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Sir Edward Coke Gets It Wrong? A Brief History of Consecration

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In many modern works of ecclesiastical law, the Institutes of Sir Edward Coke are given as the authority for the consecration of buildings as places of public worship. For authority Coke relies on scriptural precedent. This paper suggests that, in fact, the origin of consecration as a legal precedent lies in pre-Christian Roman law.[1]

INTRODUCTION

The Irish canonist Archdeacon Stopford remarked in 1861 that 'Modern law has not dealt with the consecration of churches: but the matter is not therefore without law. The common law recognizes and requires that churches shall be consecrated by the bishop'. He also says, from the Irish point of view, 'Of the common law of England, in relation to matters ecclesiastical, we know but little … Our knowledge of common law as relating to matters ecclesiastical, hardly extends at present beyond a few judgements, some of them founded on defective examination'.[2] Regrettably, the last century and a half has seen little improvement. There appears to be no discussion of consecration of churches as it relates to Ireland.[3] So, of necessity, we must use the paradigm of the established Church of England, whose law is the ecclesiastical law of England. This general paradigm will also apply to the internal or canon law of the disestablished churches of Ireland and Wales, with the possible exception

1 This article is based on a paper given at a postgraduate seminar at Cardiff Law School in May 2007. I am very grateful to Professor The Revd Thomas G Watkin for his invaluable help on primary sources of Roman law of the sacred and religious, and to Professor Norman Doe for commenting on a draft of the paper. Many of the old sources referred to in this paper are readily available on or via the website of Fordham University <http://www.fordham.edu>, accessed May and June 2007: the search engine on Fordham University's homepage will take one directly to the Fordham source. This paper is written from an Irish viewpoint.

2 E Stopford, *A Hand-Book of Ecclesiastical Law and Duty for the use of The Irish Clergy* (Dublin, 1861), p vi, writing at the time of the United Church of England and Ireland.

3 Since 1922, the only occurrence of 'consecration' in the searchable electronic databases of Irish statute and case law has been in The Huguenot Cemetery Dublin (Peter Street) Act 1966, a private Irish act. The tenor of this Act is that remains removed from Peter Street by heirs, executors, administrators or relatives prior to its redevelopment must be re-interred in consecrated burial ground – s 3(3); and those otherwise moved must be re-interred in ground 'consecrated in accordance with the rites of the French Reformed Church' – s 3(6).

that the common law, as an incident of disestablishment, does not give recognition to the consecration of buildings and land in Wales or Ireland.[4]

To clarify terminology, dedication refers to an act of *declaration* that a place or thing is set apart for a sacred purpose, and derives from the Latin *dicare*, 'to declare'. Consecration refers to an act of setting apart for holy use, and derives from the Latin *sacare*, 'to set apart as sacred'.[5] A simpler explanation would be to say that something is dedicated either *to* something else, or dedicated *for* some specific purpose, and this is a declaration of intent.[6] Consecration, performed by an authorised person, sets the thing apart from the everyday. The terms are often used interchangeably. This paper refers solely to buildings used as places of public worship and the land on which they stand.

CONSECRATION

In the Church of England and in English law,

> by consecration, a church or burial ground is set apart for ever from common uses, dedicated to the service of God and subjected to the jurisdiction of the ecclesiastical courts. Consecration must be presumed in the case of many ancient churches and churchyards . . .[7]

4 I am aware that this is a sweeping statement, contradiction of which would be greatly welcomed. Research so far reveals nothing to suggest common-law recognition of any legal effects of consecration in disestablished and non-established churches in the United Kingdom or Ireland. The consecrated land of disestablished and non-established churches would appear to be on the same legal footing as, say, the clubhouse and playing field of a rugby club, though obviously the internal law of a church recognises the effects. This paper does not take account of domestic UK legislation, measure or case law as such, seeking as it does a root for consecration as a legal concept. Certain statutory exemptions are granted to ecclesiastical buildings used for certain ecclesiastical purposes – for example, the Planning (Northern Ireland) Order 1991, SI 1991/1220 (NI 11), Pt V, art 44(8); The Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771; Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (ch 9), s 54. These, however, hardly constitute a recognition of consecration per se.

5 See relevant entries in *Chambers Twentieth Century Dictionary* (Edinburgh, 1972, 1977, rep 1978). Cf J Inst 2.1.7 and 8: *Sacra sunt, quae rite et per pontifices deo consecrate sunt, veluti aedes sacrae et dona, quae rite ad ministerium dei dedicate sunt* . . . (Sacred things are those which have been ceremonially consecrated to God by priests, for instance churches, and also gifts solemnly dedicated to the service of God): P Birks and G McLeod, *Justinian's Institutes* (London, 1987). See also M Hill, *Ecclesiastical Law* (3rd edition, Oxford, 2007), p 220, para 7.02: 'Dedication . . . is merely a declaration of intent as to the purpose for which the land is to be put. Consecration . . . is the setting aside of land solely for sacred use in perpetuity'. In Roman Catholic canon law, places are dedicated, and people consecrated – see R Jones, *The Canon Law of the Roman Catholic Church and the Church of England: a handbook* (Edinburgh, 2000), p 46.

6 See T Briden and R Hanson, *Moore's Introduction to English Canon Law* (3rd edition, London, 1992), p 86.

7 R Walton (ed), *The Encyclopaedia of Forms and Precedents. Fifth edition, volume 13: ecclesiastical law, education* (London, 1987), para 42 [45], p 28.

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The authority for this statement is given as Halsbury.[8] Halsbury, in turn, uses a rather bland and unsatisfactory reference to Coke's *Institutes* as authority.[9] Further authority in Halsbury comes from Lyndwood, from whom it is presumed that all ancient churches are consecrated.[10] Lyndwood flourished from 1375 to 1446, so it is reasonable to presume that all churches existing at that date were consecrated.[11] A building does not become a church in English law until it is consecrated:[12]

> The outward sign of such setting aside is generally a religious ceremony performed by the bishop, but as a matter of law, the land becomes consecrated by the bishop signing the sentence of consecration, which is then lodged in the diocesan registry.[13]

In English ecclesiastical law (which of course only relates to the Church of England), consecration possesses a special, recognised and legal effect upon that consecrated.[14] Once consecrated, the land and all to do with it, including any building, is subject to the Ordinary, who has a jurisdiction to ensure that on it and in it the ecclesiastical laws of the Church of England are observed. The same provision applies to churchyards for burials. In England, consecration does not appear to have any recognised legal effect on any land or building not belonging to the Church of England.[15] The essence of consecration is that something can only be consecrated – and so made sacred – by a person authorised so to do.

Although no satisfactory *legal origin* for consecration can be found in the readily available sources of common law, such as Coke and Blackstone, there is a vast body of case law recognising the legal effects of consecration of a Church of England place of public (as distinguished from divine or private) worship,[16] and, in common law, the fact that the institution has existed from time out of mind, or even that is mentioned by Coke, would seem to be legality enough.

8 Ibid, para 42, n 6, p 28, referring to 14 *Halsbury's Laws* (4th edition), paras 1069, 1073.
9 14 *Halsbury's Laws* (4th edition), para 1054, n 1, 1068, n 1.
10 Ibid, para 1054, n 2.
11 Halsbury distinguishes between private consecrated chapels and places of public worship: ibid, para 1054, n 4.
12 Ibid, para 1068.
13 Hill, *Ecclesiastical Law*, p 220, para 7.02.
14 14 *Halsbury's Laws* (3rd edition), para 881.
15 This appears to be an incident of establishment – see *Wright v Ingle* (1885) 16 QBD 379 at 399, CA. Lord Esher MR noted that a statute may put any building on the same footing in law as that of a church of the Church of England in common law, but no other form of legal act, such as a covenant or trust deed, will do so – *Wright v Ingle* (1885) 16 QBD 379 at 391–392, CA. See also 14 *Halsbury's Laws* (4th edition), para 1306, n 6. Phillimore's only comment on the legal effect of consecration refers to this case: R Phillimore, *Ecclesiastical Law*, vol 2 (London, 1895), p 1399.
16 See 14 *Halsbury's Laws* (4th edition), para 1306, n 6. For the effects of consecration on a private chapel, as distinct from a place of public worship, see *Re Tonbridge School Chapel (No 2)* [1993] Fam 281 at 290, Rochester Cons Ct, and Briden and Hanson, *Moore's Introduction to English Canon Law*, p 86.

SIR EDWARD COKE

The antipathy of Coke and other common lawyers of the early modern period to civil and canon law is well enough known. It ran deeper than the collateral procedures and prohibitions used by the common law courts that served to frustrate both admiralty and ecclesiastical courts.[17] To common lawyers of the time, 'the civil law represented an alien intrusion into England'.[18] Both courts were subject to prohibition, and 'the weight of prohibition fell even more heavily on the church courts ... all came under the general stigma of inferiority largely because of professional attitude to their status'.[19]

This antipathy was part of a broader English development that is reviewed by Pocock in *The Ancient Constitution and the Feudal Law*,[20] and which came to a particular head in the 1620s, resulting in the Petition of Right of 1628, and again in 1649 with the beheading of Charles I. The broad argument was that the common law was the only ancient and native law of England. All other forms of law, such as canon and civilian law, were foreign imports. The so-called ancient constitution bound the king to obey the common law of England because William I had so bound himself following the Norman conquest, and the king was not to use other forms of law or jurisdiction against the property and liberty of his subjects. The common law could only be altered by parliament, so the king must exercise authority through the king-in-parliament. Other forms of law only had the effect granted to them by the common law and parliament, and the king was not to use forms of law over which parliament had no control. This was, in effect, a remedy to the arbitrary *praemunire* of Henry VIII, by which Henry had extended the concept to anything that usurped his authority, and later a remedy to the arbitrary use of the royal prerogative. The outcome was a triumph for the common law and its practitioners, who alone had the authority to interpret statutes as they applied to matters ecclesiastical.[21]

Raffield, in an intense study of the culture of the Inns of Court in the early modern period, identifies the Inns as the breeding ground of the defence of the fictive ancient constitution.[22] He identifies a number of causes for the rejection of foreign law,[23] principle among them being the integration by members of the Inns of Judaeo-Christian theology with the Platonic principles

17 For a history of the conflict between the common law and the admiralty court, see the introduction to MJ Prichard and DEC Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, Selden Society vol 108 (London, 1993), pp xlvii ff.
18 Ibid, p xlix.
19 Ibid.
20 JGA Pocock, *The Ancient Constitution and the Feudal Law: a study of English historical thought in the seventeenth century* (2nd edition, Cambridge, 1987), pp 280–305.
21 See RH Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990), p 76.
22 P Raffield, *Images and Cultures of Law in Early Modern England: justice and political power, 1558–1660* (Cambridge, 2004).
23 Ibid, pp 1–5.

of *The Republic* and the Neoplatonic humanism of Aristotle, together with the conviction that common law principles were enshrined in scripture.[24] These combined to inform the political struggles between lawyers and king for control of the law, the royal prerogative being the principle target. Informed by the ideas of a religious commonwealth such as that expressed by Richard Hooker,[25] the Inns came to portray themselves as the perfect commonwealth, the lawyers as a secular priesthood,[26] and 'the guardian of common law rights and the arbiter of disputes between magistrate and subject'.[27]

Coke, and Blackstone after him, both in tune with post-Reformation xenophobia,[28] were hostile to the Roman church.[29] This general antipathy owed much to the fact that, in the eyes of English common lawyers, the civil and ecclesiastical law were the laws of foreign, continental princes, and of the Roman church as a foreign princely body.[30]

Given that Coke is referred to by modern authorities as the supreme authority for the legal effects of consecration, and has been (at least until the advent of the Internet) relatively difficult to consult, he is worth quoting. Chapter 117 of *The Third Part of the Institutes of the Laws of England* deals with buildings generally, including churches, tombs and sepulchres – all things familiar to us from Roman law.[31] Coke determines that the building of churches and chapels by bishops, earls and barons within their fees, and indeed by all

24 Ibid, p 177. It seems that the Bible was considered the ultimate ancient constitution of England.
25 Ibid, pp 106–107, 109.
26 Ibid, pp 107, 179, 181, 199.
27 Ibid, p 5.
28 A lucid sense of Elizabethan xenophobia can be found in R Hutchinson, *Elizabeth's Spymaster* (London, 2006). See also Raffield, *Images and Cultures of Law*, generally.
29 Both Coke and Blackstone showed a distinct anti-papal, anti-ecclesiastical stance, and Blackstone an additional anti-clerical stance – see Coke's 'Speech and charge at the Norwich Assizes' in S Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Indianapolis, IN, 2003), pp 544–548 (papists and ecclesiastical courts, but see also p 547 for a defence of ecclesiastical civilian law as represented by the bishops in parliament); and W Blackstone, *Commentaries on the Laws of England, Book the Third* (Dublin, 1769), pp 61–62 (ecclesiastical courts are a vile and foreign usurpation of the ancient constitution of England), and p 124 (how to be very rude to a clergyman and get away with it).
30 See Raffield, *Images and Cultures of Law*, pp 106–107. We should perhaps also take into account European developments of the time: the general European-wide Reformation tendency that favoured the Scriptures for precedent; the secular backlash against the *ius commune* of Roman and canon law; and the decreasing influence of Roman law as a law of last resort. See G Strauss, *Law, Resistance, and the State: the opposition to Roman law in reformation Germany* (Princeton, NJ, 1986), passim; D Johnston, 'The general influence of Roman institutions of state and public law' in DL Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen quincentenary essays, Schriften zur Europaischen Rechts- und Verfassungsgeschichte*, Bd 20 (Berlin, 1997), pp 100–101. For how the *ius commune* was integrated with territorial law in Germany, see HJ Berman, *Law and Revolution 2: the impact of the Protestant Reformation on the Western legal tradition* (Cambridge, MA, 2003), ch 3. For a wider European discussion, see RH Helmholz (ed), *Canon Law in Protestant Lands* (Berlin, 1992).
31 3 Co Inst 200–204. The edition referred to is E Coke, *The Third Part of the Institutes of the Laws of England* (London, 1797), pp 200–204, available at <http://www.constitution.org/coke/coke3rd.htm> in facsimile form, which loses some of the text closest to the gutter.

people,[32] is by common law and custom lawful. King John requested Pope Innocent III to confirm this custom (naming only the baronage in his petition). Innocent ruled that the permission of the bishop was required for such building, 'but that addition bound not, seeing it was against the liberty of the baronage warranted by the common law'.[33]

As to consecration,

> And albeit churches or chappels may be built by any of the kings subjects, (as hath been said) without licence, yet before the law take knowledge of them to be churches or chapels, the bishop is to consecrate them or dedicate the same: and this is the reason, that a church or not a church, a chappel, or not a chappel, shall be tryed and certified by the bishop.[34] See for this dedication or consecration the 43 chapter of Ezechiel, the 23 chapter of Genesis, the 90 Psalme, the 24, 26, 27, 84, and 134 Psalms, the 2 of Samuel 6. 10 of Saint John, vers 22 to the end.[35]

For the sake of brevity we will examine only the two biblical references that refer germanely to Coke's sepulchres and churches and seem to be of most relevance.

Chapter 43 of Ezekiel recounts a vision of the temple received by Ezekiel in exile 'in the land of the Chaldeans',[36] and includes the command that Ezekiel make known to the people 'the law of the temple'.[37] The altar is consecrated as a result of a series of ritual acts that must be performed by Levitical priests of the family[38] of Zadok, after which it is fit for priestly use[39] and the peace and burnt offerings are made.[40] Then the Lord will accept his people.[41]

The twenty-third chapter of Genesis deals with a sepulchre for Sarah, the wife of Abraham. This, a cave at the end of a field, is to be purchased,[42] but the owner in the presence of witnesses gives the field and cave of proposed sepulchre for free.[43] Abraham, however, insists in front of witnesses on paying for the field.[44]

32 3 Co Inst 203.
33 3 Co Inst 201.
34 Phillimore uses this part of the quotation from Coke in his *General Observations* on churches and churchyards, though without comment – R Phillimore, *Ecclesiastical Law*, vol 2, p 1383.
35 3 Co Inst 203. A marginal note mentions 8 H.6.32.37, but research has so far not identified the contents of these statutes. It appears that these are statutes of 1429, but there seem to be only 29 statutes for that year, rather than the 37 or more that Coke's reference suggests.
36 Ezekiel 1: 3.
37 Ezek 43: 11–12.
38 Family, in this sense, may be better understood as 'lineage'.
39 Ezek 43: 26–27.
40 Ezek 43: 27.
41 Ibid.
42 Genesis 23: 9.
43 Gen 23: 11.
44 Gen 23: 15–16.

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The curtilage or area is given in detail[45] and the field is to be used (or set apart) as a burying place.[46]

The first passage, from Ezekiel, gives a clear procedure for consecrating an altar. Ezekiel is in exile, so this is a theoretical and visionary affair. In Ezekiel, it is as a *consequence* of the consecration of the altar and the offerings there made that God will accept his people. This does not speak of the consecration of buildings as such, but does indicate a setting apart.

The second, from Genesis, gives the idea of a place set apart for sepulchre, as well (incidentally) as an example of contract in the ancient world. We have noted that consecration in common law indicates a setting apart, and of all Coke's biblical references it is only this one from Genesis that comes close to the mark. The psalms mentioned by Coke indicate places where the divine is to be encountered, but add little to Coke's suggestion that a root for consecration may be found there.[47] In particular, Coke's examples are demonstrative of a phenomenon, rather than providing a legal precedent. In fact, the overall impression from Coke's illustrations is of a deity whose presence is experienced in place, rather than the setting apart of place.[48]

Coke, it appears, shows the outlook (or prejudices) of a typical post-Reformation lawyer, who has rejected as far as possible both the Roman law and the medieval constitutions of the Church, and turned to scripture and the ancient constitution. We may speculate on the reason for this: Coke, the priest of the law, evidently recognised the validity of consecration, and so a common law authority had to be found in scripture – that is, from God, and not from a foreign legal system, and certainly not from the laws of continental princes or church.

45 Gen 23: 17.

46 Gen 23: 20.

47 Psalm 90 has no obvious connection with the matter in hand. It refers to the Lord as the dwelling place or refuge of his people (v 1), rather than to physical place. Psalm 24 refers to the hill of the Lord (v 3), which may refer to Jerusalem and Mount Zion. Kidner identifies the psalm with David appropriating the Jebusite stronghold: D Kidner, *Tyndale Old Testament Commentaries Series*: *Psalms 1–72* (Leicester, 1973), p 113. The psalm is used in the liturgy for the consecration of a church (see, for example, the *Irish Book of Common Prayer* (Dublin, 1926), p 312) and it indicates that blessing shall be received from the Lord for those who go into his holy place with clean hands. Again, it appears to have little to do with dedication and consecration. Psalm 26 speaks of 'the place where thy glory dwells' (v 8) and of the great congregation (v 12). In Psalm 27, the supplicant requests to 'dwell in the house of the Lord all the days of my life, to behold the beauty of the Lord, and to inquire in his temple' (v 4). Psalm 84 is a paean of praise to the dwelling place of the Lord of hosts. Psalm 134 is a very short psalm – 'Come, bless the Lord, all you servants of the Lord, who stand by night in the house of the Lord. Lift up your hands to the holy places, and bless the Lord. May the Lord bless you from Zion, he who made heaven and earth.'

48 It is perhaps surprising that Coke did not mention Solomon's dedication of the temple in 1 Kings 8. Solomon declares that he has built an exalted house where God is to dwell forever, even though heaven and earth cannot contain the deity. Solomon dedicates the house of the Lord, and also 'the middle of the court that was before the house of the Lord' – 1 Kings 8: 64.

In summary, Coke offers an identifiable reference to setting apart for sepulchre, and a reference to an act of consecration by priests, but, it would seem, no legal precedent.

EDWARD BULLINGBROKE

We turn briefly now to the Irish canonist Edward Bullingbroke,[49] whose digest and commentary upon the ecclesiastical law[50] of Ireland was published in 1770,[51] and who lived at much the same time as The Revd Mr Burn of Orton in Westmoreland.[52]

Bullingbroke takes as authority for consecration first the legatine constitution of 1236 of Otho,[53] and second the legatine constitution of Othobon of 1268. Bullingbroke provides a form of Otho's constitution:

> By a legatine constitution of Otho, the dedication of royal temples is known to have taken its beginning from the old testament, and was observed by the holy fathers in the new testament, under which it ought to be done with the greater care and dignity, because under the former sacrifices dead animals only were offered, but under the latter the heavenly, lively and true sacrifice, that is Christ, the only begotten son of God, is offered on the altar for us by the hand of the priest: therefore the holy fathers providentially have ordained that so sublime an office should not be celebrated in any place, but what is dedicated, except in case of necessity. Now because we have ourselves seen, and heard by many, that so wholesome a mystery is despised, at least neglected by some (for we have found many churches and some cathedrals not consecrated with holy oil, though built of old) we therefore being desirous to obviate so great a neglect do ordain, and give in charge, that all cathedral, conventual, and parochial churches, which are ready built, and their walls perfected be consecrated by the diocesan bishops, to whom they belong, or others authorised by them within two years: and let it be so done within a like time in all churches hereafter to be built . . .[54]

49 Bullingbroke is in Phillimore's *List of Authorities* – R Phillimore, *Ecclesiastical Law*, Vol 2, p xx.

50 As it then was, being part of the law of the land until disestablishment of the Irish part of the United Church of England and Ireland on 1st January 1871 – see the Irish Church Act 1869, s 21.

51 E Bullingbroke, *Ecclesiastical Law: or, the statutes, constitutions, canons, rubricks and articles, of the Church of Ireland. Methodically digested under proper heads. With a commentary historical and juridical* (Dublin, 1770).

52 The second edition of R Burn, *Ecclesiastical Law* was published in 1769.

53 An unpopular legate 1236/7–1241: N Adams and C Donahue, *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c.1200–1301*, Selden Society vol 95 (London, 1981), p 325, n 1 gives the date of Otto's Council of London as 1237.

54 Bullingbroke, *Ecclesiastical Law*, pp 247–248. See also Phillimore, *Ecclesiastical Law*, vol 2, p 1389.

And of Othobon's:[55]

> By a legatine constitution of Othobon, the church of God not differing as to its materials from private houses, by the invisible mystery of dedication is made the temple of the Lord, to explore the expiation of sins, and the divine mercy . . . the rector, governor, or vicar of an unconsecrated church within a year after it is built (if it may conveniently be) do request the proper bishop to consecrate the church; or else let him require the archdeacon, that he would within the said time make this request to the bishop. And if the rector, governor, vicar, or archdeacon do forebear to make such request, we ordain that from that time forward they be suspended from their office till they make such request. Let the bishop, who upon such request, denies to do it by himself, or by some other (unless the multitude of churches to be consecrated in his diocese, or some other lawful impediment plead for a greater length of time) let him (I say) know, that he is suspended from that time forward from wearing his dalmatic, tunic, and sandals, till he thinks fit to perform the consecration, and in the act of consecration let him resume them.[56]

It is, however, Bullingbroke's gloss which is of more interest: 'The house of God is separated from common use by dedication – and therefore Otho made the foregoing constitution for the dedication of new churches'.[57]

Otho's constitution of 1236/1237 justifies consecration (or dedication) as biblical, and Bullingbroke's gloss on Otho stresses the setting apart from common usage of the building consecrated – though Otho's text as given by Bullingbroke does not state that a temple or church is set apart from common use.[58] The differentiation is of use or purpose – in Othobon the building is for the exploration of the expiation of sins and divine mercy. Both these constitutions commanded consecration of churches, and that it be done by a bishop,[59] who had both a duty so to do, and a right, in that none other except by his delegation could do so. Bullingbroke turns to Coke to assert that 'the law takes no notice of churches or chapels, til they are consecrated by the bishop' and it is the bishop who has the power to declare them as such.[60] So Bullingbroke, despite being a canon lawyer with, one presumes, a knowledge of Roman and

55 Othobon, alias Ottobon, Octobonus, Ottobonus, otherwise Ottobueno Fieschi, was cardinal deacon of St Adrian and papal legate of Britain – see Adams and Donahue, *Select Cases from the Ecclesiastical Courts*, pp 69n, 265–267, 300–305. Ottobon's Council of London was in 1268, and in the same year he left England: ibid, pp 265, n 11, 302, n 3, 325, n 1.

56 Bullingbroke, *Ecclesiastical Law*, p 248. Othobon became Pope Adrian V.

57 Ibid.

58 The gloss would more obviously apply, if yet unsatisfactorily, to Othobon's constitution.

59 Bullingbroke, *Ecclesiastical Law*, pp 248, 249.

60 Ibid, p 252 citing (incorrectly) Coke, 4 Inst p 203 – it should be Coke, 3 Inst p 203.

civilian law, relies upon Otho's biblical perspective for the rationale for consecration, and Coke for the legal effect. Bullingbroke's approach is that of the common law, with the canon lawyer's respect for the ancient constitutions of the Church thrown in.[61]

Now, we could fight our way rather tediously back through every authority, but little will be lost if we simply leap back to pre Reformation times, and turn to Bracton.

BRACTON[62]

Henry de Bracton lived from about 1210 until 1268, and so was roughly contemporary with the legates Otho and Ottobon. Bracton is nicely founded in Roman law;[63] although Coke, Blackstone and Bullingbroke all to some degree use the Roman classifications of things, Bracton is firmly in that tradition.[64]

So far we have considered consecration as identifying something as sacred, and set apart as a consequence. Bracton makes a further distinction in the classification of things, and introduces three *degrees* of sacredness: first, things that are quasi sacred; second, those things that are sacred; and third, those things that are both sacred and holy.[65]

61 A Browne, *A Compendious View of the Ecclesiastical Law of Ireland* (Dublin, 1803), p 174 also takes the common law approach. It is perhaps worth noting that Browne, in the preface to this work, deplored the lack of knowledge of ecclesiastical law at the time in Ireland, where there had been no Reformation ban on the study of canon law.

62 The text of the Thorne Edition of Bracton in English is available online at Harvard Law School Library at <http://hlsl5.law.harvard.edu/bracton/>, accessed 4 June 2007. All citations to Bracton are to the volume and page as they appear on the Harvard website.

63 Maitland was famously derisive of Bracton's knowledge of Roman law (see FW Maitland, *Select Passages from Bracton and Azo*, Selden Society vol 8 (London, 1894)) and I am grateful to Professor Doe for drawing my attention to this. Maitland's comment unleashed a great deal of *odium academicum* in defence of Bracton – see, for example, WS Holdsworth's review of H Kantorowicz, *Bractonian Problems* (Glasgow, 1941), (1942) 57 no 228 *English Historical Review* 502–504; HG Richardson, 'Azo, Drogheda and Bracton', (1944) 59 no 233 *English Historical Review* 32 and 42–44, suggesting Bracton's legal education at Oxford was curtailed by his entering the king's service in 1239 and at that point he had only studied the elementary *Institutes* of Justinian. Pennington identifies a certain reluctance in Maitland to acknowledge the influence of the *ius commune* – see K Pennington, 'Learned law, droit savant, gelehrtes Recht: the tyranny of a concept' (1994), <http://faculty.cua.edu/pennington/learned.htm>, accessed 19 July 2007. More recently, Breslow has suggested that Maitland was uncomfortable with the influence of learnéd law: see his review of J Hudson (ed), *The History of English law: centenary essays on Pollock and Maitland* (Oxford, 1996), in (2001) 19 no 1 *Law and History Review*, <http://www.historycooperative.org/journals/lhr/19.1/br_2.html>, accessed 19 July 2007. It seems that Maitland shared Coke's and Blackstone's antipathy to the *ius commune*, though in a more gentlemanly manner, as befitted his times – see HAL Fisher, *The Collected Papers of Frederick William Maitland* (Cambridge, 1911), pp 438–445. For an example of the sort of course that Bracton may have attended, see F de Zulueta and P Stein, *The Teaching of Roman Law in England around 1200*, Selden Society, supplementary series vol 8 (London, 1990).

64 Bracton, *De Legibus et Consuetudinibus Angliae*, ed and trans by SE Thorne, 4 vols (Cambridge, MA, 1968–1977), vol 2, p 39.

65 'Those things are sacred and holy which are properly consecrated and dedicated to God by His ministers, as churches, not only cathedral but conventual and parochial' – Bracton, *De Legibus*, vol 2,

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Bracton writes that

> sacred, holy and inviolable things belong to no one, for what is subject to divine law is no one's property, but the property of God *by the common opinion of mankind*.[66] Sacred things are those properly consecrated to God by priests[67] such as sacred and religious buildings and gifts solemnly dedicated to the service of God . . . cemeteries are also sacred places, as are churches and chapels . . .[68]

Here we appear to have a firm link with Roman law, as well as a conceptual distinction – things are sacred by the common opinion of mankind.

However, before we move to Justinian and Roman law, there is one small problem. Bracton mentions, and implies, that at one time there was an interdict[69] in force, which meant that places annexed to churches and cathedrals (such as cemeteries) were not dedicated, though by Bracton's time they were considered in law as sacred and holy.[70] Thus, it seems that we must ask if there is evidence of consecration as a custom in the church prior to Bracton – that is, before the 1200s.

Evidently, in Bracton's time the non-consecration of churches was regarded as remiss, hence Otho's legatine constitution of 1236 (as quoted by Bullingbroke).

p 58. In Justinian's Digest (D) of 553 AD (and so of the Christian era), holy things are those that are defended and protected from the injuries of men (D 1.8.9; see also D 1.8.6.2).

66 '*in bonus dei hominum censura*' (emphasis added). This suggests an echo from Cicero (*c.*106–43 BC), who held that once-consecrated sacred things (*res sacrae*) could not be usucapted – that is, acquired privately by long possession – and that this rule was one not of the *ius civile* but of the *ius gentium* (Cicero, *De Haruspicum Responsis* 14.23): see A Watson, *The Law of Property in the Later Roman Republic* (Oxford, 1968), pp 4 and 22. Aelius Gallus (dates unknown, but probably lived sometime during the last two hundred years of the Republic, that is, *c.*220–27 BC) 'said that it was generally agreed (*satis constare ait*) that a temple consecrated to a god was *sacer*' (ibid, p 2). See also J Inst 1.2.1 for that which is common to all mankind.

67 At this point, the footnote in the Thorne edition of Bracton refers to J Inst 2.1.8.

68 Bracton, vol 2, pp 40–41.

69 This may refer to the papal interdict of 1208–1214 of King John's kingdom, when the celebration of public worship and the sacraments was forbidden, and presumably all consecrations ceased. It may also suggest an interdict against mortmain. A reading of Blackstone, book 2, ch 18 (vol 1, p 299) implies that this refers to the second great charter of Henry III (reigned 1216–1272). Blackstone's reference is 'Mag Cart 9'; however, in the original Magna Carta this citation does not refer to church lands. Magna Carta was reissued in 1224/1225 by Henry III, and it may be that it is the second charter to which reference is made – I have so far been unable to access the text. Blackstone states that the restriction to which he refers applied only to religious houses, and was to deal with an abuse whereby religious houses had failed to get the necessary licences for mortmain in the two centuries of upheaval following the Norman conquest. Bracton can hardly be referring to Edward I's Statutes of Mortmain of 1279 or 1290 if his work *was* produced before his death in 1268.

70 Bracton vol 2 p 58 – 'Also things annexed to them [churches and cathedrals], as cemeteries and other places where the dead are buried, though not formally dedicated, as in the time of the interdict'. There appears to be a clear link here to the Institutes of Gaius (G). Gaius states '[A]nything in the provinces not consecrated by authority of the Roman people is not sacred properly speaking, yet is treated as sacred' – G 2.7.

Otho wrote that he himself had 'seen, and heard by many, that so wholesome a mystery is despised, at least neglected by some (for we have found many churches and some cathedrals not consecrated)' and decreed that such be consecrated within two years.[71]

A few examples of consecration in the first millennium will do. Odericus Vitalis (1075–1141) tells us of the desecration of consecrated buildings in the time of Henry I.[72] In 816, a form of consecrating churches was approved at the synod of Celcyth.[73] In the *Annals of Wales*, we read in 718 of the consecration of the church of the archangel Michael on the mount.[74] The Venerable Bede (673–735) tells us that, in 686, Bishop John of Hagulstad, a place on the River Tyne, had been invited by an earl to consecrate a church. Afterwards, he cured the earl's wife of an illness by the administration of some of the holy water that he had used for the consecration.[75] Bede gives other accounts of episcopal consecration of buildings. It seems, then, that the consecration of places as sacred was a long-established custom in the English church.

From here it is only a leap backwards of about 150 years to Justinian (emperor, 527–565). Eusebius tells us of the great consecration of the Church of the Holy Sepulchre in Jerusalem in 335,[76] which takes us back even earlier than Justinian. Burn, in his *Ecclesiastical Law*, mentions that in 154 Euginus, a Greek priest in Rome who styled himself as pope, decreed that churches should be consecrated.[77] This takes us to the time of Gaius (fl 110–179). So let us turn to Justinian and Roman law.

JUSTINIAN

Unfortunately, very little of the Roman law of pre-Christian Roman religion survives.[78] For one thing, the law relating to religion was classed as public law, and

71 Bullingbroke, *Ecclesiastical Law*, p 248.
72 Odericus (or Ordericus) Vitalis, 'On Henry I', from his *Ecclesiastical History*. This can be found in M Chibnall (ed and trans), *The Ecclesiastical History of Orderic Vitalis, volume VI* (Oxford, 1978) and is available at <http://www.fordham.edu/halsall/source/orderic.html>, accessed 3 June 2007.
73 Phillimore, *Ecclesiastical Law*, vol 2, p 1401.
74 *Annales Cambriae* (447–954), available at <http://www.fordham.edu/halsall/source/annalescambriae.html>, accessed 3 June 2007.
75 Bede, *Ecclesiastical History of the English Nation*, book 5, ch 4. See also book 5, ch 5. Available at <http://www.fordham.edu/halsall/basis/bede-book5.html>, accessed 3 June 2007.
76 Eusebius Pamphilus of Caesarea, *The Life of the Blessed Emperor Constantine* (The Bagster translation, revised by Ernest Cushing Richardson), book 3, chs 25–46 (see ch 40 for the decision to dedicate), available at <http://www.fordham.edu/halsall/basis/vita-constantine>, accessed 3 June 2007.
77 *Notes & Queries*, 4th series, vol 2, no 11 (19 April 1873), p 327.
78 Unfortunately Christian historiography has tended to dismiss non-Christian and pre-Christian study. Jerry Linderski has written of the general academic neglect of the Roman law of religion – 'It stems from a tradition that either dismissed all religions as irrelevant superstitions or dismissed particularly the religions of antiquity as "pagan" and hence of no consequence' (cited in A Watson, *The State, Law and Religion: pagan Rome* (Athens, GA, 1992), p 95, n 3). Reasons for the dearth of Roman religious law are given in J Scheid, 'Oral tradition and written tradition in the formation

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this never seems to have been written down in collected form. The great works of Gaius (110–*c.*179)[79] and Justinian (527–565) were principally works of private law, and by the time of Justinian were Christian as well. However, the general classification of Roman law survived from Gaius to Justinian, and with it ideas of the sacred.[80]

Gaius, who was pre-Christian, drew the distinction between things sacred and things religious. To be sacred a thing had to be consecrated to the gods above by due authority (of the Roman people, by a statute or by a Senate resolution). Land was made religious by the burial of a dead body by one who had responsibility for the funeral.[81] This was only the case where it was done by Romans in Roman land, although in other parts of the empire, when performed by non-citizens, the effects were regarded as the same.[82] Things sacred and religious could not be owned.

Justinian reproduces the same in his *Institutes* and, as in Gaius, this is largely for the purpose of identifying things religious and sacred so that they may be consigned to those things owned by nobody,[83] and so (in the case of sacred things) not part of the private law of which Justinian principally treated: 'Anyone can make a site religious by deciding to bury a dead body on land which he owns';[84] 'Sacred things are those which have been ceremonially consecrated to God by priests, for instance churches ... the ground on which a church has been built remains sacred even after the building comes down. That is in Papinian'.[85]

Now the phrase 'that is in Papinian' (*ut et Papinianus scripsit)* appears to be the decisive link between the Christian and pre-Christian legal precedent for consecration. We may well wonder why the reference to Papinian has been thrown in. Papinian died in 212, and so belonged to the pre-Christian Roman empire,[86] but he is referred to quite freely in the *Institutes*.[87] Justinian tells us that the effect

of sacred law in Rome' in C Ando and J Rupke (eds) *Religion and Law in Classical and Christian Rome* (Stuttgart, 2006), pp 19–20.

79 Only readily available from 1903 – see WM Gordon and O Robinson, *The Institutes of Gaius* (London, 1988), p 12 (hereafter, G Inst).

80 An accessible and readable description and explanation of *res sacrae, res religiosae* and *res sanctae* is that of Watson, *Law of Property*, ch 1, pp 3–15 on 'Kinds of *res*'.

81 G Inst 2.1.3, 4, 5, 6.

82 G Inst 2.1.7.

83 J Inst 2.1.7.

84 J Inst 2.1.9.

85 J Inst 2.1.8. It appears that, in the time of the late Republic (133–49 BC), some things sacred and religious could revert to private ownership and use, but this seems to have been a reversion restricted to dedicated gifts given to a temple – see Watson, *Law of Property*, pp 9–10.

86 For Christian antipathy to Papinian, see Jerome's (c.342–420) caustic remark that 'Papinian taught one thing, our Paul teaches another' (Jerome, *Epistles*, 77.3), quoted in AS Jacobs, 'Papinian commands one thing, our Paul another: Roman Christians and Jewish law in the *Collatio Legum Mosaicarum et Romanarum*' in Ando and Rupke, *Religion and Law in Classical and Christian Rome*, p 85.

87 J Inst 1.25.2; 1.26.7; 2.1.8; 2.6.9; 2.2.0.14; 2.25.1; 3.23.7.

of consecration of a church applies to the land too, and does so even after the church or sacred building has gone, and this was so in former, pre-Christian, times.[88] Our implication from this is that the pre-Christian and Christian law of consecration was the same.[89]

Clifford Ando has remarked that what Papinian and Justinian meant by churches or sacred buildings can hardly have been the same thing.[90] But I think that he misses here a point that he made earlier in his article when he asked the question

> How are we to assess and describe changes in the understanding of government, law and religion, or their respective and mutually implicated roles in the constitution of society, if the terms devised by Romans in the classical period to articulate those fundamental truths passed without remark into the linguistic toolboxes of Christian lawyers in late antiquity?[91]

Watson and Johnston have drawn attention to the rather slack way that words were used in Roman law and that they could have a different technical meaning at different periods, and also to the way in which meanings were adopted and carried forward even to medieval institutions.[92]

It seems that the point here is that consecration as a concept is a fundamental truth, and the meaning of the legal terminology used by Gaius and Papinian and Justinian *does not differ*. It is merely the form of religion that has changed. If this is so, then the legal precedent for consecration has its root in pre-Christian

88 The question of the persistence of consecration has itself been a curiously persistent one – see Phillimore, *Ecclesiastical Law*, vol 2, p 1400. The matter was settled in England by the Consecration of Churchyards Act 1867, s 12, the essence of which is much the same as Roman law once we have overcome the Roman distinction between sacred and religious – once consecrated, always consecrated.

89 In the Digest of 533 AD, Justinian refers to the pre-Christian *On the Edict*, Book LXVIII of Ulpian (d 228). Ulpian tells us that 'a sacred place is one which has been consecrated' (D 1.8.9.2) and that 'it should be understood that a public place can only become sacred when the Emperor has dedicated it, or granted permission for this to be done' (D 1.8.9.1) – ie, by proper authority. See also D 43.6.

90 C Ando, 'Religion and *ius publicum*' in Ando and Rupke, *Religion and Law in Classical and Christian Rome*, p 131.

91 Ibid.

92 See Watson, *Law of Property*, p 3; Johnston, 'General influence of Roman institutions', p 95; D Johnston, *The Roman Law of Trusts* (Oxford, 1988), p 81. For an example of the continuity of Roman law, the following will be familiar to canon lawyers of disestablished churches – 'Societies and associations which have the right to assemble can make, promulgate, and confirm for themselves such contracts and rules as they may desire; provided nothing is done by them contrary to public enactments, or which does not violate the common law.' This is claimed to be in The Twelve Tables of 451–450 BC (Table 8, Law 2) in the Scott translation at <http://www.constitution.org/sps/sps01_1.htm>, accessed 8 June 2007. However, Table 8 concerns the law of real property, and this law sits there very uneasily, nor does it appear in other available versions, and so the citation must be regarded as suspect. One wonders from where it has slipped in?

Roman law of the sacred. Sacred buildings, then, are sacred buildings whatever the religion may be, and so it would seem, as Bracton says, that sacred buildings exist as sacred as an idea common to humankind. This suggests in turn that the rules of any legal system relating to sacred place are likely to show common characteristics.

DID SIR EDWARD COKE GET IT WRONG?

The title of this article suggests that Sir Edward Coke was wrong in seeking a legal precedent for consecration in Scripture. In conclusion, we can demonstrate a continuous link between the Roman pre-Christian law of consecration and the common law of consecration of the Anglican Church in England (and, indeed, the canon law of the Church of Ireland and Church in Wales, for that matter), rather than a scriptural route, per se. But it also seems that Sir Edward got it right when he chose his particular illustrations from Scripture, in so far as he inadvertently demonstrated that consecration and a sense of the sacred is a phenomenon that finds expression in religious law, even if sometimes one person's sacred place is not always another's.