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THE ROLE OF RULES:

LEGAL MAXIMS IN EARLY-MODERN COMMON LAW PRINCIPLE AND PRACTICE

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Early-modern common lawyers writing about the common law itself shared a collection of theoretical ideas or assumptions. One of these was the importance of legal maxims to the common law. These writers were also all practitioners, many of them highly successful, and the language of maxims can be seen in contemporary law reports. One of the major sources for historians' consideration of maxims is itself from a law report, the case of *Colthirst v Bejushin*.<sup>1</sup> While Christopher St German wrote that a 'large volume would not suffice' to declare all the maxims of the common law, this did not deter others.<sup>2</sup> Literature devoted to maxims was a feature of early printed law books, suggesting a market amongst practitioners.<sup>3</sup>

Maxims themselves have been the subject of considerable discussion amongst historians of the common law, considering the different theories of maxims which were enunciated and

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\* Lecturer, Faculty of Laws, UCL. Spelling has been modernised in all quotations and law-French has been translated. The place of publication of printed works is London unless otherwise indicated. The following abbreviations are used: Bacon, *Maxims* (F. Bacon, *Maxims of the Law*, in J. Spedding, R.L. Ellis and D.D. Heath (eds.), *The Works of Francis Bacon* (1857-1874, Longmans), vol.7, p.307); BL MS Add (British Library Additional Manuscript); BL MS Harg (British Library Hargrave Manuscript); BL MS Stowe (British Library Stowe Manuscript); CUL MS (Cambridge University Library Manuscript); *Doctor and Student* (T.F.T. Plucknett and J.L. Barton (eds.), *St German's Doctor and Student* (1974, Selden Society)); HEH MS El (Henry E. Huntington Library Ellesmere Manuscript).

<sup>1</sup> (1550) 1 Plowden f.21. Plowden's *Commentaries* are generally taken as fairly accurate reports of proceedings, although Cromartie has raised the question of whether more attention should be directed to Plowden's own views as shaping his reports (A. Cromartie, *The Constitutionalist Revolution* (2006, Cambridge University Press, Cambridge), p.109).

<sup>2</sup> *Doctor and Student*, p.59.

<sup>3</sup> In addition the works cited through this paper, see, e.g., Anonymous, *Principia sive Maxima Legum Anglie* (1546, Richard Lant).

the relationship between maxims and other elements of the law.<sup>4</sup> This paper takes a different approach and seeks to investigate the relationship between early-modern common law theory about maxims and the use of maxims in legal practice.<sup>5</sup> The paper sets out common features in the various theoretical discussions of maxims, comparing these to the use of maxims in legal practice. Four topics are considered: the identification of maxims; their incontrovertibility; the content and scope of maxims; and the relationship between maxims and equity.

Broadly, the use of maxims in practice was compatible with the theory of maxims and in some cases the influence of theoretical literature on practice seems clear. However, the prominence of maxims in legal theory was not reflected in legal practice. Law reports suggest that whatever their theoretical importance, maxims were not sufficient to resolve actual cases.

Investigation of maxims in legal practice raises several methodological problems. First, early-modern law reports were not generally intended to be verbatim transcripts of proceedings and were often written by someone other than the lawyer whose argument is

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<sup>4</sup> E.g., P. Stein, *Regulae Iuris; from juristic rules to legal maxims* (1966, Edinburgh University Press, Edinburgh); M.S. Neustadt, *The Making of the Instauration: science, politics, and law in the career of Francis Bacon* (1987, unpublished PhD dissertation, John Hopkins University), pp.35-61; Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (2000, John Hopkins University Press, Baltimore), especially pp.66-68, 166-178; Cromartie, *Constitutionalist Revolution*.

<sup>5</sup> For purposes of this paper, 'early-modern' covers the period 1528-c.1650. The start date was determined as it is the year in which St German's *Doctor and Student* was first printed. As will be noted below (text at n.41), there seems to be a change in the practice of maxims after the first decade of the sixteenth century and there is good evidence that St German's work influenced subsequent practice. In terms of thinking about maxims, after St German discussion of maxims seems to be more heavily influenced by civilian ideas about *regulae iuris* than is the case in the fifteenth century.

reported, so it cannot be assumed that the language used in the report was also that used in court.<sup>6</sup>

Second, there was diversity in the language associated with maxims, a problem of which some early-modern writers were well aware.<sup>7</sup> For example, some writers argued for differences between ‘maxims’ and ‘rules’, while others regarded these terms as referring to identical concepts. When considering the theoretical discussions this difficulty can usually be overcome: writers make their preferred usage explicit or can be seen using a range of vocabulary in a manner which enables some assessment of whether different words functioned only as synonyms or as different concepts. Practitioners do not seem to have been concerned to distinguish these clearly, a point recognised by John Dodderidge.<sup>8</sup> For example, in two of his draft arguments Thomas Egerton explained that royal patents are interpreted against the patentee and favourably to the king, describing this as both a ‘rule’<sup>9</sup> and a ‘maxim’.<sup>10</sup> The substantive point was the same, and it seems legitimate to infer that rules and maxims were interchangeable for Egerton.

Third, the modern assumption is that legal maxims are short Latin statements.<sup>11</sup> This has caused considerable problems for some historians, who have identified maxims wherever

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<sup>6</sup> D.J. Ibbetson, ‘Report and Record in Early-Modern Common Law’, pp. 55-68 in A. Wijffels (ed.), *Case Law in the Making, the techniques and methods of judicial records and law reports (Vol. I)* (1997, Duncker and Humblot, Berlin), especially pp.57-58.

<sup>7</sup> For the differences in language and attempts by writers to clarify their terminology, see I. Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (2008, unpublished PhD dissertation, University of Cambridge), pp. 27-28.

<sup>8</sup> J. Dodderidge, *The English Lawyer* (1631, Miles Flesher), p.151.

<sup>9</sup> *The Dean and Chapter of Chester’s Case* (1578) HEH MS El 482 f.34.

<sup>10</sup> *Hawes v Hynge* (undated) HEH MS El 482 f.249.

<sup>11</sup> See, e.g., J.M. Gest, ‘The Writings of Sir Edward Coke’ (1909) 18 *Yale Law Journal* 504 at 529-30; S.E. Thorne, ‘Sir Edward Coke: 1552-1952’, pp.1-18 in *The Selden Society Lectures, 1952-2001* (2003, William S. Hein & Co., Buffalo, N.Y.), p.7; T.G. Barnes, ‘Introduction to Coke’s “Commentary on Littleton”, pp.1-25 in A.D. Boyer (ed.), *Law, Liberty and Parliament: selected essays on the writings of Sir Edward Coke* (2004, Liberty Fund, Indianapolis, Ind), pp.2-3.

Latin appears in law reports.<sup>12</sup> Neither early-modern writers on maxims, nor references to ‘maxims’ in law reports, are limited to Latin statements. Early-modern lawyers seem freely to have stated maxims in both Latin and the vernacular, sometimes in the same work.<sup>13</sup> Not only could maxims be expressed in the vernacular, but not all statements in Latin should be regarded as maxims. Common lawyers might quote material originally in Latin,<sup>14</sup> or in the case of Edward Coke simply summarise arguments with a pithy Latin statement.<sup>15</sup>

This paper takes a conservative approach. Maxims are only identified where they are specifically identified as such in the report, but given the diversity of language used, this

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<sup>12</sup> A good example of the difficulty is Charles M. Gray, *The Writ of Prohibition: Jurisdiction in Early Modern English Law* 2<sup>nd</sup> edn (2004, e-book available here: <http://www.lib.uchicago.edu/e/law/gray/>), vol.2 pp.25 and 322 and vol.3 p.130. Gray’s analysis is flawed in identifying any Latin statement as a ‘maxim’. The reports of *Bennet v Shortwright* (1590) and *Brooke v Parson of D* (1600) cited by Gray do not refer to a maxim, although most do include the Latin statement ‘*transeunt decima in catalla*’ in relation to tithes. In context this is simply a conclusion rather than a maxim. The Latin statement was probably used as it also features in the ‘statute’ *Articuli Cleri* 1316 (1 Statutes of the Realm 171) c.1 and so the common lawyers sought to use the ‘statute’ to justify their exercise of jurisdictional control. Similarly, most of the reports of *Cullier v Cullier* (1590) refer to the civil and canon law rule that *nemo tenetur seipsum prodere*. Gray interprets this as a ‘maxim’ of the common law which other courts could not contradict, but the better interpretation seems to be that the common law courts thought that they were holding the ecclesiastical courts to the canon law’s own rules (see R.H. Helmholz, ‘The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century’ pp.17-46 in R.H. Helmholz, C.M. Gray, J.H. Langbein, E. Moglen, H.E. Smith, A.W. Alschuler (eds.), *The Privilege Against Self-Incrimination: Its Origins and Development* (1997, University of Chicago Press, Chicago), pp.43-5.

<sup>13</sup> E.g. BL MS Harg 207, a collection of maxims which uses both Latin and vernacular statements of maxims.

<sup>14</sup> See above, n.12.

<sup>15</sup> See, e.g., *Slade v Morley* (1602) 4 Co.Rep., ff.92<sup>v</sup>-93, where Dodderidge’s argument is summarised in Latin. The surviving reports of the case show that Dodderidge delivered a much fuller argument which did not include the Latin statement in Coke’s report (see J.H. Baker and S.F.C. Milsom, *Sources of English Legal History: Private law to 1750* (2<sup>nd</sup> ed. 2010, Oxford University Press, Oxford), pp.460-466). Thomas Ashe, *Fasciculus Florum* (1618, G.Eld.) is a collection of Latin statements taken from Coke’s *Reports* which Ashe never describes as maxims.

includes any references to ‘rules’, ‘principles’, ‘grounds’ or ‘maxims’. Where such language is used, either the lawyer in court, or the reporter, associated the argument with the idea of maxims. One consequence is that the paper may underestimate the use of maxims in practice.<sup>16</sup> This approach also avoids the difficulties in the use of Latin or the vernacular.

#### IDENTIFYING MAXIMS

Both theorists and practitioners needed to develop ideas about how maxims were to be identified, an issue which raised considerations about the nature of maxims themselves. There were two different strands of thought in the theoretical literature, strands which were sometimes woven together from 1579 onwards.

The older tradition is found in Fortescue and St German. The existence of maxims in a legal system was simply assumed and no source was given for the maxims. The fifteenth-century writer Fortescue stated that there was no ‘rational ground’ for ‘principles’, which could be known only through ‘sense and memory’.<sup>17</sup> This position was a necessary part of Fortescue’s Aristotelian view of maxims as principles used in a logical reasoning process. To consider the source of maxims might provide a means to dispute principles. St German similarly did not explain the existence of particular maxims, or maxims in general. Instead, he linked maxims and customs, the basis for both of which was not explained. According to St German, while customs were known to all, maxims were known only to the learned.<sup>18</sup>

An alternative approach to maxims can be found in Serjeant Morgan’s argument in *Colthirst v Bejushin* (1550), as printed in Plowden’s *Commentaries* in 1571. According to Morgan,

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<sup>16</sup> See, e.g., the cases discussed about maxims and equity below, text at nn.65-67. Gray not only refers to cases where a ‘maxim’ is explicitly mentioned, but other cases where the same substantive issue arose. However, the reports do not demonstrate that the lawyers in those cases considered the issue in terms of maxims.

<sup>17</sup> J. Fortescue, *In Praise of the Laws of England* in S. Lockwood (ed.), *Sir John Fortescue: On the Laws and Governance of England* (1997, Cambridge University Press, Cambridge), p.15. Fortescue’s work was first printed in 1543.

<sup>18</sup> *Doctor and Student*, pp.57-9.

rather than simply being known, maxims are ‘conclusions of reason’.<sup>19</sup> In the 1579 printing of Rastell’s law dictionary, this idea of maxims as conclusions of reason was combined with Fortescue’s inductive approach to maxims, changing Fortescue’s language of maxims being learned through ‘sense and memory’ to knowledge from ‘experience’.<sup>20</sup>

Most later writers chose one of these two positions. Both Edward Coke and Francis Bacon, in a rare moment of agreement, described maxims as ‘conclusions of reason’, although Bacon also thought it ‘undue and preposterous to prove rules and maxims’, a position like that of Fortescue.<sup>21</sup> However, Noy regarded maxims simply as rules which are known.<sup>22</sup> Like St German, Noy expressly linked maxims and customs and limited knowledge of maxims to the ‘learned’. Noy took this position a little further, explaining that ‘which is a maxim and which is not, shall always be determined by the judges, because they are known to none but to the learned’.<sup>23</sup> The role of the judges in determining what is and is not a maxim was recognised by St German, but the addition of ‘because’ by Noy suggests that he

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<sup>19</sup> *Colthirst v Bejushin* (1550) 1 Plowden, f.27<sup>v</sup>. However, Morgan may have been acknowledging the earlier tradition when he described maxims as ‘authorities in themselves’.

<sup>20</sup> J. Rastell, *An exposition of certaine difficult and obscure words, and termes of the lawes* (1579, Richard Totell), ff.150<sup>v</sup>-151. The law dictionary was first printed in 1523 (as the *Exposiciones terminorum legum anglorum*) and periodically amended. The 1579 printing was a major alteration.

<sup>21</sup> E. Coke, *The first part of the Institutes of the lawes of England. Or, A Commentarie vpon Littleton* (1628, Societe of Stationers), f.10<sup>v</sup>, Bacon, *Maxims*, pp.320 and 322.

<sup>22</sup> W. Noy, *A Treatise of the Principal Grounds and Maxims of the Lawes of the Kingdome* (1642, W. Cook), p.20. There is no evidence that Noy was the author of this work, which was printed posthumously. The theoretical content is derived from St German, while the particular maxims come from Finch’s *Nomotexnia*. A manuscript version of the text (BL MS Stowe 383) has no association with Noy. False attribution of printed works to famous lawyers seems to have become a problem from the 1630s. See below, n.85 for an example in relation to Francis Bacon. Similarly, it is quite possible that the *Compleat Copyholder* attributed to Edward Coke is not Coke’s work (see I. Williams, ‘The Tudor Genesis of Edward Coke’s Immemorial Common Law’ (2012) 43 *Sixteenth Century Journal* 103, p.122 n.98). I shall refer to the *Treatise* as Noy’s work throughout this paper, but the attribution should be treated with considerable caution.

<sup>23</sup> Noy, *Treatise*, p.20.

saw only the judges as being the 'learned'. Henry Finch, who differentiated between 'rules of reason' and 'maxims', regarded maxims as derived from existing laws, which suggests that maxims are a form of conclusion.

John Dodderidge's discussion was arguably more sophisticated, trying to bring together the two different strands of thinking about maxims as well as ideas from the civilian and Aristotelian traditions. In many respects Dodderidge follows St German. Dodderidge described 'principles' as known to all (like St German's customs) through the 'light of Nature'.<sup>24</sup> By contrast, '[s]econdary principles...are not so well known by the light of Nature, as by other means...and are peculiarly known, for the most part, to such only as profess the study and speculation of Laws'.<sup>25</sup> The limitation on who knows these secondary principles echoes St German's description of maxims. However, Dodderidge also referred to maxims as 'conclusions of reason', a departure from St German's ideas about maxims.<sup>26</sup> According to Dodderidge, 'secondary principles' were 'derived out of the general customs, and maxims, or principles of the law of nature or primary conclusions'. Secondary principles were therefore conclusions of a reasoning process. This seems to be an attempt by Dodderidge to integrate the view of maxims as 'conclusions of reason' and as known to the learned.<sup>27</sup>

In legal argument the situation appears to have been different. However much theorists claimed that maxims were known by all the learned, in argument maxims were very rarely asserted without reference to some other 'authority'.<sup>28</sup> It was not assumed that the judges

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<sup>24</sup> J. Dodderidge, *The English Lawyer* (1631, Miles Flesher), p.191.

<sup>25</sup> Dodderidge, *The English Lawyer*, p.194.

<sup>26</sup> Dodderidge, *The English Lawyer*, p.153.

<sup>27</sup> Dodderidge's discussion of the derivation of 'secondary principles' seems to follow St German's concept of the law of reason secondary particular (*Doctor and Student*, p.35), not only suggesting St German's influence but also indicating a degree of conceptual confusion by Dodderidge.

<sup>28</sup> The concept and language of authority was difficult in this period. Here I take authority to mean simply any text or case which had some force in legal reasoning. An example of a 'maxim' for which no authority was provided is that used in *Beverley's Case* (see below, n.67). In fact, the 'maxim' seems

knew a particular maxim. Either lawyers did not think that maxims were not known by all the learned, or that judges were not especially learned! Not only was this a divergence from theoretical writings, it is also a change from practice seen in medieval law reports.

Occasionally, a 'maxim' would be taken from a law book, although this technique seems to be associated principally with Edward Coke.<sup>29</sup> More typically, assertions of maxims were associated with cases. In all of these instances where I have been able to identify the earlier case with which a maxim was associated, the earlier case does not expressly state that a maxim was involved. The identification of a maxim in a case was consequently an interpretation of these cases by lawyers.

There were different techniques in using cases to find maxims. In some instances lawyers would discuss a selection of cases, deriving a single maxim from the collection. Serjeant Saunders in *Colthirst v Bejushin* did just that, extracting from the cases he cited a 'principle in law', 'which principle they utterly deny who argue that the bar here is not good'.<sup>30</sup> In others, a lawyer would state a maxim and argue that the maxim explained various cases, even if they were not directly on point, before then applying the maxim in a different context.<sup>31</sup> These approaches may explain the use of cases in maxims literature too.<sup>32</sup>

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to be taken from Littleton's *Tenures* (1581, Richard Tottell), f.95<sup>v</sup> (Lib.III, c.6, §406), where it is not stated to be a maxim. 'Maxims' stated in argument in the medieval period are not associated with authorities (e.g. (1440) Y.B. Pasch.18.Hen.6, f.1, pl.1 at f.2b, per Newton CJCP), but as citations of authority are very unusual in medieval law reports, this should not be given much weight.

<sup>29</sup> *Hallyocke v White* (1599) BL MS Add 25203, f.53 (a 'rule' from *Bracton*); *Ratcliffe's Case* (1592) 3 Co.Rep., f.40 (a 'maxim' from Littleton's *Tenures*). *Hallyocke v White* is useful in showing that Coke's use of legal texts was not an editorial addition to his own reports, but observable by others in Coke's curial arguments. A 'maxim' was asserted in *Sharington v Strotton*, seemingly as an extension from a set of facts discussed in Littleton's *Tenures* ((1566) 1 Plowden f.305).

<sup>30</sup> *Colthirst v Bejushin* (1550) 1 Plowden, f.28<sup>v</sup>.

<sup>31</sup> E.g. Croke J in *Lord Hastings v Douglas* (1634) CUL MS Gg.2.19 at f.509.

<sup>32</sup> See below, text at n.38.

A different approach was taken in *Lodsham v Labourne* (1602), where Walter said that he ‘learned for a rule often times in this court’ before putting forward a rule applicable to the facts.<sup>33</sup> This language of learning something through presence in court suggests a type of experience, indicating a relationship with Rastell’s definition of maxims. Thomas Egerton used an alternative approach in *The Dean and Chapter of Chester’s Case* (1578), where he put forward a ‘maxim’ agreed by the all the judges in a single prior case.<sup>34</sup> That approach is closer to the ideas of St German and especially Noy’s later contribution, of relying upon the judges to determine what is a maxim. One use of a single case to establish a maxim is possibly linked to theory in another way. In *Eaden v Marshe* (1600) Popham CJ and Gawdy J observed a maxim that was ‘put for a rule’ in an earlier case, and then applied it.<sup>35</sup> In fact, the prior case does not refer expressly to a rule, simply stating that ‘in all these cases, the commencement of this must of necessity be alleged’, explaining that to require otherwise would be ‘against reason’.<sup>36</sup> The attribution of this statement as a maxim might have been reinforced by the language of reason, as it could be interpreted as meaning that the requirement of stating commencement amounted to a ‘conclusion of reason’, integrated into the theory of maxims as a result.

The use of cases in relation to maxims in legal practice can therefore be associated with particular aspects of theoretical discussions about maxims. While none of these discussions explicitly provided a role for cases in relation to maxims, both the model of maxims as known only to the learned, and maxims as conclusions of reason, provided a role for prior cases in determining maxims. If maxims are learned through ‘sense and memory’ or ‘experience’, prior cases provide a means of acquiring (and remembering) the necessary experience. If maxims are conclusions of reason, prior cases are a means to learn these conclusions of reason, in effect an intellectual short cut. As Dodderidge put it, the efficient cause of maxims is reason ‘tried and sifted upon disputation and argument’, which is

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<sup>33</sup> *Lodsham v Labourne* (1602) BL MS Add 25203, f.445<sup>v</sup>.

<sup>34</sup> *Dean and Chapter of Chester’s Case* (1578) HEH MS El 482, f.34.

<sup>35</sup> *Eaden v Marshe* (1600) BL MS Add 25203 f.214<sup>v</sup>.

<sup>36</sup> *The Serjeants’ Case* (1553) P.7.E.6.Dyer 83, f.85<sup>v</sup>.

(arguably) a description of what can be seen in law reports.<sup>37</sup> Although Francis Bacon thought it was 'preposterous' to prove maxims, this remark occurred in an explanation as to why he had not cited cases in his discussion of each maxim, suggesting that he did recognise a role for cases in identifying maxims, even if he did not approve of it. However, no theorist insisted upon prior cases as a necessary element in identifying maxims. Several discussions of maxims do feature references to prior cases, but always seemingly as examples of the application of the maxim.<sup>38</sup> Several of these examples therefore suggest a link between the theory and practice of maxims, albeit in relation to cases which were rarely themselves mentioned in the theoretical discussions (or, in fact, in common-law theory generally in this period).

#### THE INCONTROVERTIBILITY OF MAXIMS

A significant agreement between the theory and practice of maxims was their incontrovertibility, a theoretical position upon which all writers about maxims agreed. This position was clear in the writings of Fortescue, St German and the Henrician judge Anthony Fitzherbert and adopted by later writers.<sup>39</sup> Indeed, according to one Elizabethan manuscript

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<sup>37</sup> Dodderidge, *The English Lawyer*, p.242. Dodderidge discussed the civilian practice of collecting maxims from cases and seemingly rejected it (*ibid.*, p.153), although he did acknowledge that maxims contain 'in a short sum the reason and direction of many particular and special occurrences', which looks somewhat casuistic.

<sup>38</sup> Bacon, *Maxims* (although it is not clear that these references were included in Bacon's original text); Coke, *Commentarie on Littleton*, f.10<sup>v</sup> and the cross-references there; Finch, *Nomotexnia* (1613, Societie of Stationers); Noy, *Treatise*. In manuscript, see the collections of maxims in BL MS Harg 207 and BL MS Harg 318.

<sup>39</sup> Fortescue, *In Praise*, p.15; *Doctor and Student*, pp.57-59; A. Fitzherbert, *La Novel Natura Brevium* (1534, Thomas Bartlett), preface (unpaginated). Later references include Finch, *Nomotexnia*, f.2<sup>v</sup> (although see below, text at n.44 for the interaction between Finch's idea of 'rules of reason' and 'maxims'); Coke, *Commentarie on Littleton*, f.10<sup>v</sup>; Dodderidge, *The English Lawyer*, pp.37 and 196; Noy, *Treatise*, p.20 (the text here closely follows *Doctor and Student*). Thomas Hedley's speech in Parliament, 26<sup>th</sup> June 1610, pp. 170-197 in Elizabeth R. Foster (ed.), *Proceedings in Parliament 1610*, Vol. 2, House of Commons (New Haven: Yale University Press, 1966) at p.186.

collection of maxims, the incontrovertibility of maxims was itself a maxim.<sup>40</sup> This incontrovertibility appears to be a change in practice. Assertions of a relevant maxim were challenged into the first decade of the sixteenth century.<sup>41</sup> The change may be a consequence of the influence of both Fortescue (whose views on maxims were first printed in 1543) and St German (*Doctor and Student* was first printed in 1528).

Although it is difficult to prove satisfactorily by absence, no instances have been found of an asserted 'maxim' being challenged as substantively incorrect in legal argument from the reign of Henry VIII onwards, nor have any instances been discovered where lawyers ever challenged the assertion that a particular rule was a maxim. The only positive evidence which seems to point towards incontrovertibility in legal practice comes from Thomas Egerton's report (or possibly draft) of his argument in *Hawes v Hynde* (1578). An argument made by Coke was criticised by Egerton as an examination of the 'reason' of a maxim which Egerton had put in argument.<sup>42</sup> Although not directly concerned with the unchallengeable status of maxims, the fact Egerton could complain about any examination of the maxim at all suggests that challenges would be unacceptable. If this is correct, then assertions of a maxim would perhaps be the strongest argument available to common lawyers, at least where no statutory material was involved.

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<sup>40</sup> BL MS Harg 207, f.6.

<sup>41</sup> (1496) Y.B. Hil. 11.Hen.7, f.15, pl.11, where serjeant Kebell said 'there is no ground or erudition as you say'; (1504) Y.B. Mich.20.Hen.7, f.6, pl.17, at f.8, where Fyneux CJKB said that 'there is not in our law any such general maxim or ground for the showing of deeds, but that such maxim may be disproved'.

<sup>42</sup> *Hawes v Hynde* (undated) Hunt.MS.El. 482, f.249. It should be noted that Egerton continued to criticise Coke for examining the reason of the maxim without any book or authority to support him, suggesting the matter may not have been quite so simple, but nevertheless Coke's attempt to subvert the maxim by examining its justification was decidedly unwelcome. Coke did examine the 'reason' behind maxims on a number of occasions (such as *Pinchon's Case* (1611) 9 Co.Rep., f.86<sup>v</sup>, where he put as a maxim that executors may not be sued on simple contracts of the deceased, and explained this as due to a presumption of want of knowledge). However, no instances have been found of Coke doing so outside of his own printed reports, and it may be that such justifications were added as pedagogical devices.

Some theoretical writers considered the potential of challenges to the use of particular maxims in particular cases on the basis that individual maxims existed within a broader system of maxims and were consequently limited by other parts of the system. Such a position is evident in the works of writers who thought that English law could ultimately be reduced to a collection of maxims.<sup>43</sup> These writers differed from St German, who identified maxims as only one of the types of law in England. For these writers, ultimately all of English law could be set down as a system of maxims. As a consequence, they needed to address potential conflicts in a way which those writers who saw maxims simply as one source of law or type of legal argument did not – for lawyers in the latter group conflicts might be avoided or resolved by the use of alternative arguments or sources of law. Finch distinguished between ‘rules of reason’ and ‘maxims’ with maxims being inferior and giving way to rules of reason.<sup>44</sup> According to Dodderidge the ‘Rules, Axioms, and Propositions of the common Law’ are ‘restrained by exceptions; which are grounded upon two causes. The one is Equity: the other is some other Rule or Ground of Law, which seems to encounter the Ground or Rule proposed: wherein, for conformity’s sake, and that no absurdity or contradiction be permitted, certain exceptions are framed, which do not only knit and conjoin one Rule in reason to another, but by means of their equity, temper the rigour of the Law, which upon some certain circumstances in every of the said Rules might happen and fall out’.<sup>45</sup> Bacon described some rules as ‘worthier and to be preferred’.<sup>46</sup> More generally, Serjeant Morgan suggested that in legal argument seemingly competing maxims could be ‘conferred and compared, the one to the other’ ‘by reason’.<sup>47</sup>

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<sup>43</sup> Such a model of law, which he associated with positivism, was rejected for the common law by Simpson (A.W.B. Simpson, ‘The Common Law and Legal Theory’, repr. in A.W.B. Simpson, *Legal Theory and Legal History* (1987, Hambledon Press), pp.359-382. Simpson described the common law as a customary system, but the use of custom here is different to that in early-modern sources.

<sup>44</sup> Finch, *Nomotexnia*, f.2<sup>v</sup>.

<sup>45</sup> Dodderidge, *The English Lawyer*, pp.209-10.

<sup>46</sup> Bacon, *Maxims*, p.336.

<sup>47</sup> *Colthirst v Bejushin* (1550) 1 Plowden f.27<sup>v</sup>.

No applications of these ideas of a system or hierarchy of maxims (or even seemingly conflicting maxims) have been found applied in legal practice, despite Serjeant Morgan's remark occurring in a reported case. While practitioners seem to have accepted the theoretical idea of maxims as unchallengeable, they did not develop any particular tools for addressing situations where different maxims may have been applicable, leading to different outcomes. One explanation for this may be the influence of St German's legal theory, rather than the theoretical models which regarded the entire law as a system of maxims.<sup>48</sup> St German did not raise the possibility of disagreement amongst maxims, regarding maxims as only one part of English law.

The incontrovertibility of maxims did not mean that in practice arguments which referred to maxims were automatically successful. Many were not. However, counters to maxims were never challenges to the maxims themselves. Rather they were disputes about the application of the maxim to the particular facts of the case in question. In the preface to his *Maxims*, Bacon explained that he included cases applying maxims after the statement of each maxim for 'light and direction' as a means of 'opening their sense and use and limiting them with distinctions'.<sup>49</sup> For Bacon therefore, cases were crucial for understanding the real sense of maxims and their use in legal reasoning. Bacon's use of cases to limit maxims is unique in the theoretical literature and may have been driven by observation of legal practice.<sup>50</sup>

In legal practice practitioners relied not on theories about maxims, but on cases. Cases provided an important means by which maxim-based reasoning could be weakened.<sup>51</sup> Even Serjeant Morgan's well-known explanation of a theory of maxims in *Colthirst v Bejushin*

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<sup>48</sup> See below for a situation where the best explanation for the use of maxims in legal practice derives from the work of St German, text at n.64.

<sup>49</sup> Bacon, *Maxims*, p.323.

<sup>50</sup> Dodderidge did use cases to explain maxims (*The English Lawyer* p.157), but never refers to the possibility of the scope of the maxim being limited.

<sup>51</sup> 'Cases' could be real or hypothetical in this period, although genuine cases were becoming predominant (see Williams, 'English Legal Reasoning', pp.66-68).

(1550) was criticised on this very ground. Serjeant Saunders put forward cases with an outcome contrary to that suggested by Serjeant Morgan, who was relying on maxims.<sup>52</sup> Saunders argued that by ignoring these cases, the opposing lawyers ‘commend the maxims in words, yet they deny them in fact’.<sup>53</sup> For Saunders, a simple reliance upon maxims without association with cases was not truly to understand and apply maxims at all. This meant that arguments involving maxims rapidly became very similar to other types of common-law reasoning: strongly casuistic and analogical.

#### THE CONTENT AND SCOPE OF MAXIMS

Theoretical writers agreed that maxims had a significant role in the common law. Most writers also agreed that individual maxims could have a wide scope. Several lawyers observed that some maxims could be very specific, but others were very broad, potentially encompassing a range of situations. Dodderidge, Bacon and Henry Finch even sought to classify maxims on the basis of their breadth.<sup>54</sup> For such writers, the maxims with wider scope, at least, were applicable to most, if not all, of the common law.

The situation in legal practice seems to have been very different. Typically, ‘maxims’ put in argument were narrow rules of law and were predominantly concerned with property law alone.<sup>55</sup> In *Colthirst v Bejushin* (1550) three maxims were suggested. The first was that when a remainder was appointed to someone, the recipient must be capable of receiving the remainder; the second that ‘a bar is good if it is certain to a common intent’; third that ‘livery of seisin shall not be taken most strongly against him that makes it’.<sup>56</sup> None of these

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<sup>52</sup> *Colthirst v Bejushin* (1550) 1 Plowden, f.28v.

<sup>53</sup> *Colthirst v Bejushin* (1550) 1 Plowden, f.28v.

<sup>54</sup> See generally Neustadt, *Making of the Instauration*, pp.38-40, 43-4 and 53-4 (Bacon distinguishing between ‘maxims’ and ‘*placitata juris*’). Finch’s *Nomotexnia* distinguishes between ‘rules of reason’ and more narrow legal learning (f.2v).

<sup>55</sup> Gray (‘Boundaries of the Equitable Function’, p.207), reached a similar conclusion but limited it to real property law and only from cases involving jurisdictional disputes between common law courts and courts of equity. The discussion here covers a wider range of cases.

<sup>56</sup> *Colthirst v Bejushin* (1550) 1 Plowden ff.27v and 28v.

are broad general principles, two of them are limited to real property law. In *Eaden v Marshe* (1600) it was stated as a rule that where someone seeks to establish title to a thing, the commencement of their title must be expressly alleged, another narrow point of property law (and of pleading).<sup>57</sup> In two seventeenth century cases, the rule of survivorship in situations of joint tenancy of land were identified as maxims.<sup>58</sup> Not all examples concerned real property law, for example in *Lodsham v Laborne* (1602), a rule was stated as to what amounted to a conversion of goods.<sup>59</sup> Maxims, whether substantive, interpretative or concerned with pleading rules, almost always related in some way to issues concerning property.

A good demonstration of the difference between theoretical writers and lawyers in practice can be seen in the arguments of Thomas Egerton. All the 'maxims' discussed by Egerton in his notes of cases concerned the interpretation and application of documents such as deeds and royal charters. One such maxim was that deeds are to be interpreted strongly against their maker.<sup>60</sup> By contrast, in Francis Bacon's *Maxims*, a more general maxim was stated, 'that a man's deeds and his words shall be taken strongest against himself'.<sup>61</sup> Bacon's discussion incorporated the maxim of Egerton, categorising it as an example of the broader maxim.

The one exception to the narrow scope of individual maxims found in legal practice is another maxim used by Thomas Egerton. His notes do not provide the facts or legal context, but the case seems to be an appeal of felony, a process by which victims of felonies (or their surviving relatives, in the case of homicide) could bring criminal proceedings against the alleged perpetrator. Egerton, when arguing about the acceptability of the appeal in this case, states as a maxim that the common law is 'in favour of life'.<sup>62</sup> Given the mandatory

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<sup>57</sup> *Eaden v Marsh* (1600) British Library Additional Manuscript 25203, f.214v.

<sup>58</sup> See below, n.66.

<sup>59</sup> *Lodsham v Laborne* (1602) British Library Additional Manuscript 25203, f.445v.

<sup>60</sup> *Saunders and Starkey v Stanforde* (undated) HEH MS El 482, f.73v.

<sup>61</sup> Bacon, *Maxims*, p.333.

<sup>62</sup> *Anon* (undated) HEH MS El 482 f.84.

death penalty for felony convictions, this was an argument against any appeal of felony. The same maxim was recognised in a manuscript collection, where it was part of a largely familiar triad. According to this collection, the common law was in favour of life, liberty and marriage.<sup>63</sup>

Practitioners may have only described narrow rules of law as maxims because such precise rules were more useful at deciding particular cases. However, given the acknowledged theoretical strength of maxims, arguing that a wide principle was applicable in a given case would provide some added strength to an argument. Application of such a wider principle would probably require the use of cases, but this occurred in relation to narrow rules of law too.

If maxims in practice were regarded as narrow rules of law, this might explain the focus on property law. One would expect to find precise rules in the more developed areas of the common law. The most sophisticated body of learning in the medieval common law was property law. Other areas of law, such as contract, were subject to considerable change in the early-modern period and it might have been difficult to describe any of the emerging ideas as 'maxims' which could not be challenged.

The narrowness of maxims, and the focus on property law, may also be a consequence of the dissemination of particular ideas about maxims. A focus on maxims as narrow and concerned with property law can be seen in St German's *Doctor and Student*. St German listed twenty eight maxims, of which four were not somehow connected with land law issues.<sup>64</sup> If lawyers were learning much of their legal theory from St German, then their understanding of maxims would be of narrow rules of property law.

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<sup>63</sup> BL MS Harg 207, ff.10, 12<sup>v</sup> and 124<sup>v</sup>. The author of this collection repeats that the common law is in favour of life on three occasion, once in combination with liberty and 'dower', the other in combination with 'liberty'. As the author also refers to the common law favouring marriage (f.8), the reference to dower in the triad seems to be a mistake.

<sup>64</sup> *Doctor and Student*, pp.59-65. The four maxims which are not connected with land are 'if an exigent of felony be awarded against a man: he hath thereby forfeited his goods to the king'; 'if a man steel

## MAXIMS AND EQUITY

One use of maxims in legal practice is largely unaddressed in the early-modern theoretical literature, namely the role of maxims in jurisdictional disputes between the common law courts and inferior courts of equity such as the Court of Requests.<sup>65</sup> In the first three decades of the seventeenth century, common law courts prohibited courts of equity from proceeding with cases where equitable intervention would infringe a 'maxim' of the common law. These maxims were usually narrow rules of law. In two cases the maxim in question was the rule of survivorship in joint tenancy of land.<sup>66</sup> In the third case, the 'maxim' concerned whether someone could rely upon their own incapacity to avoid a bond upon which money was owed.<sup>67</sup>

The principal difficulty with the application of the common law in this way is that the contemporary theory of equity, essentially Aristotelian in its fundamentals, accepted that the application of general rules might lead to hardship in particular cases and that this was a legitimate basis for equitable intervention.<sup>68</sup> John Dodderidge's discussion of maxims appreciated this difficulty, accepting equity as an exception to the application of maxims.<sup>69</sup>

Gray suggests that maxims might have justified preventing equitable intervention on the basis that such maxims were not 'expressions of those deep and fruitful value-choices that

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goods to the value of xii.d. or above it is felony'; 'he that is arraigned upon an indictment of felony shall be admitted in favour of life to challenge xxxv jurors peremptorily'; 'he that recovers debt or damages in the king's court by such an action wherein a *capias* lay in the process may within a year after the recovery have a *capias ad satisfaciendum* to take the body of the defendant and to commit him to prison and he shall not be released till he have paid the debt and damages'.

<sup>65</sup> The use of maxims in this field was first discussed by Charles M. Gray, 'The Boundaries of the Equitable Function' (1976) 20 *American Journal of Legal History* 192.

<sup>66</sup> *Anon* (1612), BL MS Add 25210, f.4 and *Portington v Beaumont* (1624), BL MS Harl 5148, f.15<sup>v</sup>.

<sup>67</sup> (1603) *Beverley's Case* 4 Co.Rep. 123b at 124.

<sup>68</sup> J.L. Barton, 'Introduction' to *Doctor and Student*, pp.xliv-li

<sup>69</sup> Dodderidge, *The English Lawyer* pp.209-10.

deserve to be called fundamental and so to control Aristotelian equity.<sup>70</sup> To apply a maxim was not unconscionable, which was the basis of equitable intervention.<sup>71</sup> Gray's analysis is therefore based in the theory of equity, not of maxims. The difficulty with this is that one of the 'maxims' which justified prohibiting the intervention of equity was that 'a man would not be permitted to stultify himself' and so could not use equitable intervention to be relieved from liability on a bond created when he was *non compos mentis*. However, the report shows that the maxim would permit someone else to plead the incapacity of the creator of the bond, demonstrating that even the common law considered the obligation created in such circumstances to be unacceptable. This seems to be just the sort of rule of pleading or proof, rather than substance, from which equity provided relief in other contexts.<sup>72</sup>

If this explanation is deficient, might the theory of maxims assist in providing a justification for the common law position? In his report of *Beverley's Case*, Coke made it clear that equity could not intervene 'for this should be in subversion of a principle and ground in law'.<sup>73</sup> This was the only attempt at an explanation which Coke provided. For Coke, the fact that equitable intervention would contradict a maxim in itself justified interference in the proceedings of the equity court. This suggests that it is ideas about maxims which provide the justification for Coke's conclusion. Coke does not provide any explanation as to why equity could not interfere with the application of a maxim, but the theoretical literature on

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<sup>70</sup> Gray, 'Boundaries of the Equitable Function', p.218.

<sup>71</sup> See generally, D.R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (2010, Ashgate, Farnham, Surrey).

<sup>72</sup> A standard early-modern example of equitable intervention was of a debt owed on a sealed bond. If the debtor paid the debt, but the bond was not destroyed or defaced, or the debtor given a written acquittance, at common law the creditor could sue on the bond twice due to the evidential rule that the only defence to such a bond was an acquittance. It was universally accepted that equity could intervene in such a context.

<sup>73</sup> (1603) *Beverley's Case* 4 Co.Rep. 123b at 124.

maxims provides a solution, specifically the work of Christopher St German.<sup>74</sup> Like Coke, St German stated that equity could not be used to interfere with the application of a maxim of the law.<sup>75</sup> The only explanation, such as it is, for this assertion is that equitable intervention would render the maxim void, a comment similar to that made by Coke.<sup>76</sup> Coke's position, and perhaps that in the other cases, may be attributable to the ongoing influence of St German's exposition of legal theory.<sup>77</sup>

#### THE RELATIONSHIP BETWEEN THEORY AND PRACTICE, AND THE PROMINENCE OF MAXIMS

The evidence presented in this paper suggests relatively close correspondence between the early-modern common law theory of maxims and the use of maxims in legal practice, but with certain important differences. Theory and practice seem to have been aligned in

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<sup>74</sup> The reliance on St German would explain why other writers on maxims did not raise this issue. These writers were concerned with maxims, or the common law more generally. By contrast, St German's work was concerned with the appropriateness and limits of equitable intervention in the English legal system.

<sup>75</sup> J. Guy (ed.), *St German on Chancery and Statute* (1985, Selden Society), p.116. This is a reference to St German's *Little Treatise* concerning writs of subpoena, a work which only exists in manuscript. Aside from St German's autograph copy, the surviving copy is from later than 1576. Four of the five remaining copies of St German's *Replication* (to which the *Little Treatise* was a reply) are also mid-Elizabethan. This suggests that St German's work was still regarded as current in Elizabethan England.

<sup>76</sup> St German was influenced by Thomas Aquinas, and Aquinas argued that *epieikeia* was not a virtue, because it 'judged' a law (T. Aquinas, *Summa theologiae* (Caramello, ed.), vol.II, 546-7 (II, II, q.120 [arts.1-2])). In his *Little Treatise*, St German refers to the idea of judgment of a law (Guy, *St German*, p.116, 'there lies no subpoena directly against a statute, not directly against the maxims of the law, for [if] it should lie, then *the law should be judged* to be void, and that may not be done by no court, but by the parliament' [emphasis added]). On this issue and possible influence see J. Guy, 'Law Equity and Conscience in Henrician Juristic Thought', pp.179-198 in A. Fox and J. Guy (eds.), *Reassessing the Henrician Age: Humanism, Politics and Reform 1500-1550* (1986, Basil Blackwell, London), p.186.

<sup>77</sup> For *Anon* (1612), BL MS Add 25210, f.4 and *Portington v Beaumont* (1624), BL MS Harl 5148, f.15<sup>v</sup>, St German's influence may have been mediated by Coke, whose report of *Beverley's Case* was printed in 1604.

identifying maxims and both recognised the incontrovertibility of maxims, but the two seem to have diverged with regard to the content of maxims and theory was largely silent on the interaction between maxims and equity.<sup>78</sup> This section attempts to explain both the similarities and differences between theory and practice.

A recurring comment in this paper has been the seeming influence of the work of Christopher St German on maxims in legal practice. St German's influence seems to have been particularly significant, not only in identifying maxims with narrow rules of property law, but also in stressing the protection of maxims from equitable intervention and perhaps in changing the approach of lawyers in practice to render maxims incontrovertible, unlike the position in late-medieval law.<sup>79</sup> *Doctor and Student* may have been influential for a few reasons. Most obvious is perhaps its accessibility. *Doctor and Student* was available in English from the early-1530s, making it a suitable work for students early in their legal studies. Furthermore, St German's work served both as a discussion of legal theory, and as a source of cases for use in legal argument.<sup>80</sup>

Most importantly, perhaps, *Doctor and Student* was printed.<sup>81</sup> Many of the other discussions of maxims were unprinted until late in the period under discussion, most only in the reign of Charles I. Of the various writers concerned with maxims discussed in this paper, only St German, Fortescue and the remarks reported in Plowden's *Commentaries* were printed before 1600.<sup>82</sup> There is one piece of evidence which suggests that practitioners who were not themselves writing theory made use of ideas from other theorists to inform their legal

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<sup>78</sup> The exception is the work of John Dodderidge, whose views are opposite to practice (see above, text at n.69).

<sup>79</sup> See above, text at n.41.

<sup>80</sup> The latest case to use *Doctor and Student* as a source for a case is *Miller and Jones v Manwaring* (1634) CUL.MS. Gg.ii.20, f.621<sup>v</sup>, per Oliver St John.

<sup>81</sup> See above, n.75 for the difficulty in this regard in relation to maxims and equity, where St German's views only existed in manuscript until 1985.

<sup>82</sup> Good examples are Dodderidge and Bacon, both of whose works on maxims were printed without permission.

arguments. As was shown above, there is plenty of evidence that in practice cases were used to prove the existence of particular maxims. However, in one case, a maxim was used to argue against particular cases. In *Lord Mountjoy v Sir Henry Mildmay* (1632), Rolle argued that individual cases providing ‘precedents’ were inferior to an established ‘rule of law’.<sup>83</sup> Rolle’s position was to rely upon the higher nature of maxims to diminish the strength of precedents, arguing that cases incompatible with a maxim were invalid. The only writer who hints at this role for maxims is Francis Bacon, who suggests that maxims, as conclusions of reason, could ‘correct’ erroneous cases.<sup>84</sup> For considering the relationship between legal theory and legal practice, the important evidence is that Bacon’s *Maxims* were first printed in 1630.<sup>85</sup> It seems plausible that Rolle’s argument was informed by the recent publication of Bacon’s views.

Finally, St German’s theoretical discussion of the common law purported to be descriptive of what common lawyers did.<sup>86</sup> Aside from the incontrovertibility issue, St German’s discussion of maxims looks fairly consistent with late-medieval practice as seen in the law reports. This might be significant, because it made St German a means to interpret the cases which students were expected to read – and the late-medieval reports the practice in which St German seems to describe were the most printed law reports of the sixteenth (and possibly seventeenth) century and were printed in a cycle which suggests a regular student audience.<sup>87</sup> St German’s theory therefore provided a suitable tool for explaining what students and lawyers encountered early in their training. This does not mean that St

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<sup>83</sup> *Lord Mountjoy v Sir Henry Mildmay* (1632) CUL MS Gg.ii.19, f.295.

<sup>84</sup> Bacon, *Maxims*, p.322.

<sup>85</sup> In *The Elements of the Common Lawes of England* (1630, Robert Young). This book incorporated Bacon’s *Maxims* and *The Use of the Law*, which was also attributed to Bacon (almost certainly erroneously).

<sup>86</sup> *Doctor and Student*, pp.31-2.

<sup>87</sup> D.J. Seipp, ‘Introductory Tables and Notes’, p.iii in D.J. Seipp (ed.), *Year Books Edward V, Richard III, Henry VII, and Henry VIII: 1483-1535* (2011, Lawbook Exchange, Clark, New Jersey); I. Williams, ‘A medieval book and early-modern law: Bracton’s authority and application in the common law c.1550-1640’ (2011) 79 *Tijdschrift voor Rechtsgeschiedenis* 47-79, p.54.

German did nothing more than describe; he provided a theoretical language and some ideas to lawyers which they could use. Furthermore, the yearbooks do not demonstrate the incontrovertibility of maxims, or the relationship between maxims and equity, subjects upon which St German also may have been influential. By seeming to provide a theory based upon what could be found in the books of legal practice, St German's views which were not found in the law reports could also be interpreted as accurate statements of English law.

#### POSTSCRIPT: WHY DID THEORY DIVERGE FROM PRACTICE?

This provides some explanation of the nature of maxims in practice, but not to the divergence of theory from practice. Why did theoretical writers, who were themselves practitioners, insist upon a model of maxims which was different to that seen in practice?<sup>88</sup> The answer lies in understanding what the theorists were often setting out to do. Not all writers on maxims were concerned with accurately representing contemporary legal practice. Francis Bacon even criticised lawyers who 'argue upon general grounds, and come not near the point in question', but still thought such general maxims were worth recording.<sup>89</sup> Several Elizabethan and Jacobean writers on maxims, including Bacon, were concerned with the role of maxims in legal education and learning the law, rather than legal practice. Others were concerned with the related issue of the status of the common law as a 'science'.

By setting out maxims, writers could provide some degree of method to the common law.<sup>90</sup> In early-modern thought, method was an important route to learning and understanding.

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<sup>88</sup> One possibility is that the conservative approach to identifying 'maxims' in practice adopted in this paper misrepresents the position. Sometimes practitioners did rely on broad general statements, and if these should also be considered as 'maxims' then the divergence between theory and practice is less pronounced (although my impression is that narrow rules and property law would still predominate).

<sup>89</sup> Bacon, *Maxims*, p.320.

<sup>90</sup> Although not all lawyers concerned with maxims as a route to learning the law approved of this. Bacon rejected the methodical approach, 'because this delivering of knowledge in distinct and

Both Henry Finch (who applied Ramist ideas of method) and John Dodderidge were writing works for students and used their understanding of broad maxims and narrower rules to provide structure to the law. Finch's book purported to be a methodical exposition of the entire common law, while Dodderidge attempted to show how any particular legal topic could be set out methodically. There was no claim on the part of these authors that simply learning the individual maxims would answer particular legal questions. Maxims were a route to memory and understanding which would then enable questions to be answered.

Another concern grounded in education was to establish the common law as a 'science'.<sup>91</sup> This could be associated with memory and method.<sup>92</sup> However, rather than being concerned with the efficacy of legal education, claims to scientific status were based upon disciplinary competition and prestige, originally in the university context. Maxims provided the means to establish claims that the common law was a 'science'. As a science the common law would be a higher discipline, equivalent to medicine, the civil and canon laws and theology.<sup>93</sup> To claim status as a science, a discipline needed to fulfil the Aristotelian criterion of being based upon known principles. Maxims provided these principles for the common law.

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disjointed aphorisms doth leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications' (Bacon, *Maxims*, p.322). Bacon's view seems to have been unique.

<sup>91</sup> The first reference to maxims in connection with the common law as a science is found in Fitzherbert, *Novel Natura Brevium*, preface (unpaginated). Later references, in the context of maxims, include John Dodderidge, *The English Lawyer* (1631, Miles Flesher), p.244 ('in the Law (as in other sciences)'); Edward Coke, *Le tierce part des reportes del Edward Coke* (1602, Thomas Wight), sig.Cii (in the common law 'as in all other Arts and Sciences').

<sup>92</sup> William Fulbeck *A Direction or Preparative to the Study of the Lawe* (1600, Thomas Wight), ff.4-5<sup>v</sup>. Fulbeck was a civilian, but his book was an introduction to the study of both the civil and common laws and the substantive point here was widely accepted in early-modern England and Europe.

<sup>93</sup> On this issue in European universities see Maclean, *Interpretation and Meaning in the Renaissance: the Case of Law* (CUP, 1992), pp.22-29.

By establishing the common law as a science, its prestige would be enhanced. Justifying the law and enhancing its prestige is a recurring trend in speeches given in readings (lectures) at the Inns of Court.<sup>94</sup> Demonstrating that the common law was a science was a means to establish the common law's equivalence or even superiority over other bodies of learning. According to Francis Bacon, it was a matter of 'majesty' to show the 'concordance' between the broad maxims of the common law which he set out and those of the civil law. Edward Coke and John Davies took this further. In Coke's report of *Ratcliffe's Case* it is stated explicitly that the 'rules and principles' are set out as the common law is like 'every art and science', a remark which precedes criticism of the civil law (another science) for its uncertainty.<sup>95</sup> Similarly, in the preface to John Davies' *Reports*, Davies explains that the principles of the common law are not only certain like those of other sciences, but, hyperbolically, 'more certain', making the common law more science-like than recognised sciences and demonstrating its superiority.<sup>96</sup>

Legal theory about maxims was consequently not always directed to legal practice, but to the practicalities of legal education and the status of the common law as an educational discipline. In this regard maxims may have achieved some success. Finch's elaboration of the common law was dependent upon his theory of maxims and according to Blackstone, Finch's 'method is greatly superior to all that were before extant'. Blackstone noted 'how great are the obligations of the student to him...in reducing the elements of law from their

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<sup>94</sup> See Williams, 'The Tudor Genesis', p.106. I am currently working on a study of all the surviving speeches which prefaced readings.

<sup>95</sup> *Ratcliffe's Case* (1592) 3 Co.Rep, f.40.

<sup>96</sup> John Davies, *Le Primer Reports des Cases and Matters en Ley resolves & adjudges en les Courts del Roy en Ireland* (1615, Dublin, John Franckton), sig.\*2v. Davies' concern may have arisen because his collection of reports was largely concerned with the establishment of English rule in Ireland, including the imposition of the common law in place of native Irish custom. By demonstrating that the common law was not only better than Irish custom (which the relevant cases in the volume all concluded) but that the common law was better than other sciences (which would include the common and civil law), Davies showed that the common law was the better law to be implemented in Ireland.

former chaos to a methodical science'.<sup>97</sup> As Blackstone was recommended to read Finch when he was learning the common law, this was informed praise from a scholar over a century after the first appearance of Finch's work.<sup>98</sup> How legal education in general, and the role of maxims within education, affected legal practice is a much more difficult question to answer, but may perhaps be the more significant.

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<sup>97</sup> W. Blackstone, *An Analysis of the Laws of England* (1756, Oxford, Clarendon Press), p.vi.

<sup>98</sup> W. Prest, *William Blackstone: Law and letters in the eighteenth century* (2008, Oxford, Oxford University Press), p.68.