

The discovery of the Common Law at the University of Göttingen

**On Christian Hartmann Samuel
Gatzert's "Commentatio iuris exotici
historica de iure communi Angliae. Of
the Common Law of England", 1765**

I. Christian Hartmann Samuel Gatzert

* 4.6.1739 Meiningen † 2.4.1807 Gießen

- from 1757-1761: Law studies in Göttingen
- 1761-1763: Tutor of Johann v. Uslar
- 1762: Grand Tour to England accompanying Johann v. Uslar
- 1764: Doctor iuris and Professor extraordinarius iuris germanici at Göttingen University
- 1767: Professor of *Reichsstaatsrecht* in Gießen
- 1782: Privy council and judge at the *Appellationsgericht* in Darmstadt
- Since 1792: Minister of foreign affairs in Hessen-Darmstadt
- 1799: Resignation



II. Göttingen University and England



King George II (1683-1760)

- Göttingen University (founded in 1734 by George II of Hanover) as the place for reception of English culture in Germany
- The English constitution as a central issue in political debates in 18th century Germany
- The “Göttingische Gelehrte Anzeigen” and the new legal literature from England
- University policy of Gerlach Adolph Baron of Münchhausen

- Gerlach Adolph Baron of Münchhausen (1688-1770) served as minister under King George II, Elector of Hanover. As one of its founders and its first curator he was the “spiritus rector” of Göttingen University.
- Advancement of Gatzert’s scientific career
- Start of a collection of English books at the Göttingen University Library
- Justus Clapproth – professor of law in Göttingen since 1759 – who influenced Gatzert
- Clapproth’s German translation (1767) of Blackstone’s “An analysis of the Laws of England”, (1st ed. 1756)



**G. A. v. Münchhausen
(1688-1770)**

III. The Book

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CHRISTIANI HARTMANNI SAMVELIS GATZERT

IVRIVM DOCTORIS ET PROFESSORIS EXTRAORDINARIJ IN ACADEMIA
GEORGIA AVGVSTA

COMMENTATIO IVRIS EXOTICI
HISTORICO-LITTERARIA

DE

IVRE COMMVNI ANGLIAE

OF THE

COMMON LAW OF ENGLAND



GOTTINGAE

EX OFFIGINA BARMERIANA, MDCCLXV.

1. Gatzert's incentive and aims

Gatzert's book as a typical university script of its time. Apparently Gatzert had offered a private course of lectures »anglicano sermone« to an English and a Scottish auditor in Göttingen in 1764. The book as an elaboration based on the materials used for the course.

2. *Ius Angliae* as *ius germanicum*

Gatzert justified his choice of this topic as a way to improve the comprehension of the *Ius germanicum* and its legal sources:

»Neque enim utilitas argumenti illustrationi juris Germanici plane aut ex toto adversatur, si quidem sequimur eos, qui inter praecipuas jurisprudentiae patriae auxiliares scientias Anglorum legitimam, veterum inprimis, collocant«

(Gatzert, *Commentatio*, *Introductio*, p. 1).

3. Gatzert's visit to London in 1762

»memini in diurnis Londinensibus circa finem anni 1762 (...)«

(Gatzert, Commentatio, p. 94)

»Vix enim cognoverat comprobaratque [i.e. G. A. von Münchhausen] de Iure Anglicano exponendi consilium meum, quum clementissime statim, quotquot ex eo genere libros praestantiores in loculamentis Bibliothecae publicae adhuc desiderarem, ultra mare arcessi sumtuque satis grandi comparari juberet (...)«

(Gatzert, Commentatio, Introductio, p. 5)

4. Gatzert's Sources

For his script Gatzert drew upon various English legal literature but he especially relied on the following then well known opera:

a) Jacob Gilles (1686-1744), The common law common-plac'd, 2nd ed. London 1733 (Gatzert, Commentatio, p. 7)

b) Matthew Hale (1609-1676), History of the Common Law of England, London 1713 (Gatzert, Commentatio, p. 4)

c) Arthur Duck (1580-1648), De usu et autoritate juris civilis, London 1653, Kap. VIII "De usu et autoritate juris civilis romanorum in Regno Angliae"

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V. The book's content and outline

- The first section contains a presentation of the Common Law in general and its legal sources. The second section is dedicated to the history of English law.
- Gatzert had precisely understood the essential characteristics of English law, for example the doctrine of the precedent and the difference between Common Law and Statute Law.

»Sine enim secundum claram legem, (...) factam ibi esse controversiae decisionem appareat, sine ad ductum sanae alicujus analogiae; utroque tamen casu judicata haec Curiarum tamquam receptacula jurium et consuetudinem praeterlapsei temporis atque veluti documenta probantia considerari statuunt debere«

(Gatzert, Commentatio, p. 41).

- Gatzert treats the issue of the limited authority of Roman law in England. He also refers to the bitterly conflicts between Civilians and Common Lawyers.

»Juris Romani in Anglia nullum omnino esse usum, nullam penitus auctoritatem«

(Gatzert, Commentatio, p. 41-42).

»Hinc origo repetenda est odii, quo juris communis periti prosecuti sunt legum civilium cultores; hinc derivandae duae illae familiae, in quas divisi sunt Iureconsulti in Anglia omnes, Civilians and Common Lawyers«

(Gatzert, Commentatio, p. 45).

- Gatzert's perspective, however, remains to be one of a continental lawyer; consequently he favors John Cowell and the Civilians and considers the roman sources being indispensable also in English law.

»usum praecipue hermeneuticum, (...) qui eximie adjuvet in interpretatione et applicatione Consultos juris communis (...). Meque proinde non citra causam ius Romanum fontibus anglicanae jurisprudentiae adnumerasse«

(Gatzert, Commentatio, p. 47)

- The last three sections of the book are dedicated to a bibliographic documentation of English legal literature and status of English law at that time.
- The apprenticeship of the Common Lawyers is treated in detail. Same applies to the establishment of the "Vinerian Chair" in Oxford and William Blackstone's inaugural lecture hold there in October 1758.

VI. The Common Law in the perspective of a continental lawyer

- Gatzert's perspective is one of a continental observer without real comprehension of the English legal particularities
»Ut soli enim sapere nec ullo modo cedere locum vel minimum lureconsultis Romanis viderentur Communistae, (...) linguam juris patrii ita tenebrosam et incultam composuerunt, ut olim in vulgatum proverbium abiisse legamus, jurisconsultum Anglicanum extra Angliam eo ipso desinere esse in numero eruditorum«
(Gatzert, Commentatio, p. 45-46).
- The difficulties in studying English law are insurmountable
»maximam partem horrendae illius nefandaeque barbarici atque incredibilis obscuritatis, qua involuuntur juris Anglici praecepta«
(Gatzert, Commentatio, p. 45-46)
- The language is incomprehensible
»vehementer porro augetur haec difficultas alia non minoris momenti, quam alibi jam proprius indicavi, nefanda nimirum linguae anglicanae juridicae barbarie«
(Gatzert, Commentatio, p. 91).

- The case law due to the large amount of Reports is very complex and confusing
»immensi, ... ac desperati operis hodie res erit, ad cognitionem ejus interiorum pervenire«

(Gatzert, Commentatio, p. 87).

- Civilians such as John Cowell and Thomas Wood had a strong influence on Gatzert's biased understanding of the Common Law
»jus commune [i.e. Common Law] (...) nihil aliud esse, quam compositionem ex jure feudali, civili et canonico confectam«

(Gatzert, Commentatio, p. 48)

- Accordingly he sympathises with those contemporary English authors who demand the Common Law to be reformed and systematically compiled and codified

»Iuris Municipalis Systema aliquod sapienter digestum, et ad immutabilis justitiae constantes regulas formatum legum Corpus«

(Gatzert, Commentatio, p. 92-94).