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JOHN SELDEN'S
H I S T O R Y O F T I T H E S
IN THE CONTEXT OF
TWO OF HIS OTHER EARLY WORKS

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KATHLEEN LONCAR

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The translations of all passages in this work quoted in Latin, Greek, Hebrew and French are my own.

ABSTRACT

In the seventeenth century one very keenly contested issue was that of tithes. In many areas these were still levied in kind - one-tenth of all produce of the land - though some had been commuted to money payments. Because so much former monastic land had come into possession of lay persons at the Dissolution of the Monasteries, many of the tithes were held by lay landlords and were not being paid to the clergy. Also some former monastic lands were exempt from tithe. As a result, many parish livings no longer provided a reasonable livelihood for a clergyman. The Church was trying to regain the tithes, which it saw as rightly Church revenue, by arguing that tithes were a levy set by divine law for the upkeep of the clergy. Those who believed this based their argument on the Bible, and also on canon law, which gave control of the tithes to the Bishops. They maintained also that any dispute over tithes must be determined in the ecclesiastical courts. The landed interest on the other hand said that as tithes were a levy on land, disputes over tithes belonged properly to the common law courts.

When John Selden wrote his History of Tithes he elected not to enter the argument as it stood, but claimed to set out in full the whole history of tithes from the time they were first levied. In the course of this history he not only examined Biblical texts and writings of pagan antiquity, but also early Saxon

laws for tithing in England. However he spent a very great part of the work in discussing the medieval period, including researching and quoting from wills, chartularies and legal cases. In the course of this analysis he argued that tithes, not only in England but throughout Europe, were established by secular law, and disputes about them were properly matter for the secular courts; also that when tithes had been legally conveyed by will or gift to a monastic church this created a valid title in law which must stand. Most of these conveyances were made prior to the thirteenth century; after that the title to tithe was settled in the parish rector.

Selden allocated the second half of the work to examining the situation in England in detail, and showed that as all the former monastic lands in England were held by the right of the Statutes of Dissolution of the Monasteries, with all the rights inhering in them at the time of the Dissolution, all the rights to tithe and exemptions from tithe held by lay persons should remain with them. However he also claimed that the clergy were more assured of their right to the tithes they held by accepting his argument than they were if they claimed them by divine law, since not everyone believed in divine law. He believed that the Church's rights were inextricably linked with the land, and if this linkage were broken the stability of society would be disrupted, and the parish clergy would be in danger of losing their rights altogether.

To obtain a full understanding of his thought on the matter, this thesis examines the History of Tithes in the context of two of his other works written at about the same period, in which ancient laws were researched and the importance of the early Middle Ages, which he saw as the seminal period for the constitutional and legal framework of society, demonstrated.

INTRODUCTION

At the outbreak of the English Civil War the King summoned John Selden to join him at York. Selden's letter to the Marquis of Hertford gave a long explanation as to why he judged it better not to come: he was not well; but even if he were, it would not really advantage the King to have him there, - it might occasion some "difference" between the King and the House of Commons:

...My legal and humble affections to His Majesty and his service are, and shall be, as great and as hearty as any man's, and therefore, when I am able I shall really express them.

He went on to ask the Marquis to persuade the King not to be angry with him for not coming.¹

Yet Selden had on many occasions come into conflict with both James I and Charles I. He had been summoned before High Commission after publishing his History of Tithes; he had been committed to the Tower when he shared in the protest to James I when the King refused to receive the remonstrance of the twelve members - though released after one month; in 1624 he served on the Election Committee which established that the House of Commons had jurisdiction over the election of its own members and this right did not depend on royal grant. In 1627 he pleaded for the discharge of Hampden and later took part in framing the Petition of Right. In 1629 after Charles I dissolved Parliament he was committed to the Tower. On these grounds he

¹Selden Table Talk Preface by S.W. Singer (Reeves & Turner 1890) p. xlvi.

might have been expected to be persona non grata to the King. On the other hand the King had been very pleased with Selden's Mare Clausum, published in 1635, which sets out to prove that the sea contiguous to the British Isles is under the jurisdiction of the King of England; the King had ordered copies to be kept in Admiralty and the Exchequer. Selden had also served on a Committee set up by Laud to look into the state of the Established Church.

His situation at the beginning of the Civil War, being a member of the Long Parliament but expected by the King to join him, is reminiscent of the situation of Cicero at the beginning of the Civil War between Caesar and Pompey, both of whom wrote summoning him to join them. The similarity between the two men is quite striking: both were lawyers and researchers into old laws; both wrote extensively on religious matters;² both were respected for their voluminous knowledge, and this explains to a great extent why both were desired as supporters on either side of the conflict. For in both these Civil Wars there was a certain amount of constitutional argument to support either side, and a person who had such immense legal and constitutional knowledge would be invaluable: hence both sides wanted to enlist them.

This illustrates why it is impossible to fit Selden into any of the categories which analysts of the Civil War conflict have drawn up. He first came into prominence as a researcher; when he was first called in to

²E.g. Cicero de Natura Deorum; Selden De Iure Naturali apud Veteres Hebraeos.

assist Parliamentary leaders in 1621 to draw up the Protestation of the Commons he was not an M.P., but he had already established a reputation as a researcher into legal history.

John Selden's contribution was his complete mastery of legal authorities, and his vast unrivalled knowledge of constitutional precedent. He supplied the munitions of attack from a peerless armoury of learning.³

Fletcher is looking at Selden as an exemplar of the Parliamentarian side in the Royalist/Parliamentarian conflict. This confrontational model is no longer accepted as accurate by a large number of historians. Clearly, though, whatever model we use to explain the conflict, Selden was claimed as a supporter by both camps: equally clearly he did not feel that he fitted completely into either. Perhaps the clue to his thought is found in the motto which he had printed on the title page of many of his works: *περὶ πάντων τὴν ἑλευθερίαν*: freedom in all things. For him this seems to have meant predominantly intellectual freedom - the freedom to pursue a line of thought no matter where it led him.

Along with other important lawyers and Parliamentarians of the early seventeenth century, like Spelman, Camden, Ussher and Cotton, Selden belonged to the Society of Antiquaries which had been founded in Elizabeth's reign. There was at that time an increasing interest in early legal and constitutional authorities, and repositories of earlier Parliamentary records were established at the Rolls House and the Tower, the four Treasuries at Westminster, the State Paper Office at White-

³Sir Eric Fletcher John Selden: Selden Society Lecture 1969 p.7.

hall, and various Government departments. One of the Society members, Sir Robert Cotton, collected a large private library of ancient wills, chartularies, and other manuscripts, to which Selden makes frequent references in his works.

James I looked on the Society "with disfavour" and it ceased to meet about 1608. Attempts to revive its meetings about 1614 were blocked by the King.⁴ However the members of the Society continued their researches and some of these were of great importance in supporting the arguments over many of the political and religious issues of the day. Sir Eric Fletcher says that the History of Tithes was the work which

...transformed Selden into a figure of national importance and controversy.⁵

Selden was summoned before High Commission to answer charges relating to it, and was eventually prevailed on to sign a document apologising for the publication of the book, though he did not recant the opinions contained in it. He was forbidden to answer any attack made on the book or on himself. Fletcher believes that this

...roused in Selden, at the outset of his political career, a resistance to absolutism in government⁶

Certainly Selden did not believe in absolutism - see for example his comment:

If a Prince be servus natura, of a servile base spirit, and the subjects liberi, free and ingenuous, oftentimes they depose the Prince

⁴C. Tite Impeachment and Parliamentary Judicature in Early Stuart England (Athlone Press 1974) p.29.

⁵Fletcher John Selden p.5.

⁶ibid. p.6.

and govern themselves. On the contrary, if the People be servi natura, and someone among them of a free and ingenuous spirit, he makes himself King of the rest: and this is the cause of all changes in the State: Commonwealths into Monarchies, and Monarchies into Commonwealths.⁷

but it is impossible to say whether this experience caused that opinion. The History of Tithes however was probably the first of Selden's works which brought him into prominence. It is a contribution to an argument which was of great importance to the Church and to society at large in the seventeenth century, when the right to tithes was a matter of great economic importance. It also provided Selden with a forum for arguing a theme which was of great importance to him: the relative authority of ecclesiastical law, civil law, and common law. It also provided him with cogent arguments for demonstrating that the basis of English constitutional and legal practice lay in the Middle Ages. These themes can be studied not only in the History of Tithes but in two other books which, together with it, form a group of early works published within a few years of each other: Jani Anglorum Facies Altera (1610), Titles of Honor (1614) and History of Tithes (1618). This thesis will argue that Selden was seeking to prove that the common law had precedence over ecclesiastical and civil law; that tithes were due by positive secular law and not by divine law; and that since the Church was linked with the land, its title to tithe was more secure, not less, if it rested its claim to tithe on positive secular law. These themes are clarified by

⁷Selden Table Talk ed. Singer p.122.

being seen in the context of arguments put forward in the other two works. Selden's preoccupation with the Middle Ages becomes more understandable when we see that he saw it as the seminal period for the establishment of the parochial system, linked firmly to the landowners, lay and monastic, who between them controlled the land, not only in England but in all European countries, by an interlocking fabric of rights and tenures which is reminiscent of the Great Chain of Being - an idea so popular in the seventeenth century.

Selden himself makes it clear that he did not approve of antiquarian research without a purpose. In the Dedication to Sir Robert Cotton at the beginning of the History of Tithes⁸ he defends the study of antiquity, in that it enables us to add to our years by drawing on the wisdom of our ancestors, but condemns the

...too studious affectation of bare and sterile Antiquitie, which is nothing else but to be exceeding busie about nothing.

We may take it therefore that his antiquarian researches do have a purpose, and are not undertaken merely to display his learning.

In the Preface to the History of Tithes Selden sets out his reasons for writing it. He claims that in the "frequent disputations" about tithes - which he does not specify by name - not only are Biblical arguments used, but also historical arguments, which have been adduced very inaccurately. These include:

⁸No page numbers.

...the kinds of payment of them among the Hebrews, among the Gentiles, the maintenance of the Church in the primitive times, the arbitrarie consecrations, appropriations, and infeodations of them in the middle times, the payment of them at this day in the several states of Christendome, together with the various opinions and positive laws touching them.⁹

This summary is in fact a guide to the order of the subjects he himself discusses in the History of Tithes, and clearly he felt that the inaccuracy in the way they had been dealt with by other writers needed correction. He claims that the "Canonists and Divines" who have written these works have not only misquoted the early sources they claimed to be using, but also assumed that if there was a Canon about tithing this proved that people were obeying it, which was far from the case.¹⁰ The canon law

...was never receivd wholly into practice in any State, but hath ever been made subiect in whatsoever touches the temporalties or maintenance of the Church (which come from Laymen) to the varietie of the secular Laws of everie State, or to National customs which cross it.¹¹

He claims that the clergy will not be disadvantaged by the arguments he puts forward. There has never been so much evidence collected to show the obligation by human positive law to pay "whole tithes" as here.¹² Whereas, if they are agreed to be due only by Divine Law, the way is open to those who do not believe in Divine Law to refuse to pay them at all; or to those who deny parochial right to say they are pay-

⁹Preface to History of Tithes p.III.

¹⁰ibid. p.IV

¹¹ibid.

¹²ibid. p.XII

able as alms to the clergy of one's choice - the argument used by Dominican and Franciscan friars, Wycliffe, and Erasmus.¹³ (This was the position adopted by the Jacob church in Selden's day).¹⁴ The constitution and practice of Christian states have settled the payment of tithes as maintenance for the clergy by civil title, and this is what his History sets out to show.¹⁵

Selden says that some people (unnamed) have questioned what right a common lawyer has to be writing on the subject of tithes. He considers a common lawyer a more appropriate person than a Divine, a Canonist, or a Civil Lawyer. None of these study the history of laws and practices correctly. Even study of the practice of tithing among the Hebrews is history rather than divinity. This is study proper to a common lawyer and indeed is undertaken as part of Philology.¹⁶

This is a very important clue to the kind of study Selden saw himself as undertaking, and indeed to many of the arguments he adduces, particularly his concentration on the Middle Ages. As Pocock explains, the true forerunner of modern historical studies is to be found in the historical studies of law carried out in the Law Faculties of sixteenth-century French universities, where the attempts of the humanists to study Roman law texts, expurgated of the glosses and commentaries of later jurists, had led them to compare and collate original texts to determine the original

¹³ Preface to History of Tithes p.XIV

¹⁴ See Conclusion to this thesis.

¹⁵ Preface p.XIV.

¹⁶ ibid. pp.XVII-XVIII

meanings.¹⁷ Their researches thus revealed something of the original context in which Roman laws were formulated, and robbed them of their aura of universality.

One of the principal thinkers of this school was François Hotman, who is frequently referred to by Selden in Titles of Honor. None of the references is very telling in itself; Selden does not set out to give any exposition of his thought. However the scattered brief references do reveal a familiarity with his writings, and indicate that the similarities in their thought are not coincidental. One would in fact expect some familiarity with Hotman's thought in Selden, considering Hotman's life history. He was the son and brother of traditionalist and conservative lawyers, who broke away from his family tradition, joined the Reformed religion, made contact in Paris with juristic thinkers who were working on new lines, and went to Geneva in 1548 where he "venerated Calvin as his spiritual father."¹⁸ He was a prolific writer, whose writings were widely known and used in polemical arguments by seventeenth century writers. Like the other French jurists with whom he was associated, he advocated that French customary law should be treated as the law of the country rather than Roman law, and they all regarded the Papacy and the canon law as having usurped royal authority and corrupted ancient law.¹⁹

This group of thinkers was very interested in

¹⁷ J.G.A. Pocock The Ancient Constitution and the Feudal Law (C.U.P. 1957) p.8.

¹⁸ Hotman Francogallia ed. R.E.Giesey and H.M. Salmon (C.U.P. 1972): editor's introduction pp.11-12.

¹⁹ Francogallia Introduction p.15.

feudalism as being the repository of customary laws. Some of them believed that it had a Celtic Gallic origin; others - including Hotman - thought that it was Germanic and Frankish (the Franks being originally a Germanic people). It is noteworthy that in Titles of Honor Selden follows Hotman in regarding feudalism as deriving specifically from the Frankish kingdom. The point which Hotman and the other French jurists were making was that customary laws derived from the "free" barbarian peoples, and were both native to their lands, and superior to the Roman law which had been imposed on them.

In this context Selden's insistence on the priority and superiority of the common law of England, and the native laws of other countries of Europe, to canon law or Roman law, becomes clearly an important ideological point. It was not merely a ploy to get as much work as possible into common law courts in rivalry to the civil lawyers, as Levack suggests when analysing the practical reasons for conflict between civil lawyers and common lawyers in James I's reign.²⁰ No doubt practical considerations had some influence, but the philosophical reasons went much deeper.

Thus Selden's identification of his study as being part of Philology (see above) is also clarified. The sixteenth century French jurists, as Pocock said, compared and collated texts to determine the original meanings of legal and constitutional terms.²¹ This

²⁰B. Levack The Civil Lawyers in England (O.U.P. 1973) pp. 3 ff.

²¹Pocock Ancient Constitution p.8.

is the method which Selden uses in the three books under discussion in this thesis. He uses a large number of original manuscripts, some of which he lists in his own index at the end of Titles of Honor, though he is not at all methodical, and the index is far from exhaustive. But in enquiring into the origins of titles and offices from King and Emperor downwards, especially in Titles of Honor, he enquires at length into the original meaning of the words, and compares explanations from many sources to prove the points he is making. Clearly he sees himself as being in the tradition of Hotman and his compatriots, and it is understandable therefore that the salient points of his conclusions are similar: the importance of the study of early laws; the priority of the common law and its superiority to the canon law and civil law "intruders"; and the importance of the feudal system as the defender of each nation's customary law. The fact that the feudal system was inextricably linked to the land made the study of tithe a natural choice as a field for studying these principles in detail, and the current interest in tithes in England for practical economic causes was another reason for choosing this subject.

The conclusions he came to were unacceptable to the Establishment of his day when they first appeared. No doubt there was more than one reason for this. The Bishops were all in favour of the theory that tithes were due by divine law, and that they should be under

the control of the bishops, and out of the hands of the lay impropiators. These persons claimed to hold them in right of the fact that all former monastic possessions which had passed to other hands at the Dissolution of the Monasteries came with all their possessions, visible and invisible, intact. The bishops laid claim to tithe in virtue of their diocesan authority. The difference this would have made to the revenues of the Church, and the income of the clergy, was incalculable.

The King looked to the Bishops as important supporters of his authority and thus was on their side in this argument. Moreover he would have been in disagreement with Selden's view about the primacy and superiority of the common law. Some of the civil lawyers in England were his best supporters in the theory of royal supremacy. In 1607 Dr John Cowell, Professor of Civil Law at Cambridge, published The Interpreter, in which various political terms were defined. This book stated that the King of England was an absolute king and that laws made in Parliament could not bind the ruler:

...(that) were repugnant to the nature and constitution of an absolute monarchy.²²

James I did not state the doctrine of absolute monarchy quite so fully as Dr Cowell, but he did regard the civil lawyers as very important supporters: so he had this reason also for objecting to the History of Tithes with its strong arguments against civil law. These factors led to Selden's summons to answer to High Com-

²²J.R. Tanner English Constitutional Conflicts of the Seventeenth Century (C.U.P. 1928) p.21.

mission over the book (see above) and brought him into prominence as a political figure.

This thesis examines in detail the arguments adduced in the History of Tithes in the context of the other two works, and seeks to establish their significance. For this reason the first printed texts only of the three books have been used. Later editions incorporate other material, which may have been added with hindsight by the author, or even interpolated by other persons. In any event they would blur the impact made by the original arguments.

In Chapter 1 Selden's account of the payment of tithes in the ancient world is examined - both payment by the Hebrews as recorded in the Bible, and payment of tithes or similar levies in pagan communities. Chapter 2 deals with his account of the payment of tithes in Christian countries, and how the parochial system emerged and the tithes were annexed to it. The rise of the monastic system and the conflict between this and episcopal rights is also discussed. From this emerges the query as to whether tithes were a right annexed to the land or a specific levy on the faithful for the support of the clergy, and therefore by what law they should be set and enforced. This leads Selden to a discussion of the relative claims of ecclesiastical and secular law. This is examined in Chapter 3.

This discussion leads on to an enquiry into Selden's views on the origin of law and of authority in

society, and the relationship of law and monarchy. This is discussed in Chapter 4. As Selden's opinion is clearly that feudalism was the basis of English and European society, (see above), Chapter 5 examines his views on feudalism in detail. Chapter 6 then deals with Selden's analysis of the practice of tithing in England. In the History of Tithes he divided the subject in this way, spending about half the book on the rest of the world and half on England. It seems important to follow his lead in analysing them separately, in order to understand his argument. He wanted to establish the principle that secular law was the basis for tithing by looking at the universal practice and to reinforce this by analysing English law and practice in detail. He also wanted to emphasise that the parochial system is inextricably linked to land tenure, and is the true basis of the Church's position, so that the clergy are better off relying on his arguments than basing their claims on divine law. The conclusion will examine whether this argument reflects Selden's own genuine opinion, or whether it was an excuse for keeping the tithe in the control of the landed interest.