

Draft for March Conference

English Property Law and Christianity, 1500-1650

R. H. Helmholz

At first sight, the notion that there is (or could be) a religious law of property seems little short of ridiculous.² Christianity might touch some areas of the law, but surely not property law.

Religion deals with the spirit. Property law deals with things. What has Blackacre to do with Righteousness? It is true there have always been specific places in the law where the two spheres intersected – consecrated ground, for example, has long come under a special heading in the common law, one that has had rules and consequences different from those applied to ordinary real property.³ But there is nothing particularly spiritual about protecting a churchyard against trespass or waste, and today the purpose of this special area of the law seems more like historic preservation than it does the advance of the Christian religion.

Scripture, however, sheds a different light on the question. Speaking of the knowledge of God that has been imparted to his people, St. Paul reminds us that “we have this treasure in earthen vessels” (2 Cor. 4:7). This statement suggests that there may be a union, or at least a mixture, of these two seemingly disparate elements. He seems to have held that earth and spirit exist in the same container. Of course, I do not ask you to suppose that St. Paul had the common law of property in mind when he wrote those words to the Corinthians. However, Christians

² It finds no place in the standard introductory histories of the subject; see, e.g., A.W.B. Simpson, *History of the Land Law*, 2d ed. (Oxford, 1986); Sheldon Kurtz, *Moynihan’s Introduction to the Law of Real Property*, 6th ed. (St. Paul, MN 2015); K. E. Digby, *Introduction to the History of the Law of Real Property*, 5th ed. (London 1897).

have never thought that the meaning of the Scriptures was exhausted by their relevance to conditions in the Middle East during the first century of the Christian era.⁴ So perhaps, I thought, at some level there might be a tie between property law and religion. At the very least, St. Paul's text encouraged me to investigate. I was also encouraged by law review articles I remembered. They recalled a time when Christianity was itself part of the common law.⁵ So too was I encouraged by a chance finding that Sir Edward Coke derived the found an appropriate precedent for the English term "feoffment" in Ephron's gift to Abraham described in Genesis 23:17-18.⁶ Together with the kind invitation from the promoters of this Conference, these bits of evidence provided the impetus for my historical investigation of religion and the English law of property.

Scope of the Investigation

I have taken the possibility that both elements are to be found within the English land law between 1500 and 1650 as a subject for investigation. In deciding how to proceed, I thought it would be best to read as many of the cases involving rights in land and chattels from this period of 150 years as I could within the time at my disposal. Instead of trying to cover the subject over

³ See, e.g., Mark Hill, *Ecclesiastical Law*, 2d ed. (Oxford 2001), 207.

⁴ See, e.g., the "experiment" offered by Milner Ball, "Biblical Kingdom and American Law," in *The Weightier Matters of the Law: Essays on Law and Religion*, John Witte, Jr. & Frank Alexander eds. (Atlanta, GA 1988), 303-14.

⁵ Stuart Banner, "When Christianity was Part of the Common Law," *Law & History Review* 16 (1998), 27-62; Frank Alexander, "Property and Christian Theology," in *Christianity and Law: An Introduction*, John Witte and Frank Alexander eds. (Cambridge 2008), 205-17; Harold Berman, *The Interaction of Spiritual and Secular Law: the Sixteenth Century and Today* (Fulton Lecture, Chicago 1997); John Nagle, "A Right to Clean Water," in *Christianity and Human Rights: An Introduction*, John Witte, Jr. & Frank Alexander eds. (Cambridge 2010), 335-50. The place religion in the law of property is, however, barely mentioned in most general works on property theory, as *Early Modern Conceptions of Property*, John Brewer & Susan Staves (London & New York 1995).

⁶ Co. Lit. *9a. See also Sir John Fortescue, *De Laudibus legum Anglie*, cc. 1 and 3, S. B. Chrimes ed. and trans. (Cambridge 1949), 2-11.

many centuries, I chose to concentrate on a limited period (about 150 years). It was a more manageable task, and insofar as possible, I wished to avoid the vice and also the charge of “cherry-picking.” The selection of a few famous cases or the citation from the works of one particular writer would not, I thought, be either as informative or as convincing as a study built upon a concentrated study of one area of law among the cases heard in the royal courts at Westminster. My choice was property law, the subject I teach. This choice has meant that my conclusions are more limited than they would be if I had covered a longer time period or investigated a fuller range of legal topics. With the exception of working through the text known as *Coke on Littleton*, the basic treatise on the land law during this period, I have not (yet) looked in any but a superficial way at works on political theory, ecclesiastical law, or international law. Perhaps I may be able to do more later on.

In working through the cases, I discovered that the most perplexing question required deciding what to count as an instance of religious influence on the law. The judges and lawyers during this period in English history were all Christians. They were not reticent about saying so. They assumed that their religion was true, sometimes even stating that it was the law of England in so many words. Moreover, many of the institutions within which they worked bore an evident religious imprint. The terms during which the courts sat were taken from the Christian calendar, and the oaths that were routine parts of court practice were purposefully religious in character. I have nonetheless excluded these aspects of the law from my survey. They were routine enough in legal practice not to have called for any real thought about religion (or indeed any thought at all) on the part of the participants in routine litigation. For my survey, ordeals and wager of law have also not counted as religious parts of the law. Likewise, I have ignored the frequent

references to “Acts of God” that appear in the Reports.⁷ The legal distinction between acts of God and acts of men could make a real difference in the outcome of litigation, but I doubt that the lawyers who applied the distinction were thinking about religion when they applied the concept in court. I have also excluded cases in which a lawyer or judge based an argument or a decision simply upon moral grounds.⁸ Those grounds may have had religious roots, but equally they may not have. Unless explicitly coupled with religion, I have therefore excluded appeals to fairness or equity.

However, I have not carried this skeptical attitude into the cases in which lawyers and judges specifically invoked a religious authority or made a point buttressed by the Christian religion in arguing and deciding cases. To write these references off as “inconsequential” or as “purely ornamental” risks substituting modern prejudices for the ideas that were characteristic and important during the period. For this reason I have taken them at face value. Although I sought to ignore obviously frivolous or irrelevant references to religion, I have also taken account of arguments based on religion even where they were not in the end accepted by the judges. Since my effort was to understand what part, if any, the Christian religion played in legal practice in English property law, the inclusion of even unsuccessful arguments seemed warranted.

Results of the Investigation

⁷ E.g. *Waller v. Lambe* (1574), 1 And. 21, 123 E.R. 332: an action of formedon in which the defendant pleaded nonage which was rejected by the court because his entry was “son act demesne de enter en le terre et nemi le act de dieu de getter le terre sur luy.”

⁸ E.g., *Butler v. Baker* (1591), 3 Co. Rep. 25a, 32b, 76 E.R. 684, 701: argument “that equity and equality shall be observed and inequality avoided” in the interpretation of a statute.

That I found more invocations of religious ideas in the cases than most legal histories have allowed must be obvious. I would not have submitted this paper were this not so, and most legal histories say nothing whatsoever about the subject, and it turns out that there is a good deal to be said. I found more property cases involving religion than I myself had expected. In what follows I have divided and discussed the cases according the source or the nature of the place of religion found within them.

Invocations of Scripture

Examples taken from the Bible, both the New and the Old Testaments, appeared in some quite unexpected (to me) situations. Although lawyers do seem to have cited passages from Scripture most commonly in criminal cases,⁹ they used the more widely. The common law's claim to exclusive jurisdiction over freehold land was buttressed, for example, by the authority of Jesus' refusal to become involved in a dispute between brothers over their inheritance (Luke 12:13-14).¹⁰ Since the ecclesiastical courts in England had long exercised a probate jurisdiction over wills and intestate succession, the point made in this case was that those courts had exceeded the boundaries established in their own law by meddling incidentally with succession to land. The legitimacy of the system was a contentious one during these years, and this biblical text was regarded as relevant to it. In another case, one involving the requirement termination and renewal of a lease of land, the words of Jesus, "He who walketh in darkness knoweth not whither he goeth" (John 12:35) also supplied authority for the argument.¹¹ Neither lessor nor lessee could be expected to comply with the lease's terms while they were in the dark about its

⁹ See the useful list in *Selected Writings of Sir Edward Coke*, Steve Sheppard ed. (Indianapolis, IN 2003), iii, 1410.

¹⁰ Course of Trial of Legitimacy and Bastardy (Castle Chamber 1611), Dav. 51, 54, 80 E.R. 537, 540.

continuance. Therefore, where the lease contained no clear provision, clear communication of their intent was required. In the famous Case of Mixt Moneys, one lawyer invoked the authority of Jesus' statement that his followers must give unto Caesar that which belonged to Caesar (Matt. 22:21, Mark 12:17) as a way of establishing the necessity of the prince's authority to render a coin legal tender.¹² Of course, establishing the truth of the Christian religion was not the point of any of these texts. They did not even all touch the main points of the cases. But they did occupy an honorable place in the law and they were apparently regarded as relevant to its interpretation.

Passages from the Old Testament were treated as equally relevant in cases brought before the King's justices. The words of Solomon in the Book of Wisdom (Sap. 7:10-12) were taken to illustrate the need for the light of reason in statutory interpretation in a case involving a dispute over title to land.¹³ Solomon's example was also used to argue (unsuccessfully) that a marriage produced a legitimate child even if contracted by children below the lawful age recognized by English law.¹⁴ A saying attributed to King Solomon in the Scriptures was even used in another case to support an argument in favor of the existence of an implied easement of light and air.¹⁵ And it is worth noting that the phrase describing the role played by English judges – “lions under the throne” – was a reference to the twelve lions keeping guard around the throne of King

¹¹ Hill v. Grange (CP 1556), 1 Plowd. 164, 173, 75 E.R. 253, 267.

¹² Case of Mixt Moneys (1604), Dav. 18, 19, 80 E.R. 507, 508.

¹³ Partridge v. Strange & Croker, (CP 1553), 1 Plowd. 77, 82, 75 E.R. 123, 130; see also Earl of Clanrickard et ux. v. Sidney (1615), Hob. 273, 277, 80 E.R. 418, 423.

¹⁴ Kenn's Case (Exch. 1609), Jenk. 289, 145 E.R. 289 (“[S]ome write that Solomon begat Rehoboam at ten years of age”).

¹⁵ William Aldred's Case (1610), 9 Co. Rep. 57b, 58b, 77 E.R. 816, 821 (Ec. 11:7): “Truly the light is sweet, and a pleasant thing it is for the eyes to behold the sun.”

Solomon (1 Kings 10:19-20).¹⁶ It was used with reference to a dispute between Coke and King James I,¹⁷ but its origin and its effect came from its place in the Bible.

Passages from the Old Testament were sometimes used to justify decisions about inheritance of land in cases of partial intestacy, as for example the decision of Moses about inheritance by the daughters of Zelophehad from the Book of Numbers (Num. 27:1-11).¹⁸ In fact, the fixed rule of English property law that land could only descend to the estate holder's kin upon intestacy also evoked Biblical citation; the rule that land could not ascend, even to those more nearly related by kinship than descendants was also justified as supported by that same example.¹⁹ The effects of the Statute of Uses of 1534-34 (27 Hen. VIII, c. 10) on land titles in England were also described and justified by evocation of King Nebuchadnezzar's tree in the Book of Daniel (Dan. 4:1-27). In that tree, it was said, "the fowls of the heaven build their nests, and the nobility and gentry of the realm settle and establish their families."²⁰ Under that tree-like statute, "a great part of the farmers and lessees of the land do lie for shelter and safety." This point of the comparison was to show that the Statute had come to have many and different effects than those its framers had intended; Like Nebuchadnezzar's tree, it sheltered many unexpected

¹⁶ *Brownloe v. Michell* (1615), 1 Rolle 288, 289, 81 E.R. 490, 491.

¹⁷ Most famously by Catherine Drinker Bowen, *The Lion and the Throne: the Life and Times of Sir Edward Coke* (1552-1634) (Boston and Toronto 1957). Its provenance was acknowledged by Sir Francis Bacon, "Essays Civil and Moral, no. 56, Of Judicature," in *The Works of Lord Bacon* (London 1837, repr. 2000), i, 305.

¹⁸ *Case of Tanistry* (1608), Dav. 28, 35, 80 E.R. 516, 523: "Et cest ordinance accord ove le divine ordinance en le case de Zelophehad." See also *R. v. Boreston & Adams* (1628), Noy 158, 161, 74 E.R. 1119, 1121 (also mentioning 'the daughters of Zelophehad' from Num. 27:6 and 36).

¹⁹ See *Ratcliff's Case* (1592), 2 Co. Rep. 37a, 40b, 76 E.R. 713, 727. Explaining this strange rule, which excludes direct ascendants but admits collaterals, has been one of the unsolved mysteries of English land law. See, e.g., Frederick Pollock & F. W. Maitland, *History of English Law before the time of Edward I*, 2nd ed. S.F.C. Milsom ed. (Cambridge 1968), ii, 286-295.

²⁰ *Dillon v. Freine* (*Chudleigh's Case*) (1589-95), 1 Co. Rep. 120a, 134b, 76 E.R. 270, 304-305, *Berry v. White* (CP 1662) *Bridgman O.* 82, 90-91, 124 E.R. 480, 485.

guests. Their presence had “grown so general” in practice, that “they [have] now come to be favoured by the law.”²¹

English lawyers used the Biblical examples in a variety of circumstances to justify and interpret English law and customs.²² The purpose of a statute (4 Hen. VII, c. 24) limiting the time period within which actions to recover real property could be brought, was explained in one case by Justice Dyer as a consequence of following the example of Jesus who “for peace descended from Heaven upon the Earth.”²³ The statute was intended to bring an end to quarrelling over land titles and Dyer, J. thought it should be broadly construed to reach that result. The strange institution of the deodand, the concept by which an animal or inanimate object that had caused the death of a man or woman was forfeit to the Crown, was said to have been founded “upon the law of God” both in a commentary by Sir Edward Coke and in a case from the Commonwealth period.²⁴ It was said to be the English equivalent of the Biblical Ox that gored and hence a legitimate part of English property law. Even more tellingly, in situation where the English law’s rules for inheritance of land diverged from principles within natural law, as they did for example in adopting the rule of male primogeniture in the law of succession to land, English lawyers sometimes invoked the Bible to justify this long standing practice.²⁵ An accepted principle of medieval jurisprudence held that an “odious” custom – one contrary to natural law – should be abolished, or at least strictly construed. Primogeniture therefore

²¹ *Berry v. White* (CP 1662), Bridg. O. 82, 90-91, 124 E.R. 480, 485. See also *Copyholders’ Case* (1626), Ben. 187, 190, 73 E.R. 1048, 1050.

²² See generally, John Eusden, *Puritans, Lawyers, and Politics in early Seventeenth-Century England* (New Haven, CT 1958), 123-26.

²³ *Stowel v. Lord Zouch* (1562), 1 Plowd. 353, 368, 95 E.R. 536, 559.

²⁴ 3 Co. Inst. *57; *R. v. Crosse & Dabbyn* (1663), 1 Sid. 204, 205, 82 E.R. 1058 (citing Exod. 21:28).

²⁵

presented a problem, but if it had been established by God himself, as the lawyers contended, then it passed muster. The Bible was read to make this result palatable.

Knowledge and Use of the Church's Law

It used to be thought that study and use of the canon law in England ceased during the reign of Henry VIII, as shown by the closure of the canon law faculties at Oxford and Cambridge. We know now that this conclusion is false.²⁶ The power and privileges of the papacy were rejected, but the canon law was retained except where it was contrary to English statute and custom.

Retention mattered most in the ecclesiastical courts, of course, but it is still surprising to find that it also mattered in the common law courts in cases involving real and personal property. That at least some common lawyers were familiar with the basic documents of the canon law and also some of the treatise literature that went with it is clear. Coke himself acknowledged its relevance.²⁷ William Lyndwood was the most frequently cited of the canonists – explained no doubt by the specifically “English focus” of his *Provinciale*.²⁸ However, their knowledge did not stop there. The *Liber extra* and the great canonists who glossed it – Hostiensis, Innocent IV, Baldus de Ubaldis, Panormitanus, William Durantis, Philippus Francus, Dominicus de Sancto Geminiano – all were cited as of relevance in the English reports.²⁹

²⁶ See 25 Hen. VIII, c. 19 (1533), specifying that pending a revision the canon law should remain in force if not contrary to the laws and customs of the realm or the king's prerogatives. The proposed revision was never enacted. See also Sir Edward Coke's exposition of the subject in “The King's Ecclesiastical Law,” (1509), 5 Co. Rep. 28a, 32b, 77 E.R. 33, 37.

²⁷ E.g., Co. Lit. *95b (of tenure by frankalmoin, that “the common law . . . taketh knowledge of the ecclesiasticall law in that behalf”). See also John Doddridge (d. 1628), *The English Lawyer* (London 1631), 102-106 (using the canon law to describe the status of custom in English law).

²⁸ A good example is *Hilton v. Paul* (CP 1627), Lit. 73, 124 E.R. 143.

²⁹ E.g., *Dickinson v. Greenhall* (1624), 2 Rolle 479, 480, 81 E.R. 928, 929; *Sobrean & Teige v. Kevan* (1619), 2 Rolle 101, 102, 81 E.R. 686; *Jones v. Jones* (1617), Hob. 185, 186, 80 E.R. 332, 333; *Kitchin v. Calvert* (Exch. 1611), Lane 100, 101, 145 E.R. 332, 333; *Anon.*, (1611), Dav. 68, 75, 80 E.R. 552, 559;

It seems surprising to find the canon law accorded any relevance in the royal courts. In fact, this was not uncommon. The law of the church was relevant, for instance, where the existence of a valid marriage could determine the outcome of a widow's suit for dower. One operative rule was: "where there is no marriage, there is no dower."³⁰ Determining that question required reference to canon law, since the church's law defined what constituted a valid marriage – not always a simple question. And there were other, even more intricate, questions raised in practice. To determine, for example, the scope of the statute regulating the validity of marriages between persons related by blood or marriage – a question that arose in some disputes over inheritance – it was necessary to know first, what the canon law allowed and second, what the effect of a Reformation statute (21 Hen. VIII, c. 21) had been. The statute limited that power to unions the law of God itself had not declared unlawful. The first question required knowledge of the pre-Reformation canon law.³¹ The second required understanding of what the Bible held on the subject of unlawful unions. So it happened that common lawyers and judges looked at both questions when a dispute came before them.³² Broadly speaking they had recourse to the canonists for the first and theologians for the second, though there was never a firm dividing line.

Much the same process shaped administration of the common law of tithes. Their payment raised some of the most contentious issues of the time. Best known as a symbol of that disagreement is the question of whether tithes were owed by divine law or only by custom. John

Jones v. Boyer (1610), 2 Brownl. 27, 28, 123 E.R. 795, 796; Morris v. Webber (1586), 2 Leo. 169, 172, 74 E.R. 449, 452.

³⁰ Co. Lit. *32a. See also Amy Louise Erickson, *Women and Property in early Modern England* (London & New York 1993), 24-26.

³¹ Co. Lit. *235a; one reason for this was that the pope's power to grant dispensations in was itself limited; see, e.g., D. L. d'Avray, *Papacy, Monarchy and Marriage 860-1600* (Cambridge 2015), 189-217.

³² See, e.g., Williams's Case (CP 1631), Lit. 355, 124 E.R. 282 (Levitical degrees). Much the same pattern is found in the cases that dealt with dispensations to hold more than one ecclesiastical benefice, a

Selden's role in that controversy has long attracted the primary interest of historians.³³ That great question did come up litigation,³⁴ but it was confined to the background of most of the tithe cases that came before the royal courts. Front and center in the cases was a conflict between local custom and the formal law of the church on the subject of the amount of tithe owed. The monetary inflation of the period rendered the income derived from many long established customs inadequate, and those who held the right to tithes sought to upset them in favor of full payment a tenth part of income derived from the fruits of the earth and the labor of men. This required knowledge of both the status of custom in the common law and the law of tithes in the canon law. So we find both being invoked in the reported cases.³⁵ The law of the medieval church could be relevant to the decision of disputes that arose in the King's courts, and although the common lawyers did not always enforce it, they often began with it, following it where it did not conflict with their own law.

Protestant religious principles also worked their way into some of the cases.³⁶ Statutes did much of the work, but not all. The fate of charitable grants of lands and chattels used for religious purposes depended upon their conformity with the principle that superstition should be rooted out from Christianity. What exactly did that term encompass? And what did it leave intact? In one case from late in Elizabeth's reign interpreting a Henrician statute (23 Hen. VIII,

subject regulated both by English statute and canon law; see, e.g., *Colt v. Glover* (Exch. 1612), 1 Rolle 451, 81 E.R. 600, 601; *Case de Commenda* (CP 1611), Dav. 68, 75, 80 E.R. 552, 559.

³³ E.g. Christopher Hill, *Economic Problems of the Church* (Oxford 1963), 77-131.

³⁴ See, e.g., *Urrey v. Bowyer* (CP 1611), 2 Brownl. 20, 24, 123 E.R. 791, 793.

³⁵ See, e.g., *Dickenson's Case* (1616), Benl. 163, 73 E.R. 1027, 1028 (accepting those aspects of the canon law of tithes which "ont obteyne le force del ley par usage et length de temps."); see also *Mountford v. Sidley* (1625), 3 Bulst. 336, 81 E.R. 279; *Case of Royal Piscary* (1610), Dav. 55, 56, 80 E.R. 540, 541 (citing Lyndwood and Thomas Aquinas); *Canning v. Dr. Newman* (1610), 2 Brownl. & Golds. 54, 123 E.R. 811 (citing the decrees of the Fourth Lateran Council of 1215); *Dean & Chapter of Bristol v. Clerke* (1553), 1 Dyer 83a, 84b, 73 E.R. 181, 184.

c. 10), it was held that the term did not include a grant for “good and charitable uses (not savouring of superstition), as to found grammar schools, to relieve poor men, or any such good use.”³⁷ Similarly a medieval gift in part for the saying of masses was interpreted to forbid masses, but saved by inclusion in it of a provision in favor of the poor, since “he who robs poor men of their living is a greater thief by the law of God.”³⁸ Or as similar case in which the license to found a hospital had included an obligation on the residents to attend mass daily and say the Pater Noster fifty times on every such occasion, was nevertheless saved because it also contained an obligation on the hospital to provide hospitality for travelers. The legal argument was that ‘admitting that there were superstitious uses here, still the good use . . . saves the land.’³⁹

Invocation of Moral and Religious Principles

The modern law of real property has not turned its back on principles of morality.⁴⁰ What has happened is that judges and lawyers have ceased to credit the Christian religion with any part in the process. James Thayer, while a professor at Harvard Law School in the late nineteenth century, wrote that Christianity’s only contribution to the common law was to “give the benefit of any doubt to the accused person” in criminal cases.”⁴¹ As a description of the current situation

³⁶ An illuminating work on this subject, although largely devoted to Continental developments, is John Witte, Jr., *Law and Protestantism: the Legal Teachings of the Lutheran Reformation* (Cambridge 2002), esp. 168-75.

³⁷ Porter’s Case (1592), 1 Co. Rep. 22b, 24b, 26a, 76 E.R. 50, 54, 58; see also Co. Lit. *96b-97a.

³⁸ Adams v. Lambert (1602), 4 Co. Rep. 104b, 106a, 76 E.R. 1091, 1093; see also The Skinner of London’s Case, (1582), Moo. K.B. 129, 72 E.R. 485; Holford’s Case (1620), 2 Rolle 205, 81 E.R. 752.

³⁹ Pit v. Webster (1603), Palm. 124, 125, 81 E.R. 1009, 1110.

⁴⁰ See Thomas Merrill & Henry Smith, “The Morality of Property,” *William & Mary Law Rev.* 48 (2007), 1849-95; F. E. Dowrick, *Justice according to the English Common Lawyers* (London 1961), 73-105.

⁴¹ Harvard Law School Special Collections, Thayer Correspondence and Memoranda, Vol. 2, s.d. February 28, 1879, quoted in Daniel Coquillette, and Bruce Kimball, *On the Battlefield of Merit: Harvard Law School, the First Century* (Cambridge, MA, 2015), 449.

in the law of real and personal property, Thayer may be right. Religion seems to have disappeared.

At the same time, modern historians have also established that religious ideas – often practical rules of morality – once had an effect on the government of European nations. The storehouse of ideas found within the medieval *ius commune* was so used, and some of them worked their way into English law. To take only the most clearly established example, the principle that what touches all should be approved by all (*Quod omnes tangit ab omnibus approbari debet*), which appears in the Roman law’s Codex (Cod. 5.59.5.2), became the foundation of protection from arbitrary taxation imposed by European monarchs.⁴² The doctrine was used to establish the necessity of securing the consent of the governed acting through their representatives before they could be taxed. The question raised by my topic is whether one can go further. Did something like this same use of moral ideas found in the *ius commune* touch the law of real and personal property in England?

To some extent, I think it did. It started at the top. A famous example is the use of Christian principles to guide and control the King and his agents. It reached into feudal law and the royal prerogative. Today, when lawyers describe the King’s historic role, they describe him as holding the land of England as the “sovereign lord or lord paramount” of all. He has no superior, and “[t]o this rule there is no exception.”⁴³ Lawyers four centuries ago would not have

⁴² Its development is discussed in Gaines Post, “A Romano-canonical maxim, *Quod omnes tangit*, in Bracton and in early Parliaments,” in idem, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton, N.J. 1964) 162-238; and Bruce Braisington, “A Divine Precept of Fraternal Union: the Maxim *Quod omnes tangit* in Anglo-American Thought to the Ratification of the Constitution,” in *Bridging the medieval-modern divide: medieval themes in the world of the Reformation*, James Muldoon ed. (Farnham 2013), 205-23. Its success in practice proved to be mixed, however. See, e.g., *Thomas Bisson, Assemblies and Representation in Languedoc in the thirteenth century* (Princeton, NJ 1964), 296-99.

⁴³ See *Challis’s Law of Real Property*, 3d ed., Charles Sweet ed. (London 1911), 5.

said that. They said instead that the monarch did have a superior, namely God.⁴⁴ Did this pious rule have any consequences? Not an easy question to answer. The answer you get may depend on the beliefs of the person you ask. What we can say with some confidence is that the sovereignty of God was meant to have consequences. It was meant to set the limits of the King's dispensing power.⁴⁵ It was meant to spur him to take action to provide justice to his subjects.⁴⁶ It was meant to require him to keep his promises, particularly those he had sworn to observe.⁴⁷ The judges also invoked "their oaths to God" to excuse themselves from executing an order from Queen Elizabeth to admit an unworthy man to an office in the courts at Westminster.⁴⁸ Some of the great moments of English constitutional history have made use of the moral principle that God was the true sovereign of the realm.⁴⁹ And on a more prosaic level, the presumption that the monarch must have been "deceived" when he had acted contrary to settled principles of the law of the land allowed cases to be decided aright.⁵⁰

These were great issues, but the role of Christian principles in the case law extended into humble matters. One of the humblest was an invocation of Christ's words describing the buying and selling in the Temple at Jerusalem. They offered a solution to a difficult problem of

⁴⁴ Anon. (1615), 1 Rolle 135, 81 E.R. 385; Henry Finch (d. 1625), *Lawe: or, A Discourse thereof in Four Books*, Bk. II, c. 1 (London 1636). 81.

⁴⁵ *Colt & Glover v. Bishop of Coventry & Lichfield* (1612), Moo. K.B. 898, 902, 72 E.R. 982, 985 (that it did not extend to an exercise of the king's power if 'contrary al ley de Dieu'); Anon. (1548), Jenk. 79, 145 E.R. 56.

⁴⁶ *Case of Duchy of Lancaster* (1562), 1 Plowd. 212, 222, 75 E.R. 325, 338-39 ("considering how that Almighty God hath placed him in the honourable estate of King"). See also Ralph Turner, "The Royal Courts Treat Disseizin by the King: John and Henry III, 1199-1240," in idem, *Judges, Administrators and the Common Law in Angevin England* (London & Rio Grande, OH 1994), 251-68.

⁴⁷ *Willon v. Berkley et al.* (1560), 1 Plowd. 223, 237, 75 E.R. 339, 361.

⁴⁸ *Cavendish's Case* (1587), 1 And. 152, 155, 123 E.R. 403, 405.

⁴⁹ As, for example, the *Trial of the Seven Bishops* (1688), 12 Howell's State Trials 271, to the effect that the King had no power to suspend the laws affecting religion. See also Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA, 2010), 67-69; Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA 2008), 168-72.

⁵⁰ See, e.g., *Attorney General v. Bushopp* (1600), 1 Co. Rep. 40b, 50a, 53a, 76 E.R. 89, 114, 120.

misnomer in a grant of land involving charitable uses.⁵¹ His definition – a “house of prayer for all nations” and a place where God is served (Luke 11:17) – seemed ample enough to permit the judges to set aside an objection based on what may have been a simple mistake in naming the beneficiary of a devise of land. Today, this apparent disparity today might be disregarded as purely formal or investigated to uncover the testator’s likely intent. In Jacobean England it was interpreted instead according to a principle found within the Christian religion.

This approach extended to deal with several technical questions within the law of real property. The reason a father’s agreement to stand seized of land to the use of his children raised a valid use that was executed by the Statute of Uses was effective, where a similar agreement with a stranger was not, was said to be that “nature, reason, and the law of God countenance and respect the love which is between the father and his issue.”⁵² The most common reason attempts to create perpetuities in land were held invalid in the early cases was not that the needs of the market in land required early alienability, but rather that such attempts “fought against God” by supposing that mortal men could control the future to an extent that sought to deny God’s omnipotence.⁵³

Similarly, a grant to a man and a woman and the heirs of their bodies that would ordinarily create an estate in fee tail special was invalid if the man and woman were married to other persons at the time of the grant was treated as invalid not only because it would “introduce dangerous events to inheritances,” but also because it would introduce ‘a remote and foreign

⁵¹ *Sherborn v. Lewis* (1597), Gould. 120, 123, 75 E.R. 1037, 1038; see also *Pits v. James* (1614), Hob. 121, 125. 80 E.R. 271, 272.

⁵² *Sharington v. Strotten* (1565), 1 Plowd. 298, 304, 75 E.R. 454, 463. See also *Gerrard v. Worseley* (1577), 1 And. 75, 79, 123 E.R. 361, 364. See Simpson, *History of the Land Law*, 188-89, but without any notice the source of the distinction.

⁵³ *Anon.* (Chan. 1599), Cary 9, 21 E.R. 5; *Floyd v. Cary* (Chan. 1697), 2 Free. Ch. 218, 219, 22 E.R. 1170, 1171.

expectancy.”⁵⁴ To have enforced it as written would have contravened a moral principle tied to the Christian religion. Similarly, a reason given in justification of the English law of coverture that restricted the rights of married women over their own property during their marriage was that “by the law of God she is under the power of her husband.”⁵⁵ An alternate explanation, equally tied to religion, was that the man and the woman “became one flesh” in marriage, so that they could not be more than one person in the eyes of the law.⁵⁶

Conclusion

The three areas of the law just discussed in which Christianity played a part do not exhaust the subject. The doctrines and sacraments of the church – baptism and excommunication to take just two examples – could matter to outcomes in litigation about land in the royal courts. I think, however, that I have found enough evidence to demonstrate that English common lawyers regarded Christianity as relevant to English property law. I should add that I would not say more than that. Although some lawyers went further, saying that the laws of England “came as near to the laws of God as they could,”⁵⁷ in my view it would be pushing the evidence too far to say that English property law was based upon the Christian religion. The common lawyers quoted Virgil’s *Aeneid* too,⁵⁸ and it would be a considerable stretch to suppose that the poet exercised

⁵⁴ Hoe’s Case (1622), Winch. 54, 56, 124 E.R. 46, 48.

⁵⁵ Haward v. Duke of Suffolk (1553), 1 Dyer 79b, 73 E.R. 170, 171; Manby & Richardson v. Scot (Exch. Ch. 1662), 1 Keb. 482, 83 E.R. 1065.

⁵⁶ Manby v. Scott (1674), 1 Mod. 124, 86 E.R. 781.

⁵⁷ Reniger v. Fogossa (Exch. Ch. 1562), 1 Plowd. 1, 8, 75 E.R. 1, 12. Similar were the opinions of Christopher St. German, in *St. German’s ‘Doctor and Student’*, T. F. T. Plucknett and J. L. Barton eds. (Selden Society, Vol. 91, 1974), 75 and Michael Dalton, *Country Justice* (London 1618), ch. 1 [check]. See also Norman Doe, *Fundamental Authority in late Medieval English Law* (Cambridge 1990), 135-36.

⁵⁸ E.g., Co. Lit. *342b.

any real influence on English property law. It is also undoubted that there were far more reported property law cases between 1500 and 1650 that did not mention religion than there were cases that did.

It would also be a mistake to think of religion's influence as a means of criticizing or resisting the law. My findings do not quite fit the title of this conference, which highlights religious "critiques" of the law. At least in my field of inquiry, Christianity was most commonly used to support or to interpret existing law, not to undo it. Conscientious refusal to obey an unjust law – what we think of as the most common reason for invoking freedom of religion, did not appear in English cases involving real and personal property. Perhaps it did elsewhere, but not within my (admittedly limited) field of inquiry.

This may seem disappointing. However, what I can say to the contrary is that religion did play an overt role in the thinking of English lawyer. What Thomas Shaffer wrote about the modern American legal academy –that it, "more than any other has systematically discouraged and disapproved of invoking the religious tradition as important or even interesting,"⁵⁹ finds no precedent in the English case law of property between 1500 and 1650. The reverse is true. During those years – even within a seemingly secular field like the common law of property – the Christian religion occupied a legitimate place. It was mixed in with the law of property, as St. Paul has suggested could happen many centuries before.

⁵⁹ Quoted from Conference Brochure, p. 2 [find page no. in book]