesapeake and New England, 1607–1660*. Oxford: Oxford University Press, 2008.
- Newitt, Malyn ed. *The First Portuguese Empire*. Exeter: Exeter Studies in History no. 11, University of Exeter, 1986.
- A History of Portuguese Overseas Expansion, 1400-1668*. London and New York: Routledge, 2005.
- Nicholas, David. *The Later Medieval City, 1300-1500*. London: Longman, 1997.
- Nicholls, Andrew. *A Fleeting Empire: Early Stuart Britain and the Merchant Adventurers to Canada*. Toronto and Montreal: McGill-Queens University Press, 2010.

- Nicholls, K. W. 'Land, Law, and Society'. *O'Donnell Lecture Delivered at University College Cork, May 1976*. Dublin: National University of Ireland, 1978.
- Nicholls, Mark. 'George Percy's "Trew Relacyon": A Primary Source for the Jamestown Settlement'. *Virginia Magazine of History and Biography* 113, 3 (2005), 212-275.
- Nordman, Daniel. 'Sauf- Conduits et Passeports, en France, à la Renaissance'. *Voyager à la Renaissance*, ed. Ceard and Margolin, 145-58.
- Nowell, Charles E. 'The Treaty of Tordesillas and the Diplomatic Background of American History'. *Greater America: Essays in Honour of Herbert Eugene Bolton*, no editor. Berkeley: University of California Press, 1945, 1-18.
- Nugent, Christopher, Lawrence Brooke, and Christopher Robert Cheney, ed. *Church and Government in the Middle Ages*. Cambridge: Cambridge University Press, 1978.
- O'Callaghan, E. B. *History of New Netherland; Or, New York under the Dutch*. 2 vols. New York: D. Appleton & Co., 1846.
- O'Callaghan, Joseph F. *Reconquest and Crusade in Medieval Spain*. Philadelphia: University of Pennsylvania Press, 2003.
- Oberg, Michael Leroy. *Uncas: First of the Mohegans*. Ithaca: Cornell University Press, 2003.
- Ogilvie, Shelaigh. *Institutions and European Trade: Merchant Guilds, 1000-1800*. Cambridge: Cambridge University Press, 2011.
- Ohlmeyer, Jane H. 'Strafford, the "Londonderry Business" and the "New British History"'. *Political World of Thomas Wentworth*, ed. Merritt, 209-29.
- ed. *Ireland from Independence to Occupation, 1641-1660*. Cambridge: Cambridge University Press, 2002.
- Making Ireland English: The Irish Aristocracy in the Seventeenth Century*. New Haven: Yale University Press, 2012.
- Olivier-Martin, Fr. *L'Organisation Corporative de la France D'ancien Régime*. Paris: Librairie du Recueil Sirey, 1938.
- Ormrod, David. *The Rise of Commercial Empires: England and the Netherlands in the Age of Mercantilism, 1650-1770*. Cambridge: Cambridge University Press, 2003.
- Osgood, Herbert L. 'The Proprietary Province as a Form of Colonial Government, I'. *American Historical Review* 2, 4 (1897), 644-664.

- ‘The Proprietary Province as a Form of Colonial Government, II’. *American Historical Review* 3, 1 (1897), 31-55.
- Otto, Paul. ‘Real Estate or Political Sovereignty? The Dutch, Munsees, and the Purchase of Manhattan Island’. *Opening Statements*, ed. Rosenblatt and Rosenblatt, 67-82.
- Pagden, Anthony ed. *The Languages of Political Theory in Early Modern Europe*. Cambridge: Cambridge University Press, 1987.
- Spanish Imperialism and the Political Imagination: Studies in European and Spanish American Social and Political Theory, 1512-1830*. New Haven: Yale University Press, 1990.
- Lords of All The World: Ideologies of Empire in Britain, France, and Spain, 1400-1800*. New Haven: Yale University Press, 1995.
- ‘Conquest and the Just War: The “School of Salamanca” and the “Affair of the Indies”’. *Empire and Modern Political Thought*, ed. Muthu, 30-60.
- ‘Law, Colonization, Legitimation, and the European Background’. *Cambridge History of Law*, ed. Grossberg and Tomlins, 1-31.
- Palmer, Robert C. *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law*. Chapel Hill: University of North Carolina Press, 2001.
- Pamuk, Sevket. ‘The Black Death and the Origins of the “Great Divergence” inside Europe, 1300-1600’. *European Review of Economic History* 2 (2007), 289-317.
- Parkman, Francis. *France and England in North America*. 7 vols. Boston: Little, Brown and Co., 1865-92.
- Parrott, David. *Richelieu’s Army: War, Government, and Society in France, 1624-1642*. Cambridge: Cambridge University Press, 2004.
- The Business of War: Military Enterprise and Military Revolution in Early Modern Europe*. Cambridge: Cambridge University Press, 2012.
- Parthesius, Robert. *Dutch Ships in Tropical Waters: The Development of the Dutch East India Company (VOC) Shipping Network in Asia, 1595-1660*. Amsterdam: Amsterdam University Press, 2010.
- Pawlich, Hans S. *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism*. Cambridge: Cambridge University Press, 1985.
- Pedreira, Jorge M. ‘Costs and Financial Trends in the Portuguese Empire’. *Portuguese*

- Oceanic Expansion*, ed. Bethencourt and Curto, 49-87.
- Penn, Nigel. 'Robben Island, 1488-1805'. *The Island*, ed. Deacon, 9-32.
- Pérotin-Dumon, Anne. 'The Pirate and the Emperor: Power and the Law of the Sea, 1450-1850', *Political Economy*, ed. Tracy, 196-227.
- Perreau-Saussine, Amanda and James Bernard Murphy, ed. *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*. Cambridge: Cambridge University Press, 2007.
- Picavet, C.-G. *La Diplomatie Francaise au Temps du Louis XIV (1661-1715): Institutions, Moeurs et Coutumes*. Paris: Librairie Félix Alcan, 1930.
- Pichonnaz, Pascal. 'From *Clausula Rebus Sic Stantibus* to Hardship'. *Fundamina* 17, 1 (2011), 125-43.
- Piergiovanni, Vito ed. *From Lex Mercatoria to Commercial Law*. Berlin: Duncker und Humblot, 2005.
- Pincus, Steven C. A. *Protestantism and Patriotism: Ideologies and the Making of English Foreign Policy, 1650-1668*. Cambridge: Cambridge University Press, 2002.
- Pirenne, Henri. *Les Villes et Les Institutions Urbaines*. 2 vols. Paris: Librairie Félix Alcan, 1939.
- Poole, Reginald L. *Lectures on the History of the Papal Chancery, Down to the Time of Innocent III*. Cambridge: Cambridge University Press, 1915.
- Pope, Peter E. *Fish into Wine: The Newfoundland Plantation in the Seventeenth Century*. Chapel Hill: University of North Carolina Press, 2004.
- Post, Gaines. *Studies in Medieval Legal Thought*. Princeton University Press, 1964.
- Postan, M. M. *Medieval Economy and Society*. Harmondsworth: Pelican, 1979.
- Postan, M. M., E. E. Rich and Edward Miller, ed. *The Cambridge History of Europe, III: Economic Organization and the Policies of the Middle Ages*. Cambridge: Cambridge University Press, 1963.
- Pouliot, Leon. 'Que Penser des Frères Kirke?'. *Bulletin des Recherches Historiques* 44, 11 (1938), 321-335.
- 'La Lande, Jean de'. *Dictionary of Canadian Biography*.
- Pounds, Norman. *The Medieval City*. Westport: Greenwood Press, 2005.

- Prakash, Om. *European Commercial Enterprise in Pre-Colonial India*. Cambridge: Cambridge University Press, 1998.
- Prowse, D. W. *A History of Newfoundland from the English, Colonial, and Foreign Records*. London and New York: Macmillan, 1895.
- Queller, Donald E. *The Office of the Ambassador in the Middle Ages*. Princeton, NJ: Princeton University Press, 1967.
- Quinn, David B. 'Ireland and Sixteenth Century European Expansion'. *Historical Studies* (1958), 22-32.
- The Elizabethans and the Irish*. Ithaca: Cornell University Press, 1966.
- Raban, Sandra. *Mortmain Legislation and the English Church, 1279-1500*. Cambridge: Cambridge University Press, 1982.
- Radding, Charles M. and Antonio Ciaralli. *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival*. Brill: Leiden, 2007.
- Raven-Hart, R. *Cape Good Hope 1652-1702*. Kaapstad: A. A. Balkema, 1971.
- Reeve, L. J. *Charles I and the Road to Personal Rule*. Cambridge: Cambridge University Press, 1989.
- Reid, John G. 'The Scots Crown and the Restitution of Port Royal, 1629-1632'. *Acadiensis* 6, 2 (1977), 39-63.
- Acadia, Maine, and New Scotland: Marginal Colonies in the Seventeenth Century*. Toronto: University of Toronto Press, 1981.
- Reynolds, Henry. *The Law of the Land*. Ringwood: Penguin, 1987.
- Reynolds, Susan. *Fiefs and Vassals: The Medieval Evidence Reinterpreted*. Oxford: Oxford University Press, 2001.
- Richter, Daniel K. 'Cultural Brokers and Intercultural Politics: New York-Iroquois Relations, 1664-1701'. *Journal of American History* 75, 1 (1988), 40-67.
- The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization*. Chapel Hill: UNC Press, 1992.
- Riley, Patrick. 'Social Contract Theory and Its Critics', *Cambridge History of Eighteenth-Century Political Thought*, ed. Goldie and Wokler, 347-78.
- Rink, Oliver A. *Holland on the Hudson: An Economic and Social History of Dutch New*

- York. Ithaca: Cornell University Press, 1986.
- Robbins, Kevin C. *City on the Ocean Sea: La Rochelle, 1530-1650: Urban Society, Religion, and Politics of the French Atlantic Frontier*. Leiden: Brill, 1997.
- Roberts, Michael. *The Early Vasas: A History of Sweden, 1523-1611*. Cambridge: Cambridge University Press, 1968.
- Robertson, Lindsay G. 'John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine'. *Journal of Law and Politics* 13 (1997), 759-77.
- Roosen, W. J. *The Age of Louis XIV: The Rise of Modern Diplomacy*. Cambridge, MA: 1976.
- Roper, L. H. and B. Van Ruymbeke, ed. *Constructing Early Modern Empires: Proprietary Ventures in the Atlantic World, 1500-1750*. Leiden: Brill, 2007.
- Rose-Troup, Frances. *The Massachusetts Bay Company and its Predecessors*. New York: Grafton Press, 1930.
- Rose, Susan. *Medieval Naval Warfare, 1000-1500*. London and New York: Routledge, 2002.
- Calais: An English Town in France, 1347-1558*. Woodbridge: Boydell Press, 2008.
- Rosenblatt, Albert M. and Julia C. Rosenblatt, ed. *Opening Statements: Law, Jurisprudence, and the Legacy of Dutch New York*. Albany, NY: State University of New York Press.
- Ross, Richard J. and Philip J. Stern. 'Reconstructing Early Modern Notions of Legal Pluralism'. *Legal Pluralism and Empires*, ed. Benton and Ross, 109-41.
- Rosser, Gervase. *The Art of Solidarity in the Middle Ages: Guilds in England, 1250-1550*. Oxford: Oxford University Press, 2015.
- Royle, Stephen. *Company's Island: St Helena, Company Colonies and the Colonial Endeavour*. London: L. B. Tauris, 2007.
- Ruebel, James S. 'The Trial of Milo in 52 B.C.: A Chronological Study'. *Transactions of the American Philological Association* 109 (1979), 231-49.
- Runciman, David and Magnus Ryan, ed. *Maitland: State, Trust and Corporation*. Cambridge: Cambridge University Press, 2003.
- Runciman, David. *Pluralism and the Personality of the State*. Cambridge: Cambridge University Press, 1997.

- Russell-Wood, A. J. R. *The Portuguese Empire, 1415-1808: A World on the Move*. Baltimore: Johns Hopkins University Press, 1998.
- Russell, Conrad. *The Causes of the English Civil War*. Oxford: Clarendon Press, 1990.
- The Fall Of The British Monarchies 1637-42*. Oxford: Clarendon Press, 1991.
- Russell, Frederick H. *The Just War in the Middle Ages*. Cambridge: Cambridge University Press, 1975.
- ‘Paulus Vladimiri’s Attack on the Just War: A Case Study in Legal Polemics’, *Authority and Power*, ed. Tierney and Linehan, 237-54.
- Russell, P. E. ‘Some Sociolinguistic Problems Concerning the Fifteenth-Century Portuguese Discoveries in the African Atlantic’. *Portugal, Spain, and the African Atlantic*, ed. Russell.
- ed. *Portugal, Spain, and the African Atlantic, 1343-1590: Chivalry and Crusade from John of Gaunt to Henry the Navigator*. Aldershot: Ashgate, 1995.
- Ryan, Magnus. ‘Bartolus of Sassoferrato and Free Cities’. *Transactions of the Royal Historical Society* 10 (2000), 65-89.
- Ryder, Huia. ‘Biencourt de Poutrincourt et de Saint-Just, Jean de’, *Dictionary of Canadian Biography*.
- Salisbury, Neil. *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643*. Oxford: Oxford University Press, 1982.
- Sapori, Armando. *Studi di Storia Economica Medievale*. 3rd ed. Florence: G. C. Sansoni, 1955.
- Scammell, G. V. *The World Encompassed: The First European Maritime Empires, c. 800-1650*. London: Methuen, 1981.
- Scargill-Bird, S. R. *A Guide to the Principal Classes of Documents preserved in the Public Record Office*. London: Eyre & Spottiswood, 1891.
- Schama, Simon. *The Embarrassment of Riches: An interpretation of Dutch culture in the Golden Age*. New York: Knopf, 1987.
- Schermaier, Martin Joseph. ‘Bona Fides in Roman Contract Law’. *Good Faith in European Contract Law*, ed. Zimmermann and Whittaker, 63-92.
- Scholar, Richard and Alexis Tadié, ed. *Fiction and the Frontiers of Europe, 1500-1800*. Farnham: Ashgate, 2010.

- Schutte, Gerrit. 'Company and Colonists at the Cape, 1652-1795'. *Shaping of South African Society*, ed. Elphick and Giliomee, 284-93.
- Scott, Tom. *The City-State in Europe: Hinterland, Territory, Religion*. Oxford: Oxford University Press, 2012.
- Seed, Patricia. 'Taking Possession and Reading Texts: Establishing the Authority of Overseas Empires'. *William and Mary Quarterly* 49, 2 (1992), 183-209.
- Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640*. Cambridge: Cambridge University Press, 1995.
- Seward, Desmond. *The Hundred Years War: The English in France 1337-1453*. Harmondsworth: Penguin, 1999.
- Sharpe, Kevin. *The Personal Rule of Charles I*. New Haven: Yale University Press, 1996.
- Shatter, Carlos. *Sir Humfrey Glylberte and His Enterprise of Colonization in America*. Boston: Publications of the Prince Society, 1903.
- Simpson, A. W. B. *A History of the Land Law*. Oxford: Oxford University Press, 1986.
- Skinner, Quentin. 'Thomas More's *Utopia* and the Language of Renaissance Humanism'. *Languages of Political Theory*, ed. Pagden, 123-57.
- Slafter, Edmund F. *Sir William Alexander and American Colonization*. Boston: Prince Society, 1873.
- Slattery, Brian. *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories*. Saskatoon: University of Saskatchewan Native Law Centre, 1979.
- 'Understanding Aboriginal Rights'. *Canadian Bar Review* 66 (1987), 727-83.
- Smith, Damian J. "'Soli Hispani?' Innocent III and Las Navas de Tolosa'. *Hispania Sacra* 51 (1999), 487-512.
- Sobocinski, Carl H. 'The *Travails* of Madagascar: Rennefort's *Relation du Premier Voyage de la Compagnie des Indes Occidentales*'. *Distant Lands and Diverse Cultures*, ed. Ames and Love, 97-110.
- Springer, James Warren. 'American Indians and the Law of Real Property in Colonial New England'. *American Journal of Legal History* 30, 1 (1986), 25-58.
- Spufford, Peter. 'Trade in Fourteenth-Century Europe'. *New Cambridge Medieval History*, VI, ed. Jones, 155-208.

- Stahn, Carsten. “‘Jus ad Bellum’, ‘Jus in Bello’ . . . ‘Jus post Bellum’? – Rethinking the Conception of the Law of Armed Force’. *European Journal of International Law* 17, 5 (2006), 921-43.
- Stapelbroek, Koen. ‘Trade, Chartered Companies, and Mercantile Associations’, *Oxford Handbook of the History of International Law*, ed. Fassbender and Peters, 338-58.
- Starkey, David J., Chris Reid and Neil Ashcroft, ed. *England’s Sea Fisheries: The Commercial Sea Fisheries of England and Wales Since 1300*. London: Chatham, 2000.
- Stebbing, Chantal. ‘The Commercial Application of the Law of Mortmain’. *Journal of Legal History* 10, 1 (1989), 37-44.
- Stein, Peter. *Regulae Iuris: From Juristic Rules to Legal Maxims*. Edinburgh: Edinburgh University Press, 1966.
- ‘Vacarius and the Civil Law’, *Church and Government*, ed. Nugent et al., 119-38.
- Roman Law in European History*. Cambridge: Cambridge University Press, 1999.
- Stein, Stanley J. and Barbara H. Stein. *Silver, Trade, and War: Spain and America in the Making of Early Modern Europe*. Baltimore: Johns Hopkins University Press, 2000.
- Stein, Tristan. ‘Passes and Protection in the Making of a British Mediterranean’. *Journal of British Studies* 54, 3 (2015), 602-31.
- Stephenson, Carl. *Medieval Feudalism*. Ithaca: Cornell University Press, 1942.
- Stern, Philip J. ‘Politics and Ideology in the Early East India Company-State: The Case of St Helena, 1673- 1709’. *Journal of Imperial and Commonwealth History* 35, 1 (2007), 1-23.
- “‘A Politie of Civill & Military Power’”: Political Thought and the Late Seventeenth-Century Foundations of the East India Company-State’. *Journal of British Studies* 47, 2 (2008), 253-83.
- The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*. Oxford: Oxford University Press, 2011.
- “‘Bundles of Hyphens’”: Corporations as Legal Communities in the Early Modern British Empire’, *Legal Pluralism and Empires*, ed. Benton and Ross, 21-48.
- Stern, Philip J., and Carl Wennerlind ed. *Mercantilism Reimagined: Political Economy in Early Modern Britain and Its Empire*. Oxford: Oxford University Press, 2014.

- Stith, William. *The History of the First Discovery and Settlement of Virginia*. Williamsburg: William Parks, 1747.
- Stone, Lawrence. *Causes of the English Revolution*. London: Routledge, 1972.
- Stow, George. *The Native Races of South Africa: A History of the Intrusion of the Hottentots and Bantu into the Hunting Grounds of the Bushmen, the Aborigines of the Country*. London: Swan Sonnenschein & Co., 1905.
- Strickland, Matthew. *War and Chivalry: The Conduct and Perception of War in England and Normandy, 1066-1217*. Cambridge: Cambridge University Press, 1996.
- Subrahmanyam, Sanjay. *The Portuguese Empire in Asia, 1500-1700: A Political and Economic History*. 2nd ed. London: Wiley Blackwell, 2012.
- Tai, Emily Sohmer. 'Law of Marque'. *Trade, Travel, and Exploration*, ed. Friedman and Figg, 338-9.
- Tait, James. *The Medieval English Borough: Studies on Its Origins and Constitutional History*. Manchester: Manchester University Press, 1999 (1936).
- Tapié, Victor Lucien. *France in the Age of Louis XIII and Richelieu*. Translated by D McN. Lockie. Cambridge: Cambridge University Press, 1984 (1967).
- Temin, Peter. *The Roman Market Economy*. Princeton: Princeton University Press, 2013.
- Theal, George McCall. *Chronicles of Cape Commanders*. Cape Town: W. A. Richards & Sons, 1882.
- Thierry, Eric. *La France de Henri IV en Amérique du Nord: De La Creation de L'Acadie à la Fondation de Québec*. Paris: Honoré Champion Éditeur, 2008.
- Thomson, Erik. 'France's Grotian Moment? Hugo Grotius and Cardinal Richelieu's Commercial Statecraft'. *French History* 21, 4 (2007), 377-394.
- Thomson, Janice E. *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*. Princeton: Princeton University Press, 2002.
- Thorp, M. R. and A. J. Slavin, ed. *Politics, Religion and Diplomacy in Early Modern Europe*. Kirksville, MO: Sixteenth Century Journal Publishers, 1994.
- Thrush, Andrew and John P. Ferris ed. *The History of Parliament: the House of Commons 1604-1629*. Cambridge: Cambridge University Press, 2010.
- Thrush, Andrew. 'Bagg, James II (c.1592-1638)'. *The History of Parliament*, ed. Thrush and Ferris.

- Thuau, Étienne. *Raison d'État et Pensée Politique à l'Époque de Richelieu*. Paris: Armand Colin, 1966.
- Thurston, Herbert. 'Bulls and Briefs'. *The Catholic Encyclopedia*. Volume 3. New York: Robert Appleton Company, 1908.
- Tierney, Brian and Peter Linehan, ed. *Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullmann on his Seventieth Birthday*. Cambridge: Cambridge University Press, 1980.
- Tierney, Brian. *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*. 2nd ed. Leiden: Brill, 1998.
- The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. Michigan: Eerdmans, 2001.
- Todorov, Tzvetan. *The Conquest of America: The Question of the Other*. Translated by Richard Howard. New York: Harper and Row, 1984.
- Tolan, John, Henry Laurens, & Gilles Veinstein. *Europe and the Islamic World: A History*. Princeton, NJ: Princeton University Press, 2013.
- Tomlins, Christopher. 'The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century'. *Law and Social Inquiry* 26, 2 (2001). 315-72.
- ed. *Many Legalities of North America*. Chapel Hill: UNC Press, 2001.
- Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America*. Cambridge: Cambridge University Press, 2010.
- Touchard, Henri. *Le Commerce Maritime Breton a la Fin du Moyen Age*. Les Belles Lettres: Paris, 1967.
- Tracy, James D. *Holland under Habsburg Rule, 1506-1566: The Formation of a Body Politic*. Berkeley: University of California Press, 1990.
- ed. *The Rise of the Merchant Empires: Long-Distance Trade in the Early Modern World, 1350-1750*. Cambridge: Cambridge University Press, 1990.
- ed. *Political Economy of Merchant Empires*. Cambridge: Cambridge University Press, 1991.
- Trigger, Bruce. *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered*. Montreal and Toronto: McGill-Queen's University Press, 1986.

- The Children of Aataentsic: A History of the Huron People to 1660*. 2 vols. Montreal: McGill-Queen's University Press, 1988.
- Tritton, A. S. *The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar*. London: Oxford University Press, 1930.
- Trivellato, Francesca. "Amphibious Power": The Law of Wreck, Maritime Customs, and Sovereignty in Richelieu's France'. *Law and History Review* 33, 4 (2015), 915-44.
- Trocme, Etienne and Marcel Delafosse. *Le Commerce Rochelais de la Fin du XVe Siecle au Debut du XVIIIe*. Paris: A. Colin, 1952.
- Trudel, Marcel. *Histoire de la Nouvelle-France: Les Vaines Tentatives, 1524-1603*. Montreal: Fides, 1963.
- 'Caën, Guillaume de'. *Dictionary of Canadian Biography*.
- 'Les Obligations du Censitaire, à l'Époque des Cent-Associés'. *Revue d'Histoire de l'Amérique Française* 27, 1 (1973), 3-41.
- The Beginnings of New France, 1524-1663*. Translated by Patricia Claxton. Toronto: McClelland and Stewart Ltd, 1973.
- Tuck, Richard. 'Peter Haggemacher, Grotius et la Doctrine de la Guerre Juste'. *Grotiana* 7 (1986), 87-92.
- The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. Oxford: Oxford University Press, 1999;
- 'Alliances with Infidels in the European Imperial Expansion'. in *Empire and Modern Political Thought*, ed. Muthu, 61-83.
- Turpyn, Richard. *The Chronicle of Calais in the Reigns of Henry VII and Henry VIII to the Year 1540*. Edited by John Gough Nichols. London: Camden Society, 1846.
- Twiss, Sir Travers. *Monumenta Juridica: The Black Book of the Admiralty*. London: Longman and Co., 1871-4.
- Ullmann, Walter. 'Bartolus on Customary Law'. *Juridical Review* 52 (1940), 265-83.
- 'The Delictal Responsibility of Medieval Corporations'. *Law Quarterly Review* 64 (1948), 77-96.
- 'The Development of the Medieval Idea of Sovereignty'. *English Historical Review* 44 (1949), 1-33.

- Unger, R. W. 'Dutch Herring Technology and International Trade in the Seventeenth Century'. *Journal of Economic History*, 40 (1980), 253-79.
- Upton, L. F. S. 'The Extermination of the Beothuks of Newfoundland'. *Canadian Historical Review* 58, 2 (1977), 133-53.
- Vale, Malcolm. 'Aristocratic Violence: Trial by Battle in the Middle Ages'. *Violence in Medieval Society*, ed. Kaeuper, 159-82.
- van Deventer, David E. *The Emergence of Provincial New Hampshire, 1623-1741*. Baltimore: Johns Hopkins University Press, 1976.
- van Ittersum, Martine Julia. 'Hugo Grotius in Context: Van Heemskerck's Capture of the *Santa Catarina* and its Justification in *De Jure Praedae* (1604-1606)'. *Asian Journal of Social Science* 31, 3 (2003), 511-48.
- 'Preparing *Mare Liberum* for the Press: Hugo Grotius' Rewriting of Chapter 12 of *De Jure Praedae* in November-December 1608'. *Grotiana* 26-8 (2005-7), 246-80.
- '*Mare Liberum* in the West Indies?: Hugo Grotius and the Case of the Swimming Lion, a Dutch Pirate in the Caribbean at the Turn of the Seventeenth Century'. *Itinerario* 31, 3 (2007), 59-94.
- Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615*. Leiden: Brill, 2006.
- van Wamelen, Carla. *Family Life onder de VOC: Een Handelscompagnie in Huwelijks- en Gezinszaken*. Hilversum: Verloren, 2014.
- van Wyk Smith, M. "'The Most Wretched of the Human Race": The Iconography of the Khoikhoin (Hottentots), 1500-1800'. *History and Anthropology* 5, 3-4 (1992), 285-330.
- Vanderkindere, Léon. *Choix d'Études Historiques*. Bruxelles: Weissenbruch, 1909.
- Vaughan, Alden T. "'Expulsion of the Salvages": English Policy and the Virginia Massacre of 1622'. *William and Mary Quarterly* 35, 1 (1978), 57-84.
- Transatlantic Encounters: American Indians in Britain, 1500-1776*. Cambridge: Cambridge University Press, 2006.
- Verhulst, Adriaan. *The Rise of Cities in North-West Europe*. Cambridge: Cambridge University Press, 1999.
- Vieira, Monica Brito. '*Mare Liberum* vs *Mare Clausum*: Grotius, Freitas, and Selden's Debate on Dominion over the Seas'. *Journal of the History of Ideas* 64, 3 (2003), 361-77.

- Vilain, Noël. 'Prescription et Bonne Foi: Du Décret de Gratien (1140) à Jean d'André (d. 1348)'. *Traditio* 14 (1958), 121-89.
- von Gierke, Otto. *Political Theories of the Middle Age*. Translated by F. W. Maitland. Cambridge: Cambridge University Press, 1900.
- Waldron, Richard. 'New Sweden: An Interpretation'. *Revisiting New Netherland*, ed. Goodfriend, 71-91.
- Walker, James W. St. G. *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone, 1783-1870*. London: Longman & Dalhousie University Press, 1976.
- Wallerstein, Immanuel. *The Modern World System*. 4 vols. Berkeley: University of California Press, 2011.
- Ward, John Manning. *British Policy in the South Pacific, 1786-1893*. Sydney: Australian Publishing Co., 1948.
- Ward, Robin. *The World of the Medieval Shipmaster: Law, Business and the Sea*. Woodbridge: Boydell Press, 2009.
- Watson, Alan. *The Law of Property in the Later Roman Republic*. Oxford: Clarendon Press, 1968.
- ed. *Daube Noster: Essays in Legal History for David Daube*. Edinburgh: Scottish Academic Press, 1974.
- 'The Evolution of Contract Law: The Roman System of Contracts'. *Law and History Review* 2, 1 (1984), 1-20.
- Weaver, John C. *The Great Land Rush and the Making of the Modern World, 1650-1900*. Montreal and Toronto: McGill-Queens University Press, 2003.
- Webb, David H. 'Profiting from Misfortune: Corruption and the Admiralty under the Early Stuarts', *Politics, Religion, and Popularity*, Cogswell et al., 103-23.
- Weber, Henry. *La Compagnie Française des Indes (1604-1875)*. Paris: Edition Arthur Rousseau, 1904.
- Weber, Max. *The History of Commercial Partnerships in the Middle Ages*. Translated by Lutz Kaelber. Lanham: Rowman & Littlefield, 2003.
- Weslager, C. A. *Dutch Explorers, Traders and Settlers in the Delaware Valley 1609-1664*. Philadelphia: University of Pennsylvania Press, 1961.

- 'Did Minuit Buy Manhattan Island from the Indians?'. *De Halve Maen* 43 (1968), 5-6.
- The English on the Delaware*. New Brunswick: Rutgers University Press, 1967.
- Westbrook, Raymond. 'The Origin of *Laesio Enormis*'. *Revue Internationale des Droits de l'Antiquité* 15 (2008), 39-52.
- Westlake, John. *A Treatise on Private International Law: Or the Conflict of Laws, with Principal Reference to Its Practice in the English and Other Cognate Systems of Jurisprudence*. London: W. Maxwell, 1858.
- Weststeijn, Arthur. 'The VOC as a Company-State: Debating Seventeenth-Century Dutch Colonial Expansion'. *Itinerario* 38, 1 (2014), 13-34.
- Wilkinson, C. H. *The Adventurers of Bermuda: A History of the Island from its Discovery until the Dissolution of the Somers Island Company in 1684*. Oxford: Oxford University Press, 1958.
- Williams, Robert A. *The American Indian in Western Legal Thought: The Discourses of Conquest*. Oxford: Oxford University Press, 1990.
- Wilson, Peter H. *Europe's Tragedy: A History of the Thirty Years War*. Cambridge, MA: Harvard University Press, 2009.
- Wolfe, Richard. *A Society of Gentlemen: The Untold Story of the First New Zealand Company*. London: Penguin, 2007.
- Woolf, Cecil N. Sidney. *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought*. Cambridge: Cambridge University Press, 1913.
- Woolrych, Austin. *Britain in Revolution, 1625-1660*. Oxford: Oxford University Press, 2002.
- Worden, Nigel et al. *Cape Town: The Making of a City*. Cape Town: David Philip, 1998.
- Wubs-Mrozewicz, Justyna and Stuart Jenks, ed. *The Hanse in Medieval and Early Modern Europe*. Leiden: Brill, 2013.
- Yeager, Timothy J. 'Encomienda or Slavery? The Spanish Crown's Choice of Labor Organization in Sixteenth-Century Spanish America'. *Journal of Economic History* 55, 4 (1995), 842-59.
- Yirush, Craig. 'Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704-1743'. *Law and History Review* 29, 2 (2011), 333-73.
- Zaller, Robert. 'Martin, Richard (1570–1618)', *Oxford Dictionary of National Biography*.

Zeller, A. G. *The Champlain-Iroquois Battle of 1615*. Oneida: Madison County Historical Society, 1962.

Zimmerman, Reinhard, and Daniel Visser ed. *Southern Cross: Civil Law and Common Law in South Africa*. Cape Town: Juta and Co., 1996.

Zimmermann, Reinhard and Simon Whittaker, ed. *Good Faith in European Contract Law*. Cambridge: Cambridge University Press, 2000.

Zmora, Hillyay. *Monarchy, Aristocracy, and the State in Europe, 1300-1800*. London and New York: Routledge, 2001