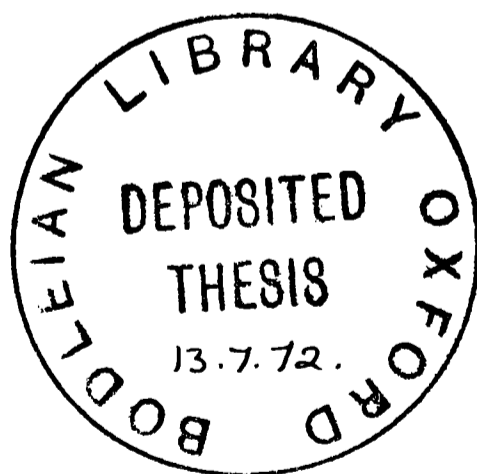


THE
FUSION
OF THE
COMMON LAW
AND THE
ECCLESIASTICAL LAW:
IS IT COMPLETE?

- by -

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A B S T R A C T

Chapter I pages 1 - 24

Consequent upon the separation of the temporal and ecclesiastical courts by the ordinance of William I, 1072 - 1076, it was necessary to decide : (a) What law could be applied in the Church courts? and (b) Over what matters they had jurisdiction? Due to the royal power and writs of prohibition the practical ascendancy in deciding these matters belonged to the temporal courts. Nevertheless, it was a time not of fusion but of finding a modus vivendi and the canon law explained any seeming encroachment upon the jus commune by recognising local variations by the application of canonical custom.

Chapter II pages 25 - 45

With the beginning of the sixteenth century the authority of the canon law began to be challenged. Hunne's Case epitomised the laity's opposition and this opposition was given jurisprudential and theological backing by Henry Standish who sowed the seeds of the receptionist doctrine. The watershed may be found in 1515; thereafter the common law was to achieve ascendancy backed by the literary arguments of John Skelton, Simon Fish, Christopher St. German and Stephen Gardiner.

Chapter III pages 46 - 95

The Reformation Parliament saw the beginning of ecclesiastical law as opposed to the canon law applied in England. Statutory regulation of Church life was extremely wide. Convocation in theory had a parallel place to that of Parliament but royal control of its legislative powers radically curtailed them and Convocation could not derogate from the common law, statute law or the King's

prerogative. The revision of the canon law did not take place but the canon law was similarly limited. Moreover the study of the canon law was seriously curtailed.

Chapter IV pages 96 - 139

After the Reformation the ultimate authority of the ecclesiastical law lay in the King and Parliament. By 35 Henry VIII, c.16 s.3 the ecclesiastical law as a whole was limited by the scope of the common law. Nevertheless the King and Parliament were also concerned with heresy and this led to a greater emphasis upon uniformity, a principle also embodied in legislation. Indeed the principle was so far-reaching that by this legislation the bishops' jus liturgicum was probably abolished although they still retained the right to give rulings in cases of liturgical doubt.

Chapter V pages 141 - 170

In 1533 Parliament recognised Convocations' right to legislate in re ecclesiastica. Prior to the Reformation canons bound clergy and laity alike but by 1736 it was decided that canons did not proprio vigore bind the laity. It seems that between 1533 and 1736 a change was made in the law based upon the common lawyers unconscious change of attitude to the canon law. The clergy are bound by the canons, although not deaconesses or layreaders. On the other hand ecclesiastical court officials may well be so bound. Lastly, it is probable that the 1969 canons have repealed those 1603 canons which embody pre-Reformation canon law.

Chapter VI pages 174 - 212

In the nineteenth century the Church's jurisdiction over the laity was greatly restricted by statute. Has the rest of its

jurisdiction over the laity, save that relating to church fabric and churchyards, become abrogated? The disciplinary jurisdiction is now obsolete but canonical custom contra legem is probably not part of the ecclesiastical law and this obsolescence is a matter of fact, regulated by the chancellor's discretion as to whether such proceedings may be brought, rather than law. Yet since the Ecclesiastical Jurisdiction Measure 1963 the notional jurisdiction of Church courts over the laity in discipline cases has no forum for its implementation and it is unlikely that such a forum would be created other than by statute.

Chapter VII pages 213 - 242

At the Reformation the seal of the confessional was a duty imposed by the canon law and was as such incorporated into the laws ecclesiastical. This duty has been confused with the seal of the confessional imposed by the Roman Catholic canon law and it has therefore been argued that it is a duty not recognised by the common law. This misunderstanding is due to the lack of study of the ecclesiastical law but also to the related fact that those concerned in denying the existence of such a duty are trained solely in the discipline of the common law.

Chapter VIII pages 243 - 257

The demarcation of the jurisdictions of the ecclesiastical and temporal courts lies with the secular courts and is enforced by the order of prohibition. The order of mandamus lies against ecclesiastical courts whereas the order of certiorari does not. Nonetheless the ecclesiastical courts are by no means inferior courts as they are unfettered in all spiritual causes.

Chapter IX pages 258 - 284

The civilians acquired the sole right of audience in the ecclesiastical courts on the discontinuation of the study of canon law. However, by the second half of the nineteenth century those practising in the ecclesiastical courts had grown so small in number that barristers and solicitors were admitted to practice in them. The direct consequence of this was to hasten the fusion of the two systems of law as the common lawyers had never been trained in the canon law. A fast-growing ignorance of the ecclesiastical law also resulted. In the field of practice and procedure, and especially evidence, the fusion of the two systems has now become virtually complete. Indeed only one possibility of conflict between the two systems remains: the remarriage of a person whose previous marriage is by statute voidable. Nonetheless: the fact that it is necessary to go to such an extreme to find a realm where the fusion of the common law and the ecclesiastical law may not be complete demonstrates that for all practical purposes there is a complete fusion between the two systems.

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CHAPTER I

THE ORDINANCE OF WILLIAM I TO THE REFORMATION

The most convenient starting point for the study of the fusion of the English common law and ecclesiastical law is the ordinance issued by William the Conqueror between 1072 and 1076⁽¹⁾:

"Propterea mando, et regia auctoritate praecipio, ut nullus episcopus, vel archidiaconus, de legibus episcopalibus amplius in Hundret placita teneant; nec causam quae ad regimen animarum pertinet, ad iudicium secularium hominum adducant; sed quicumque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit, et nominaverit, veniat; ibique de causa vel culpa sua respondeat, et non secundum Hundret, sed secundum canones et episcopales leges, et rectum Deo et episcopo suo faciat"⁽²⁾

By this charter the temporal and ecclesiastical courts were separated but it is important to remember that the ordinance did not itself create the judicial functions exercised in the courts. It was primarily an administrative enactment, although emphasis is placed upon causes being decided "according to the canons and episcopal laws" not "according to the Hundred".

What then were these "canons and episcopal laws"? Halsbury's Laws of England, volume 13, at p. 10 states that -

(1) The former date is more probable : Report of the Commission on Ecclesiastical Courts, (1954) at 1. See also C.H. Walker in E.H.R. XXXIX 399, 400.

(2) H. Spelman, Reliquiae Vol.II at p.14; R. Phillimore, Ecclesiastical Law of the Church of England (1873) Vol.II at 1433-1434. It was recited in a close roll of Richard II and then confirmed : Str. 669.

"The canon law of Europe does not and never did as a body of laws form part of the law of England."

For this proposition the unanimous opinion of the judges advising the House of Lords in R. v. Millis⁽¹⁾, expressed by Tindal, C.J.⁽²⁾, is relied upon; Tindal, C.J. in turn relies upon the opinion of Lord Hale. Lord Hale, referring to the ecclesiastical courts, states⁽³⁾:

"The rule by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary Acts of Parliament or the common law and custom of England; for there are divers canons made in ancient times, and decretals of the Popes, that never were admitted here in England."

Hale, however, obtained this view of the force of the canon law in England by two converging lines of argument⁽⁴⁾. Juristically, he held that no laws are binding upon a community except those which it has made for itself either by legislation or by custom; historically, he accepted the picture of the relations between England and Rome current among the judges of Elizabeth and James I (see, for example, Case of Commendams (1612)⁽⁵⁾), obtained in turn from certain of Henry VIII's statutes and the arguments of Standish in 1515⁽⁶⁾.

The learned editors of Halsbury, indeed, go on to note the

(1) (1834), 12 Cl + F. 534.

(2) at 684.

(3) History of the Common Law, Chapter 2.

(4) H.W.C. Davies. "The Canon Law in England", Zeitschrift der Savigny - Stiftung Für Rechtsgeschichte. XXXIV Kanon. Abt III (1933) at 353 et seq..

(5) Dav. Ir. 68 at 69b.

(6) See below.

historical inaccuracy of the above-quoted statement in the text⁽¹⁾
- or, at least, they admit that -

"The contrary view that within their field of jurisdiction the English courts christian had recognised and were bound by the same law as the rest of the church for some centuries until the Reformation is now held by historians."

The acceptance of this latter position, championed by F.W. Maitland⁽²⁾ against Bishop Stubbs⁽³⁾, seems now to be assured amongst historians, at least in its main outlines: see H.W.C. Davis, The Canon Law in England⁽⁴⁾.

The "canons and episcopal laws", therefore, to be applied in deciding ecclesiastical causes in the bishops' courts in Norman England, was the general canon law of Europe. That is not to say, however, that the jus commune was applied without variation in England: in fact the jus commune itself made allowance for

(1) at 10, footnote(s).

(2) Roman Canon Law in the Church of England, (1898). See too Z.N. Brooke, The English Church and the Papacy from the Conquest to the Reign of John, (1931).

(3) Appendix to Report of the Historical Courts Commission, (1883). See also A. Ogle, The Canon Law in Mediaeval England, (1912).

(4) op. cit. at 346. Note, moreover, the caveat entered by C. Duggan, Twelfth-century Decretal Collections at 3-4 but this does not affect "the conclusions of general historical importance which were reached by Maitland and Brooke..."

variations, within its general framework, by local custom⁽¹⁾. Lyndwood cites in his Provinciale⁽²⁾ (completed in 1433) a long-established custom by which the use of Sarum is sanctioned throughout the province of Canterbury although according to the jus commune "officium Divinum servari debet, et dici per totam Provinciam secundum modum et usum Metropolitanae Ecclesiae..." Similarly, within the sphere of ritual there was great scope for variety: in England the feast day of St. Sylvester was usurped by Thomas the Martyr⁽³⁾. This is in line, however, with the Decretal Conquestus⁽⁴⁾. John de Burgh in Pupilla Oculi⁽⁵⁾ points out, moreover, that in England the ordinary prescribes new saints days as he thinks fit; E.W. Kemp, on the other hand, concludes in his book Canonization and Authority in the Western Church⁽⁶⁾ that -

"The evidence for England shows little that goes beyond a temporary popular devotion to the memory of certain persons."

Perhaps this evidence shows no more than "liturgical custom which evaded the strict letter of the law"⁽⁷⁾. In the realm of

(1) c.42 X. V,3 and further, c.11 X. I,4; Dictionnaire de Droit Canonique ad. v. "coutume"; Le Bras, Le Febvre and Rambaud, L'Age Classique at 212-213. The question of "reception" of the canon law thus resolves into the question: Are such English variations from the jus commune permissible within that jus commune by local custom or are they evidence of the repudiation of its reception in toto?

(2) Provinciale (Oxford),1679, at 104 gl. ad. v. Usum Sarum.

(3) op. cit. at 102 gl. ad.v. Thomae Martyris.

(4) c. 5 X.II,9.

(5) folio 122.

(6) at 124.

(7) Kemp, An Introduction to Canon Law in the Church of England, at 29, footnote 1.

liturgy may also be quoted de Burgh's statement that the proper method of immersion in baptism is fixed by local custom; to depart from such local custom is a grievous fault⁽¹⁾. On the other hand, the local English custom by which the chalice was withdrawn from the priest's assistants at the eucharist began in the twelfth century⁽²⁾ and spread throughout Western Christendom. In England, too, by local custom three sponsors might be allowed at Baptism⁽³⁾. There are further examples of local English custom which are not concerned with the liturgy. The most obvious example is the custom reserving to the ecclesiastical courts all testamentary causes⁽⁴⁾. In England, too, the repair of the nave of the parish church is the parishioners' obligation and not that of the rector⁽⁵⁾. Of lesser importance is the custom by which, if a rector dies between Ladyday and Michaelmas, the tithes due at Michaelmas may go to the payment of his legacies⁽⁶⁾; Lyndwood points out, however, that a similar custom is admitted by the Decretal Suscepti regiminis⁽⁷⁾. By a further custom it seems that in England a son may succeed to a benefice immediately after his father without a dispensation⁽⁸⁾. Peckham,

(1) Pupilla Oculi, folio 6.

(2) See Council of Lambeth, 1281, De custodia eukaristie:
II Councils + Synods, vol.II, at 895.

(3) See note 5 to Chapter IV (infra).

(4) Lyndwood, op. cit., at 170, gl. ad. v. insinuationem. See M.M. Sheehan, The Will in Medieval England.

(5) Ibid, at 53, gl. ad. v. reparatione. On the comparative aspect see the editorial note to Veley v. Burder, 12 Ad. + Ell. at 315 - 316.

(6) Ibid, at 25, gl. ad. v. de consuetudine.

(7) Extr. Joan. XXII., tit.1, c.2.

(8) Stock v. Sicks, Noy 91; sub nomine Stoke v. Sykes, 1 Stillingfleet 250.

indeed, at the Council of Lambeth, 1281, refers to the "consuetudini regionis que in multis ab omnibus aliis est distincta..."⁽¹⁾.

Of course these are not the only cases in which the canon law in England varied from the jus commune. There are, firstly, cases of pure disobedience which (although relied upon by Bishop Gibson in his Codex Juris Canonici as evidence of the need for canonical rules not to be "contradicted by the Laws of the Land" in order to be "Legal Rules" (his emphasis)⁽²⁾) are treated by both Lyndwood and John of Athon as mere disobedience and not as rules of law enforceable in their variation from the jus commune in the ecclesiastical courts: such are the non-observance of the rules concerning clerical apparel⁽³⁾ and concerning judge delegates⁽⁴⁾. A further example, not cited by Gibson, is the non-observance of the strict seclusion of religious persons⁽⁵⁾.

Two other English customs may be referred to in the realm of procedure. By William I's ordinance⁽⁶⁾ both in civil and criminal cases the penalty for those refusing to appear in an ecclesiastical court after three citations was excommunication. More-

(1) II Councils and Synods, ed. Powicke + Cheney, vol 2, at 893.

See (e.g.) op. cit. at 819, note 1: the "Ancient pious custom" of reek-penny was confirmed by Pope Alexander III.

(2) at XXVIII.

(3) Joh. de Athon, at 37, gl. ad. v. et cappis clausis.

(4) Ibid at 123, gl. ad. v. committantur. These may be examples of desuetude: Maitland, op. cit. at 32.

(5) Provinciale at 212, gl. ad. v. cum socia.

(6) "Si vero aliquis, per superbiam elatus, ad justitiam episcopalem venire contempserit, et noluerit; vocetur semel, et secundo, et tertio: Quod si nec sic ad emendationem venerit, excommunicetur; et si opus fuerit ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibeatur: Ille autem qui vocatus ad justitiam episcopi venire noluerit, pro unaquaque vocatione legem episcopalem emendabit."

over, the secular arm could be used to enforce the sentence: a state of affairs approved by Pope Innocent III in 1203⁽¹⁾ and called by Pope Clement V a pious and laudable custom⁽²⁾.

Bishop Gibson also draws attention to the fact that in England the canon allowing for the legitimation of children born before marriage was rejected as being contrary to the laws of England⁽³⁾. This, however, is neither an argument for the necessity of the reception of canon law nor an example of a local custom contrary to the jus commune. It is rather an example of the English common law not following the canonical rules in question falling within the common law jurisdiction. Indeed, in matters of purely ecclesiastical cognizance, the canonical doctrine of legitimation continued to be applied, as Maitland has shown⁽⁴⁾. This also seems to be the sense of Sir Edward Coke in Undrell v. Elsey⁽⁵⁾ citing Bracton "matrimonium subsequens legitimos facit quoad sacerdotium (because they are legitimate by the common law) non quoad successionem propt' consuetudinem regni quae se habet in contrarium"⁽⁶⁾. Similarly, the further examples cited by Gibson, those of reckoning the six months period of lapse (that is, the period after which the right to present to a vacant benefice lapses) by weeks rather than months⁽⁷⁾ and the allowance of only four months to lay (as opposed to clerical) patrons, are to be explained by the fact that the common lawyers treated these questions, as all questions of patronage, as falling

(1) X.5,39, 35.

(2) Wilkins, Concilia, Vol. II at 323.

(3) (cp) X. 4, 17, 7.

(4) op. cit., at 55.

(5) 8 Co. Rep. 99a.

(6) at 101a. See also Evans v. Ascuithe, Palmer 457 at 469.

(7) Maitland, op. cit., at 82, note 3, doubts whether there is evidence that this was an English peculiarity.

within their jurisdiction. In fact, all questions of patronage (as well as lay fee⁽¹⁾) fall into this category which in England were reserved to the secular, not the ecclesiastical jurisdiction⁽²⁾. (Also, though all suits of dilapidations were within ecclesiastical cognizance, the successor might "upon the custom of England" have a special action on the case against the dilapidator, his executors or administrators⁽³⁾.) Maitland has rightly pleaded for the separation of two propositions :- that -

"in England the state did not suffer the Church to appropriate certain considerable portions of that wide field of jurisdiction which the canonists claimed as the heritage of ecclesiastical law"

and that -

"the English courts Christian held themselves free to accept or reject, and did in some cases reject, the canon law of Rome" -

and points out that by proving the first the second is not also proved.

True though this undoubtedly is it is also important to note the canonists' attitude to the appropriation of part of the jurisdiction claimed by them according to the jus commune. They do not treat it as a denial of the efficacy of the jus commune in England in however a limited sphere: rather do they treat it as another example of local variation from the jus commune by custom. Lyndwood, for example, comments⁽⁴⁾ -

"In quo tractatur Causa Juris Patronatus de consuetudine

(1) This was recognised by Pope Alexander III in X.4,17,7.

(2) Lyndwood, op. cit. at 104 gl. ad. v. foro regio.

(3) Degge's Parson's Counsellor cited in Phillimore, op. cit.,

Vol. II at 1620, note (d) and Phillimore's editorial note (a) to Whinfield v. Watkins, (1812) 2 Phill, 1 at 3.

(4) Ibid.

Regni Angliae, licet pertineat ad Forum Ecclesiasticū
secundum canones"

and further⁽¹⁾ -

"Cujus cognitionem ad se pertinere vendicat Curia Regia,
licet causa Juris Patronatus sit annexa spiritualibus, et
sic pertineat ad Forum Ecclesiasticum Sed Consuetudo
dat cognitionem Foro Temporalis, et hoc fateri videtur haec
constitutio in hoc loco."

Similarly Pope Alexander III recognised that -

"Secundum consuetudinem Anglicanam (jus patronatus) poterit
ab eadem ecclesia removeri."⁽²⁾

The approval of Pope Clement V to the secular arm's enforcement of excommunication as a laudable custom has already been referred to.

There seems to be no reason why "consuetudo" in the last three quotations at least should not be taken to refer to canonical custom⁽³⁾. Similarly Lyndwood states⁽⁴⁾:

(1) Ibid, at 316, gl. ad. v. jure patronatus.

(2) X. 3, 38, 19. Even if in the former quotation the custom "Regni Angliae" refers to common law custom this does not alter the fact that what is common law custom may also be canonical custom. In Churchwardens of Market Bosworth v. Rector of Market Bosworth, (1699) 1 Ld Raym. 435 Treby, C.J. used the converse of this argument: what is not custom according to the common law cannot be custom according to the canon law.

(3) Glanvill no doubt had the common law in mind, however, when he states that the canonical rules of legitimation were "contra jus et consuetudinem regni": 1. 7, c. 15.

(4) op. cit., at 53 gl. ad. v. reparatione.

"Consuetudo tamen transferit onus reparationis, saltem navis ecclesiae, in parochianos ..."

This surely must refer to local canonical custom varying the jus commune to which Lyndwood has just referred. Tindal, C.J. however, in Veley v. Burder⁽¹⁾ says that -

"according to Lyndwood, p. 53., "By custom" (that is, by the common law) "the burthen of reparation, at least on the nave of the church, is transferred upon the parishioners" ... The same doctrine is laid down in Ayliffe's Parergon, 455, a work of high authority."

Ayliffe seems, on the other hand, to mean that the canon law recognises a local canonical variation by which the common law, by its own custom, transfers the burden of repair to the parishioners. He states⁽²⁾:

"...(O)f Common-Right the laity are not compellable hereunto; tho' the Canon-Law will have it, that even Lay-Parishioners may be compell'd to repair their own Church by Virtue of a Custom, since they ought to observe every laudable Custom of the Church: And thus by the Custom or Common-Law of England, it belongs to the Parishioners to repair the Nave or Body of the Church, where they sit and hear Divine Service; and the repairs of the Chancel only belongs to the Rector."

Three years later in Veley v. Gosling⁽³⁾ Sir. H. Jenner Fust in the Court of Arches was well aware of this semantic problem. Dealing with the problem of repairs to the chancel he commented⁽⁴⁾:

(1) (1840), 12 Ad + Ell. 265 at 301.

(2) J. Ayliffe, Parergon Juris Canonici, (1726) at 455. The words "common law" themselves are ambiguous: see Hutchins v. Denziloe 1 Hagg. Con. 170.

(3) (1843), 2 Not. Cas. 278.

(4) at 291.

"I do not think it necessary to go into the question whether this Common Law was the Commune jus laicum or the Commune jus Ecclesiasticum..."

On the other hand Dr. Lushington in The Bishop of Norwich v. Pearse⁽¹⁾ had doubts as to the propriety of using the term "ecclesiastical common law."

Although the law to be applied by the ecclesiastical courts was the jus commune subject to local variation allowed by the jus commune itself, it must be remembered that the canon law was at the period of the Norman Conquest still to be found in no single code of law. Gratian's Decretum was not compiled until c.1140⁽²⁾ and even then the Panormia of Ivo of Chartres was not entirely displaced⁽³⁾. Indeed it was under Lanfranc's direction that leading texts of the canon law were transmitted to the greater English churches: Z.N. Brooke, for example, concludes that -

"It is not too extravagant an assumption that there was a copy (of the abridged False Decretals and a complete text of the Councils) in every cathedral library for the bishop to use"⁽⁴⁾.

Moreover, following their separation by William I, there followed a lengthy period during which a frontier was established between the secular and temporal courts: As M.M. Sheehan has pointed out⁽⁵⁾:

"...(T)he precise area of jurisdiction included within William's definition of spiritual pleas was no less uncertain to the lawyer of his age than to the historian of our own."

By 1230 a general extrinsic jurisdiction over bequests of chattels had been assumed by the ecclesiastical courts but the

(1) (1855) 1 Jur. N.S. 1178.

(2) Kemp, Introduction to Canon Law at 17.

(3) Brooke, op. cit. at 41.

(4) Ibid at 78 - 79.

(5) Sheehan, op. cit., at 165.

interference of the temporal courts was never entirely excluded in the execution of wills. For example, if the king had any claim against the testator then the temporal courts would act to safeguard the royal interest⁽¹⁾. Moreover, by the end of the twelfth century the common law courts had condemned the devise of realty although it was allowed in those areas covered by borough custom⁽²⁾.

But this "shadowy and ill-defined"⁽³⁾ borderland was not confined to the realm of the devise. Glanvill, for example, writing circa 1187, includes in his treatise De Legibus writs of prohibition de laico feodo and de advocacione. Indeed it is between 1165 and 1170 that G.B. Flahiff places the inauguration of writs of prohibition to courts Christian⁽⁴⁾. By the writ de laico feodo the ecclesiastical court was prohibited from trying a cause concerning a lay fee as such pleas belonged exclusively to the King's crown and dignity : "quia placitum illud spectat ad coronam et dignitatem meam"⁽⁵⁾. The writ covered not only manors, lands, pastures, woods and marshes but also houses, standing crops, the right of pasturage and the services and customary dues on certain land. At first the ecclesiastical courts were allowed to try claims over certain immovables but by the thirteenth century they were forbidden to hear pleas concerning realty even if held by frankalmoign tenure. The church's jurisdiction was confined to consecrated soil, church sites and churchyards⁽⁶⁾;

(1) Ibid at 171 - 172.

(2) Ibid at 269 and 274.

(3) C.B. Flahiff, The Writ of Prohibition to Court Christian in the Thirteenth Century, Medieval Studies, VI (1944) 261 at 261. I am indebted to this article for much of what follows.

(4) Op. cit. at 272.

(5) Glanvill, De Legibus, lib. XII, c.21.

(6) Flahiff, op. cit. at 273 - 274.

even the trial of parish boundaries was a question to be tried by the common law courts even if the main cause was between two clerics⁽¹⁾.

The writs of prohibition de advocacione⁽²⁾ are represented in Glanvill by the writ indicavit concerned with an action between two clerics who claimed the same church by virtue of presentation by different patrons. By the thirteenth century the claim of the common law courts to all causes directly concerned with advowsons was established and in general it was only those causes indirectly so concerned which are found in cases of prohibition. The writ indicavit, in fact, dealt with just such a case in that, by the determination of the cause in favour of one or other of the clerics, the claim of his patron to the advowson would be confirmed. Furthermore, out of the writ indicavit cited by Glanvill grew another writ of the same name concerned with tithe disputes. Although the temporal courts did not lay claim to jurisdiction in tithe cases, custom treated any dispute over more than one-sixth of the tithes of a church as affecting the church's advowson⁽³⁾.

Both causes of lay fee and advowsons were claimed by the Constitutions of Clarendon (1164) for the temporal jurisdiction as were all lay debts⁽⁴⁾: no cases relating to debts or chattels "nisi sint de testamento vel matrimonio" were permitted to the church courts. Other chattels could also come within ecclesiastical cognizance: for example, tithes, oblations and goods seized violently from a cleric⁽⁵⁾. Furthermore, by the Constitutions of Clarendon, c. 15, the Church's jurisdiction over contracts

(1) per Coke, C.J. in Robertson v. Stallenge, 7 Co. Rep. 42 b.

(2) Flahiff, op. cit. at 274 et seq..

(3) The minimum amount is placed at one fourth by Circumspecte Agatis, 1286 : "dummodo non petatur quarta pars alicuius ecclesie": II Councils and Synods at 975.

(4) cc. 1, 9 and 15.

(5) Bracton, De Legibus IV at 266 - 269.

was denied; this jurisdiction was claimed by the church on the basis of faith - a sacred thing - being pledged by the promissor. Yet, in spite of the ecclesiastical courts' jurisdiction over breaches of faith being limited to criminal causes, the church continued to encroach on the temporal courts' exclusive jurisdiction over contract⁽¹⁾. As late as the end of the fifteenth century Fitzherbert in La Graunde Abridgement⁽²⁾ felt compelled to protest:

"Si home sue auter pro lesione fidei en court christian, quel serement aiuge sur temporal contract ou cause, il aura prohibicion..."

Although the ecclesiastical courts claimed no jurisdiction over breaches of the peace, such a claim was asserted when the offender was a cleric⁽³⁾. Since the murder of Thomas Becket and Henry II's subsequent reconciliation to the church, the right of the ecclesiastical courts to try criminous clerks was unchallenged but the dispute as to whether clergy might be arrested by secular officers continued. In practice, however, they were arrested by the King's officers and charged in the secular courts; benefit of clergy could then be claimed by the accused cleric either immediately or upon conviction. Again, in practice, even if benefit of clergy was claimed on arraignment, the secular court would proceed to a verdict of its own⁽⁴⁾. However, because of the dispute as to the right to arrest criminous clerks and the resultant claims in the church courts by those arrested, writs of pro-

(1) (e.g.) Rot. Parl. 319 (1373).

(2) (1568) Li. III, fol. 32.

(3) Flahiff, op. cit. at 279.

(4) Ibid: footnote 93, and T.F.T. Plucknett, A Concise History of the Common Law, 5th ed., at 439.

hibition concerning trespass were issued aiming to prevent such actions against the King's officers. By 1260 they were of frequent occurrence. By 1272 such a writ had no reference to the arrest of a cleric by royal officers and before the end of the thirteenth century the writ referred to a case of trespass in the ecclesiastical courts in which both parties were laymen⁽¹⁾.

Ordinarily cases of defamation were regarded as cases of spiritual cognizance but a writ of prohibition would lie to prevent any action in the church courts based on any proceedings in the secular courts (e.g.) grounded in the accusation made, or evidence given, in that court. Likewise, a prohibition would lie to prevent any action being brought in the church courts concerning

"What transpires in the king's court or what is done by his order or that of his justices or according to recognised custom..."⁽²⁾

The two jurisdictions may thus be seen to be sparring in order to delimit the borderline between them. William of Drogheda warned canonists that, when setting down a case in the court Christian, care should be taken to make no mention of damages lest a prohibition should lie; the offender ought to be represented as being in a state of sin - and, after all, the sin could not be absolved without reparation being made⁽³⁾. Cases of contract, moreover, could only continue in the ecclesiastical courts when neither party sought a writ of prohibition - that they did not always do so is apparent. Yet, even applying the normal tests in order to decide the correct forum, cases were

(1) Flahiff, op. cit., at 280.

(2) Ibid at 282.

(3) Summa Aurea, ed. L. Wahrmund, (Quellen zur Geschichte des Kōmisch-Kanonischen Processes in Mittelater, Band 2 Heft 2) at 66 - 67.

not always clear. The spiritual courts had cognizance of all cases of fornication whereas the secular courts enjoyed jurisdiction over cases of breaches of the peace. Into which jurisdiction did the crime of rape fall? In the fourteenth century, however, this question is decided and writs of prohibition against a plea of rape in the spiritual courts are of regular occurrence⁽¹⁾.

Sir Edward Coke explains in the Case of Modus Decimandi that even in tithe cases the limits of parishes should be tried by the common law -

"for thereupon depends the title of inheritance of the laysee, whereof the tithes were demanded..."⁽²⁾;

similarly he explains the trial of a modum decimandi by the secular courts on the grounds that -

"if the recompence which is to be given to the parson in satisfaction of his tithes doth not amount to the value of the tithes in kind, they (the spiritual courts) would overthrow the same...."⁽³⁾.

Howevermuch this latter argument might appeal to the layman, it is difficult to see why, on purely jurisprudential grounds, this question should not have been tried according to the canon law if tithes fell within the spiritual jurisdiction. Similarly, it is not easy to see why a prohibition should lie if the spiritual courts, according to canonical procedure, insisted upon proof by two witnesses concerning the release of a legacy⁽⁴⁾ whereas it would not lie when two witnesses were necessary to prove the will⁽⁵⁾.

(1) Flahiff, op. cit. at 283.

(2) 13 Co. Rep. f.12 at f.17; this book is not to be entirely relied on, however.

(3) Ibid at ff.17 - 18.

(4) Bagnall v. Stokes, Cro. Eliz. 88:

(5) Chadron v. Harris. Noy 12.

or to prove an act of adultery⁽¹⁾. In the testamentary examples cited it is difficult to see why the proof of a will is a matter "that is meer spiritual"⁽²⁾ while the release of a legacy is not; presumably the rationale behind the common law attitude is that the release is a contract to be tried according to the common law rules.

In fact the borderline between the two jurisdictions was one of pragmatism rather than of jurisprudential enquiry. Although this seems obvious it is worth restating. In England there were two separate jurisdictions, the secular and the ecclesiastical, each applying their own laws, the common law or the canon law. The main lines between the two jurisdictions was clear, the ecclesiastical courts being concerned with the well being of the soul, but in practice the borderline could be hard to determine. The question then necessarily arose: Who might determine into which jurisdiction a disputed case should fall? Certainly the right of the King's courts to limit the ecclesiastical courts by writs of prohibition was not conceded without a struggle.

The King's right to issue writs of prohibition flowed from the royal prerogative⁽³⁾ and he based his right upon the mediaeval plea par excellence, that of custom:

(1) Evans v. Evans, (1844) 3 Not. Cas. 416; Simmonds v. Simmonds, (1847) 5 Not. Cas. 324; Taylor v. Taylor, (1848) 6 Not. Cas. 558.

(2) Chadron v. Harris (supra). In Anon., Hob. 188 it is stated "it is not sufferable by our Law to disallow that Proof against a Legacy, which is allowable by Law against a Statute, Recognizance or Judgement, for that would make a Devastavit, But if they will except to the Credit of the Witnesses, or the like, they may according to their Law"; see also Anon Cro. Car. 222.

(3) Hale, *op. cit.* I, called it his "potestas jurisdictionis."

"Cum igitur tam regni nostri consuetudinis quam regiae sit potestatis eorum inhibere processum, quae in dignitatis nostrae praejudicium vertuntur, vobis inhibemus..."⁽¹⁾

In fact, the King claimed the right (a) to prohibit any action in the ecclesiastical court which seemed to be of royal jurisdiction or which might in some way prejudice his authority; (b) to decide for himself whether the action was really of royal cognizance; (c) to cause all activity in the ecclesiastical court to be suspended until this decision has been made; and (d) to bring an action against anyone who did not defer to the royal prohibition⁽²⁾.

Robert Grosseteste, Bishop of Lincoln, on the other hand, went so far as to question the King's right to issue any prohibitions at all to the ecclesiastical courts. He believed that the question whether a cause was properly before the court Christian should be decided on appeal and not by the secular courts. Although the King had long enjoyed the right to issue prohibitions, he argues that this is sinful, and sin is nothing. Sin being nothing cannot be possessed nor can the King be said to be deprived of any right when a cleric refuses to accede to a royal citation to answer before secular judges⁽³⁾.

Grosseteste's position is, of course, the logical one if the spiritual courts are not in some sense to be regarded as "inferior"⁽⁴⁾. His extreme views, however, are not those most usually put forward by the Church. An undated document found in the Public Record Office between two documents of Archbishop

(1) From a letter dated 1225: Rotuli Litterarum Clausarum (London) II.80.

(2) See Flahiff, op. cit., at 286 - 287.

(3) Ibid at 288 - 289.

(4) The term "inferior" was only ultimately explained by Wrottesley, L.J. in R. v. Chancellor of St. Edmundsbury and Ipswich Diocese (1948) 1 K.B. 195 at 205 (see below).

Peckam in 1279⁽¹⁾ distinguished three types of prohibitions:

(I) prohibitiones mere licitae were concerned with cases properly belonging to the secular courts;

(II) prohibitions issued in good faith by the royal chancery but obtained by a misrepresentation of the true nature of the cause; and

(III) prohibitions which were purely illicit and abusive of the ecclesiastical courts' proper jurisdiction.

Prohibitions of the first type were to be obeyed. As regards the second type the ecclesiastical courts were to ignore the prohibition and the party guilty of the misrepresentation to the secular court was to be punished; no action, however, ought to be taken against the officers of the royal chancery. The third type of prohibition was to be rejected completely and all those concerned with the issue of the writ, as well as those who sued the writ, were to be censured. The same principles, indeed, are set out by the Councils of London (1257), Merton (1258), Lambeth (1261) and, again, of Lambeth (1281).

It is clear that in practice the usual spheres of the two jurisdictions were settled. In spite of an attempt in 1285, for example, by Edward I to limit litigation by the laity in the ecclesiastical courts to testamentary and matrimonial causes⁽²⁾ the writ Circumspecte Agatis⁽³⁾ (addressed to itinerant justices in Norfolk in 1286 but accepted as the official doctrine for the whole of England⁽⁴⁾) recognised the church's jurisdiction over other matters also. These matters were either spiritual or those connected with such matters: actions pro salute animae were left

(1) See Flahiff, op. cit. at 287 and printed in an appendix to that article.

(2) Statute of Westminster II, 1285.

(3) II Councils and Synods, vol. 2. at 974 - 975.

(4) E.B. Graves, E.H.R. XLIII 1 - 20.

to the ecclesiastical courts but actions could also be brought against parishioners for contributions to the upkeep of the church and cemetery⁽¹⁾. A rector was permitted to sue for mortuary fees "in partibus ubi mortuaria dari consueverunt", as also for "oblaciones, decimas debitas et consuetas"; so too one rector might sue another for lessor or greater tithes "dummodo non petatur quarta pars alicuius ecclesie"⁽²⁾ and a priest might sue for any pension owed to him. The writ then dealt with three controversial matters: assault of the clergy, defamation and breach of faith. In these cases the writ drew a distinction between correction of the sin, which was within ecclesiastical cognizance, and pecuniary indemnity, which was to be sought in the temporal courts⁽³⁾. The writ concluded:

"In omnibus casibus predictus et consimilibus habet index ecclesiasticus cognoscere, non obstante regia prohibitione, licet porrigatur."

In the "addition" to the writ⁽⁴⁾ another distinction was made by which anyone sentenced by the ecclesiastical court to bodily punishment (penam corporalem) might if he so wished commute the

- (1) In these latter cases the penalty was pecuniary. In some other cases the King seems to have recognised a right to impose a fine: ".. pro quibus aliquando infligitur .. pena peccuniaria..." On this question see Flahiff, op. cit. at 308, footnote 116.
- (2) If the action concerned more than a quarter of the tithes the matter was regarded as one concerning the advowson and therefore within the temporal jurisdiction.
- (3) "...concessum fuit alias quod placitum inde teneretur in curia christianitatis, dummodo non petatur pecunia sed agatur ad correctionem peccati".
- (4) See Graves, op. cit. at 15 - 16, and Flahiff, op. cit. at 312 - 313.

punishment into a monetary payment. Furthermore, the "addition" made a reservation as to tithes : any action for the purchase price of tithes of produce (decimas suas in horreo congregatas vel alibi existentes) if brought in the spiritual court was to be prohibited "quia per vendicionem res spirituales fiunt temporales, et decimae transeunt in catallis." Thus, although the right of the King to decide those borderline cases that were in dispute was never admitted by the church, in practice the decision lay with the secular power⁽¹⁾. In spite of deliberate poaching in the territory of the other by both jurisdictions, disputes arose predominantly in cases which might be viewed in different lights depending upon the initial presuppositions made. The case given above of an action for the purchase price of tithes is a good example. To the canonist it was a tithe case, to the common lawyer a case of chattels. Indeed, the mere fact that a party to an action needed to misrepresent a case in order to bring it within a different jurisdiction is in itself proof of the admission by both sides of jurisdictions peculiar to the ecclesiastical or secular authorities.

With the practical ascendancy of the secular courts and the writs of prohibition in deciding borderline jurisdictional disputes it is easy to see the position in an unbalanced light. Certainly the King's courts prohibited the ecclesiastical courts; indeed a prohibition plea might be initiated in the royal courts by the defendant in the Church court, if the writ of prohibition was ignored, thus leading to the attachment of the plaintiff. Yet the Church strongly contested the pressure emanating from the King's courts⁽²⁾. Their general attitude to the King's claims has

(1) Flahiff, op. cit. at 301.

(2) C.B. Flahiff, The Writ of Prohibition to Court Christian in the Thirteenth Century, II, Medieval Studies, VII (1945) 229 at

been discussed above; moreover, the Church strove against encroachment. As pleas properly falling within the secular jurisdiction were brought in the courts Christian, so a complaint, properly of ecclesiastical jurisdiction, might be brought in the temporal courts. In 1281 the Archbishop of Canterbury complained that the Abbot of Cumbermere, being "carried away by the devil", had sued the Prior of Ware in the King's court concerning a church, having already been deprived of it in a Church court⁽¹⁾. In 1279 the Archbishop rebuked the Prior of Christ Church, Canterbury, for prosecuting a parson in the secular courts; he had discovered the fact only on receipt of a royal writ ordering him to have the parson cited before the King's justices⁽²⁾.

To sum up, the law applied in the Church courts in England - "the canons and episcopal laws" of the Conqueror's ordinance - was the jus commune of the Western Church, subject to certain variations by local custom. The facts on which these customs were based might be appealed to as establishing a custom either at common law, or the canon law, or both simultaneously. Thus, in England pleas concerning patronage were in the cognizance of the secular courts according to the custom of the common law and the Church in the person of the Pope herself recognised this as a regional variation of the jus commune according to canonical custom.

Yet the mere separation of the jurisdictions by the ordinance created a problem of jurisdiction. Although the main line of division was clear, there were necessarily questions of doubtful competence to be decided in cases brought originally in either jurisdiction. Leaving aside those cases where attempts were made

(1) Cited by S.J. Churchill in Canterbury Administration, Vol. I at 530.

(2) Ibid. See also other examples there cited.

deliberately to bring a cause within the jurisdiction of a court properly incompetent to hear it⁽¹⁾, these questions usually arose in cases open to different interpretation according to whether one's standpoint was that of the common lawyer or the canonist. Objectively, either viewpoint was in many instances valid; practically, the decision in doubtful cases was that of the royal courts and therefore of the common lawyers. Although this decision in doubtful cases was not conceded by the Church, who regarded herself as the spiritual, and therefore higher, authority⁽²⁾, the royal power in fact had the greater efficacy⁽³⁾ and therefore the last word. The practice of consultation by which the ecclesiastical court might have recourse to the royal justices to decide doubtful questions of competence is itself "a de facto recognition of the lay courts' right" to make such a determination⁽⁴⁾.

Once it is accepted, however, that the canon law was in force in England ipso jure and not merely in so far as it was received, there can be no question of fusion between the common law and the ecclesiastical law in this early period. It is not a time of encroachment by the common law on the canon law but a

(1) This was often because of more satisfactory procedure in the jurisdiction improperly attempted.

(2) See. W. Ullmann, The Growth of Papal Government in the Middle Ages.

(3) The Church even relied upon the King for the enforcement of its sentences of excommunication. This was also the case, ironically enough, when ecclesiastics proceeded to excommunicate those who sued out writs of prohibition against an action in a Church court. See Flahiff, *op. cit.* at 244.

(4) Flahiff, *op. cit.* at 240.

period in which both jurisdictions are finding a modus vivendi⁽¹⁾. In such cases, as the secular jurisdiction had cognizance of those matters which on the Continent were within the jurisdiction of the Church courts, the canon law could provide for its loss within its own jurisprudential framework; in those same cases the common law explained its jurisdiction by an appeal to the common law of England.

(1) See, e.g., Whinfield v. Watkins, (1812) 2 Phillimore 1 in which it is pointed out that the common law allowed a successor in title an action on the case against the dilapidator, his executors or administrators: a privilege unrecognised by the canon law outside England.

CHAPTER II

THE WINDS OF CHANGE

It has been concluded that in the period already considered a broad agreement was reached as to the respective jurisdictions of the ecclesiastical and secular courts. That is not to say, however, that the wide jurisdiction given to the Church was received in all quarters with equanimity. Lyndwood completed his Provinciale in 1433; in 1447 Convocation protested against the common lawyers' view that the rival jurisdiction of the Church was un-English in its nature and its derivation. This complaint was aimed against writs of praemunire which, it was said, made the exercise of the Church's jurisdiction impossible⁽¹⁾. This controversy, however, was pushed into the background by the Wars of the Roses and not until Hunne's Case⁽²⁾ in 1512 was battle properly joined. As R.J. Schoeck has said :

"Overnight his name became a rallying-cry for lay grievances against the clergy, and his legal causes widened into a conflict between ecclesiastical and secular jurisdiction that foreshadowed the cutting of the canon-law ties between England and Rome."

Hunne's Case arose out of the demand for Hunne's child's christening robe as a mortuary by the rector of the parish in which the child was buried. Mortuaries were, of course, customary

(1) Cited by A.F. Pollard, Wolsey (1965 ed.) at 33, 167 and 248.

(2) (1514) Keilway ff 182. For a convenient discussion of this case see Pollard, op. cit., at 31-41; see also E.W. Kemp, Counsel and Consent at 145 and 151. I am indebted to an as yet unpublished article by R.J. Schoeck, Common law and Canon law in the Writings of Thomas More: the affair of Richard Hunne, read to the Third International Congress of Canon Law held at Strasbourg in 1968.

payments; Archdeacon Hale in his Precedents and Proceedings in Criminal Causes cites⁽¹⁾ three actions in the Court of the Commissary in London claiming mortuaries in the twelve years prior to Hunne's Case. In 1500 John Hamond denied that he had refused the payment of a mortuary to the curate of Saint Clement without the Bar and was given four days in which to purge himself. In 1502 complaint was laid against the vicar of All Saints, Barking, because he refused to bury Jacob Jonson "nisi prius habito et extorto mortuario" although no mortuary was due to him "juxta consuetudinem in civitate London". In 1510 Henry Malyng was reported to the court (seemingly by his rector) for subtracting a mortuary from a non-parishioner (cujusdam hominis extranei) who had died beneath his house; in his defence Malyng produced one Alice Swisby to prove the garment in question (viz. unam tunicam le blankett gardet le velvett) had been a gift from Henry Shyrellyff, deceased. There is, in fact, little doubt that mortuaries, inter alia⁽²⁾, were causing unrest amongst the laity. Even allowing for the animosity stirred up by Hunne's Case, the fact that an Act was passed in 1529⁽³⁾ relating to mortuaries is an indication of how seriously the question was regarded; indeed, section 4 deals specifically with cases concerning children and "wayfaring persons" or those who "ne maketh residence in the place where they shall happen to die."

To return to Richard Hunne: He refused to pay the mortuary demanded and the Rector of St. Mary Matfelon sent his chaplain and the vicar of the parish, Henry Marshall, to institute a suit for

(1) At pages 71, 75 and 86 respectively. The latter case is omitted in C.H. Williams, England Under the Tudors (1925) at 196-7.

(2) See petition of Londoners quoted in Pollard, *op. cit.*, at 41, note 2.

(3) 21 Henry VIII, c. 6. See Stephen's Ecclesiastical Statutes, vol. I at 127.

its recovery at Lambeth. Hunne was summoned on the 28th April, 1512, and, on entering an appearance, denied the truth of the libel which had merely declared that the infant, Stephen Hunne, had died (on 29th March, 1511) within a year of coming to the parish and that the christening-robe was his best piece of clothing and so due as a mortuary. The issue was found against Hunne on the evidence of witnesses⁽¹⁾. It is stated by Hall's Chronicle⁽²⁾ that Hunne's refusal was based on the argument that the child had "no properties in the shete"⁽³⁾; Schoeck on the other hand queries whether, if this were so, the argument would not have been put forward in "earlier, and unsuccessful, tests of mortuary payments" and therefore suggests that Hunne's refusal was based on the fact that Stephen died in a parish in which his father did not live⁽⁴⁾. Schoeck's argument, however, seems to be based on a misunderstanding. The property of the child in the christening-robe was one of fact to be decided in each case; it was not a question of law to be decided once for all⁽⁵⁾, hence the need for witnesses.

- (1) The facts are taken from the pleadings in the record of the later praemunire action in the King's Bench roll for the Hilary term, 4 Henry VIII, cited by S.F.C. Milsom in 76 E.H.R.80.
- (2) See E. Jeffries Davis in 30 E.H.R.477 for a consideration of the authorities.
- (3) Quoted by C.H. Williams, *op. cit.*, at 197. Milsom in his article already referred to says that issue was joined "presumably on the property in the sheet".
- (4) The child was put out to nurse and died in St. Mary Matfelon; Hunne lived in the parish of St. Margaret's Bridge Street. See A. Ogle, The Tragedy of the Lollards' Tower, at 51.
- (5) For the question of the payment of mortuaries by children see (eg) the Statutes of Durham III, 1276, c.6. (II Councils and Synods, vol. II at 819); for garments as mortuaries see II Councils and Synods, vol II at 1050, footnote 4. By 21 Henry VIII. c.6, s.4 no mortuary was to be on behalf of a child.

Likewise the claim to payment of a mortuary was a claim on the property of the deceased; thus only the residence (more properly the domicile) of Stephen was relevant, not that of the father, as far as the issue before the court was concerned⁽¹⁾.

Although the sequence of the ensuing events is not clear from the historical evidence, the logical sequence is fairly clear⁽²⁾. On the 27th December, 1512, Hunne's own parish priest - not Henry Marshall, it should be noted - refused to say vespers until Hunne left the church, saying: "Hunne thowe arte accursed and thowe standist accursed."⁽³⁾ On the 25th January, 1513, Hunne instituted proceedings for slander against the priest on the grounds that at the time the words were spoken he was not excommunicate. Unfortunately the grounds of the denunciation are not clear⁽⁴⁾. It is usually assumed that it was consequent upon Hunne's failure to obey the ruling of the court in the previous ecclesiastical proceedings whereas Schoeck suggests that Hunne may have begun process for a suit of praemunire before December and this caused the denunciation; indeed, such a suit is recorded in the King's Bench roll for the Hilary term 1513. It is equally possible, however, that Hunne's denunciation was more largely based upon his "unorthodox" behaviour of attending private readings of the bible⁽⁵⁾ and his

(1) On this see Lyndwood, *op. cit.* at 20. gl. ad v. ecclesiae suae.

(2) Pollard, *op. cit.*, at 32, note 4.

(3) Milsom, *op. cit.*, at 81 - 82.

(4) See footnote 6 (supra)

(5) It is not improbable that he attended such meetings; see

J.D. Mackie, The Early Tudors, at 292, note. On his arrest a search of his house yielded some heretical books, including a Wycliffite Bible: See A.C. Dickens, The English Reformation, at 91. See too the charges made against Hunne six years later: Ogle, *op. cit.* at 102 - 103.

alleged failure to bow to the crucifix⁽¹⁾; if this were so, Hunne's actions in the courts would have been seen merely as symptomatic of the whole and not as the very cause itself. Certainly in 1543 one Andreas Brett confessed in the Archdeacon's Court of Colchester that he had not made due reverence to the cross or crucifix "as a Christian should"⁽²⁾; in 1587 John Wasp was excommunicated for contemptuously refusing to make reverence to the name of Jesus⁽³⁾. These cases are of a later date but at the date with which we are concerned heresy was a term covering a multitude of sins: in 1505, for example, William Brygge and his wife were cited for making beehives on feast days and in 1520 Lucas Pancake of Otterden was accused of not keeping the Sabbath "because he shaved his own beard on the Lord's Day"⁽⁴⁾. How much more heinous would Hunne's actions have seemed to a parish priest of those days.

Be that as it may, neither the slander action nor the praemunire suit ever came to judgment; the latter being repeatedly adjourned on a point of law from Michaelmas 1514 to Hilary 1515⁽⁵⁾. In December 1514 Hunne was summoned for heresy and brought before the Bishop of London. Two days later, on the 4th December, Hunne was found hanged in his cell. A coroner's jury was impanelled and the following day his gaoler, Charles Joseph, sought sanctuary first at Westminster and then fled to Good Easter in Essex. The ecclesiastical authorities meanwhile pressed their initial charges;

(1) Milsom, op. cit..

(2) Hale's Precedents at 126.

(3) Ibid at 191 (Court of the Archdeacon of Essex).

(4) See B.L. Woodcock, Medieval Ecclesiastical Courts in the Diocese of Canterbury at 80-81. for these and other examples.

There were eight-eight species of heresy according to the canon law: Ayliffe, op. cit. at 290.

(5) Milsom, op. cit..

on the 10th December the preacher at St. Paul's cross read out fresh articles against Hunne and on Sunday the 16th his body was tried before a court presided over by the Bishop of London⁽¹⁾, was condemned for heresy and burnt by the secular authorities at Smithfield four days later. Sir Thomas More, one of the two under-sherrifs of London and present at the trial, says in his Dyaloge that he was convinced of Hunne's heresy by the deposition of the witnesses⁽²⁾. (In this connection it should be noted that Hunne would not have been competent, even if alive, to give evidence in his own defence⁽³⁾.) This does not alter the fact, however, that without the decision of the coroner's jury no decision could properly have been taken as to whether Hunne was unrepentant when he died and thus properly sentenced and handed to the secular arm to be burnt⁽⁴⁾. If Hunne committed suicide the assumption of final contumacy might be valid⁽⁵⁾; not so, how-

(1) For the status of this court see Pollard, *op. cit.*, at 34, note.

It should be noted that one of the three assistants to the Bishop was Ruthal, the King's secretary.

(2) at 235 and 239. It is of interest to note that More was the brother-in-law of John Rastell who was later given wardship of Hunne's two daughters: A.W. Reed, Early Tudor Drama at 9-10.

I am indebted to Schoeck for this reference.

(3) This was altered in 1868, at least in regard to cases falling within the Church Discipline Act, 1840 (3 + 4 Victoria, c.86), by the Bishop of Norwich v. Pearse, L.R. 2 Adm. + Eccl. 281 overruling Burder v. O'Neill, (1863), 9 Jur. (N.S.) 1109.

(4) "Quales sunt pertinaces et relapsi, qui non petunt misericordia ante sententiam, sunt damnandi ad mortem per saeculares potestates". Lyndwood, *op. cit.*, at 293, gl. ad v. paenas in jure expressas.

(5) "nam ante declarationem, si paratus sit corrigendi, licet erret, non est dicendus Haereticus": Ibid, gl. ad v. extune.

ever, if he had been murdered and this question was properly one for the coroner's jury to decide. As Pollard points out⁽¹⁾-

"Hunne was a suspected, accused, and imprisoned heretic; but even by canon law he was not a condemned heretic until six days after his death."

In point of fact the coroner's jury in February 1515 brought in a verdict (based on Joseph's confession) of murder by the gaoler, his assistant and the Chancellor of London, Dr. Horsey. Horsey was arrested and placed in the custody of the Archbishop of Canterbury although, when he was arraigned in the Court of King's Bench, the case against him was dropped.

Even if, as seems likely, Hunne was a heretic according to the lights of the time, the flight of his gaoler after his death must of necessity raise great doubts as to whether he committed suicide. Certainly the precipitate action of the ecclesiastical authorities suggests "a desire to forestall the findings of a coroner's jury"⁽²⁾. In retrospect the action must be seen as foolhardy. Hunne was now a martyr: in 1529 Simon Fish could cry in his Supplication of Beggars⁽³⁾-

"Who can get justice against the clergy, when all the learned men of the realm are paid fees by them? If poor Richard Hunne had not sued a priest, he would have yet been alive."

Even if Hunne's Case cannot be regarded as "a dress rehearsal of the Henrician Reformation" it may yet be seen as to some extent foreshadowing "the initial stages of the Reformation Parliament in 1529 - 32"⁽⁴⁾. It gave a focal point for the then prevalent opposition to the spiritual courts and their jurisdiction.

(1) Op. cit. at 35.

(2) Mackie, op. cit. at 292, note.

(3) Quotation from a precis by Dickens, op. cit. at 100.

(4) Dickens, op. cit. at 94.

This is the more so as it must be seen as the backcloth to greater things. In 1512 parliament had passed an Act entitled Punishment of Murders⁽¹⁾ by which only those in Holy Orders might claim benefit of clergy in a case of murder; thus those in minor orders did not come within the exception. The Act was only to remain in force until the next parliament and parliament met on the 5th February, 1515, the month in which the coroner's jury reached its verdict in the Hunne Case. However in May 1514 Pope Leo X had issued a bull that laymen had no jurisdiction over churchmen and either on the 4th or possibly 11th February, 1515⁽²⁾, Richard Kidderminster, the Abbot of Wynchcombe, preached a sermon at St. Paul's Cross on Psalm 105, verse 15: Nolite tangere Christos meos. In his sermon the abbot attacked the 1512 Act as "enconter le ley de dieu, et les liberties de saint Eglise"⁽³⁾. He asserted that⁽³⁾ -

"touts Clerkes quex ont resceive ascun maner des orders greinders ou meinders son exempts del temporal punishment pro causis criminalibus devant le temporal Judge".

On the 10th February the Lords rejected two bills in favour of Hunne and postponed a renewal of the 1512 Act: on the 10th March, the renewal was again quashed and on the 5th April parliament was prorogued. The debate, however, became more widely based as King Henry VIII was persuaded that his rights were being infringed. One of the King's spiritual advisers, Doctor Henry Standish, defended the 1512 Act at Blackfriars (perhaps having already done so before the King⁽⁴⁾) in a debate before the judges

(1) 4 Henry VIII, c.2: see Gibson, Codex Juris Canonici (1713) at 1173.

(2) See Pollard, op. cit., at 43.

(3) Keilway's Reports (1688 ed.) at f. 181. On the authority of these reports see Pollard, op. cit., at 44 note 2.

(4) Pollard, op. cit., at 46, note 5.

and the temporal Council of the King. Standish grounded his case on the argument that the Pope's decree of 1514⁽¹⁾ "ne fuit unques resceive cy en Engleterre"; moreover, he endeavoured to place Psalm 105 in its historical context to show that it was not a true proof text for the matter in hand.

After parliament was prorogued Standish continued to defend his position in public lectures. The bishops seized this opportunity and the summons to Convocation, called to reassemble on the 13th November, referred to matters "in grave damnum et praejudicium ecclesiae universalis ... remaneant inexpedita et indeterminata"⁽²⁾.

At this Convocation Standish was called to answer four questions⁽³⁾:

- (1) Was it permissible for temporal judges to call clergy before judicial tribunals?
- (2) Were minor orders⁽⁴⁾ holy orders, or not?
- (3) Did a constitution ordained by pope and clergy bind a country where a contrary use had always been established?
- (4) Could a temporal prince restrain bishops?

(1) Keilwey's Reports at f. 181 merely refers to "un decree" but it is probably the bull of Leo X.

(2) Wilkins, Concilia, vol.III at 658.

(3) Keilwey's Reports, at f. 183.

(4) "primi ordines". Minor orders were those of porters, lectors, exorcists and acolytes; subdeacons were placed amongst those holding the major orders by Pope Innocent III in 1207: see the Dictionary of the Christian Church, ed. F.L. Cross at 904.

This is recognised by 23 Henry VIII, c.1,s.3. which excepts "such as be within holy Orders, that is to say, of the orders of subdeacon, or above" from an act concerning convicts in petit-treason, murder, etc., See also 23 Henry VIII,c.11,s.2.

Hunne had been accused of heresy for less and Standish called on the King for his assistance in accordance with his coronation oath: "what should one poor friar do alone against all the bishops and clergy of England?"

Yet that one poor friar was well able to look after himself in disputation. He answered to the questions originally put him at a second assembly also held at Blackfriars⁽¹⁾:

- (1) Minor orders were not holy;
- (2) Clerical exemption was not based on divine law;
- (3) Laymen might without sin coerce those clergy who by reason of episcopal neglect (went unpunished);
- (4) The positive laws of the church bound no-one not otherwise receiving them;
- (5) The Experience embodied in the holy canons (the handmaid of theology) ought to be abandoned when condemned by theology itself;
- (6) As little (and not more) of the volume of ordinances bound Christians as the very little capable of comprehension.

Moreover, when pressed, Standish stood his ground and affirmed that "ecclesiastical laws, against which a contrary practice has been established for three hundred years, are not binding unless received."

Kidderminster's original plea against the 1512 Act had been based on an appeal to Scripture and Standish denied the validity of that appeal⁽²⁾. Standish reiterated this at the second assembly when he denied that clerical exemption was based on divine law; moreover, the jus positivum ecclesiasticum was the

(1) Keilwey's Reports, at f.183.

(2) As A.C. Dickens points out, Standish's argument is in the Humanist tradition: op. cit. at 93.

handmaid of theology and could not bind if contrary to theology. Appeal was also made to the doctrine of reason. Here then was the initial divergence between the ecclesiastical authorities and Standish. To the former the authoratative appeal was to the law promulgated by pope and clergy, bolstered by reference to scripture as interpreted by pope and clergy; to the latter the authoratative appeal was to "theology" and "reason" (including pragmatism: see answer (3) above). It is no wonder that Doctor John Taylor, who was both clerk of the parliaments and prolocutor of Convocation, noted⁽¹⁾:

"(I)n this parliament and convocation there arose the most dangerous discords between the clergy and the secular power over the liberties of the church; and the minister and the fomenter of all the trouble was a certain friar-minor of the name Standish."

Here was the straw with which the bricks of the Reformation were made. The Church was not slow to see that its basis was being undermined.

Standish denied that the minor orders were "holy" but Henry VIII pointed out that it was not their "holiness" which was in issue: "quod minores ordines uno respectu dicuntur sacri, alio respectu dicuntur non sacri"⁽²⁾. What was in issue was the citation of clergy by temporal judges and Henry VIII denied that this was contrary to the positive law of the Church⁽³⁾. This was

(1) Quoted by Pollard, op. cit. at 51.

(2) Keilwey's Reports at f.184.

(3) "Jus divinum positivum". Presumably by this Henry VIII meant the alterable jus positivum ecclesiasticum in the sense already given it (supra) as opposed to the unalterable jus divinum.

a stronger statement than that to be found in Standish's answers as reported as Standish had merely denied that clerical exemption was based on divine law, and, as far as the jus positivum ecclesiasticum was concerned, merely claimed that there was no sin if the laity interposed in cases of episcopal neglect. Such sophistry cannot be imparted to Standish with certainty on the basis of such a circumscribed report as we now have, yet the report has a ring of truth to it. In any case the crux of the Church's case was in the third question put to Standish and Henry VIII was merely applying Standish's answers to that question to the particular cause in issue.

But what exactly was Standish's position? He stated, firstly, that the 1514 decree was "never here received in England"; secondly, that the positive laws of the Church bound no-one not otherwise receiving them; and thirdly, that ecclesiastical laws, against which a contrary practice had been established for three hundred years, were not binding unless received. (This period of three hundred years is puzzling and is unlikely to be a reference to the fact that in 1207, that is, three hundred and eight years before, Pope Innocent III had upgraded subdeacons' orders to the rank of major orders⁽¹⁾; it is possibly a plea to immemorial custom which according to the common law dated from 1189⁽²⁾). It is difficult to see where Standish learnt this doctrine which, as has already been seen, was completely foreign both to the canon law and

(1) See footnote 4 p.33 supra. The problem of criminous clerks was older than 300 years. See A.L. Poole, From Domesday Book to Magna Carta, at 218.

(2) Statute of Westminster I (1275), c.39. Certain decretists seem to have required a custom to have been of immemorial usage in order to overrule a statute but this cannot explain the period of three hundred years unless Standish here fuses the common law and canon law: see G. Le Bras, Ch. Lefebvre and J. Rambaud, L'Age Classique, at 548.

the common law; yet, as Maitland has pointed out,

"About the matter of fact he was in the right, for even in cases of felony our temporal courts had not allowed to the criminous clerk that full measure of immunity which the decretals claimed on his behalf"⁽¹⁾.

It is submitted, however, that it was from the matter of fact itself that Standish learnt his doctrine. In the first chapter mention was made of the disagreement as to whether the canon law was "received" in England or not. The historians ultimately concluded that there was no such "reception" and their conclusion was due to a great extent to following the evidence through in a true historical sequence; the exponents of the reception theory on the other hand had been much influenced by the position (analogous to reception in its application) imposed on the Church by the Henrician Reformation statutes⁽²⁾. Looked at from a particular date in history, in fact, the reception theory, even allowing for the conditioning of the Henrician statutes, was most plausible; looked at through a historical sequence the theory did not really hold water.

Standish, one of the royal councillors, was concerned with a particular problem, that of the criminous clerk. This problem was one both of theory and pragmatism. The stand of the canonists was one primarily of theory: according to the law of God a clerk "should not be 'convented' before the secular judges." Yet in practice - and Standish was much concerned with the practice (see his answer (3) above) - this ideal did not work: "no-one could deny that throughout the last three hundred years the indictment and

(1) Canon Law in the Church of England at 87.

(2) Yet "To rely upon testimony which comes from a later date would be to beg the whole question": Maitland, *op. cit.* at 89. Stubbs and others had been conditioned by legal views of the seventeenth century: see Davis, *op. cit.*, at 351 et seq..

arraignment of clerks in our courts of common law had been an extremely common event"⁽¹⁾. As a matter of fact, therefore, the full ambit of the jus commune was denied in England even though, as has already been argued, its jurisprudence was sufficiently flexible to incorporate the de facto position into its framework. The facts which might be evidence of custom both at the common law and in the canon law could be contained within the theoretical structure of both jurisprudences - the custom of England was the custom of the common law AND local canonical custom. This theoretical position would emerge when looked at "horizontally": regarded at a given point of time the de facto position would have seemed, in addition, to have been the better theoretical (jurisprudential) explanation of the facts.

To put it another way, there were in England (as in any other jurisprudential system) a limited number of possible "legal situations", that is, of social encounters regulated by law⁽²⁾. In pre-Reformation England these "legal situations" were not regulated by one, but by two, jurisdictions: the canon law and the common law. Moreover, not every "situation" fell neatly into the cognizance of one or other of the jurisdictions although the theory of each jurisdiction might claim to deal with that situation. In such a case, once one jurisdiction obtained cognizance of it, either that jurisdiction would be seen to be dominant or its victory would need to be explained by the theory of the other. In England the de facto decision in borderline cases lay with the common law courts. Any decision by them denying their own jurisdiction in any given case was explicable by their own jurisprudential system, as was any "gain" of jurisdiction explicable by

(1) Both quotations are from Maitland, op. cit., at 87.

(2) It is one of the tests of a good legal system that these legal situations cover as many of the infinite everyday, human encounters as possible.

common law custom. Similarly the ecclesiastical courts explained any "loss" on the grounds of local canonical custom. The facts making up that custom were the same in both cases. Neither jurisdiction recognised the dominance of the other as each could explain the division of "legal situations" according to its own jurisprudence⁽¹⁾. But that was theory. Looked at pragmatically the common law must necessarily have appeared dominant in any gain in its jurisdiction: the ultimate decision lay with the writ of prohibition and the canonists would then seem to be compelled to explain away the results of such aggression.

Standish was concerned with the criminous clerk, complete jurisdiction over whom was claimed by the jus commune; yet he knew (and argued it to be a necessity born of episcopal neglect) that in fact such a claim was not recognised by the common law. It is hardly surprising that he saw the canonical doctrine concerning the criminous clerk as applying only in so far as, in practice, the common law courts permitted it. From there it is but a small step to seeing the canonical doctrine as binding only when (common law) custom permitted, rather than not applying when (either) custom denied it. In theory the two propositions are far apart; in a particular instance the practical results of either would be the same. The theory that the laws ecclesiastical were not binding unless received would then be but an extension of the particular to the general. The fact that in 1095 the custom by which no legates or papal letters were to be sent to England without the King's consent was confirmed by papal authority could only bolster up this theory⁽²⁾. In addition this argument is

(1) Even if the Church courts could not concede the right of the secular courts to decide borderline cases.

(2) Hugh of Flavigny, cited by A.L. Poole, Doomsday Book to Magna Carta, at 175.

strengthened if Standish's reference to three hundred years of contrary usage may be taken as an appeal to an immemorial custom of the common law⁽¹⁾.

To bolster his pragmatic argument further Standish denied that the positive laws of the Church were binding unless received. That is to say, he distinguished between the jus positivum ecclesiasticum and the jus divinum; he placed Leo X's decree amongst the former (repudiating Kidderminster's use of Psalm 105, verse 15) and insisted, moreover, that mere positive law was the handmaid of theology. He appealed, too, to practical considerations and to reason. It is hardly surprising that his argument, based as it was on the practical politics of the age, should appeal to men whose opposition to the ecclesiastical jurisdiction had been crystallised in the affairs of Hunne. Nor is it to be wondered at if Henry VIII's Reformation statutes were based on an awareness fostered by Standish (to put it no higher), just as his later use of praemunire may have been influenced by Hunne's Case.

The outcome of all these heated events, however, was an anti-climax. Convocation dropped the proceedings against Standish and the Attorney-General failed to press the charge against Dr. Horsey. Standish was soon promoted to the bishopric of St. Aseph; Horsey had to pay £600 and later became prebendary of Chichester and Wells and canon residentiary of Exeter⁽²⁾. Yet a watershed had been reached in the relationship of the ecclesiastical and secular jurisdictions and the tide was then to flow against the canon law. The real force of this, it must be admitted, was not to be felt

(1) Supra. According to Pope Boniface VIII (VI.I.2.1.) a prior particular custom could not be revoked by a general law if no express mention was made concerning it in the law itself:

Le Bras, L'Age Classique at 536.

(2) He retained his prebends at Scamlesby (Lincoln) and Tottenham: see Pollard, *op. cit.* at 51.

for some years but meanwhile opposition to the Church courts continued.

John Skelton, who was himself a priest and died in 1529, showed scant respect for any law in his poem "Why Come Ye Not to Court"⁽¹⁾:

"Strawe for lawe canon,
Or for the lawe common,
Or for the lawe cyuyll!"

It is the anonymous author of "The Image of Ipocrisy", written in the mid-1530's, who most violently attacked the canon law, however⁽²⁾:

"As thoughe law men were dawes,
And dome as any stone,
With sivile and canon
To serve God and Mammon;
Righte and wronge is one.
Serche his decretalles
And bulles papalles,
Et, inter alia,
Loke in his palia
And Bacchanalia,
With his extravagantes
And wayes vagarantes:
His lawes arrogantes
Be made by truwantes
That frome his finctions
Into distinctions,

(1) For these references I am indebted to R.J. Schoeck, Canon Law in England on the Eve of the Reformation, Mediaeval Studies, Vol. 25, 125 at 137-138. The quotation is from lines 413-415.

(2) Ibid. In 1534 Cromwell helped to finance an English version of the Defensor Pacis: Mackie, op. cit., at 423.

With cloutes of clawses,
Questyons and cawses,
With Sext and Clementyne,
And lawes legantyne ..."

This latter poem, of course, was written in the middle of the spate of Henrician statutes and shows (apart from a surprising knowledge of canonical terminology) that the attack on the canon law was not restricted to the ordinary man in the street or to legal literature.

As far as the latter is concerned mention must be made of Christopher St German whom F. Le Van Baumer has termed the "most erudite of early Tudor lawyers"⁽¹⁾ and whom A.C. Dickens described as "the very embodiment of the old hatred felt by the common lawyers for ecclesiastical jurisdiction"⁽²⁾. His earlier works were written before the revolutionary period of statutory reform whereas, once that reform was under way, he was a great champion of the King. Indeed, as Dickens goes on to say, he "may claim a conspicuous place among those which (sic) prepared public opinion for drastic change"⁽³⁾. He wrote his great work Doctor and Student in 1523 and it was translated from the Latin in 1530 and 1531. In this he preached an almost complete Erastianism, learnt in some measure at least from Marcellus of Padua⁽³⁾. He taught, for example, that it was for -

"the King's grace in his parliament to expound scripture,
and so decide what the irrefragable law of God is, for the
King with his people have the authority of the Church."

Indeed, whilst he had much to say about abuses of ecclesiastical jurisdiction, he went almost so far as to equate the secular

(1) "Christopher St. German, The Political Philosophy of a Tudor Lawyer", Amer. Hist. Rev., vol. 42, 631-651.

(2) Op. cit., at 97.

(3) Ibid.

jurisdiction with the Law of Reason itself:

"It is not used among them that be learned in the laws of England to reason what thing is commanded or prohibited by the law of nature, and what not, but all the reasoning in that behalf is under this manner. As when any thing is grounded upon the law of nature, they say, that reason will that such a thing be done; and if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done."

This in itself was an attack upon the canon law which was "the principle vehicle of the doctrine of the law of nature"⁽¹⁾ -

"jus naturale est, quod in lege et euangelico continentur"

(Natural law is that which is contained in the Scriptures and the Gospel): Gratian's Decretum, D.I, c.1. Indeed, in 1533 in Dialogue betwixt Salem and Bizance he went so far as to contrast the claim of the King as grounded upon the law of God with the merely human right of the Bishop of Rome. Here then were Standish's doctrines appearing in the field of common law jurisprudence. Standish denied that the plea of the criminous clerk was founded in Scripture and the divine law; St. German founded the claim of the secular power upon divine law and claimed that the interpretation of Scripture lay not in the Church but in Parliament. Standish denied any efficacy to ecclesiastical laws beyond the comprehension of men; St. German claimed the law of reason as the basis of the common law. That is not to say that St. German learnt his doctrines from Standish - indeed, he was far more indebted to Marcellus of Padua, Aquinas and Garson⁽²⁾ - but where Standish attacked the canonists St. German used similar ground to prepare the common law for victory. Yet this was to

(1) A.P.D'Entreves, The Medieval Contribution to Political Thought, at 93.

(2) Ibid and Dickens, op. cit., at 97.

be victory and not annihilation; even St. German did not deny to the Church jurisdiction over "mere spiritual things."

The attack upon the ecclesiastical jurisdiction was not confined to poetry and legal literature. Simon Fish attacked the Church with great virulence in his Supplication of Beggars (1529):

"Who can get justice against the clergy, when all the learned men of the realm are paid fees by them? If poor Richard

Hunne had not sued a priest, he would have yet been alive".

Moreover, at least according to Foxe's Acts and Monuments⁽¹⁾, Anne Boleyn introduced the book to the King who "Kept the book in his bosom for three or four days". In the Church, too, Erastianism found its place. Stephen Gardiner, who himself made a collection of canon law⁽²⁾ and was made Bishop of Winchester in 1531, questioned in De Vera Obedientia Oratio⁽³⁾ (1535):

"Seeing the Church of England consisteth of the same sorts of people at this day that are comprised in this word, Realm, of whom the King is called the Head: shall he not, being called the Head of the Realm of England, be also the Head of the same men when they are named the Church of England?"

For the primacy claimed by Rome Gardiner found no authority in Scripture: how could Our Lord have given an authority to the popes which He declined to exercise Himself?

Until the sixteenth century, therefore, the relationship between the ecclesiastical and secular jurisdictions was one of compromise and conflict to decide borderline disputes. In the early years of that century, however, amidst a case which seemed to epitomise the worst of laymen's fears, Henry Standish challenged the authority of the canon law in England - here was

(1) Vol. IV at 659 et seq..

(2) See appendix to Strype's Memorials, vol. III.

(3) Quoted in D'Entreves, op. cit., at 140, footnote.

the wind of change: no longer would the canon law be accepted without question. Here, in 1515, may be found the watershed in the history of the fusion of the common law and the ecclesiastical law for then the seeds of the "reception" theory were sown; from that time onwards the common law was to achieve an ascendancy, given it by Parliament, based on jurisprudential and theological argument reminiscent of the theories of the canonists themselves.

CHAPTER III

THE DOMINANCE OF THE COMMON LAW

The so-called "Reformation Parliament" sat in seven sessions from the 3rd November, 1529, to the 4th April, 1536, and within that period the shape of the law applied in the Church courts was radically altered. The ecclesiastical statutes in 1529, however, were of a popular rather than a far-reaching nature. The first statute of the session was an Act of general pardon from which were excepted robberies of goods in churches, alienations in mortmain and actions of quare impedit⁽¹⁾ and this was followed by statutes regulating sanctuary, executorship, probate, mortuaries, and plurality and secular employment⁽²⁾. None of these, however, can be regarded as of a radical nature but dealt, rather, with procedures or abuses and modifications of existing law. The statute 21 Henry VIII, c.13, s.1, for example, followed the canon law in enacting that no "spiritual persons ... shall from henceforth take to ferm ... any manors, lands tenements," etc. and that "no spiritual person shall from henceforth ... buy to sell again for any lucre ... any manner of cattel, corn, lead, tin," etc⁽³⁾. Similarly, the statute 21 Henry VIII, c.6 (although Sir Simon Degge was of opinion in his Parson's Counsellor⁽⁴⁾ that an action of debt by which mortuaries might be recovered in the secular courts was thereby created) plainly supposes that the recovery of the money payment in lieu of goods taken by way of mortuary (an innovation by the statute) should be solely in the spiritual courts.

(1) 21 Henry VIII, c.1. Similar exceptions occur in 22 Henry VIII, c.15; 26 Henry VIII, c.18 as well as 37 Henry VIII, c.18 and 7 Edward VI, c.14.

(2) 21 Henry VIII, c.2; 21 Henry VIII, c.4; 21 Henry VIII, c.5; 21 Henry VIII, c.6; and 21 Henry VIII, c.13 respectively.

(3) See Gibson, op. cit. at 179, note (u), and 180, note (x).

(4) at 559.

In Johnson v. Oldham⁽¹⁾, for example, it was argued inter alia, against a motion for a prohibition that the statute had saved the jurisdiction to the spiritual court and Holt, C.J. and the whole court were against the prohibition. Moreover, in Johnson v. Ryson⁽²⁾ in which the suggestion set forth the statute, the court observed⁽³⁾:

"There is no colour for a prohibition, since you have not pleaded; for a mortuary is a thing within their jurisdiction, and if there were any room for a prohibition, it would be for want of a custom, and then that ought to have been pleaded.."

More far reaching was s.10 of 21 Henry VIII, c.13, which enacted that "every licence or dispensation concerning pluralities" but "contrary to this present Act" should be "utterly void and of no effect." This was made more explicit by s.11 which stated that:

"...if any person or persons ... contrary to this present Act, procure and obtain at the Court of Rome, or elsewhere, any Licence or Licences, ... or Dispensation, to receive and take any mo Beneficies with Cure than is above limited ... then every such person shall ..."

be subject to the penalty of £20 and the forfeiture of the benefice. Although this may equally have limited the King's own dispensing power⁽⁴⁾, it was aimed particularly at the power of the Pope. The claim was not a new one, however, as was pointed out in Britton v. Wade⁽⁵⁾:

(1) (1700) 1 Ld Raym. 609.

(2) 12 Mod. 416.

(3) at 416.

(4) See Armiger v. Holland, Cro. Eliz. 542 and 601 (also reported in 4 Co. Rep. 75a) at 542 on the statute 25 Henry VIII, c.21.

(5) Cro. Jac. 515 at 517.

"...(I)n 11 Hen. 4 HANKFORD said, that the pope's bulls cannot dispense with the temporal law, nor meddle therewith, although they tend in ordine ad spiritualia, as appears 18. Edw. 1. Munchensie's Case; a multa fortiori then not with the statute law ..."

Even if "the Act did not presume to challenge the pope's dispensing power"⁽¹⁾ it was at the very least a foretaste of things to come and a warning to the Pope of the King's possible reaction if he failed to obtain a divorce. Moreover, the 1529 measures served to win the heart of the House of Commons on whose behalf the Supplication of the Commons against the Ordinaries may well first have been drafted by Thomas Cromwell in the same year⁽²⁾.

During the next twelve months Henry VIII pursued his attempts to obtain a divorce by importuning the Pope and consulting the universities⁽³⁾. In December 1530, however, the King's legal advisers impleaded the whole of the English clergy for breach of praemunire. According to contemporary writers the basis of this allegation was that the clergy had recognised Cardinal Wolsey as legate but according to the subsequent Act of Pardon they had exercised ecclesiastical jurisdiction "contrary to the form of the Statutes of Provisors, Provisions and Praemunire."⁽⁴⁾ Although the imperial ambassador wrote of praemunire that -

"no-one can fathom the mysteries of this law. Its interpretation lies solely in the King's head, who amplifies and declares it at his pleasure, and applies it to anyone he pleases"⁽⁵⁾,

it is unlikely that it was the canon law that was here under

(1) D.S. Chambers, Faculty Office Registers, at XIX.

(2) Dickens, *op. cit.*, at 113.

(3) An appeal to the universities had been suggested by Thomas Cranmer in August 1529: Mackie, *op. cit.* at 348.

(4) See Dickens, *op. cit.*, at 103-104.

(5) Quoted by O. Chadwick, The Reformation, at 100.

attack; rather, it is submitted, it is best to regard the text quoted above from the Act of Pardon as one of the alterations made by certain of the King's councillors and reported by Bishop Stokesley⁽¹⁾. Meeting in January 1531 the Convocations of Canterbury and York resolved to buy their pardons for £118,000, a bribe accepted by the King who magnanimously allowed its payment over a five year period. In addition to this monetary payment, however, the clergy were compelled to acknowledge the King as "their singular protector, only and Supreme Lord, and ... even Supreme Head" - but the clergy insisted on qualifying his recognition as Supreme Head by adding the rider "as far as the Law of Christ allows". On the other hand the King refused to define the scope of praemunire. As Chancellor Audley said to Bishop Gardiner⁽²⁾:

"But we will provide that the Praemunire shall ever hang over your heads and so we laymen shall be sure to enjoy our inheritance by the Common Laws and Acts of Parliament."

The die was cast; it was now a matter of time as to whether the King would press home his advantage⁽³⁾.

In January 1531 Pope Clement VII had forbidden Henry VIII to remarry and the King proceeded to attempt to blackmail the Pope. In the statute 23 Henry VIII, c.20. "the wise, sage politick commons" referred to the "great and inestimable sums of money" which "have been daily conveyed out of this realm, to the impoverishment of the same", and, "considering that the court of Rome ceaseth not to tax, take and exact the said great sums of

(1) See Dickens, op. cit., at 103-104.

(2) Quoted by Dickens, op. cit., at 104.

(3) It is not the writer's intention to imply that without the question of the King's divorce England would have remained subject to the jus commune: the divorce was, however, a catalyst which hastened its subjection to the common law.

money", forbade all payments of annates or first-fruits. The rider was added, however, that "the final order and determination of the premises" was committed -

"unto the King's highness. So that if it may seem to his high wisdom ... meet to move the Pope's holiness, and the court of Rome, amicably, charitably, and reasonably, to compound, other to extinct and make frustrate the payments of the said annates ... or else by some friendly, loving and tolerable composition, to moderate the same in such wise as may be by this realm easily borne and sustained; that then those ways and compositions once ... agreed upon between the Pope's holiness and the King's highness, shall stand in strength, force, and effect of law, inavoidably to be observed"⁽¹⁾.

Although this statute was not aimed at the English clergy, it was, of course, based upon the presumption of the primacy of English statute law and thus of the English common law; under the cover of a statute claiming to remedy abuses most detrimental to English prelates, the jurisdiction of those prelates was being slowly undermined. Indeed in February 1531 Archbishop Warham had made a formal protest against all acts of Parliament derogatory to the Pope, to ecclesiastical power or to the privileges of the see of Canterbury⁽²⁾.

(1) 23 Henry VIII, c.20, s.3. It is also enacted that if the Pope molested any of the King's subjects by excommunication, etc., because of non-payment of annates such excommunications, etc., shall not "be at any time or times hereafter published, executed, nor divulged, nor suffered to be published, executed or divulged in any manner of ways." See also 13 Richard II, s.2, c.3. and 16 Richard II, c.5.

(2) D. Wilkins' Concilia, vol.III, at 746. The threat of the statute 23 Henry VIII, c.20, although it did not obtain Henry VIII his divorce, did extort the necessary instruments for Cranmer's consecration in 1533. -50-

Meanwhile other ecclesiastical statutes had been passed regulating more everyday problems: in 1530 a further Act dealt with abjurations and sanctuaries⁽¹⁾, whilst in 1531 statutes dealt with the exception of all those in holy orders from convictions for petit-treason and murder, citation out of dioceses⁽²⁾, mortmain and gaolbreak by the clergy⁽³⁾.

On the 18th March, 1532, the Speaker of the House of Commons presented the revised Supplication against the Ordinaries to the King and on the 12th April it was sent to Warham demanding a speedy answer. The Supplication linked two themes: the legislative action of the Church and the practices of the Church courts. It complained of the fact that Convocation legislated without the consent of the King and laity -

"the prelates and ordinaries with the Clergy of this your most excellent Realme have in thayr Convocacyons heretoffore made ordeynyed and constitutyd dyuers lawes and also do make daylye dyuers lawes and ordenanunces without your Royall

(1) 22 Henry VIII, c.14.

(2) The claim of the archbishop of Canterbury "Cum ecclesia Cant. tali gaudeat privilegis in corpore jur' redacto, quod archiepiscopus qui pro tempore fuerit, causas subditorum suffraganeorum suorum, etiam per simplicem querelam audire posset et debeat" (Reg. Pecch. f.145 (a), 148 (a)) probably originated from the archbishops of Canterbury being legati nati to the Pope. There are pre-Reformation instances of an archbishop requiring bishops to proceed against particular irregular persons in their dioceses, or show cause why he himself should not proceed: A.J. Stephens, Ecclesiastical Statutes at 132, note (4).

(3) 23 Henry VIII, c.1, 23 Henry VIII, c.9, 23 Henry VIII, c.10 and 23 Henry VIII, c.11, respectively.

assent or knowledge or the assent or consent of Any of your laye Subiectes"⁽¹⁾ -

and of specific alleged abuses in the ecclesiastical courts: inordinate delays, trivial prosecutions, high fees, vexatious examinations and imprisonment of offenders, as well as traps set for those accused of heresy. In 1507 Warham had issued ordinances for the reform of abuses in his own courts and in 1527 changes in the Court of Arches; he also ratified the rule of Archbishop Winchelsey as to the increase of the number of proctors practising in the Court of Canterbury to twenty-four⁽²⁾. Indeed, the restrictions on the number of proctors was one of the Commons' complaints in 1532. The Church, therefore, was not wholly blind to the strictures levelled against it and in 1529 Convocation may have made ordinances against such abuses as simony and the conditions of the monasteries⁽³⁾; furthermore, in January and February 1532 Convocation instigated reforms relating to ordinals, non-residence, and clerical immorality and learning⁽⁴⁾. But welcome though these reforms were, they came too late; nor did they touch upon the complaints made by the Commons.

The Convocations made their reply by mid-April, appealing to the King as protector of the Church and referring to the injustice of blaming a long-accepted system for the faults of isolated individuals; moreover, they pointed out that the King must know they could not submit the execution of their charges and duties to his royal assent. When the King handed this reply to the Speaker of the House of Commons, he said:

"We thynke their answeare will smally please you, for it

(1) Quoted by Kemp, Counsel and Consent, at 152.

(2) Wilkins, op. cit., vol.III at 710.

(3) Ibid at 717.

(4) Dickens, op. cit. at 114.

seemed to us very slender"⁽¹⁾;

at the same time he pressed Convocation for a more satisfactory response. The Convocations in return suggested to the King that while they should continue to make ecclesiastical laws they would -

"publish and put forth, as upon the lay subjects, no constitutions, acts or ordinances which they should thereafter make, without his consent required; and from time to time to suspend such acts and ordinances, thereafter to be made, until they should be authorised by his consent and authority, except they were such as concerned the maintenance of faith and good manners in the Church, or the reformation and correction of sin"⁽²⁾.

This was obviously an attempt at compromise but the exception was far reaching and did not satisfy the King who would be satisfied with nothing short of capitulation. He therefore demanded on the 10th May that they should pass no legislation unless by him licensed so to do; that existing provincial constitutions should be examined and revised by a royal commission of sixteen parliamentarians and sixteen clergy; and that all other constitutions not abrogated by the commission should stand with the King's assent⁽³⁾. On the following day he summoned the Speaker and a deputation from the Commons and informed them⁽⁴⁾:

"...(W)e thought that ye clergie of our realme had been our subiectes wholly, but now wee haue well perceived, that thei bee but halfe our subiectes, yea and scace our subiectes..."

(1) E. Hall, The Union of the two noble and illustre famelies of Lancastre and York, f. ccv.

(2) Wilkins, op. cit., vol. III at 753 et seq..

(3) Ibid at 749.

(4) E. Hall, The Union of the two noble and illustre famelies of Lancastre and York, f. ccv.

The clergy, however, knew when they had lost. Having taken Henry's broad hint they capitulated on the 15th May to his three demands in what is now known as the "Submission of the Clergy". Convocation was immediately prorogued.

The Submission of the Clergy was duly embodied in a statute in the following year, whilst in 1532 only three acts were passed concerning ecclesiastical affairs. Two of these were of very minor consequence - 24 Henry VIII, c.4, allowing the sale of flax and hemp by spiritual persons and 24 Henry VIII, c.13 regulating the dress of the clergy inter alia⁽¹⁾ - whereas 24 Henry VIII, c.12 regulated ecclesiastical appeals. This latter Act for the Restraint of Appeals restricted all appeals -

"in causes testamentary, causes of matrimony and divorces, right of tithes, oblations and coventions."⁽²⁾

(which had previously lain to the Pope) to a final appeal to the relevant court of the archbishop⁽³⁾, save in any cause touching the king in which case the final appeal was to the spiritual prelates, etc. "of the upper house, assembled and convocate by the King's writ in the convocation"⁽⁴⁾. Quite apart from its surprising confidence in -

"the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself ... to

(1) By s.15. The minor clergy, for example, were forbidden to wear "any manner of Furrer, other than black conie, budge, grey conie, shanks, calaber gray, fick, for, lamb, otter and beaver".

(2) S.2.

(3) S.6.

(4) S.9. An appeal to the delegates was only provided by 25 Henry VIII, c.19., s.4.

declare and determine all such doubts ... as to their rooms spiritual doth appertain"⁽¹⁾ and the reliance placed in Convocation - surprising, that is, in the light of the attacks being made on Convocation - quite apart from this, the statute's immediate importance was that it took the cognizance of the King's divorce away from Rome although the divorce was not heard until May 1533⁽²⁾.

Of far greater importance, however, was the Act's effect on the canon law. The Act concerning Restraint of Payment of Annates to the See of Rome⁽³⁾ had already made some encroachments on the jus commune especially in that restrictions were placed upon papal "censures, excommunications, interdictions, or any other process or compulsories.". The Act for Restraint of Appeals was also enacted -

"any foreign inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, judgments, or any other process or impediments .. from the see of Rome ... notwithstanding"

- (1) S.1. As early as January 1531 the Duke of Norfolk had told Chapuys, the Imperial ambassador, that papal jurisdiction was invalid in England.
- (2) This is peculiar. Anne Boleyn was pregnant and Henry married her secretly in January, 1533. Mackie, op. cit., at 357 speaks of the Act's being hurried through because of the pregnancy but this is impossible because of the timing. It seems likely that the divorce hearing was dependent on Cranmer's consecration to the archbishopric of Canterbury which was not until 1533.
- (3) 23 Henry VIII, c.20. See similarly, 13 Richard II, s.2, c.3. and 16 Richard II, c.5. Provision was also made for the consecration of any bishop or archbishop, the lack of any papal bulls, etc. notwithstanding.

and this was backed by the threat of -

"the same pains, penalties, and forfeitures, ordained and provided by the statute of Provision and Praemunire"⁽¹⁾.

Moreover, the restrictions placed on appeals in the causes specified (supra) was the first great step towards creating a national ecclesiastical law⁽²⁾. Yet none of this need be regarded as a fusion between the spiritual and temporal jurisdictions: "the body spiritual" was still seen as having cognizance of "any cause of the divine law" and "the temporality" as having cognizance of "the laws temporal", although -

"both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other"⁽³⁾.

(1) Ss. 2 + 4.

(2) It seems best to restrict the term "ecclesiastical law" to post-Reformation Church law. Although the term "canon law" may with perfect propriety be applied to English ecclesiastical law (see e.g., E. Garth Moore, An Introduction to English Canon Law) it seems best to restrict its use to pre-Reformation Church law and the law of the Church of Rome (see Halsbury, op. cit., at 11). To call modern ecclesiastical law "the canon law" helps to perpetuate the unfortunate and erroneous belief that the late revision of the canons of the Church of England has completely revised the ecclesiastical law instead of a very small portion of it.

(3) S.1. See Bracton, De Legibus, f.107(a): "Sunt enim causae spirituales, in quibus iudex saeculares non habet cognitionem nec executionem, cum non habeat coercionem. In hiis enim causis pertinet cognitio ad iudices ecclesiasticos, qui regunt et defendunt sacerdotium. Sunt autem causae saeculares, quarum cognitio pertinet ad reges et principes, qui defendunt regnum, et de quibus iudices ecclesiastici se intromittere non debent, cum eorum iura sive iurisdictiones limitatae sint et separatae; nisi ita sit, quod gladius iuvare debeat gladium."

Nonetheless the seeds sown by Standish were beginning to send forth shoots. Section 1 of the Act describes the King as being -

"institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice, and final determination to all manner of folk, residents, or subjects within this his realm, in all causes, matters, debates, and contentions, happening to occur, insurge, or begin within the limits thereof ..."(1).

Even though this was not in itself incompatible with the division of powers already referred to, there is a foreshadowing of the statute 25 Henry VIII, c.19, entitled "The Submission of the Clergy, and Restraint of Appeals," when any appeal to Rome (and thus in denial of this God-given prerogative of the King) was to be punished with the pains of the Statute of Provision and

Praemunire -

"made ... against such as attempt, procure, or make provision to the see of Rome, or elsewhere, for any thing or things, to the derogation, or contrary to the prerogative or jurisdiction of the crown and dignity of this realm"(2).

Although the Statute of Praemunire⁽³⁾ itself spoke of -

"divers processes ... made by the Bishop of Rome ... to the disherison of the Crown, and destruction of our ... Lord the King, his Law and all his Realm"(4)

and also of papal actions "clearly against the King's Crown and his Regality," it remained to the Henrician statutes to spell this out in terms of that which was -

"contrariant or repugnant to the King's prerogative royal,

(1) S.1.

(2) S.4. See also 25 Henry VIII, c.14, s.1.

(3) 16 Richard II, c.5.

(4) S.1.

or the customs, laws, or statutes of this realm"⁽¹⁾.

The issue of ecclesiastical statutes became a spate in 1533: the divorce had gone through and Thomas Cromwell (openly acknowledged the King's chief minister) was "free to elaborate a new legal relationship between Church and state"⁽²⁾. The year began fairly easily, however, with an act for the uniting of an Irish parsonage and the Priory of St. Peter's by Trymme and an Act for the Punishment of the Vice of Buggery⁽³⁾. The latter Act, however, is not without interest. It enacted that buggery and sodomy -

"be from henceforth adjudged felony, and such order and form of process therein to be used against the offenders, as in the cases of felony at the common-law."

Such offences were normally within the Church's jurisdiction pro salute animae and Sir Edward Coke stated⁽⁴⁾ that more anciently the crime had been regarded as treason against the King of Heaven and the King terrestrial and went on to cite Leviticus and I Corinthians as authorities⁽⁵⁾. In the reign of Charles I, however, a prohibition was prayed in Higgon v. Coppinger⁽⁶⁾ against the spiritual court in which a case of defamation relating to buggery was depending. The court granted the prohibition on the grounds that the offence was one of felony by 25 Henry VIII, c.6. and that, as there was no saving of the spiritual jurisdiction in the Act, the spiritual court could have no cognizance either of

(1) 25 Henry VIII, c.19.,s.2.

(2) Dickens, op. cit., at 118.

(3) 25 Henry VIII, c.2(Ir.) and 25 Henry VIII, c.6.

(4) 12 Co. Rep. 36, citing The Mirror of Justice vouched in Plowden's Commentaries in Fogosse's Case.

(5) Ibid at 37. Punishment for such offences differed: see Russell on Crime, 12th ed., vol. I at 735.

(6) Jones (Sir. W.) 350.

the Buggery or the defamation. Similarly in 1886 in In the Matter of A.B., Clerk⁽¹⁾ the Chancery Court of York refused to accept letters of request under the Church Discipline Act, 1840, alleging sodomy on the grounds that so grave a charge ought not to be investigated by an ecclesiastical court until the accused had been tried and convicted by a criminal court of competent jurisdiction. This was to some extent, however, dependent on the framing of the suit as in Burder v. ----⁽²⁾ it was decided by the Court of Arches that a suit against a clergyman for the purposes of deprivation or suspension by reason of a public scandal existing against him could be determined by an ecclesiastical court although the scandal originated from a charge which, if true, would constitute a criminal offence cognizable solely in a common law court. On the other hand, it was pointed out by Lord Penzance in the Court of Arches in Borough v. Collins⁽³⁾ that if the suit had been framed -

"in the ordinary way, invoking the censures of the Church pro salute animae as a punishment for definite offences" the articles would not have been admitted. It seems, therefore, that by the statute 25 Henry VIII, c.6. the ecclesiastical courts were deprived of their jurisdiction over the offences of buggery and sodomy even as regards such offences committed by the clergy.

One of the most striking aspects of the English Reformation is the contrast between the emancipation (if it may so be called) of the ecclesiastical law from the jus commune and Henry VIII's concern for the protection of religion. In 1533 this may be seen in two ways: in an Act entitled "an Act limiting what number of Sheep Men shall keep" the clergy were particularly exempted from

(1) (1886) 11 P.D. 56.

(2) (1844) 3 Curteis 822.

(3) (1890) 15 P.D. 81.

its provisions⁽¹⁾; more especially, in an Act for Punishment of Heresie⁽²⁾ the duty of sheriffs and others in regard to heresy were more exactly defined. This statute is important in that s.1 refers to the fact that -

"also there be many Heresies ... declared and ordained in and by the Canonical Sanctions, and by the Laws and Ordinances made by the Popes and Bishops of Rome, and by their Authorities, for holding, doing, preaching, or speaking of things contrary to the said Canonical Sanctions, Laws, and Ordinances, which be but human, being meer repugnant and contrarious to the Prerogative of your Imperial Crown, Regal Jurisdiction, Laws, Statutes, and Ordinances of this your Realm."

This doctrine was to be implemented particularly in the statute 25 Henry VIII, c.19. entitled "The Submission of the Clergy, and Restraint of Appeals."

In 1533 the Convocation's submission was given statutory recognition⁽³⁾ by 25 Henry VIII, c.19. which set forth that those "humble and obedient subjects, the clergy of the realm"⁽⁴⁾ had acknowledged that Convocation "ought to be assembled only by the royal writ"; that they would not enact any canons or constitutions in Convocation without the King's "assent and licence"; and that all the "constitutions, ordinances, and canons provincial or

(1) 25 Henry VIII, c.13, s.16.

(2) 25 Henry VIII, c.14.

(3) See the special prayer of Convocation which is never to be omitted which states, inter alia - "We who according to the order of our Holy Reformation have deliberately and with good reason renounced the errors, corruptions, and superstitions, as well as the Papal tyrrany which once prevailed." Quoted in Halsbury, op. cit., at 71, note (j).

(4) S.1.

synodal" should be reviewed by royal commission⁽¹⁾. Those constitutions and ordinances determined worthy to be abrogated and annulled should be abolished, whereas all those "approved to stand with the laws of God, and consonant to the laws of this realm" should remain in force "the King's most royal assent first had and obtained to the same." The statute went on to enact⁽¹⁾ -

"according to the said submission and petition of the said clergy, that they ne any of them from henceforth shall presume to attempt, alledge, claim, or put in ure any constitutions or ordinances provincial or synodal, or any other canons; nor shall enact, promulge, or execute, any such canons, constitutions, or ordinances provincial or synodal ... in their convocations in time coming. (which always shall be assembled by authority of the King's writ,) unless the same clergy may have the King's most royal assent and licence ..."

It should be noted that the effect of the above-quoted section was purely in the future; its scope, however, is not completely clear. In the historical recital only those -

"canons, constitutions, ordinance provincial, or other, or by whatsoever name they shall be called, in convocation"⁽²⁾ were stated to need the royal licence; no mention was made either of legatine or episcopal constitutions. Of course there was no likelihood of any new legatine constitutions but episcopal legislation still remained. A.J. Stephens in his collection of ecclesiastical statutes in a note appended to the word "constitutions" refers to the powers of archbishops and bishops "in their provincial synods before the making of this statute"⁽²⁾ and quotes

(1) Ibid.

(2) Emphasis supplied.

Lyndwood as saying⁽¹⁾:

"Possunt ... Archiepiscopi et Episcopi constitutiones facere
Juris communis declaratorias et revocatorias, et ubi poena
deficit in jure, possunt poenas apponere, et veterem poenam
augere. Possunt etiam constitutionibus Papalibus addere, et
eas supplere, et ad correctionem morum statuta facere prae-
ceptoria, prohibitoria, et poenalia, dum tamen jus commune
non subvertant"

Indeed the importance of this diocesan legislation was very great as can be seen from the most superficial glance at any collection containing synodalia and episcopal constitutions⁽²⁾. If the words "in convocation" referred merely to a provincial Convocation, it might be argued that synodal legislation was left unaffected⁽³⁾. It seems, however, that "convocation" should not be read in this restricted sense⁽⁴⁾ but as referring to any convention of the clergy, hence including any diocesan synod; this certainly seems to be Burn's view in his treatise on Ecclesiastical Law where he says that diocesan synods -

"were not wholly laid aside, till by the act of submission, 25 H.8.c.19 it was made unlawful for any synod to meet, but by royal authority."⁽⁵⁾.

(1) Op. cit., at 70. gl. ad v. juramento.

(2) See, for example, II Councils and Synods.

(3) "... si constitutio Synodalis liget Subditos Statuentis, ita qd non liceat contravenire determinatis in Synodo Episcopali; multo fortius hoc erit dicendum quoad decisa et determinata in Synodo Provinciali:" Lyndwood, op. cit. at 298, gl. ad v. synodalibus.

(4) R. Burn, Ecclesiastical Law, 2nd ed., vol. II at 18. Section 2, however, speaks of such canons made by the authority of "THE convocation" (emphasis supplied).

(5) Ibid, vol. III, at 364.

Moreover, the word "synodal" would thus be in contrast to the word "provincial"⁽¹⁾, This interpretation is not unquestionable, however. Ayliffe, writing in 1726, still stated concerning bishops that -

"in their Diocesses, they do constitute and make Episcopal Synods ... But sometimes an Assembly made by a Bishop, is called an Episcopal Council: And a Bishop in such Assembly or Council being within his Diocess, may make a Decree or Canon, which shall oblige all those, that are subject to his Jurisdiction; and such a Decree is stiled an Episcopal Canon."⁽²⁾

Section 1 (3) of the Synodical Government Measure, 1969, it may be argued, is perfectly consonant with such an interpretation of the Act of Submission; it is highly unlikely, however, that such a consideration was in the mind of the drafters of the Measure who probably assumed that the only form of legislation in question were canons of Convocations and hence, in the future, of the General Synod. Even if it could be argued that episcopal constitutions might be made without the concurrence of a diocesan synod⁽³⁾, such legislation would never have received the sanction of the common law judges in Middleton v. Crofts⁽⁴⁾. The effect of s.1 of the Act of Submission was thus extremely far reaching. E.W. Kemp has argued in his book Counsel and Consent that -

"it would have been possible to argue that the submission of 1532 had placed the clergy in Convocation under the Crown but not under Parliament ...

This balance of powers was upset in 1534 when the

(1) Phillimore, op. cit., at 949 defines synodals as "Constitutions made in provincial or diocesan synods, and published in parish churches."

(2) at 124.

(3) See II Councils and Synods, vol. I, at 616-617.

(4) (1736) 2 Atkins 650. Lord Hardwicke based his argument at 655-656 on the question of representation.

Submission was embodied in an Act of Parliament"⁽¹⁾. In particular he bases this view on the proviso in s.2 that future canons should not be contrary or repugnant, inter alia, to the statutes of the realm. This seems, however, to be too narrow a view; the Act merely spelt out a position which already tacitly existed, that is to say, that parliamentary statutes were supreme in the realm of legislation⁽²⁾. Yet the actual effect of s.1 was to leave Parliament not only supreme but also virtually the sole legislator⁽³⁾. This resulted, however, not so much from Parliament's supremacy but from the fact that the grant of royal assent to canons was not to be the formality which it has become in the case of Parliamentary statutes⁽⁴⁾. As a result Acts of Convocation have no legal effect unless they receive the royal assent. For example, those Acts⁽⁵⁾ dealing with the ministry of women have no other than "moral authority"⁽⁶⁾. Resolution 6 of the

(1) at 157.

(2) See, e.g., 24 Henry VIII, c.12.

(3) "The revision of the canon law has brought home to some churchmen, including the present writer, the stranglehold upon the life of the Church possessed by the House of Commons in virtue of two things, the Act of Submission of the Clergy and the Act of Uniformity to which the Prayer Book is attached".

Kemp, op. cit., at 203.

(4) Ibid at 190.

(5) Acts of the Convocations of Canterbury and York, ed. by A.F. Smethurst and H.R. Wilson, S.P.C.K. (1961) at 49 et seq. and 148 et seq..

(6) Kemp, op. cit., at 201.

regulations on the Status and Functions of Deaconesses states⁽¹⁾ -

"That in any Canon or regulation concerning the ordination of deaconesses it should be enacted -

(1) that the same requirements regarding Letters Testimonial and Si quis shall be fulfilled as in the case of an ordination of a deacon ..."

But this use of the subjunctive does not continue throughout: resolution 7, for example, states⁽²⁾:

"That the functions of the deaconess shall include the following and may be exercised in churches ... approved by the bishop on the invitation of the minister thereof -

(1) in case of need, to read the Services of Morning and Evening Prayer and the Litany ..."

The legal status of a deaconess, however, is neither greater nor smaller than the legal status of any other woman in the Church of England. Nor is this altered by the 1969 Canons which specifically indicate that deaconesses "may accept membership of any lay assembly of the Church of England"⁽³⁾. They are not in holy orders and therefore are not bound by the canons proprio vigore but only by consensual agreement. Yet this consensual agreement would not be sufficient to bring them within the disciplinary provisions of the Ecclesiastical Jurisdiction Measure, 1963, as s.17 confines its application to "bishops, priests and deacons." On the other hand a bishop would be bound by the provisions of D3(3). This anomalous position is the result of the Act of

(1) Emphasis supplied.

(2) The words emphasised are in the Canterbury resolution only.

It might be argued that resolution 7, at least in the Canterbury resolution, does no more than state the duty of any layman.

(3) D. 1.(4). It is true, however, that D 1 (3) alters by "lawful authority" (see B.1) the rubrics of the Book of Common Prayer.

Submission of the Clergy in 1533.

Section 2 of the Act, moreover, gives the King power to nominate sixteen clergy and sixteen laymen of either House of Parliament -

"to view, search, and examine the ... canons, constitutions, and ordinances provincial and synodal heretofore made".

Those canons not approved were to be thenceforth "void and of none effect, and never be put in execution within this realm", whereas those "worthy to be continued, kept and obeyed" were to be

"thenceforth kept, obeyed and executed within this realm, so that the King's most royal assent under his great seal be first had to the same."

Furthermore, the section continues:

"Provided alway, that no canons, constitutions, or ordinances shall be made or put in execution within this realm by authority of the convocation of the clergy, which shall be contrariant or repugnant to the King's prerogative royal, or the customs, laws, or statutes of this realm; any thing contained in this act to the contrary hereof notwithstanding."

It may be questioned whether or not this proviso was intended to relate to all canons, etc. past and future or whether it was, rather, a guide line for the royal commission. On the one hand the proviso is contained in s.2 immediately after the work of the royal commission while on the other it may be argued that, when the proviso speaks of canons that "shall be made or put in execution", it must apply equally to both the royal commission and all future enactments. Nevertheless, it must be noted that only canons, etc. "made or put in execution ... by the authority of the convocation"⁽¹⁾ are so restricted: thus it does not apply either to the jus commune as a whole nor, possibly, to legislation other than that enacted by Convocation in its restricted sense.

(1) Emphasis supplied.

However, even though no royal commission was appointed under this statute⁽¹⁾, s.7 provided a saving clause as to the law still in force.

Section 7 is of great importance for the study of ecclesiastical law. Blackstone went so far as to state that the authority of the canon law in England depended on this statute⁽²⁾ but this is an overstatement. Section 7 states as follows :

"Provided also, that such canons, constitutions, ordinances, and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said two and thirty persons, or the more part of them, according to the tenor, form, and effect of this present act."

According to the printed statutes of the Realm⁽³⁾, this section was "inserted on a schedule annexed to the original Act" and the bill with this addition concludes with the note "à cette provision les Communes sont assentez." The proviso was in fact added as a result of the Bishop of Lincoln's condition made when giving his assent to the matter in Convocation⁽⁴⁾.

It should first be noted that the Act makes no mention at all of the jus commune⁽⁵⁾ as a whole but only of the "canons,

(1) For the best discussion of this question see Sir Lewis Dibdin, English Church Law and Divorce, chapter I.

(2) 1 Bl. Com. 83; so also H.C. Bell in J.V. Bullard and H.C. Bell Lyndwood's Provinciale at XLI.

(3) Vol. III at 461.

(4) Report of the Archbishop's Committee on Church and States, (1916) at 268.

(5) 37 Henry VIII, c.17, s.2 may be read as if it understood that the jus commune was included within the Act of Submission, s.7.

constitutions, ordinances, and synodals provincial". H.C. Bell has argued⁽¹⁾ that the effect of the section is -

"that the Canon Law as practised in England, so far as it did not run counter to the laws of the realm as they were in 1534, remains in force";

this argument is, however, based not so much on the actual wording of the section but on the view of J.V. Bullard, his co-editor of Lyndwood's Provinciale, that -

"Lyndwood was regarded as the law which should be enforced, during and after the Reformation until constitutionally altered. The proof is that Lyndwood was printed in English in 1534 - the year of the Act which provided the method of dealing with Canon Law in future and also gave Lyndwood, until altered, the force of Statute Law,"⁽²⁾.

In fact, however, the 1534 edition of the Provinciale was merely a translation of the canons collected by Lyndwood without the all important gloss; moreover, the statute was in 1533, not 1534.

Thus the 1534 edition cannot give proof of the proposition that

"It is to the Provinciale that the term "the old Canons" in the Act of Submission refers"⁽³⁾.

This is to put the cart before the horse. Rather, the 1534 edition gave (at the instance of Henry VIII)⁽⁴⁾ the text of those "canons, constitutions, ordinances, and synodals provincial"⁽⁵⁾ which the royal commission were to consider. Moreover, that these should in turn be considered as the whole of "the Canon Law as practised in England", is disproved by the omission of

(1) Op. cit., at XLI.

(2) Ibid at XXXI. See, too, 27 Henry VIII, c.20, s.4.

(3) Ibid at L.

(4) See preface to the 1534 edition.

(5) Emphasis supplied.

Lyndwood's glosses⁽¹⁾ in the 1534 edition.

Secondly, the canons, etc. were to "be used and executed as they were afore the making of this act." The learned editors of Halsbury comment that on this phrase -

"and from other authorities it seems clear that this Act simply continues the authority whatever it was which the canons already possessed (Read v. Bishop of Lincoln (1889), Roscoe's Rep. 1, at p. 17, per Archbishop BENSON). That is, pre-Reformation canons rest on the common law as recognised by statute"⁽²⁾.

However, the words "Still be used and executed as they were afore the making of this Act" seem to refer not so much to the efficacy of the canons as to the fact that they were to remain in force until the royal commission had reported. Certainly Archbishop Benson says no more than as follows:

"It is agreed ... that if the directions contained in ancient canons are ever so clear and definite, they still cannot determine any question of canonical or other law in England unless they have been received and put in use. There is, however, no doubt that in matters of faith and doctrine the decrees of the first four general councils have been so received, as declared in the statute law (25 Hen.8, c.13, s.37; 1 Eliz. c.1, s.36). Canons also therein made, when strictly applicable, and when not 'contrariant to the law of the church and realm,' have authority."

(1) To argue that the 1534 edition (without Lyndwood's gloss) equals the "old Canons" referred to in the 1533 statute and therefore that the "old Canons" equal the Provinciale (with gloss) and thus "the Canon Law as practised in England" is surely impossible.

(2) Op. cit. at 9, note (i). (cp) Sir Edward Coke in Caudrey's Case, 5 Co. Rep. 1a at 8a.

Presupposing that the reference to "25 Hen. 8, c.13, s.37" is a misprint for 25 Henry VIII, c.19, s.7⁽¹⁾ and setting aside the fact that there is no statutory authority at least for any limitation on canons "contrariant to the law of the Church"⁽²⁾, it still remains that (a), if the archbishop intended to rest the authority of the canons on the common law, this was based on a reception theory which must now be accepted as disproved; and (b), if s.2 of the Act was limited to provincial canons, etc., s.7 was also so limited and thus left unaffected the authority of the first four general councils. What then is the authority of those canons affected by s.7? Should s.7 be seen as merely declaratory of the pre-Reformation position or does the section itself give statutory authority to those canons⁽³⁾? This distinction is not an idle one as it affects the interpretation and

(1) In arguendo Sir W. Phillimore and Jeune, Q.C. (A.B. Kempe with them) had argued that "The authorities for the statement that they (the canons of the first four general councils) have been recognised by Parliament are 25 Hen. 8, c.XIX. s.7; 1 Eliz. c.1, s.36".

(2) 25 Henry VIII, c.19, s.1, and 27 Henry VIII, c.15. s.1 both speak of canons "approved to stand with the laws of God, and consonant to the laws of this realm..."

(3) Stephens, op. cit. at 153, note (1) states that "this clause adds a parliamentary authority or enactment to all our own canons and constitutions, which are not repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal."

scope of 35 Henry VIII, c.16⁽¹⁾. Moreover, if s.7 is merely declaratory, should it be interpreted in the light of the true historical position of the canon law, as is compatible with the section's literal meaning, or in the light of the reception theory which may have influenced the legislature's intention?

Thirdly, the canons were not "viewed, searched, or otherwise ordered and determined" by a royal commission⁽²⁾ and the canons, constitutions, ordinances, and synodals provincial thus continued in force by authority of s.7.

The statute 25 Henry VIII, c.19, however, was not confined to the question of legislation. The Act for the Restraint of Appeals, 1532, had taken away the right of appeal to the Pope in testamentary and matrimonial causes, as well as rights of tithes, oblations and obventions. Now all appeals "of what nature, condition, or quality soever they be of" were to be restricted to England and the appellate machinery was to be the same as in the 1532 Act⁽³⁾. A further court of appeal was created in addition to hear appeals from the archbishops' courts⁽⁴⁾; this High Court of

(1) This statute includes within its scope the laws ecclesiastical as well as the canons, etc.. The question therefore arises as to the authority given to such parts of the ecclesiastical law as relate to obsolescence and custom contra legem : can these rules now be regarded as having statutory authority and as such affecting ecclesiastical statutes? If their authority rests on the common law what is their scope? Or are these rules contrary to the common law and therefore void?

(2) See Dibdin, op. cit., on the question of the commissions under this and the later Acts.

(3) S.3.

(4) S.4. In Saul v. Wilson, 2.Vern. 118 the court observed "That there lies no appeal to the house of Lords from a sentence in the Delegates ... for they cannot have any original jurisdiction, because these matters are grounded upon acts of parliament, and the acts give them none."

Delegates remained the final court of appeal in ecclesiastical causes until its powers were transferred to the Judicial Committee of the Privy Council⁽¹⁾. Yet, although this court's judgment was to be -

"definitive, and no further appeals (were) to be had or made from the said commissioners for the same"⁽²⁾,

the King could still grant a commission of review because (a) he was not restrained from so doing by the statute, and (b) the Pope, as supreme head of the Church, used to grant a commission ad revidendum and such authority as pertained to the Pope as supreme head was annexed to the Crown by the statutes 26 Henry VIII, c.1. and 1 Elizabeth, c.1.⁽³⁾ By s.5 all those suing appeals to the Pope were to incur the penalties of praemunire and by s.6 all appeals from exempt places which had previously lain directly to the Pope were to lie to the Court of Delegates.

The next Act of 1533 was the Act for the Non-payment of First-fruits to the Bishop of Rome⁽⁴⁾. After having recited the Act concerning Restraint of Payment of Annates to the See of Rome⁽⁵⁾ it stated that -

(1) 2 + 3 William IV, c.92; 3 + 4 William IV, c.41; 6 + 7 Victoria, c.38. The Court of Delegates was so called because the judges in it sat by virtue of the King's Commission under the Great Seal: s.4.

(2) S.4.

(3) Goodman's Case, Dyer 273; Haver v. Thorol, Litt. 232. No appeals lay from the Court of High Commission because the commissioners were themselves the King's delegates: 4 Co. Inst. 340.

(4) 25 Henry VIII, c.20.

(5) 23 Henry VIII, c.20.

"albeit the said Bishop of Rome, otherwise called the Pope, hath been informed and certified of the effectual contents of the said act, to the intent that by some gentle ways the said exactions might have been redressed and reformed, yet nevertheless the said Bishop of Rome hitherto hath made none answer of his mind therein to the King's highness, nor devised nor required any reasonable ways to and with our said sovereign lord for the same";

as a result, 2 continues, the King assented to the Act and "ratified and confirmed the same". The Act then went on to make provision for the election, presentation, investment and consecration of bishops and archbishops without reference to the see of Rome⁽¹⁾. This apart, the most particular innovation of the Act is the enactment by s.4 that an election is to be in accordance "with a letter missive, containing the name of the person" to be elected.

The old licence to elect called the licentia nostra fundatoria merely contained the limitation⁽²⁾:

Rogantes, ac in fide et dilectione quibus nobis tenemini praecipientes quod talem vobis eligatis in episcopum et pastorem, qui Deo devotus, nobisque et regno nostro utilis et fidelis existat."

From Easter 1533, however, an election is limited to the King's nominee:

" ... (T)he said dean and chapter, or prior and convent, to whom any such licence and letters missive shall be directed, shall with all speed and celerity in due form elect and choose the same person named in the said letters missive, to

(1) S.3.

(2) Quoted in Stephens, op. cit., at 155, note (2).

the dignity and office of the archbishoprick or bishoprick so being void ..."(1).

This then was a great inroad into the canon law; a similar inroad but of much less consequence was the enactment by s.4 that the nomination fell to the King after a default of twelve days⁽²⁾.

Moreover, any failure to comply with any of the statute's enactments carried with it the now usual threat of "the dangers, pains, and penalties of the Estatute of the Provision and Praemunire"⁽³⁾.

This Act for the Non-payment of First-fruits to the Bishop of Rome, of course, was of particular significance for the temporal control of the Church of England. It is true that in practice the position was not radically changed but now royal control was directly enforced⁽⁴⁾. Of wider significance for the fusion of

(1) S.4. The letter missive reads: "We have been pleased by these our letters patent, to name, and recommend him unto you, to be elected and chosen."

(2) The rule of the canon law was three months and no election might be made until after the burial of the deceased bishop. Stephens, op. cit., at 155, note (7).

(3) S.7.

(4) See, for example, Stephen Neil, Anglicanism, at 17 and 40-41.

In 1173 Henry II had written to the monks having election of the see of Winchester: "Henry, King of the English etc. to his faithful monks of the Church of Winchester, greeting. I order you to hold a free election, but, nevertheless, I forbid you to elect anyone except Richard my clerk, the Archdeacon of Poitiers." On the lay investiture struggle in general the best and most concise account is Z.N. Brooke, Lay Investiture and Its Relation to the Conflict of Empire and Papacy. Proceedings of the British Academy, vol. 25, reprinted in Problems In European Civilization series in The Gregorian Epoch, ed. by S. Williams.

the canon law and the common law was the wording of s.6:

"And be it further enacted . . . , that every person and persons being hereafter chosen, elected, nominate, presented and consecrated to the dignity or office of any archbishop or bishop within this realm . . . shall have and take their only restitution out of the King's hands of all the possessions and profits, spiritual and temporal, belonging to the said archbishoprick or bishoprick . . . and shall . . . do and execute in every thing and things touching the same, as any archbishop or bishop of this realm, without offending the prerogative royal of the crown, and the laws and customs of this realm, might at any time heretofore do"⁽¹⁾.

The Act embodying the Submission of the Clergy - the statute immediately prior to the Act for the Non-payment of First-fruits in the statute book - had made the efficacy of all canons, etc. dependant on their compatibility with the royal prerogative and the laws, statutes and customs of the realm. That is to say, the common law received priority over the past provincial legislation and all future ecclesiastical legislation - but this priority had been limited to the field of legislation, a field in which the statutes of the common law (as interpreted by the common law courts) were already supreme. Now by s.6 of 25 Henry VIII, c.20, this priority was extended outside the field of legislation, if only to the narrow ambit of the canon law concerning episcopal "possessions and profits, spiritual and temporal." This was a small but significant step towards the fusion of the common law and ecclesiastical law. The wedge of the common law had already been driven into canonical legislation; now that wedge was being driven into the field of the general canon law. Standish's theory was now being applied with a vengeance.

At this stage it is difficult to know exactly how Parliament

(1) Emphasis supplied.

stood in relation to Church law. It has already been seen how Standish put forward his novel theory of reception of the canon law in England and how this could so easily be seen as explaining the relationship between the secular and spiritual courts. It has also been seen how the "primacy" of the common law, implicit in Standish's theory, began to receive legislative implementation. The fact that this primacy was a novel one may perhaps be recognised in the need felt by parliament to make it explicit: see, for example, the proviso in s.7 of the Act entitled The Submission of the Clergy. That this was a conscious policy may perhaps be argued from the gentle erosion of the canon law by statute culminating in 35 Henry VIII, c.16. Yet it should always be borne in mind that this erosion may also be seen as an explicit statement of a position already regarded as de jure by Tudor national consciousness: a statement demanded by previous papal "encroachments"⁽¹⁾.

This latter view seems to be embodied in the Act concerning Peter-pence and Dispensations⁽²⁾. Section 1 (which is in fact a long preamble) recites the impoverishment and decay of the realm due to papal exactions which had been -

"heretofore practised and obtained, otherwise than by the laws, laudable uses, and customs of this realm should be permitted ..."

The section continues, however:

"(F)or where this your grace's realm, recognising no

(1) Perhaps the truth lies somewhere between these two poles.

Some may have seen it as an encroachment of the common law, some as a reassertion of common law rights. Perhaps, too the march of the statutory erosion had its own inexorable logic unforeseen by those first implementing it.

(2) 25 Henry VIII, c.21. It should be noted that these three critical statutes follow each other in the statute book.

superiority under God, but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made and obtained within this realm, for the wealth of the same, or to such other as by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent to be used against them, and have bound themselves by long use and custom to the observance and the same, not as to the observance of laws of any foreign prince, potentate, or prelate, but as to the customed and ancient laws of the same, by the said sufferance, consents, and custom, and none otherwise ..."

This would seem to imply that the papal exaction, which on the face of things would have been contrary to the common law, were in point of fact given express sanction by the common law ("the customed and ancient laws of the same"); certainly the Reformation Parliament seemed to see them as legally binding obligations. The editors of Halsbury state that the rule that -

"the statutes of Henry VIII do not set up any canon not consistent with common law rights (Bishop of Exeter v. Marshall (1868), L.R.3 H.L.17, at p.41, per Willes, J.) extends to pre-Reformation canon law received and allowed in England, not merely to provincial canons, appears from the preamble to the Ecclesiastical Licences Act, 1533 (25 Hen. 8 c.21); Bishop of Exeter v. Marshall, supra; and Burder v. Mavor (1848), 6 Notes of Cases 1".⁽¹⁾

It is difficult, however, to see the preamble of 25 Henry VIII, c.21 as legislative, rather than as declaratory of legislative presuppositions. Furthermore, the statute is used in Bishop of Exeter v. Marshall by Blackburn, J.⁽²⁾ as an authority for the

(1) Op. cit., at 9, note (i).

(2) (1868), L.R. 3 H.L.17 at 35, quoting Lord Hardwicke in Middleton v. Crofts (1736), 2 Atkins 650 at 669.

proposition that -

"such canons and constitutions ecclesiastical as have been allowed by general custom and consent within the realm, and are not contrary or repugnant to the laws, statutes, and customs thereof, nor to the damage or hurt of the King's prerogative, are still in force within this realm as the King's ecclesiastical law of the same;"

that is, there is no mention of the general canon law but only of the canons and constitutions ecclesiastical. If Halsbury intends the above rule as a restriction on the scope of the canon law, the authorities cited do not give it justification. It might, on the other hand, be argued that the preamble is an authority for the rule that the common law, by long use and custom, had embraced all the canon law as received: that is to say, by the time of the Reformation there was no part of the canon law enforced in England which could THEN be treated as contrary or repugnant to the common law. If this is the intention of Halsbury, it is indeed novel; it would, in fact, be a denial of those limitations placed on the canon law at the Reformation⁽¹⁾ (see, however, s.15 infra). It is submitted that the preamble to 25 Henry VIII, c.21 is best regarded purely as a historical document reflecting the presuppositions of Reformation legislation rather than as giving legislative efficacy to the views there expressed.

The real importance of the statute was in removing dispensations from papal jurisdiction and placing their disposition in the hands of the Archbishop of Canterbury⁽²⁾. This power was

(1) See, for example, quotation referred to in note (2) p.77 supra.

(2) S.3. By s.2 the statute forbade the payment of any "pensions, censes, portions, Peter-pence, or any other impositions" to Rome.

limited to the archbishop's discretion and it was especially enacted that no "licences, dispensations, compositions, faculties," etc. might be granted for causes "contrary or repugnant to the Holy Scripture and laws of God."⁽¹⁾ By s.4 the archbishop was authorised to grant all such licences as were -

"accustomed to be had at the see of Rome, or by the authority thereof, or of any prelate of this realm."

Moreover, he might grant any licence not so accustomed to be had with the consent of the King, his heirs and successors or of the royal council⁽²⁾. Section 6 demanded the confirmation of any dispensation costing more than £4 at Rome to be confirmed by the Lord Chancellor and enrolled in the royal chancery. In fact the most important limitation placed on the grant of dispensations - a limitation upon which Sir Edward Coke failed to comment⁽¹⁾ - was the rule that they should only be granted "in causes of necessity"⁽³⁾. Furthermore, s.15 states:

(1) For example, Lord Chief Baron Tanfield included under this head all marriages within the prohibited degrees: Colt and Glover v. Bishop of Coventry and Lichfield, Hobart 140 at 148. See, further, 25 Henry VIII, c.22, s.3. In this case Coke lists at 148 four heads limiting the archbishop's power: (I) nothing was to be repugnant to the law of Almighty God; (II) nothing should be against the statute 21 Henry VIII, c.13; (III) nothing should be done against the King's prerogative or Laws and Statutes of the Realm in general; (IV) By s.3 only those "convenient and necessary upon Examination of the Causes and qualities of the Persons.". Coke, however, admits that (III) is to be "inferred ... from the Disposition of the Times, and upon this Law it-self."

(2) S.5.

(3) S.3. The section also speaks of those licences "necessary for your highness .. people and subjects." This limitation is implicit in the wording of s.3.

"Provided always, that this act shall not be prejudicial to the Archbishop of York, or to any bishop or prelate of this realm; but that they may lawfully (notwithstanding this act,) dispense in all cases in which they were wont to dispense by the common law or custom of this realm afore the making of this act."

The question arises as to the meaning of the words "by the common law or custom of this realm". The canonists were divided as to the bishop's powers of dispensing but in point of fact the Act makes no explicit reference to the canon law; it is most unlikely that the words mean "by the jus commune or local canonical variation of this realm." It is true that later cases held that the King had a dispensing power derived from the common law⁽¹⁾ but it is not at all clear that the bishops had any dispensing power at the common law. These words seem to be an embodiment of the view already discussed that by long use and custom the common law had embraced the canon law as received. If this is correct, the words refer implicitly to the bishop's dispensing powers at the canon law.

Apart from the machinery set up by the Act for the administration of the archbishop's dispensing power and transitional provisions, the Act also made provision by s.20 for the visitation of all exempt monasteries, colleges, hospitals, etc. by royal commission and not by the Archbishop of Canterbury. Here, indeed, was a foretaste of things to come. The same section enacted that

(1) It should also be noted that in spite of the wording of s.3 - "and none otherwise" - it was held that the King retained his dispensing powers at the common law: see Colt v. Bishop of Coventry and Lichfield, Hobart 140 at 146; Armiger v. Holland, Cro. Eliz. 542 and 601 (also see Moore (Sir F.) 542; the case is reported further in 4 Co. Rep. 75a at 75b); and Evans v. Ascuithe, Palmer 457.

no person -

"Shall from henceforth depart out of the King's dominions to or for any visitation, congregation, or assembly for religion, but that all such visitations, congregations, and assemblies, shall be within the King's dominions."

Thus no-one was to go from England to any general council of the Church.

Mention must also be made of Sir Edward Coke's opinion in Colt v. Bishop of Coventry and Lichfield (the Case of the Commendam)⁽¹⁾ that by the statute 25 Henry VIII, c.21 -

"nothing be done against the King's Prerogative or Laws and Statutes of the Realm in general, which is not in the statute totidem verbis,....., but is inferred plainly upon the Disposition of those Times, and upon this Law it self .."

He quotes as authority s.21 and the statutes 25 Henry VIII, c.14, s.1 and 25 Henry VIII, c.19,s.3. Section 21, however, merely states that the Act should not derogate from the statute 21 Henry VIII, c.13 concerning pluralities; indeed, it might well be argued against Coke that expressio unius est exclusio alterius.⁽²⁾ Moreover, the statute itself must be a reflection of "the Disposition of those Times" and, as has already been seen, its general tendency is of acceptance of the canon law within the common law rather than an acceptance of the canon law subject to the common law. Furthermore, it may be argued that 25 Henry VIII, c.14, s.1 recognised the need for express statutory enactment if the canon law was felt to be -

"meer repugnant and contrarious to the prerogative of ...
(the) Imperial Crown, regal Jurisdiction, Laws, Statutes

(1) Hobart 140 at 148.

(2) Garnett v. Bradley (1878) 3 App. Cas. 944.

and Ordinances of this ... Realm."

The same might also be argued concerning 25 Henry VIII, c.19, s.3 which restricted all appeals in ecclesiastical matters to England. It is true that dispensations may be included within the ecclesiastical laws "repugnant, contrariant or derogatory to the Laws or statutes of the Realm" or "to the prerogatives of the regal Crown" within the meaning of 35 Henry VIII, c.16, s.3 but, if so, they were probably only so limited in 1543. That is to say, until 1543 dispensations, at least with the concurrence of the King or his royal council, might in theory have been granted in ecclesiastical matters, perhaps even if embodied in a statute⁽¹⁾.

By an Act concerning the King's Succession⁽²⁾, s.3 those dispensations which are "repugnant to the law of Almighty God" were given some definition. When marriages within the prohibited degrees were declared to be "plainly prohibited and detested by the laws of God." Moreover, by s.13 of the Act all persons were to be sworn to perform the contents of the Act, that is, the enactments as to the King's succession: a refusal to make the oath was to be treated as misprision of high treason. The oath to be taken, however, was not laid down by the Act; it was, in fact, formulated on the last day of the session and was given statutory sanction in 26 Henry VIII, c.2. The tenor of the oath was that all subjects should swear to bear faith, truth and obedience to the King and the heirs of his body begotten of Queen

(1) It might even be argued that a dispensation from an ecclesiastical statute (other than 21 Henry VIII, c.13: see s.21 of 25 Henry VIII, c.21), not being a penal statute, would not be contrary to the common law : In re Penal Statutes, 7 Co. Rep. 36. It would, of course, be contrary to statute law and therefore within 35 Henry VIII, c.16, s.3.

(2) 25 Henry VIII, c.22.

Anne⁽¹⁾. According to Bishop Gibson one of the forms of this oath, in addition to the question of the succession, stated⁽²⁾:

"Quod confirmatum ratumque habemus, semperque perpetuo habituri sumus, quod praedictus rex noster Henricus est, caput ecclesiae Anglicanae. Item, quod episcopus Romanus, qui in suis bullis papae nomen usurpat et summi pontificis principatum sibi arrogat nihilo majoris neque auctoritatis aut jurisdictionis habendus sit, quam caeteri quivis episcopi in Anglia alibi in sua cujusque dioecesi. Item, quod unusquisque, in suis orationibus et comprecationibus de more faciendis, primum omnium regem, tanquam supremum caput ecclesiae Anglicanae, Deo et populi precibus commendabit."

The ground was thus laid for the first statute of the next session, the Act entitled "The King's Grace to be authorized Supreme Head"⁽³⁾.

Mention has already been made of the impleading of all the clergy in 1530 for praemunire and their pardon bought for £118,000 in 1531. The pardon was refused⁽⁴⁾, however, until Convocation had added to the form of the grant, after the words "Ecclesiae et cleri Anglicani," "Cujus Protector, et Supremum Caput is solus est ..." Convocation particularly wished to omit this clause but in their thirty-fourth session the King's commissioners informed them -

(1) 25 Henry VIII, c.22, s.1 had spoken of the Bishop of Rome who had "presumed in times past," to invest whom he willed "to inherit in other men's Kingdoms."

(2) Op. cit., at 26, note (c), quoting Bishop Burnet and the Journal of Convocation.

(3) 26 Henry VIII, c.1.

(4) Gibson, op. cit., at 28.

"quod Dominus Rex noluit admittere ullam qualificationem super eadem:"

again, in the next session the commissioners declared -

"Se non habere Commissionem de concludendo super Articulo Pardonationis et Exceptionis ejusdem, priusquam conclusum fuisset per Episcopos et Clerum, super dicto primo Articulo."

On February 11th, therefore, Convocation capitulated - but with an important saving clause:

"Ecclesiae et Cleri Anglicani, cujus singularem Protectorem unicum, et supremum Dominum, et, quantum per Christi Legem licet, etiam supremum Caput ipsius Majestatem recognoscimus."

It is to this that the Act of Supremacy referred when it recited that -

"the King's majesty justly and rightfully is and ought to be the supreme head of the church of England, and so is recognised by the clergy of this realm in their convocations ..."

The Convocation's saving clause, however, was not included when the statute enacted that -

"the King our sovereign lord, his heirs and successors, King's of this realm, shall be taken, accepted, and reputed the only supreme head in the earth of the church of England" although, presumably, the words "in earth" were intended to meet the Church's objections. Yet it was the spelling out of what this supremacy meant in practice that was of the greatest importance. It was enacted that the King -

"shall have and enjoy annexed and united to the imperial crown of this realm, as well the title and stile thereof, as all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of supreme head of the ... church belonging and appertaining; and that our said sovereign lord ... shall

have full power and authority from time to time to visit, repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses, offences, contempts, and enormities, whatsoever they be, which by any manner spiritual authority or jurisdiction ought or may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended, most to the pleasure of Almighty God, the increase of virtue in Christ's religion, and for the conservation of the peace, unity, and tranquillity of this realm, any usage, custom, foreign laws, foreign authority, prescription, or any other thing or things to be contrary hereof notwithstanding."

On the 15th January the King formally assumed his title of Supreme Head and on the 21st January Thomas Cromwell obtained a commission to act as the King's vicar-general in the exercise of this royal jurisdiction⁽¹⁾. Not until July 1535, however, did he begin his general visitation. It was in the course of this visitation that the study of the canon law was suppressed in the Universities of Oxford and Cambridge⁽²⁾. The effect of this was necessarily

(1) As in many other matters Wolsey's example was a precedent for the Crown: Mackie, op. cit. at 375-376. As Legatus a latere Wolsey was a special commissioner and only had power to act within that commission; the exact scope of his legatine powers have never been precisely ascertained: see Pollard, op. cit. at 171.

(2) Injunctions of 1535, Stat. Acad. Cantab. at 134: "Quare volumus ut deinceps nulla legatur palam at publice lectio per academiam vestram totam in jure canonico sive pontifico ..."

As far as Oxford is concerned Dr. Layton, a Cambridge man, reported in a letter to Cromwell (suppression of the Monasteries (Camdem Soc., 1843), vol. 26 at 70): "We have also, in the place of the canon lecture, joneded a civel lecture, to be

momentous: Maitland, for example, states that "the very life thread of the old learning" was thereby cut⁽¹⁾. Certainly the number of Doctors of Canon Law was drastically curtailed.

According to Archdeacon Hale -

"Not more than seven or eight persons ... graduated at Oxford in Canon Law, and that under the description of Doctors Utriusque Juris"⁽²⁾,

and he quotes A. Wood in Fasti Oxonienses (1536) to the effect that there -

"occurred not a third or fourth part of Bachelors of the Canon or Civil Law (esp. the former) as before."

Doctor's Commons, however, had been founded in 1511 and the continuation of the study of the canon law was thereby safeguarded. It is true that all members of Doctor's Commons had to be graduates in law (and, at least in 1832, Doctors of Laws in one of the English universities⁽³⁾) and they were therefore especially skilled in the Roman civil law. Yet as Fuller pointed out in 1655⁽⁴⁾, "the civilians kept canon law 'in commendam' with

rede in every colege, hale, and in." William Prynne in An Exact Chronological Vindication ... (London, 1666) went to some lengths to show that the teaching of the canon law was prohibited in 1234; in fact it was the Roman civil law that was so prohibited: see Flahiff, op. cit. at 265, note 21.

(1) Op. cit., at 92.

(2) Hale, Precedents and Proceedings in Criminal Causes at XXXV.

(3) Report of the Ecclesiastical Commissioners, 1832, quoted by Phillimore, op. cit., vol. II at 1218.

(4) History of the University of Cambridge (1840 ed.) at 225.

their own profession⁽¹⁾. The study of the canon law was thus greatly curtailed but was certainly not completely abrogated; Maitland in his quotation set out above goes too far. If this were not the case the writing of the Parergon Juris Canonici Anglicani by John Ayliffe in 1726 would have been an impossibility.

The Act of Supremacy received further confirmation from the statute 26 Henry VIII, c.3, the preamble of which recited that the King was -

"now recognized (as he always hath heretofore been) the only supreme head in earth, next and immediately under God, of the church of England."

By this Act, moreover, first fruits, the payment of which to Rome had been forbidden by 25 Henry VIII, c.20, were now made payable to the King and a yearly tenth of all spiritual livings was also given to him⁽²⁾. In return the King graciously waived the payment of a fifth of the grant by which the Convocation had obtained their pardon in 1531⁽³⁾. Later in the year a further Act was passed⁽⁴⁾ in which lessees were discharged from making

(1) "Civilian" thus became coterminous with "ecclesiastical lawyer" (see Heath v. Atworth 2 Dyer 240 b at 241 a) and "civil law" with "ecclesiastical law" (see, e.g., headnote to R. v. Bishop of St. David's, 3 Dyer 287 b).

(2) Ss. 2 + 9. On certain occasions prior to the Reformation the Pope granted to the Kings of England leave to receive the tenth part of all spiritual promotions for specified terms of years, especially to maintain and support the crusades.

(3) S.28. The payment of the grant was payable in even portions over a period of five years.

(4) 26 Henry VIII, c.17.

any payment for their lessors to the King by reason of the Act of First-fruits -

"any covenant, bargain, contract, bond, condition, clause of re-entry, or other thing heretofore made or concluded to the contrary thereof, in any wise notwithstanding" - an early forerunner of modern acts relating to landlord and tenant.

Although there were other Acts concerning ecclesiastical matters in 1534⁽¹⁾, the only one of general importance was the Suffragan Bishops Act⁽²⁾. By this Act provision was made for suffragans and their consecration as they did not fall within the scope of the Appointment of Bishops Act, 1533. However the only real alteration made in the canon law was the provision made by ss. 3 and 5 for their consecration by the relevant archbishop; by the canon law consecration was by the bishop⁽³⁾.

In 1535 the ecclesiastical legislation of parliament was not of a far reaching character. The statute 27 Henry VIII, c.8, made a necessary emendation to the Act of First-fruits by enacting that tenths were not payable in that year in which first-fruits were payable. The subject of the revision of the canons and constitutions was reverted to by 27 Henry VIII, c.15; this recited the Act of Submission, 1533, and, having referred to the King's failure to appoint a royal commission, gave the King authority to appoint one either before or after the dissolution of Parliament. The commission was given power to meet for the three years next after the dissolution. The proviso as to the

(1) 26 Henry VIII, c.12 (concerning Wales); 26 Henry VIII, c.13 (sanctuaries); 26 Henry VIII, c.15 (exactions "by spiritual men in the Archdeaconry of Richmond"); and 26 Henry VIII, c.18 (c.p., 21 Henry VIII, c.1).

(2) 26 Henry VIII, c.14.

(3) See Stephens, *op. cit.*, vol. I at 189, note (1).

continued efficacy of the canons was also included in the recital. By an Act limiting an order for Sanctuaries and Sanctuary Persons⁽¹⁾ the abuse of sanctuaries was regulated.

By the two next enactments of the Reformation Parliament the perennial problem of tithes was considered⁽²⁾:

"The rich generally pay little, and the poor husbandman bears the burden"⁽³⁾.

Yet it is a mistake to see parliament as merely anti-clerical: 27 Henry VIII, c.20 was entitled "For Tithes to be paid throughout this Realm" and referred to the fact that -

"divers numbers of evil-disposed persons ... have attempted to subtract and withhold ... great parts of their tithes and oblations ... due unto God and holy church; and, pursuing such their detestable enormities and injuries, have attempted in late time past to disobey, contemn, and despise the process, laws, and decrees of the ecclesiastical courts of this realm, in more temerous and large manner than before this time hath been seen ..."⁽⁴⁾.

If Parliament was prepared to legislate for the revision of the canons and constitutions the laws ecclesiastical were yet of force throughout the land. The Act in fact confirmed the payment of tithes -

"according to the ecclesiastical laws and ordinances of his (the King's) church of England, and after the laudable

(1) 27 Henry VIII, c.19.

(2) 27 Henry VIII, cc. 20 + 21.

(3) The Great Case of Tithes, 1657 (ed. of 1754) at 64. Thomas Hobbes was also to write in Leviathan: "of the maintenance of our Saviour and his Apostles, we read only that they had a purse (which was carried by Judas Iscariot)". Everyman ed., at 292.

(4) S.1.

usages and customs of the parish or other places where he (the subject of the King's realm) dwelleth or occupieth.."(1). The enforcement of the ordinary's sentence against any offender was, moreover, given the backing of the civil authorities(1); everyone, however, retained his -

"lawful action, demand, or prosecution, appeals, prohibitions, and all other their lawful defences and remedies in every such suit, according to the said ecclesiastical laws, and statutes of this realm"(2).

The Act was not to apply to the City of London(3) and was only to take effect from such time as it was ratified by the King and the royal commission to revise the canons. Section 4, however, referred to those -

"xxxii persons which his highness shall name and appoint for the making and establishing of such laws as his highness shall affirm and ratify, to be called the Ecclesiastical Laws of the Church of England"(4).

This is of particular importance as it suggests that by this time the Act of Submission, 1533, was seen as intended to reform the whole of the laws ecclesiastical and that this was the intention behind the statute 27 Henry VIII, c.15 (supra). By the statute 27 Henry VIII, c.21 provision was made for payment of tithes within the City of London.

Following these two Acts an Act for Punishment of Sturdy

(1) Ibid.

(2) S.3.

(3) S.2.

(4) The Reformatio Legum, De Decimis, c.2 referred for the law relating to tithes to 2 + 3 Edward VI, c.13. In R. v. Owen, 4 Burrow's Reports 2096, it was held that 2 + 3 Edward VI, c.13 continued 27 Henry VIII, c.20 in force.

Vagabonds⁽¹⁾ concerned itself with the proper keeping of church poor boxes whilst the statute 27 Henry VIII, c.28 gave all monasteries under the value of £200 per annum to the King⁽²⁾. The suppression of the monasteries had been called "the supreme example of the royal power"⁽³⁾ and as such is of importance; its particular importance in the realm of canon law, however, was that it affected the number of those who might otherwise have studied the canon law⁽⁴⁾.

In 1536 and 1537 a number of statutes applied the new reforms to Ireland⁽⁵⁾ and, although no commission of review

(1) 27 Henry VIII, c.25.

(2) In Earl of Lincoln v. Wood, 1 Brownlow 39 at 39 it was stated that "if the act for dissolution of monasteries had not given the lands to the King, the founders ought to have had them."

(3) Mackie, op. cit., at 378.

(4) See A. Wood in Fasti Oxonienses (1536) quoted by Hale, op. cit. at XXXV. Hale relates the fall in numbers solely to the abolition of lectures in canon law but it seems likely that Wood's opinion is correct to some extent. It was not until the close of the reign of Queen Elizabeth that Doctor's Commons became a body entirely composed of laymen: See Senior, Doctor's Commons and the Old Court of Admiralty at 76.

(5) See (eg) 28 Henry VIII, c.2 (Act of Succession); 28 Henry VIII c.5 (King to be Supreme Head); 28 Henry VIII, c.6 (Appeals); 28 Henry VIII, c.8 (First-fruits); 28 Henry VIII, c.13 (Act against the Authority of the Bishop of Rome); 28 Henry VIII, c. 16 (Suppression of Abbeys); 28 Henry VIII, c.17 (Act for the Twentieth Part); 28 Henry VIII, c.19 (Proof of Testaments); etc.

was set up, s.10 of the Act against the Authority of the Bishop of Rome⁽¹⁾ provided that, notwithstanding anything comprised in the Act itself -

"all and every archbishop, bishop, archdeacon, commissarie, and officiall, and every of them, shall and may use and exercise in the name of the King only all such canons, constitutions, ordinances and sinodalls provincial, being already made for the direction and order of spiritual and ecclesiastical causes, which be not contrariant nor repugnant to the King's lawes, statutes, and customes of this land, nor to the damage and hurt of the King's prerogative royal, in such manner and forme as they were used and executed before the making of this act, till such time as the King's highness shall order and determin according his lawes of England, and such order and determination as shall be requisite for the same ..."

As far as England was concerned the first statute of the session made the usual enactments relating to benefit of clergy⁽²⁾; similarly, 28 Henry VIII,c.6 continued the 1533 Act relating to buggery. An Act concerning the succession of the Crown⁽³⁾ repealed the two Acts issued after the King's marriage to Anne Boleyn and vested the succession in the issue of his marriage to Jane Seymour.

Moreover, an Act extinguishing the Authority of the Bishop of Rome⁽⁴⁾ was passed against those who were "in heart members of his (the Pope's) pretended monarchy." All those maintaining the Pope's authority were to incur the usual pains of the statute of Provision and Praemunire and provision was made for oaths to

(1) 28 Henry VIII,c.13. (Ir).

(2) 28 Henry VIII,c.1.

(3) 28 Henry VIII,c.7.

(4) 28 Henry VIII,c.10.

be taken by every temporal and ecclesiastical judge, minister and officer as well as by everyone suing livery, doing fealty or having office and by persons admitted into religious orders or promoted to a degree at any English university⁽¹⁾. By s.8 provision was made that nothing in the Act should -

"be in any wise prejudiciall, hurtfull, or derogatory to the ceremonies, uses, and other laudable and politicke ordinances, for a tranquillitie, discipline, concord, devotion, unitie, and decent order heretofore in the Church of England used, instituted, taken and accepted ..."

Thus, once again the laws ecclesiastical were confirmed, the Pope's previous authority apart⁽²⁾.

The statute 28 Henry VIII,c.11 made further regulation regarding first-fruits whilst 28 Henry VIII,c.13 regulated the question of non-residence. Finally, the statute 28 Henry VIII, c.16 made provision for all papal bulls and dispensations; these were all void and were never to be "used, admitted, allowed, pleaded or alledged"⁽³⁾. All former lawful marriages were confirmed as were all archbishops, bishops and other ecclesiastical persons and orders⁽⁴⁾. Papal bulls, breves or faculties might, however, be confirmed by the Lord Chancellor to the extent that they might have been granted by the Archbishop of Canterbury "by authority of the laws and statutes of this realm"⁽⁵⁾.

The Reformation Parliament ended on the 4th April 1536. In

(1) Ss. 5 + 6.

(2) The words "taken and accepted" cannot in themselves be taken as being anything other than a mere foreshadowing of 37 Henry VIII,c.16.

(3) S.2. See, (eg) Ethrington v. Archbishop of York, 2 Lev. 251.

(4) Ss. 3 + 4.

(5) S.6.

particular it had legislated for the King's supremacy and had followed this policy through to its logical conclusions by abrogating all papal power. In doing so, however, it in general made little change in the actual content of the jus commune except in so far as it was affected by the curtailment of papal authority. Certain reforms were indeed made but the most far reaching reform envisaged - that of the revisions of the canons and constitutions - was not implemented by the King. The Church's legislative power, on the other hand was seriously curtailed. The actual policy of the various statutes, however, seems to have fluctuated.

G.W.O. Woodward⁽¹⁾ has seen two divergent tendencies, for example, concerning the roles of Parliament and Convocation. The Act for the Restraint of Appeals, 1532,⁽²⁾ seems to envisage them as concurrent powers, each operating within its own sphere. Similarly the Act of Submission, 1533⁽³⁾, placed Convocation in a parallel position to Parliament in its relation to the King, yet in practice the royal control of Convocation was to prove much more rigorous. In 1536 the King, in his role of Supreme Head, curtailed the list of saints' days by the advice and consent of Convocation⁽⁴⁾. On the other hand the submission of the clergy was embodied in statutory form, presumably to give it greater validity, and statute law was obviously regarded as being able to curtail legislative enactments of Convocation which could not in future derogate from the common law, statute law or King's

(1) Schweizer Beiträge zur Allgemeinen Geschichte, Band 16 (1958) at 56 et seq..

(2) 24 Henry VIII, c.12.

(3) 25 Henry VIII, c.19.

(4) Under Henry VIII the feast of St. Thomas of Canterbury was abolished and the title "pope" erased from the appellation of various saints. Proctor and Frere, A New History of the Book of Common Prayer, at 334.

prerogative.

A similar ambivalence may also be seen more generally in Parliament's attitude towards the ecclesiastical law. As has been seen, the Act of Submission merely envisaged the revision of the canons and constitutions but it seems at least possible (to put the case no higher) that others saw this as relating to the revision of the whole ecclesiastical law. It is with this assumption, grounded as it was upon a conviction of the superiority of the common law, that the fusion of the common law and ecclesiastical law may really be seen to begin. Prior to the Reformation the two jurisdictions may be seen as acting concurrently, at least in theory; at the Reformation the statutory regulation of Church life may be seen as a take over of the ecclesiastical jurisdiction. Real fusion of the two jurisdictions only commenced, however, when the canon law began to be whittled away by, and gradually embraced within, the common law. This tendency may be seen in the attitudes governing some of the legislation of the Reformation Parliament and it received a great impetus by the curtailment of the study of the canon law as a special discipline by the visitation of 1535 and the dissolution of the monasteries in 1536.

CHAPTER IV

CONSOLIDATION

The Reformation Parliament had laid the foundations for a national ecclesiastical law. Even if it might be argued that the jus commune was still technically applied in England, papal authority excepted, it was for that very reason a law which merely resembled the general canon law of Europe in particulars. Prior to the Reformation there were two Grundnormen in England (to use the terminology of Kelsen's pure theory of law), one secular and the other ecclesiastical; after the Reformation there was only the former⁽¹⁾. After the Reformation the ultimate authority of the ecclesiastical law, setting aside the question of divine law⁽²⁾, lay in the King and Parliament. As has been seen, the canons and constitutions continued in force except in so far as they were contrary or repugnant to the common law, statute law or the King's prerogative: the canon law otherwise remained in force as it

(1) It is immaterial for present purposes whether on the secular side the Grundnorm was located in the King or Parliament or both.

(2) There is no evidence at this period that "the English church was regarded as an independent shrine of the divine law": Powicke, The Reformation in England at 50. Saint German taught that it was for "the King's grace in his parliament to expound scripture, and so decide what the irrefragable law of God is; for the King with his people have the authority of the Church." On this question in general see J.W. Gough, Fundamental Law in English History.

stood⁽¹⁾ except for those alterations necessitated by the assumption of the royal supremacy. Authority no longer rested with the pope: the English Church was no longer a mere province of that Church of which the temporal ruler was the pope, but was a separate, national Church. Similarly, the law of that national Church was no longer the jus commune but was the ecclesiastical law of the Church of England. That is not to say, however, that it was thereby inferior or subject to the common law. As Vaughn, C.J. said in Harrison v. Burwell⁽²⁾, referring to the Acts of Succession, 1533, and 1536,

"In neither of these two Acts ... is there any power given to the Temporal Courts, to make any Alteration as to the Canon Law, or God's Law ..."

The secular and ecclesiastical jurisdictions remained separate and complimentary systems; there was in theory no reason why that ecclesiastical law as a whole should ever be subject to the rider that it should not be contrary to the common law.

But if the King had assumed the overlordship of the ecclesiastical law, he did not neglect the legal and administrative needs of the Church. The best example of this relates to parish registers. The law relating to marriage was complicated and

(1) See especially the recital of 37 Henry VIII, c.17: "Nevertheless the Bishop of Rome and his adherents ... have ... decreed ... that no lay or married man should ... exercise ... any jurisdiction ecclesiastical ..., which standing and remaining in their effect, not abolished by your grace's laws, did sound to appear to make greatly for the ... usurped power of the said Bishop of Rome, and to be directly repugnant to your majesty as supreme head of the church, and prerogative royal, your grace being a lay-man."

(2) Ventris 9 at 13.

confused. Divorce a vinculo was unknown although the courts could decree an official separation, divorce a mensa et thoro; decrees of nullity, however, could be obtained as the King's divorces show. These decrees of nullity could be granted inter alia⁽¹⁾ on the grounds of marriage within the prohibited degrees; moreover, the canonists had extended this to include spiritual affinity between a baptised person and his kin on the one hand and his godparents and their kin on the other⁽²⁾. The evidential problems which must have arisen must have been considerable and a few parish priests had of their own accord begun to record baptisms, marriages and deaths. Moreover, Thomas Cromwell introduced the compulsory keeping of parish registers by his injunctions of 1538.

The question of marriages being void ab initio due to precontracts was also a great cause of abuse and hardship. Indeed, this could also be a stumbling-block to the unwary clergy; in 1501 Dominus Darby, curate of Michaelis in Bassyngshaw, was cited in the Court of the Commissary of London -

"quod solemnisavit matrimonium inter parochianos suos,

(1) The other grounds included such things as precontracts, bigamy and impotency: for a discussion of this question see D. Tolstoy, Void and Voidable Marriages, 27 M.L.R. 385 (1964).

(2) Three sponsors were allowed at baptism according to local custom: Lyndwood, op. cit., at 242 gl. ad v. tres ad plus. The Sarum rubric stated: "Non plures quam unus vir et una mulier debent accedere ad suscipiendum parvulum de sacro fonte ... nisi alia fuerit consuetudo approbata: tamen ultra tres amplius ad hoc nullatenus recipiantur." By B23(1) of the 1969 Canons 3 godparents are now the minimum, embodying present practice.

non obstante precontractu"⁽¹⁾.

In 1540, therefore, an Act was passed "For Marriages to stand, notwithstanding Pre-contracts"⁽²⁾ which, by s.2 enacted that all marriages not prohibited by God's laws should be indissoluble which were contracted and solemnised in the face of the church and were consummated, notwithstanding any pre-contract⁽³⁾. The Act also regulated the prohibited degrees.

The usual continuation acts apart⁽⁴⁾, as also all acts of pardon and those regulating sanctuary⁽⁵⁾, the everyday life of the Church received extended legislative attention from Parliament. In 1540 an act⁽⁶⁾ regulated the collecting of, and accounting for, the tenths granted to the King. Later in the same year the Court of First-fruits and Tenths was set up by the statute 32 Henry VIII, c.45⁽⁷⁾; in 1542 - 3 it was enacted that the five newly created Bishops of Chester, Gloucester, Peterborough, Bristol and Oxford should pay their tenths only into that court⁽⁸⁾. In 1542 the time for payment of first-fruits and tenths was regulated⁽⁹⁾. Other statutes dealt with

(1) Hale's Precedents at 73. The same man was cited on the same day for non-residence at the vicarage of Kyngston.

(2) 32 Henry VIII, c.38.

(3) It was otherwise if the precontract was consummated: s.2, but for this two witnesses were required by the canon law.

(4) 31 Henry VIII, c.7 and 32 Henry VIII, c.3.

(5) 32 Henry VIII, c.12; 32 Henry VIII, c.49; 35 Henry VIII, c.18; 37 Henry VIII, c.4.

(6) 32 Henry VIII, c.22.

(7) By 32 Henry VIII, c.47 the collection of tenths was excused to the Bishop of Norwich.

(8) 34 + 35 Henry VIII, c.17.

(9) 34 + 35 Henry VIII, c.2.

further financial questions: in 1540 the payment of tithes and offerings was regulated⁽¹⁾ and tithes in London were controlled in 1543⁽²⁾; the payment of a subsidy was confirmed in 1540 and another was granted by Parliament in the same year⁽³⁾; leases were dealt with in 1540 and 1541⁽⁴⁾; in 1543 usury, which fell within the spiritual jurisdiction, was also regulated by statute⁽⁵⁾. Moreover, provision was made for the possession of the Hospitallers⁽⁶⁾ and for the further dissolution of the monasteries⁽⁷⁾.

Indeed, the question of the monasteries came before Parliament a great deal. Once a religious had taken his vows he entered a state of "civil death" as far as the canon law was concerned. In 1539, by an Act entitled For Religious Persons to be Enabled to Sue and be Sued⁽⁸⁾, all religious set at liberty by the dissolution of the monasteries were given power to purchase lands, to sue and be sued, and to -

"use and exercise, receive, take, have and enjoy all and every lawfull thing and things to be grown, fall or happen to them ... in as large and ample manner, form and condition, as if they had never been professed nor entered into Religion."

They were not allowed to marry, however, if they had taken their vows having attained their majority, or if^{they} were priests; nor

(1) 32 Henry VIII, c.7.

(2) 37 Henry VIII, c.12.

(3) 32 Henry VIII, c.23 and 32 Henry VIII, c.50.

(4) 32 Henry VIII, c.28 and 33 Henry VIII, c.27.

(5) 37 Henry VIII, c.9.

(6) 32 Henry VIII, c.24.

(7) 31 Henry VIII, c.13.

(8) 31 Henry VIII, c.6. Similarly see 33 Henry VIII, c.29.

could they inherit or claim land on any title arising before their "departings out of their Religion." Later in the same year, moreover, the dissolution was extended to the larger abbeys and monasteries⁽¹⁾; by the same Act all the late monasteries, etc., which were exempt from visitation by the ordinaries were placed within their jurisdictions⁽²⁾. In 1540 an Act concerning Privileges and Franchises⁽³⁾ revived all those franchises, privileges and temporal jurisdictions which the religious houses had possessed within three months of their dissolution and these were transferred to the King. The statute 34 + 35 Henry VIII, c.19, legislated for the payment of pensions to all those entitled out of the late monastic lands while c.21 of the same year confirmed the titles of the land obtained in spite of misrecitals of name, place or date. In 1543 the statute 37 Henry VIII, c.4 made provision for the transfer to the King of colleges, chantries and free hospitals, a move completed in the following reign⁽⁴⁾.

In 1539 the King was authorised to make bishops by letters patent, apparently with the intention of making the cathedrals "nurseries of young divines for the service of the Church"⁽⁵⁾. In the same year provision was made for bishops to sit in the House of Lords⁽⁶⁾ and in 1541 the dioceses of Chester and Man were transferred to the northern province. Yet the ecclesiastical legislation was not confined to dioceses for in 1543 the statute 37 Henry VIII, c.21 concerned itself with the union of poor

(1) 31 Henry VIII, c.13.

(2) S.23. These exemptions were granted by the pope; at the common law exemption was enjoyed by free chapels, donatives and such places exempted by the King in pursuance of this Act.

(3) 32 Henry VIII, c.20.

(4) 1 Edward VI, c.14.

(5) Gibson, op. cit., at 203.

(6) 31 Henry VIII, c.10.

churches. Similarly in 1539 a priest who contracted matrimony was condemned by statute as a felon whereas if he kept a concubine he was to suffer imprisonment at the King's will; in 1540, however, these punishments were modified⁽¹⁾.

Moreover, the working of the ecclesiastical courts was also regulated. In 1543 Parliament returned once more to the question of the revision of the canons. By the statute 35 Henry VIII, c.16 Parliament gave to the King power to appoint a commission of revision at any time during his life time. In its recital the statute referred to the earlier statute of 1535 for the examination of "the canons, constitutions, and ordinances provincial, and synodal" but in s.2 the King was authorised to nominate a commission -

"to peruse, oversee, and examine all manner of canons, constitutions, ordinances, provincial and synodal, and further to set in order and establish all such Laws Ecclesiastical, as shall be thought by the King's Majesty and them convenient to be used and set forth within his Realm and Dominions, in all Spiritual Courts and conventions."

It seems impossible to be sure whether the addition relating to the Laws Ecclesiastical was intended as an explanation of the scope of 27 Henry VIII, c.15, as it was then understood, or was an intentional widening of the commission's ambit. On the one hand the Henrician statutes tend to give explanations for any positive piece of legislation and the Act in question even explains that 27 Henry VIII, c.15 was not implemented owing to the "divers urgent and great causes and matters" that had occurred since the making of the Act⁽²⁾. Yet no reasons are given for the widened ambit of the commission. On the other hand, as has

(1) See 31 Henry VIII, c.14 and 32 Henry VIII, c.10.

(2) S.1.

already been seen, it is probably best to see the main tenor of the Henrician statutes as one of leaving the canon law undisturbed except for changes necessitated by the assumption of the royal supremacy. If that is so, the evidence should be weighty before reading into the statute 35 Henry VIII, c.16 any presuppositions running against that general tenor. Furthermore the wording of s.2 is plain and unambiguous and does not seem to contain any undertones⁽¹⁾. It thus seems best to see s.2 as an intentional widening of the scope of the statute as compared with 27 Henry VIII, c.15. Yet whether this is the case or not, the actual effects of the statute run from 1543 and not 1535. Section 3 enacted that -

"till such time as the King's Majesty and the said thirty two persons have accomplished and executed the effects and contents afore rehearsed and mentioned, that such canons, constitutions, ordinances, synodal or provincial, or other Ecclesiastical Laws or Jurisdictions Spiritual, as be yet accustomed and used here in the Church of England, which necessarily and conveniently are requisite to be put in ure and execution for the time being, not being repugnant contrariant or derogatory to the Laws or Statutes of the Realm, nor to the prerogatives of the regal Crown of the same or any of them, shall be occupied, exercised and put in ure for the time, within this or any other the King's Majesties Dominions. And that the Ministers and due executors of them, shall not incur any damage or danger for the due exercising of the foresaid Laws, so that by no

(1) The one possible exception to this is the last sentence of s.3 which may imply that some saw the implementation of the laws ecclesiastical as falling within the Statute of Provision and Praemunire.

colour or pretence of them or any of them, the Minister put in ure any thing prejudicial or in contrary of the regal power or laws of the Realm, any thing whatsoever to the contrary of this present Act notwithstanding."

By this proviso the ecclesiastical law as a whole was limited by the scope of the common law, and, indeed, ecclesiastical officers were threatened with the pains of praemunire if they should by any colour or pretence put in ure anything contrary to the King's prerogative or the common law. It is by this Act that pre-Reformation canon law is now enforced in England⁽¹⁾ and another step was made towards the fusion of the common law and the ecclesiastical law for although a commission was appointed under the Act its work was never confirmed by the King⁽²⁾.

Attention has already been drawn to the dangers of enforcing ecclesiastical laws contrary to the King's prerogative and the common law. The statute 37 Henry VIII, c.17, however, throws doubt on the actual scope of that provision. This latter Act, passed in 1545, claimed that the King -

"hath always justly been, by the word of God, supreme head

(1) Compare the views put forward in Halsbury, op. cit., at 9, note (i), and 10, note (a). See, too, 37 Henry VIII, c.17, s.2.

(2) For an account of this commission see Dibden, op. cit., at Chapter 1. The learned author points out at 7 - 8 that there are "no means of ascertaining how far the code prepared in Henry VIII's reign differed from the Reformatio Legum as it was formulated in Edward VI's reign." He assumes, however, that Foxe was correct in saying that the code as compiled in Henry's reign was "far different" from the Reformatio of the next reign.

of the church of England"

and that all ecclesiastical jurisdiction lay in him, nevertheless, the pope -

"minding utterly as much as in him lay to abolish, obscure, and delete such power given by God to the princes of the earth"

decreed that no lay or married man should exercise ecclesiastical jurisdiction

"as by the ... councils and constitutions provincial appeareth: which standing and remaining in their effect, not abolished by your grace's laws, did sound to appear to make greatly for the said usurped power of the said Bishop of Rome, and to be directly repugnant to your majesty as supreme head of the church, and prerogative royal, your grace being a lay-man"⁽¹⁾.

Section 2 went on to state that the Act of Submission, 1533, had utterly abolished those constitutions⁽²⁾ by which the papal decrees had been made and that the statute 37 Henry VIII, c.17 was only made necessary by the practices of the ecclesiastics. Indeed in Walker v. Lamb⁽³⁾ the Act was deemed merely affirmatory

(1) S.1.

(2) (cp) the wording of s.1, however: "not abolished by your grace's laws." The wording of s.2 refers to "the said decrees, ordinances, and constitutions" in which the pope had made his decrees; s.1 had referred to "councils and synods provincial." If these words refer to foreign decrees and councils the Act is evidence for the view that the Act of Submission (25 Henry VIII, c.19), s.7, was understood as embracing all the laws ecclesiastical. However, Archbishop Chicherley had made a constitution to this effect, "following the footsteps of the holy canons." See Lyndwood, op. cit., at 128.

(3) Cro. Car. 258.

of the common law.

The position was not quite so simple for those now administering the ecclesiastical law, however. Even if the King was the supreme head of the church of England in whom lay all ecclesiastical jurisdiction, it did not necessarily follow that that jurisdiction would be exercised by the King, being both a layman and married: indeed, in 1611 the common law judges were to decide in the Prohibitions del Roy⁽¹⁾ that the King could not himself act as a judge. Sir Edward Coke stated⁽²⁾:

"The King in his own person cannot adjudge any case, either criminal, or treason, felony, etc., or betwixt party and party ..."

A fortiori it did not follow from the royal supremacy that laymen other than the King ought to exercise ecclesiastical jurisdiction⁽³⁾.

Yet it was not only the exercise of the ecclesiastical jurisdiction which concerned Parliament. A Bill concerning the Explanation of Wills was passed in 1542⁽⁴⁾ and a number of acts were passed relating to heresy. Moreover, the statute 34 + 35 Henry VIII, c.14 enacted that a certification into the King's Bench should be made of all convicted clerks so that benefit of clergy might not be claimed twice.

Henry VIII had urged Charles V to use force to stamp out the Lutheran heresy and had himself in 1521 written a defence of the seven sacraments in answer to Luther's Babylonian Captivity of the Church which was an attack on Roman sacramental theology. Henry's work was dedicated to the pope and Clement VII saw the

(1) 12 Co. Rep. 63.

(2) Ibid at 64.

(3) S.4. See also Walker v. Lamb, Cro. Car. 258.

(4) 34 + 35 Henry VIII, c.5.

hand of the Holy Spirit in the book and confirmed the title of Fidei Defensor given to Henry by his predecessor⁽¹⁾. Indeed, Henry VIII adhered firmly to the traditional doctrines of the Church⁽²⁾ and in spite of his break with the pope he still strove against what he saw as heresy. In 1539 s.3 of 31 Henry VIII,c.8 excepted proclamations concerning heresy from the limitation against royal proclamations taking away either estate or life from having the force of acts of Parliament and in the same year an Act for Abolishing of Diversity of Opinions in Certain Articles concerning Christian Religion⁽³⁾ was passed. This Act, in spite of previous opposition by Cranmer and his friends, was approved by Convocation and it was worded as if Parliament was merely providing for the punishment of opinions declared erroneous by the clergy⁽⁴⁾. In fact the Act was merely declaratory as to what constituted heresy but heresy was made a felony; it was followed by a proclamation enjoining uniformity and moderation. The arbitrariness of the Act was limited in 1544 by the Act concerning the Qualification of the Statute of the Six Articles⁽⁵⁾ and its procedure was made to conform to the usual course of law. Furthermore, in 1541 an Act concerning true Opinions, and declaration of Christ's Religion⁽⁶⁾ was passed to allow a commission of the archbishops and sundry bishops to settle articles of religion according to the Scriptures in order to preserve unity in religion against heretical opinions; by s.2, moreover, nothing was to be ordained or defined which was "repugnant or contrariant to the

(1) See J. Atkinson, Martin Luther and the Birth of Protestantism at 227.

(2) He allowed the use of the English Bible in 1539.

(3) 31 Henry VIII,c.14.

(4) This was modified by 31 Henry VIII,c.10.

(5) 35 Henry VIII,c.5.

(6) 32 Henry VIII,c.26.

Laws and Statutes" of the realm. Thus the common law was seen as being in all things compatible with divine law and in the last analysis the common lawyer, not the ecclesiastic, could be seen as the arbiter of that law⁽¹⁾. Although it is very doubtful whether the Act was intended in this way, this is certainly the result of s.2.. It is likely that the proviso was added as an automatic addition to an ecclesiastical statute which might otherwise have been seen as giving to ecclesiastics power to alter the laws ecclesiastical and its full import was not foreseen. Yet in this very inadvertence can be seen that slow, but inexorable, subjection of the ecclesiastical law to the common law, a subjection which flowed naturally from confidence in the superiority of the common law and from fear of encroachment by the church on those liberties which were enshrined in the common law.

The reign of Henry VIII thus not only saw a break of the Church of England from the Church of Rome but, as a natural corollary, the creation of a national ecclesiastical law. This ecclesiastical law, however, was made subject to the common law, including both statute law and the King's prerogative. Moreover, the legislative powers of the Church were drastically curtailed and ecclesiastical statutes not only made provision for the royal supremacy but also for matters within the general spiritual jurisdiction of the church courts, such as usury, and for the actual administration and procedures of the courts themselves.

(1) Similarly the canonist Hugguccio had avowed that canon law or ecclesiastical law was divine law: see W. Ullmann, Mediaeval Papalism at 45. G. Le Bras points out in Les Escritures dans la décret Gratian in Zeitschrift, Ranon, Abt. vol. XXVII at 52-3 that Gratian in his collection "ne produit jamais un fragment scripturaire parmi ses 'auctoritates': il n'invoque la Bible que dans ses 'dicta'."

If at the turn of the fourteenth century the jus commune of Europe was applied in England as varied by local canonical custom and the exigencies of the common law, by the death of Henry VIII on the 30th January, 1547, there was a national ecclesiastical law. A national ecclesiastical law based upon the jus commune, it is true, but now curtailed and limited by the common law in all matters in which the common law could be seen to run; more especially, legislation on ecclesiastical matters was in the main confined to statutes interpreted according to the common law and what canonical legislation remained was circumscribed by royal licence. Indeed, in the mass of parliamentary legislation on ecclesiastical affairs may be seen the implementation of the view that ecclesiastical law was a mere branch of the ordinary law of the land to be regulated at will by parliament; moreover, such statutory regulation was of a kind peculiar not to the canon law but to the common law. It is hardly surprising that with the curtailment of the study of the canon law, which went hand in hand with this development, went also the gradual dominance of common law techniques and of the common law itself in ecclesiastical matters.

If there had been a 'political' reform of the Church under Henry VIII, there was a 'doctrinal' reform under Edward VI⁽¹⁾. Moreover, because of the new attitudes concerning ecclesiastical legislation, this doctrinal reform was embodied in parliamentary legislation. Hitherto, doctrinal formulation had been a question for the Church, even if its scope might be limited by the common law, and uniformity was imposed by royal proclamation. Under Edward VI both were matters for Parliament.

Indeed the first piece of legislation of the new reign was

(1) See Mackie, *op. cit.*, at 478.

concerned with reception in both kinds at Communion⁽¹⁾ and imposed a fine and imprisonment on all those speaking irreverently against the blessed sacrament⁽²⁾. Also in 1547 an Act for the Repeal of certain Statutes concerning Treasons and Felonies abrogated most of the legislation against heresy and removed all restrictions upon printing, reading, and teaching the scriptures⁽³⁾; moreover, a statute provided for the appointment of bishops by letters patent on the grounds that the cong  d' lire involved elections which were "in very deed no Elections"⁽⁴⁾ and another renewed Henry VIII's confiscation of the chantries⁽⁵⁾, which had never been fully implemented.

In 1548 Henry VIII's proclamation concerning religious uniformity was taken a step further and an Act for Uniformity imposed penalties for not using the Book of Common Prayer⁽⁶⁾. In the early Church every bishop had the power to compose a liturgy but later the practice was for a province to follow the service of the metropolitan church⁽⁷⁾. Lyndwood recognised this

(1) 1 Edward VI, c.1, s.7. This was unanimously agreed by Convocation.

(2) S.1.

(3) 1 Edward VI, c.12.

(4) 1 Edward VI, c.2, s.1. This Act stands repealed by the reviver of 25 Henry VIII, c.20. When an attempt was made in 1637 to place episcopal jurisdiction on this statute the twelve judges to whom the question was referred all agreed that it was no longer in force.

(5) 1 Edward VI, c.14.

(6) 2 + 3 Edward VI, c.1.

(7) Institutio missarum, sicut in metropolitana ecclesia agitur, ita in Dei nomine in omnibus provinciis tam ipsius missae ordo, quam psallendi vel ministrandi consuetudo servetur: c. 35. D II, de cons.. See also c. 13, D XII.

as the rule of the jus commune but allowed long contrary custom to intervene⁽¹⁾, and in England the principal uses were those of Salisbury, Hereford and York⁽²⁾. In 1548 the first English prayer book was imposed by statute as a uniform rite throughout England, although replaced by the second English prayer book in 1552⁽³⁾. Moreover, the regulations made for the establishment of the prayer book were continued in force by the Act of Uniformity, 1662, s.24⁽⁴⁾ but for the establishment of the Book of Common Prayer of 1662⁽⁵⁾:

"The several good laws and statutes of this realm which have been formerly made, and are now in force, for the uniformity of prayer and administration of the sacraments, shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said book hereinbefore mentioned to be joined and annexed to this act, and shall be applied, practised and put in ure for the punishing of all offences contrary to the said laws, with relation to the book aforesaid and no other."

(1) Lyndwood, op. cit., at 104, gl. ad v. usum Sarum Ecclesiae.

(2) Other uses such as Lincoln and Bangor, mentioned in the recital to 2 + 3 Edward VI, c.1. did not possess such a marked individuality: Proctor and Frere, A New History of the Book of Common Prayer, at 14.

(3) By 5 + 6 Edward VI, c.1. Although alterations were made to the forms of service, the repeal of the Act by 1 Mary, s.1. c.1. was itself repealed by 1 Elizabeth I, c.1.

(4) 14 Charles II, c.4.

(5) Compare, however, the opinion of Sir H. Jenner Fust in Faulkner v. Litchfield (1845) 3 Not. Cas. 511 at 545: "All the former Acts of Uniformity were not incorporated in or confirmed by that Act" of 1662. He was prepared to use the previous Acts as aids to interpretation, however.

Indeed the principle of uniformity has now become "one of the leading and distinguishing principles of the Church of England," per Sir John Nicholl in Newberry v. Goodwin⁽¹⁾ and canon 14 of 1603 lays down that -

"All Ministers shall observe the Orders, Rites, and Ceremonies prescribed in the Book of Common Prayer ... without either diminishing ... in ... any respect, or adding anything in the matter or form thereof."⁽²⁾

Such a principle has it become, in fact, that it may be debated how far it may be abrogated by the episcopal jus liturgicum.

According to Sir Robert Phillimore⁽³⁾ -

"the general canon law unquestionably placed in the hands of the bishop the authority to govern all questions of ritual."

and he quotes as authority Van Espen⁽⁴⁾:

"Et quidem quia dispares diversarum nationum mores et ingenia diversos ritus et caeremonias, ut in politicis ita in ecclesiasticis exigunt, hinc in ritibus magna ecclesiarum varietes; praesertim quia nullo extante de his Christi vel Apostolorum praecepto, libera potestas episcopis relicta erat, id sentiendi et decernendi quod unicuique salvā fide magis expediens videbatur."

(1) (1811) 1 Phillimore 282 at 282 - 3.

(2) See also the Act of Uniformity Amendment Act, 1872 (35 + 36 Victoria, c.35).

(3) Martin v. Mackonochie (1868) Ecclesiastical Judgements 72.

This may have been subject to such orders as were passed from time to time in the synod of the province in which the bishop was a suffragan: Wordsworth and Littledale, The Old Service Books of the English Church at 9.

(4) Jus Ecclesiasticum Universum, part 2. tit. 5, cap. 2, s. 15, vol. I at 411.

Moreover, Van Espen, citing a decree of a synod, stated⁽¹⁾ -

"Movae caeremoniae nullae in ecclesiis recipiantur sine
episcopi iudicio."

Yet it may be doubted how far this could be effective within the rule of the jus commune already referred to by which the ritual of the metropolitan church was to be followed throughout the whole province⁽²⁾; it would seem, at the very least, that the episcopal jus liturgicum was not unbounded and it may even be argued that the wider rule had been superceded in the thirteenth century by the law as recognised by Lyndwood⁽³⁾.

Be that as it may, if the bishops retained a jus liturgicum at the time of the Reformation it would, with the general ecclesiastical law, have been given statutory authority by the statute 35 Henry VIII, c.16, s.3. Section 3, on the other hand, limited this sanction to those laws ecclesiastical -

"not being repugnant contrariant or derogatory to the Laws or Statutes of the Realm"

and, although there is no reason to see the jus liturgicum as contrary to the common law as it then stood, it is difficult to see it as other than contrary to the intention of the Act of Uniformity, 1548⁽⁴⁾, which stated that the book of Common Prayer

(1) Ibid, s. 24, at 412.

(2) See above note (7) p. 110.

(3) See on the other hand Sir John Nicholl in Kemp v. Wickes (1809) 3 Phillimore 264 at 268.

(4) It may be debated whether s.3 referred to "the Laws and Statutes of the Realm" merely as they stood in 1543 or included also all future changes in those laws. Whichever view is correct, it seems likely that the jus liturgicum was contrary to 2 + 3 Edward VI, c.1. and was thus abrogated.

was set forth owing to the fact that -

"of long time there had been in this realm of England and in Wales divers forms of Common Prayer, commonly called the Service of the Church; that is to say, The Use of Sarum, of York, of Bangor, and of Lincoln; and besides the same now of late much more divers and sundry forms and fashions have been used in the cathedral and parish churches of England and Wales, as well concerning the mattens or morning prayer and the evensong, as also concerning the holy communion, commonly called the Mass, with divers and sundry rites and ceremonies concerning the same, and in the administration of other sacraments of the church ..."

This is certainly the view of Sir John Nicholl in Kemp v. Wickes⁽¹⁾ who stated⁽²⁾ in the Court of Arches :

"Anciently, and before the Reformation, various liturgies were used in this country; and it should seem as if each bishop might in his particular diocese direct the form in which the public service was to be performed: but after the Reformation, in the reigns of Edward the Sixth and Queen Elizabeth, acts of uniformity passed, and those acts of uniformity established a particular Liturgy to be used throughout the Kingdom."

Moreover, this is underlined by the changes made in 1552. By the Act for the Uniformity of Service and Administration of Sacraments throughout the Realm⁽³⁾ the second Edwardian prayer book was to be enforced throughout the country -

"because there hath arisen in the use and exercise of the aforesaid common service in the church heretofore set forth, divers doubts for the fashion and manner of the ministration

(1) (1809) 3 Phillimore 264.

(2) at 269.

(3) 5 + 6 Edward VI, c.1.

of the same ...; therefore, as well for the more plain and manifest explanation hereof, as for the more perfection of the said order of common service ...; the King's most excellent majesty ... hath caused the aforesaid order of common service, entitled 'The Book of Common Prayer' to be faithfully and godly perused, explained, and made fully perfect, and ... hath annexed and joined it, so explained and perfected, to this present statute ..."(1).

The previous Act of Uniformity was "to stand in full force and strength" and "to be applied, practised, and put in ure, to and for the establishing of 'The Book of Common Prayer'"(1). Furthermore, in both 1549 and 1552 the prayer book contained special provision for the resolution of any ambiguity which might arise:

"And forasmuch as nothing can be so plainly set forth, but doubts may arise in the use and practice of the same: to appease all such diversity (if any arise) and for the resolutions of all doubts, concerning the manner how to understand, do, and execute the things contained in this Book; the parties that so doubt, or diversly take any thing, shall alway resort to the Bishop of the Diocese, who by his discretion shall take order for the quieting and appeasing the same; so that the same order be not contrary to any thing contained in this Book. And if the Bishop of the Diocese be in doubt, then he may send for the resolution thereof to the Archbishop"(2).

(1) S. 5.

(2) "Concerning the Service of the Church". This was included in the 1662 Prayer Book but not in the draft of 1928. The further resolution by the archbishop was not included in 1549. 1 Eliz, c.2,s.26 allowed to the queen the right to ordain further ceremonies or rites, if there was any "mis-using of the orders appointed."

It may be argued that this authority in the bishop was to replace the diocesan's previous jus liturgicum with a more limited authority⁽¹⁾. Certainly the bishop's authority cannot be seen as overriding the statutory enactments of the prayer book itself for -

"when a bishop ministers in any office prescribed by the Prayer Book he is a minister bound to observe the directions given to the minister in the rubrics of such office"⁽²⁾

and a fortiori he cannot authorise others to do what he himself cannot do; moreover his order "shall not be contrary to anything contained in this Book"⁽³⁾. In fact the bishop's discretion is a limited one: it is within that discretion, for example, to decide whether coloured cloths on an altar are suitable or not⁽⁴⁾.

Yet this discretion of the bishop is a "living authority" within those limits of "things neither ordered nor prohibited

(1) This seems to be the view of Sir Robert Phillimore in Martin v. Mackonochie (1868) Ecclesiastical Judgements at 70: "The authority which is to resolve these doubts and remove these difficulties, is that officer in whose hands previously to the statutory enactment of any Prayer-Book, the Church had placed a supreme command over all that relates to her ritual." (Emphasis supplied).

(2) Read v. Bishop of Lincoln (1889) Roscoe's Report at 45 per the Archbishop of Canterbury.

(3) See, (eg), Sir H. Jenner Fust in Faulkner v. Litchfield (1845) 1 Rob. Eccl. 184 at 255 where it had been argued that the question of whether a stone altar was legal should be left to the decision of the Ordinary: "After much consideration now given, I am of opinion the matter is not one of discretion but of law."

(4) Westerton v. Liddell (1855) Moore's Special Report at 188.

expressly or by implication"⁽¹⁾, and as such may be argued to be an express continuation of the jus liturgicum as limited by the Acts of Uniformity; if this is so, however, it is so emasculated as hardly to be worthy of the name. It has been further argued, on the other hand, that provision is made for the jus liturgicum in the declaration of assent to the Thirty-nine Articles, the Book of Common Prayer and of the Ordering of Bishops, Priests and Deacons made by all about to be ordained priest or deacon⁽²⁾. The declaration states that those making it -

"will use the form in the said Book prescribed and none other, except so far as shall be ordered by lawful authority" and it has been urged that "lawful authority" includes variation under the jus liturgicum⁽³⁾. Thus, it is suggested, that the bishop may make "wider departures from the printed word"⁽⁴⁾ than those which may fall within the normal rule of de minimis⁽⁵⁾.

Yet this variation of common prayer by "lawful authority" was not part of the subscription to be made by all those "to be

(1) per Sir Robert Phillimore, in Martin v. Machonochie at 71.

(2) Clerical Subscription Act, 1865.

(3) See (eg) The view of The Honourable Mr. Justice Vaisey in 'Lawful Authority', A Memorandum, printed in an appendix to The Canon Law of the Church of England at 220.

(4) Vaisey, op. cit. at 220.

(5) For example, the omission of the words from a lesson on the grounds of delicacy, though not legally justified, would be greatly extenuated: per Sir John Nicholl in Newberry v. Goodwin (1811) 1 Phillimore 282 at 284. This would probably fall within the de minimis rule. See also the strictures of Earl Cairns, L.C. in Julius v. Bishop of Oxford (1880) 5 App. Cas. 214 at 226.

received into the ministry" by canon 36 of 1603 and was only added in 1865. Section 25 of the Act of Uniformity, 1662⁽¹⁾, was the first enactment to provide for the names of the king, queen or royal progeny occurring in the prayers, litanies and collects to be altered "according to the direction of lawful authority" and in practice this was always by the king or queen in council⁽²⁾. Subsequently other variations have been allowed by royal warrant or proclamation and the statutory authority of Parliament (including measures of Church Assembly)⁽³⁾. Therefore, if the jus liturgicum is to be brought within the scope of the words "lawful authority", it must be shown that it was so recognised prior to 1865. Unfortunately the case law is few and far between.

In 1542, that is, before the Act of Uniformity, 1549, William Rede, curate of All Saints, Honeylane, was cited before the Commissary's Court of London for chanting the Te Deum in English and was warned that -

"observet solitum ordinem divinorum, diebus Dominicis et festivis, in ecclesia sua parochiali, quemadmodum est jam usitatum et observatum in aliis ecclesiis civitatis London, donec et quonsque aliter habuerit in mandatis domini regis vel sui consilii (etc.)"⁽⁴⁾.

In 1566 the Vicar of Southebemflitt was cited before the Arch-deacon of Essex "because he dothe not observe the injunctions"⁽⁵⁾

(1) 13 + 14 Charles II, c.4.

(2) Gibson, op. cit., at 320. See also William Rede (1542) Hale op. cit., at 133.

(3) Vaisey, op. cit., at 219. He includes "deviations" by episcopal authority under the discretion given by the prayer book but "deviation" goes too far. See now the 1969 Canons B 1 et seq.

(4) Hale, op. cit., at 133.

(5) Ibid at 149.

and eleven years later the archdeacon admonished the Vicar of Southwild -

"that hereafter he shall orderly, duely and fully saie the service, accordinge to the booke of Common Praier and injunctions subpena juris"⁽¹⁾.

In fact it was not until 1842 that any mention was made of authorisation by the bishop and then the authority was stated so widely as also to include the archdeacon; in that year Sir H. Jenner Fust in Burder v. Langley⁽²⁾, in referring to 5 + 6 Edward VI, c.4, stated⁽³⁾:

"So that the Statute was passed to aid and support the ecclesiastical law in repressing any proceeding calculated to violate the sanctity of churches, and all acts tending to interrupt divine worship, by preventing any thing from being said or published during divine service in the church, even by the minister himself, unless authorized by the Book of Common Prayer, or by the Archdeacon or the Ordinary."

In 1824 articles had been admitted against a layman for brawling under the same statute by reading a "notice of Vestry" in church during divine service "not being a churchwarden, overseer or officer"⁽⁴⁾ of the parish. Lastly, in In re St. Nicholas, Plumstead⁽⁵⁾ Chancellor Garth Moore referred⁽⁶⁾ to -

"A pyx used for reservation lawfully authorised by the exercise of the bishop's jus liturgicum"

but the learned chancellor was concerned with the question of

(1) Ibid at 165.

(2) (1842) 1 Not. Cas. 542.

(3) at 547.

(4) Dawe v. Williams (1824) 2 Add. 130.

(5) (1961) 1 W.L.R. 916.

(6) at 920.

reservation (which "with the permission of the bishop is lawful" (1)) rather than the meaning of the words "by lawful authority". Moreover, the learned editors of Halsbury state with reference to variation by lawful authority:

"In other cases not expressly provided for by the statute (13 + 14 Charles II, c.14) the jus liturgicum of the archbishops and bishops is now often invoked, but it is very doubtful whether this has any legal basis"⁽²⁾.

Thus the question of whether the jus liturgicum can vary the uniform services imposed by the Acts of Uniformity depends rather upon its legal continuance since the Reformation than its acknowledged inclusion within the words "lawful authority".

To this larger question it is therefore necessary to return. There seems to be no mention of any jus liturgicum in the reported cases until 1792 when Sir William Scott may possibly have referred to it in Hutchins v. Denziloe⁽³⁾, a case in which proceedings had been instituted against a churchwarden for interfering to obstruct and prohibit singing authorised by the clergyman. He said⁽⁴⁾:

"Has then the Bishop a discretion upon this subject? Those who have undertaken to shew that he has not, must shew a prohibition which restrains it; and in order to establish this, it is said, that though singing part of the Psalms is properly practised in Cathedrals, it is not so in Parish Churches."

(1) at 917 - 8.

(2) Op. cit., at 328, note (o). Halsbury also states, however, at 342 that "in strictness it is not lawful to announce anything except that which is prescribed by the Prayer Book, without at least the authority of the ordinary ..." (Emphasis supplied).

(3) (1792) 1 Hag. Con. 170.

(4) at 175.

It seems best, however, to take this as a reference to the bishop's discretion granted by the Prayer Book itself as the rubric before the Venite states: "Then shall be said or sung this Psalm following," and after the Venite the rubric states: "Then shall follow the Psalms in order as they be appointed." Certainly this gives the best explanation of the reference to practice since the Reformation which follows the passage quoted above. In 1809, too, Sir John Nicholl stated in Kemp v. Wickes⁽¹⁾ that in 1573 the bishops -

"certainly had not authority to alter the law; they had only authority to explain matters which were doubtful."

Indeed the question was only seriously considered in the twentieth century.

In 1926 a faculty application for an aumbry for reservation of the Blessed Sacrament for the communion of the Sick only and to which the bishop had signified his approval came before Chancellor Dowdall in St. Luke's Southport⁽²⁾. The learned chancellor considered the meaning of the rubric at the end of the 1662 communion service and concluded that -

"the question which he had to determine was whether the bishop might dispense with the strict observance of the rubric if precautions were taken to provide against both superstition and irreverence."

He then continued:

"The right of a Bishop to allow minor variations in the strict observance of the rubrics was unchallenged. Thus in a case of this very rubric the priest habitually, and with the Bishop's full knowledge and concurrence, consumed what was left over without calling any of the communicants to him. But in important matters there was no escape from the

(1) (1809) 3 Phillimore 264 at 283.

(2) (1926) The Times, 1st October.

obligation of the Acts of Uniformity and of the 14th canon of 1603 not to diminish or add anything in the "matter or form" of the Prayer-book, of which, of course, the rubrics formed part."

The faculty was in fact decreed but, it seems, rather upon the grounds of necessity⁽¹⁾ or dispensation (or both) than upon the grounds of an episcopal jus liturgicum:

"As regards the immediate issue, the office for the Communion of the Sick was apparently designed for those dangerously ill, and, though much shorter than the ordinary service, it was of considerable length, so that it would be both inappropriate and impracticable for the vicar of a populous parish to conduct the whole service with those of his infirm parishioners who had been in the habit of making their communion regularly when they were able to go to church. In these circumstances it might well be within the discretion of a Bishop to dispense with the strict observance of a rubric ..."⁽²⁾

The reference to the "unchallenged" right of a bishop "to allow minor variations in the strict observance of the rubrics" was thus an obiter dictum. The reference cannot be regarded as one to the episcopal discretion conferred by the prayer book itself, however, as this does not allow variations but only the resolution of doubts; nor can it be taken as an application of the de minimis rule which does not give any right⁽³⁾. The reference may therefore be taken either as to the jus liturgicum or to dispensation.

Two years later the 1928 prayer-book - the "Deposited Book" -

(1) It may be noted that the canon law contained a doctrine of necessity (see Dictionnaire de Droit Canonique, ad v. nécessité). See also E. Garth Moore, *op. cit.*, at 75.

(2) Emphasis supplied.

(3) Taverner v. Dominum Cromwell, Cro. Eliz. 353.

was finally rejected by Parliament. It had, indeed, been obvious that the Act of Uniformity of 1662 and the rubrics of the 1662 prayer book were far too rigid for the needs of modern public worship⁽¹⁾, but the proposed book did not receive legislative authority. Thereupon the bishops decided to act as if Parliament had not voted and that "The Bishops in the exercise of that legal or administrative discretion, which belongs to each Bishop in his own diocese, will be guided by the proposals set forth in the Book of 1928"⁽²⁾. More particularly, this included an adoption, in accordance with this purported discretion, of that rubric in the 1928 prayer book which provided for the consumption of any consecrated Bread or Wine remaining at the close of the service "apart from that which may be reserved for the Communion of the sick." It is, however, generally agreed that this reliance upon their "legal or administrative discretion" by the bishops has no legal validity whatsoever; as E. Garth Moore states concerning the marriage service in his Introduction to English Canon Law -

"The alternative version provided by the deposited Prayer Book of 1928 has no legal authority ..."⁽³⁾

(1) See S. Neill, Anglicanism at 394 et seq. He states in a footnote that "no parish priest in the Church of England observes all the rubrics in the Prayer Book." It is interesting to note, moreover, that many parish clergy sincerely claim to keep strictly to the 1662 communion service when in fact they are closer to that of 1928.

(2) Quoted by S. Neill, *op. cit.*, at 397 - 398. He concludes that "The most humiliating thing of all is that Parliament seems to have judged more correctly than the Church." It is ironic, too, that the 1928 book omits any reference to episcopal discretion.

(3) at 88. See also In re St. Peter and St. Paul Leckhampton (1968) 2 All E.R.1551 at 1554, per Chancellor Garth Moore.

Indeed, the bishops' claim may be compared with the Lambeth Opinions on Incense and Processional Lights of the Archbishops at Lambeth Palace thirty years previously :

"And the only authority which can bind or authorise any clergyman to make any variation whatever from what is contained in the Book (of Common Prayer) is either an Act of Convocation, legalised when necessary by Parliament, or the order of the Crown ... or a direction of the ordinary under the Act of Uniformity, 1872."

In fact the services proposed in 1928 have only received (limited) legislative authority by being approved by Convocation in terms of the Prayer Book (Alternative and Other Services) Measure, 1965. Meanwhile, however, this attempt to resurrect the episcopal ius liturgicum to its former strength received some recognition in the field of faculty applications relating to reservation.

After 1928 the Bishop of Newcastle in accordance with the above mentioned policy of the bishops licensed a clergyman in his diocese, whose faculty petition for an aumbry had previously been refused by the chancellor, to reserve the sacrament along the lines of the 1928 book. The Chancellor of Newcastle made no order, when parishioners applied for a faculty to remove the aumbry, on the grounds that it was a matter for the bishop and not the court. In a subsequent memorandum⁽¹⁾ the learned chancellor defended his policy on the grounds that he might otherwise condemn "(in his absence) the action of my own Bishop": he pointed out, moreover, that if any future application was made to him for a faculty for an aumbry he would have to deal with the legality of reservation. Similarly in Re. St. Paul, Cullercoats⁽²⁾ in 1931 Chancellor Errington considered the

(1) Aumbries: Memorandum by the Chancellor of Newcastle.

(2) (1931) unreported.

legality of a sanctuary lamp hung near an aumbry which had been authorised by the bishop "in his administrative capacity." He did not consider the legality of reservation except to note that, having regard to the parish's large population, reservation was "almost a necessity". He then concluded that -

"if and so far I am at liberty to recognise any particular exception under the authority of the Bishop, it must of course be something clearly authorised by him."

Not until 1954 does the question of the jus liturgicum seem to have been again discussed in the courts. In Re Lapford Parish Church⁽¹⁾ a faculty was sought to install a tabernacle as a receptacle for the sacrament reserved for the sick and Chancellor Wigglesworth rejected the application on the grounds that a tabernacle, as opposed to an aumbry, was an illegal ornament. The learned chancellor stated, however⁽²⁾:

"In my view, the Prayer Book (of 1662) neither forbids nor authorises reservation. It makes no provision for it.

Where the bishop considers that something not provided for is needed, it is for the bishop to make provision in the exercise of that authority which he has in his diocese."

If this view is correct, the decision as to whether or not to make such provision would seem not to be an exercise of the jus liturgicum, not being a question of ritual⁽³⁾; it might be argued, however, that it was within the bishop's discretion (within the terms of the exhortation Concerning the Services of the Church)

(1) (1954) P. 416 (Consistory Court); (1955) P. 205 (Court of Arches). The reasoning in the Court of Arches presents great difficulties: for a discussion see Bishopwearmouth v. Adey (1958) 1 W.L.R. 1183.

(2) (1954) P. at 424.

(3) For the contrary view see Bishopwearmouth v. Adey, at 445 per Chancellor Garth Moore.

to decide that the 1662 rubric as to the consumption of the remains of the consecrated elements did not necessitate their consumption in circumstances not envisaged in 1662. Yet it seems rather to be an administrative decision.

Sir Philip Wilbraham, however, in the Court of Arches, whilst confirming the refusal to decree a faculty, founded himself on much more tenuous grounds⁽¹⁾. While he held, on the one hand, that "reservation of the Blessed Sacrament for any purpose is still strictly speaking, illegal"⁽²⁾, on the other hand he also stated⁽³⁾ -

"But although the bishop has no doubt a large discretion in matters that are doubtful, or not fully provided for by the rubrics, it does not enable him to legalize anything which is plainly illegal. Incidentally I should mention that an instance of the exercise of this discretion occurs in this case where the bishop has sanctioned the use of the reserved Sacrament for the benefit of certain workers who by reason of their employment are unable to attend the ordinary services of Holy Communion."

It is not easy to explain these two seemingly incompatible statements - there seems little difference between something "strictly speaking", and another "plainly", illegal - but any exercise of episcopal discretion in the circumstances outlined by the Dean of Arches would seem best explained on the grounds of necessity or dispensation or of those outlined by Chancellor Wigglesworth.

In 1958 a faculty was granted by Chancellor Garth Moore in Bishopwearmouth v. Adey⁽⁴⁾ for reservation in a pyx hanging from

(1) See footnote (1) previous page.

(2) (1955) P. at 214.

(3) Ibid at 211.

(4) (1958) 3. All E.R. 441.

a baldachino which was around and over an altar in a side-chapel. The learned chancellor, moreover, adopted the words of Chancellor Wigglesworth in Re Lapford Parish Church quoted above and explained them as follows :

"In other words, where no provision is made, the matter falls within the scope of the jus liturgicum and all that the chancellor is asked to do is to grant permission for a cupboard or aumbry. It is for the bishop to allow or forbid, now and hereafter, the use of the cupboard (aumbry) for reservation."

On the other hand the learned chancellor does not consider the question as to whether the jus liturgicum was contrary to the Acts of Uniformity and was thus impliedly repealed and, as has been seen, Chancellor Wigglesworth's dictum may be explained on grounds other than the jus liturgicum⁽¹⁾.

In the case of In re St. Nicholas, Plumstead⁽²⁾ Chancellor Garth Moore, having adopted his reasoning in Bishopwearmouth v. Adey, said⁽³⁾:

"In my view, and in accordance with the judgments of many chancellors, reservation with the permission of the bishop is lawful, and, in a proper case, should be assisted by faculty."

Moreover, he referred to -

"A pyx used for reservation lawfully authorised by the exercise of the bishop's jus liturgicum ..."⁽⁴⁾

(1) This may be a question purely of semantics. Jus liturgicum may refer merely to the episcopal discretion in accordance with the 1662 prayer book. In An Introduction to English Canon Law E. Garth Moore calls it "a faint echo" of the jus liturgicum: at 63.

(2) (1961) 1. W.L.R. 916,

(3) at 917 - 918.

(4) at 920.

If this reference to its being "lawfully authorised" is prompted by the words "by lawful authority" in the declaration of assent, the learned chancellor may probably mean more than the episcopal discretion given by the prayer book when he refers to "the bishop's *jus liturgicum*". Yet, having adopted Chancellor Wigglesworth's dictum in Re Lapford Parish Church, there is no question of any variation to be made to the authorised services, and the words "by lawful authority" must be understood as referring to such a variation. Thus the chancellor may well have had nothing more in mind than the episcopal discretion as a limitation of the old *jus liturgicum* (as opposed to a new creation not coming within the meaning of the canonical term). Moreover, Chancellor Garth Moore was also prepared, if necessary⁽¹⁾ to go further and to found his judgment on the doctrine of necessity.

The final case dealing with the *jus liturgicum* is again a judgment by Chancellor Garth Moore on reservation in which he decreed a faculty to reconstitute an ancient aumbry. In In re St. Peter and St. Paul, Leckhampton⁽²⁾ the chancellor stated⁽³⁾ that he was following his two judgments already referred to and then continued:

"...(R)eservation ... was prima facie not legally permissible by reason of one rubric in the Book of Common Prayer ..."

Yet by this he did not intend to imply that reservation was thus illegal and only "legalised", for example, by dispensation, for he went on⁽⁴⁾ to acknowledge the justification for his previous

(1) at 917 - 8. He did not think that it was necessary to go further, however.

(2) (1968) 2 W.L.R. 1551.

(3) at 1553.

(4) at 1554.

judgments. Indeed, this is important as it is also an acknowledgment that there is a latent ambiguity in the rubric upon which the bishop's discretion may be exercised in terms of the exhortation Concerning the Services of the Church. The chancellor then went on, moreover, to point out that rubric 40 of the Order for Holy Communion authorised under the Prayer Book (Alternative and Other Services) Measure, 1965, as part of the Alternative Services (second series) only demands the consumption of the remaining consecrated elements which are not "required for the purposes of Communion". Thus "the last remaining legal obstacle"⁽¹⁾ to reservation has now been removed, at least "for services within the scope of the Alternative Series (second series)"⁽²⁾.

Chancellor Garth Moore then considered the method of reservation and, having pointed out that no directions were contained in Series Two, went on⁽³⁾:

"It is, therefore, quite at large and, being quite at large, it must come within the *jus liturgicum* of the bishop and the discretion of the consistory court."

This reference, however, cannot be explained with reference to the episcopal discretion conferred by the 1662 prayer book as that prayer book was expressly excluded from consideration, although it might possibly be argued that there is sufficient ambiguity to rubric 40 to invoke it. Thus the chancellor must be referring either to the bishop's administrative discretion or to the old pre-Reformation *jus liturgicum*. Indeed in his

(1) Ibid. Perhaps "objection" would be a happier term.

(2) It may be noted that the learned chancellor would again have been prepared to invoke the doctrine of necessity.

(3) at 1554.

book An Introduction to English Canon Law he writes⁽¹⁾:

"It is submitted that there is no reason to suppose that the jus liturgicum has been abrogated by the Reformation settlement; but it has certainly been affected by it. It clearly would not lie with the bishop to authorize anything forbidden by the Book of Common Prayer, for the Book has statutory authority. Nor, for the same reason, could he authorize the omission of anything enjoined by the Book. But, over that wide area for which no provision is made one way or the other, it is submitted that the jus liturgicum can still operate, and indeed, that the exigencies of a situation may demand that it should operate in order to supply what would otherwise be grievously wanting."

On the other hand it may be argued that (a) the Acts of Uniformity were intended to cover all eventualities other than those arising from ambiguity (and these were provided for in the exhortation Concerning the Services of the Church); (b) that canon 36 of 1603, to which all clergymen assented (prior to 1865), provided that the Book of Common Prayer should be used in public prayer "and none other"⁽²⁾; and (c), if the exigencies of the situation were to demand a discretionary relaxation of the law, this would most properly fall within the doctrine of necessity and not of the jus liturgicum. Moreover, if in the quotation above the reference to lack of provision is a reference to ambiguities within the services laid down by the prayer book, the jus liturgicum is nothing more than the episcopal discretion,

(1) at 63 - 64.

(2) It is difficult to see how the jus liturgicum might usefully operate in the realms of private prayer.

described by Garth Moore as "a faint echo" of the jus liturgicum⁽¹⁾.

It may thus be seen that the weight of the evidence most probably lies against the jus liturgicum having survived and, indeed, the suggestion only properly arose in this century; that being so, the question must also arise as to whether the jus liturgicum, if it survived, had not become obsolete in the intervening period⁽²⁾. On the other hand, it might also be argued, from the many cases before the courts concerning uniformity and even from the preambles of the statutes concerned that the Acts of Uniformity had never been fully accepted within the Church of England and thus, in accordance with the canonical doctrine of custom contra legem, have never operated so as to oust the bishop's jus liturgicum fully. This later argument, however, is probably purely academic⁽³⁾. Yet, if the jus liturgicum has now been abolished, except in so far as it is

(1) at 63. He refers to Martin v. Mackonochie (1868) L.R. 2

A. + E. 116, and L.R.2 P.C.365; yet the question of reservation aside the bishop would not seem to be left much scope.

(2) See (eg.) Phillimore v. Machon (1876) 1 P.D.481, per Lord Penzance at 487; Blunt v. Park Lane Hotel, Ltd (1942) 2 K.B. 253, per Goddard, L.J. at 259; see, however, Veley v. Gosling (1843) 2 Not. Cas 278, per Sir H. Jenner Fust at 291 - 292.

(3) D.IV,c.3; this is consistent with 35 Henry VIII, c.11. On the other hand it may be argued that it would be against the common law to allow this doctrine such a breadth as to abrogate statute law (even ecclesiastical statutes); moreover, it is probable that the necessity for ecclesiastical law not to be contrary to statute law may be intended also to include future Acts of Parliament.

reflected in the bishop's discretion conferred by the prayer book itself, this is an example of the common law having subjugated the ecclesiastical law within a ritual strait-jacket and must be seen as yet a further step towards the fusion of the common law and the ecclesiastical law.

The question of the bishop's discretion and lawful authority again arise in the 1969 canons but the position is there made even more obscure. By canon B 2 "lawful authority" within the meaning of the Clerical Subscription Act, 1865, is defined so as to include by canon B 3 (b) -

"the powers of the bishop and the archbishop respectively to appease diversity and resolve doubts pursuant to the provision in the Book of Common Prayer entitled "concerning the Service of the Church".⁽¹⁾

This definition, of course, cannot be more than persuasive authority as to the meaning of "lawful authority" prior to 1969⁽²⁾ but, so far as it goes, it supports the view expressed above that the bishops' powers are confined to appeasing diversity and resolving doubt. They cannot alter the content or form of a service except under those powers referred to in canon B 5 and conferred by the Prayer Book (Alternative and Other Services) Measure, 1965, s.5, which allow any minister to make variations "not of substantial importance".

Indeed the mere necessity for the enactment of s.5 is a measure of the strength of the principle of uniformity within the ecclesiastical law even though it is not clear whether it

(1) This power is specifically stated to be neither limited nor prejudiced by the Prayer Book (Alternative and Other Services) Measure, 1965, s.10 (b).

(2) The canons, of course, cannot override the meaning of lawful authority found in the 1965 Measure as a measure has the authority of a statute.

adds at all to the state of the law in the light of the de minimis rule.

In Newbery v. Goodwin⁽¹⁾ Sir John Nicholl suggested⁽²⁾ that the omission of words in a lesson from feelings of delicacy "though not a legal justification" would be greatly extenuated. Similarly in Martin v. Mackonochie⁽³⁾ the Judicial Committee of the Privy Council stated that⁽⁴⁾ -

"Their Lordships are of opinion that it is not open to a Minister of the Church, or even to their Lordships in advising Her Majesty as the highest Ecclesiastical Tribunal of Appeal, to draw a distinction, in acts which are a departure from or violation of the rubric, between those which are important and those which appear to be trivial."

At least in liturgical cases the question of de minimis may well be only one of discretion as to whether a suit is instituted⁽⁵⁾, such discretion being exercisable by the Chancellor.

It should be noted, moreover, that by s.7 (2) a variation made under s.5 may be referred to the bishop "in order that he may give such pastoral guidance and advice as he may think fit"⁽⁶⁾ and that such a reference is specifically stated to be -

"Without prejudice to the matter in question being made the subject matter of proceedings under the Ecclesiastical Jurisdiction Measure 1963."

In fact the legal principle of uniformity - that is, the strict observance of liturgy and rite according to legal definition - remains, in spite of the great number of liturgical variations

(1) (1811) 1 Phillimore 282.

(2) at 284.

(3) (1868) L.R. 2 P.C. 365.

(4) at 382 - 383.

(5) Julius v. Bishop of Oxford (1880) 5 App. Cas. 214 per Lord Cairns, L.C. at 226.

(6) Emphasis supplied.

possible within the framework, for example, of the Holy Communion Service, Series II (being a form of service approved within the meaning of s.4 (1) of the Prayer Book (Alternative and Other Services) Measure, 1965).

Nor was uniformity the only great ecclesiastical matter dealt with by Edward VI. It has already been seen how the question of tithes was of perennial importance and by An Act for the Payment of Tithes, 1548⁽¹⁾ their payment was duly regulated. Yet the ecclesiastical judges were not given jurisdiction to -

"hold plea in any matter whereof the King's court of right ought to have jurisdiction"

or in any matter being contrary or repugnant to the second Statute of Westminster, c.5, the statutes of Articuli Cleri, Circumspecte Agatis, Silva Caedua, 1 Edward III, c.10 or "the treatise De regia prohibitione"⁽²⁾. However important the Church was in Edward's reign the common law was still supreme.

Other ecclesiastical matters, too, were dealt with, ranging from An Act touching Abstinence from Flesh in Lent, and other usual Times in 1548⁽³⁾ to an Act touching the Declaration of a Statute made for the Marriage of Priests, and for the Legitimation of their Children in 1552⁽⁴⁾. Further, the question of the revision of the ecclesiastical law was also raised in 1549 by 3 + 4 Edward VI, c.11 but the renewed attempt was thwarted by the death of the King. Yet, the principle of uniformity apart, the most important statute in Edward's reign was the statute Against Quarrelling and Fighting in Churches and Churchyards in 1552⁽⁵⁾.

(1) 2 + 3 Edward VI, c.13.

(2) S.15. Coke identifies the latter treatise as the treatise "Prohibitio formata super Articulis".

(3) 2 + 3 Edward VI, c.19.

(4) 5 + 6 Edward VI, c.12.

(5) 5 + 6 Edward VI, c.4.

Although the ecclesiastical courts had jurisdiction in brawling apart from the statute⁽¹⁾, the statute was the source of much litigation before it was repealed by the Ecclesiastical Jurisdiction Measure, 1963. Indeed, in the case of Wenmouth v. Collins⁽²⁾ a prohibition was prayed, to stay a suit in an ecclesiastical court for brawling in the belfry and striking a man there, upon the suggestion of this statute, arguing that all statutes are construable by the common law. The court, however, denied the prohibition "because this offence was conusable in the ecclesiastical court before this statute, ratione loci; and that the statute, though it provides a penalty, does not alter the jurisdiction."

Edward VI, therefore, built upon the foundations laid by Henry VIII but he carried the consolidation of Henry's supremacy far into the realms of liturgy. Not only was the Church's law now subject to the watchful eye of the common law but the Church's services, too, were bounded by statutes to be interpreted according to the tenets of the common law. In spite of Queen Mary's attempts to return to the pope's jurisdiction⁽³⁾, the ecclesiastical law of England, embracing much of the canon law but now a system of laws subject to its own peculiar limitations, was here to stay.

(1) Taylor v. Morley, 1 Curteis 470, Jenkins v. Barrett, 1 Hagg.15
In Hutchins v. Denziloe, 1 Hagg. Cons. 170 at 181 Sir William Scott stated that "The Act did not create the offence, as it subsisted by the common law before the statute was enacted, and there is no doubt that the ecclesiastical court had a right to interfere to correct or punish any act of disturbance of the public worship." (Note the ambiguity of the use of the term "common law").

(2) 2 Ld Raym. 850.

(3) See especially 1 Mary, s.2,c.2 and 1 + 2 Philip and Mary, c.8.

ADDENDUM

It is necessary to add a note about something which may at first sight be mistaken for the jus liturgicum and which is certainly closely akin to it.

Section 3 of the Act of Uniformity Amendment Act, 1872⁽¹⁾ states:

"Upon any special occasion approved by the Ordinary, there may be used in any cathedral or church a special form of service approved by the Ordinary, so that there be not introduced into such service anything, except anthems or hymns, which does not form part of the Holy Scriptures or Book of Common Prayer,"

and by s.4 an additional form of service approved by the ordinary and varying from any form prescribed by the 1662 Prayer Book may be used on Sundays if the prescribed services of mattins, evensong, the part of the order for Holy Communion required to be read if there is no Communion and the litany are said at some other hours on the same day. Thus variations were allowed by statute from the rigors of uniformity - variations necessitated in part⁽²⁾ by the lack of any power like the jus liturgicum in the ordinary but in fact amounting to a power (subject to scriptural and prayer book limitations) to compose, rather than to vary, services.

This still proved insufficient to meet modern liturgical needs, however, and the Prayer Book (Alternative and Other Services) Measure, 1965, was passed. By this Measure forms of service were made lawful which were either approved by the

(1) 35 + 36 Vict., c.35.

(2) The real necessity, however, was created by the limitation of services to those prescribed by the Book of Common Prayer rather than by the lack of flexibility in those services themselves.

Convocations of Canterbury and York⁽¹⁾ or by the ordinary⁽²⁾ for use on occasions for which no provision is made in the Book of Common Prayer and which in their opinion -

"in both words and order are reverent and seemly and are neither contrary to, nor indicative of any departure from, the doctrines of the Church of England."

The powers given by s.4, indeed, are wider than those given by s.3 of the 1872 Act for they are not confined to "any special occasion" nor do they depend for their legality upon the pre-condition of the saying of other services. Subsection (1) is intended to provide for services of national breadth, for example harvest festivals⁽³⁾, whereas subs. (2) is intended for diocesan needs.

Section 6 of the Measure in turn provides for parochial needs :

"Subject to the provisions of this Measure and to any regulations made from time to time by the Convocation of the Province, the Minister may on occasions for which no provision is made in the Book of Common Prayer or under section four of this Measure use forms of Service considered suitable by him for those occasions."

Thus a limited power to compose services is given to the minister himself but here again it is a power akin to, but separate from, the jus liturgicum for it does not confer any power to deviate from uniformity. The section particularly confines itself to "occasions" outside those "for which provision is made in the Book of Common Prayer" and therefore to compose a service similar to, yet deviating from, for example the Holy Communion service would still be illegal. Furthermore, although no mention is made

(1) s.4 (1).

(2) s.4 (2).

(3) See volume 10 of Halsbury's Statutes of England.

explicitly of the services conforming to the doctrines of the Church of England, this would be implied from the context of the Measure as a whole and in any event would be caught by the provisions of s.2 of the Ordination of Ministers Act, 1571⁽¹⁾ against affirming any doctrine directly contrary or repugnant to any of the Thirty-nine Articles of Religion.

Mention has already been made of s.5 of the Measure which allows the minister "in his discretion" to -

"make and use variations which are not of substantial importance in any form of Service prescribed by the Book of Common Prayer or authorised for use under this Measure according to particular circumstances."

This, of course, is not the jus liturgicum in its strict sense as this was confined to the bishop (and in any event was a creature, not of statute, but of the common law) yet the section does confer upon the officiating minister a power most nearly akin to it as can be found in the present day. Nonetheless it is still limited: variations must not be of "substantial importance"⁽²⁾ and they may be made "according to particular circumstances". It is not clear how wide a power this confers and it is very doubtful whether a court would today follow the nineteenth century precedents of making general judicial pronouncements on the minutiae of liturgical observance⁽³⁾. It is quite possible on the other

(1) 13 Eliz. 1 c.12.

(2) The marginal note reads "minor importance" but it is doubtful whether this in itself is a deviation of any importance.

(3) That is not to say that they will not pronounce on particular liturgical questions coming before them under the Ecclesiastical Jurisdiction Measure, 1963.

hand, that it would be held to cover such omissions as that of the Gloria in Advent or Lent from the 1662 Communion Service or that of the sermon from the Communion Service of Series 2⁽¹⁾.

(1) Rubric 12 states that "The sermon shall be preached after the Gospel". Although there has been debate as to whether this provision is mandatory or permissive it is believed that the Legal Board of the Church Assembly (a body whose opinions must hold great weight) has given as its opinion that the former is the better view.

P A R T I I

CHAPTER V

CONSTITUTIONS AND CANONS ECCLESIASTICAL

As has already been seen, the canon law in England prior to the Reformation consisted partly of the general canon law and partly of the more local enactments consisting of provincial and legatine constitutions as well as certain diocesan legislation⁽¹⁾. At the Reformation, however, the Act for the Submission of the Clergy, 1533⁽²⁾, enacted that the clergy -

"ne any of them from henceforth shall presume to attempt, alledge, claim, or put in ure any constitutions or ordinances provincial or synodal, or any other canons; nor shall enact, promulge, or execute any such canons, constitutions, or ordinances provincial, by whatsoever name or names they may be called, in their convocations in time coming, (which alway shall be assembled by authority of the King's writ,) unless the same clergy may have the King's most royal assent and licence to make, promulge, and execute such canons, constitutions, and ordinances provincial or synodal, upon pain of every one of the said clergy doing contrary to this act, and being thereof convict, to suffer imprisonment, and make fine at the King's will."⁽³⁾

Furthermore, s.2 limited this power by a proviso that -

"no canons, constitutions, or ordinances, shall be made

(1) For a very good summary of the history of the canons the report of the Archbishops' Commission on Canon Law entitled "The Canon Law of the Church of England", 1947, should be consulted. Some of the conclusions in chapter IV should be treated with reserve, however.

(2) 25 Henry VIII, c.19.

(3) S.1.

or put in execution within this realm by authority of the convocation of the clergy, which shall be contrariant or repugnant to the King's prerogative royal, or the customs, laws, or statutes of this realm; any thing contained in this act to the contrary hereof notwithstanding."

Parliament thus recognised and affirmed the power of the Church to legislate in re ecclesiastica but subject to the royal assent and its subordination to common law and statute⁽¹⁾. Indeed, the learned editors of Halsbury's Laws of England describe post-reformation canons as -

"bye-laws for the guidance of the church in re ecclesiastica made under the direction of the Crown in the Convocations"⁽²⁾

This is a very fair description but that is not to say that their status has been without doubt. In fact the interpretation of the above provisions themselves came before the common law courts in 1610 when in the Case of Convocations⁽³⁾ it was decided that:

1. A Convocation cannot assemble at their own or the Archbishop's convocation, without the assent of the King, (i.e.) by writ.
2. After their assembly they cannot confer together to constitute any canons without licence del Roy.
3. When they upon conference conclude any canons, yet they cannot execute any of their canons without royal assent.
4. They cannot execute any after royal assent, but with four limitations:
 - (a) that they be not against the King's prerogative;
 - (b) nor against the common law;

(1) But see addendum to this chapter.

(2) Volume 10, 3rd edition at 13.

(3) 12 Co. Rep. 72.

(c) nor against any statute law;

(d) nor against any custom of the realm.

Thus the Act was interpreted as giving to the King not only a power to licence the making of canons in general but also to veto any particular canon once enacted by Convocation.

Moreover the Act was stated merely to be declaratory of pre-Reformation canon law⁽¹⁾:

"...(A)nd this was but an affirmance of what was before the said statute, for that it appears by the 19 Ed. 3 title Quare non admisit 7, where it is held, that if a canon law be against the law of the land, the Bishop ought to obey the commandment of the King, according to the law of the land, 10 H. 7."

It has been shown already, however, that this view of the law is historically incorrect and Sir Edward Coke himself pointed out⁽²⁾:

"But by the said Act of 25 Hy. VIII. their jurisdiction and power is much limited and straitened concerning the making of new Canons: for they must have both licence to make them, and after they be made the King's royal assent to allow them before they be put in execution."

The question over which the greatest amount of ink has been spilt is the problem of how far the laity are bound by the canons⁽³⁾. There can be no doubt that prior to the Reformation the canon law bound clergy and laity alike. For example the ecclesiastical courts had a wide jurisdiction pro salute animae: six years before the Act of Submission the Commissary's Court of

(1) at 72.

(2) 4 Co. Inst. 322.

(3) See in particular the memoranda of Dr. Frere and Sir Lewis Dibdin in the Report of the Archbishops' Committee on Church and State (1916) at 265 and 279.

London dealt with an offence of abortion -

"Margareta Sawnders notatur quod potionibus infantulum
in utero Johanne Bydre interemit ..."(1)

and this jurisdiction was explicitly recognised by the common law courts in Middleton v. Crofts(2).

By reason of this jurisdiction, by any alteration of those canons which affected the laity the clergy were legislating for the laity and this was one of the particular complaints of the Commons contained in the revised Supplication presented to the King by the Speaker on the 18th March, 1532:

"(T)he prelattes and ordinaries with the Clergy of this your most excellent Realme have in thayr Convocacyons heretoffore made ordeynynd and constitutyd dyuers lawes, and also do make daylye dyuers lawes and ordenanunces without your Royall assent or knowladge or the assent or consent of Any of your laye Subiectes"(3).

The first part of this complaint was, of course, corrected by the Act of Submission, 1533, but no attempt was made by act to alter the fact that the laity were unrepresented on a body which legislated for them. Indeed the inference which may be drawn from this omission is that the status quo was intended to continue just as the Henrician settlement continued the two jurisdictions of the ecclesiastical and common law courts so there were to be two legislative bodies legislating in the same spheres as before the Reformation.

In Queen Elizabeth I's reign several sets of canons were

(1) (1527) Hale's Precedents 105.

(2) (1736) 2 Atkins 650.

(3) See Chapter III p. 51.

prepared but none had any lasting authority⁽¹⁾. In 1603,⁽²⁾ however, the Convocation of Canterbury enacted 141 canons to which in 1606 the Convocation of York also agreed. Yet of these canons few in number directly purported to make new regulations for the laity as distinguished from repetitions of already existing laws and their enforcement by a defined penalty⁽³⁾. In 1605 a Bill for the restraint of their execution unless confirmed by Parliament passed the Commons and was read a second time in the Lords, whilst similar attempts were made in 1606, 1610 and 1614. There was thus a growing opposition to canonical legislation which bound the laity without lay representation but in the case of Bird v. Smith⁽⁴⁾ in 1607 the common lawyers themselves confirmed the binding force of the canons. Indeed, such eminent judges as Lord Ellesmere and Sir Edward Coke resolved that -

"les Canons del eglise fait per le Convocacion et le Roy sand Parliament lieront en touts matters ecclesiastical

- (1) Those of 1571 the Queen did not sanction; the canons of 1575, 1585 and 1597 received the royal assent but only in a form effectual during her life.
- (2) These canons are variously dated as 1603 or 1604 "which is owing to the style, the date, if I recollect, being January" per Lord Brougham in Escott v. Mastin (1842) 4 Moo. P.C. 104 at 123 - 4.
- (3) Sir Lewis Dibdin lists 6, viz. Canons 18, 19, 29, 57, 62 and 100 but it may be doubted how far these actually made new law (eg) canon 18 merely sums up behaviour in divine service which was already binding as custom. And see Godolphin's Abridgement, App. 11 (ed. 1687).
- (4) Moore 781.

cy bien comme Act de Parliament"

and in a further passage that -

"The Convocation fait canons de chose appertaining al eux
et le Roy eux confirm, ils lieront tout le Realm."

The judges were consulted again on the question of the canons in 1610 in the Case of Convocations. This is reported in the 12th volume of Coke's reports and therefore must be treated with reserve, yet to it are appended three notes by Coke which were later treated as themselves being part of the report. The first states⁽¹⁾ -

"A Convocation may make constitutions by which those of the spirituality shall be bound, for this that they all, or by representation, or in person, are present, but not the temporality."

Whilst the third reads :

"Prohibitio Regis ne clericus in congregatione sua, etc.
attemptet contra jus seu coronam. Et alia, ne quod statuat
in concilio suo in prejudicium Regis seu legis, etc. By which it appears, that they can do nothing against the law of the land; for every part of the law, be it common law or statute law, cannot be abrogated nor altered without an act of Parliament, (to which every one shall be party) except for spiritual causes, or which concern spiritual persons; nor them, if it be against the prerogative of the King or the common law."

Great weight is given by Lord Hardwicke in Middleton v. Crofts⁽²⁾ to the former note but it may be pointed out that it may equally well be taken to mean that (a) the Convocations may bind the clergy and (b) the clergy are represented but not the laity; in other words the note need not necessarily be taken as meaning

(1) at 72 et seq.

(2) (1736) 2 Atkins 650 at 664.

that the Convocations can bind the spirituality but not the temporality. Furthermore, Lord Hardwicke dismisses the third note as a misprint -

"for it is neither grammar nor sense; and therefore no weight is to be laid upon it"

and declines to "attempt to explain its meaning"⁽¹⁾. This latter stricture is fair and certainly one should not stretch its meaning necessarily to include the view that the Convocation by their canons bind the laity. Yet this uncertainty should lead one also to treat with reserve any attempt to prefer one interpretation of the first note over another - especially in the light of Coke's judgment three years' previously. Having said this, however, it must be admitted that the first note is invariably taken as showing that it was Coke's view that Convocation could not legislate for the laity.

On the other hand the mere fact that Parliament felt constrained to pass legislation regarding Convocation's jurisdiction may itself show that Parliament recognised the binding character of canons on the laity even if it did not like that state of affairs. It is certainly overstating the evidence to state categorically, as Sir Lewis Dibdin does, that -

"lay public opinion, as expressed in the House of Commons, repudiated them (the 1603 Canons) from the first"⁽²⁾.

Certainly the Church itself had no doubts as to the validity of the 1603 Canons so far as the laity were concerned⁽³⁾:

(1) Ibid. But see Coke's dictum at Godol. 126 (infra).

(2) Op. cit., at 288.

(3) Canon 140. The Latin text is the authoratative text; the English text is the "ordinary unauthorised text" quoted by J.V. Bullard in "Constitutions and Canons Ecclesiastical, 1604".

"Whosoever shall affirm, that no manner of the Clergy or Laity, not being themselves particularly assembled in the said sacred Synod, are to be subject to the decrees thereof in causes Ecclesiastical (made and ratified by the King's Majesty's supreme authority) as not having given their voices unto them, let him be excommunicated, and not restored, until he repent and publicly revoke that his wicked error."

A number of cases early in the seventeenth century are quoted by Archdeacon Hale which may be examples of punishment of the laity for breach of 1603 Canons⁽¹⁾ but such references as there are to the 1603 Canons may only be added ex abundanti cautela according to Dibdin⁽²⁾. Certainly in 1619 John Tile was presented in the Court of the Archdeacon of Essex inter alia -

"for that he hath not used such reverence and attention within the church, at the tyme of divine service, as is required by the 28th Constitution ... and hath not given such reverence as is required, when the name of Jesus is mencioned ..."⁽³⁾.

Yet such irreverence was punishable by the ecclesiastical law prior to 1603 as may be seen, for example, in the case of John Wasp in 1587 who was excommunicated in -

"that he contemptuously refuseth to make reverence to the name of Jesus"⁽⁴⁾;

this was also a case in the Court of the Archdeacon of Essex. Thus they cannot be evidence that the 1603 Canons as such, and apart from the general ecclesiastical law, were enforced against

(1) See Hale's Precedents 245, 247, 254, 259, 261.

(2) Op. cit., at 287.

(3) Hale's Precedents 245.

(4) Ibid at 191. The same may also be said of the other cases cited in note (1): see Hale at 157 and 175.

the laity in re ecclesiastica.

Canon 89 stated that -

"All Churchwardens or Questmen in every parish shall be chosen by the joint consent of the Minister and the Parishioners, if it may be: but if they cannot agree upon such a choice, then the Minister shall choose one, and the Parishioners another ..."

The common law courts however decided that the 1603 canons were subject to a custom to the contrary: see, for example, Jermyn's Case⁽¹⁾, Warner's Case⁽²⁾ and Butt's Case⁽³⁾. Similarly in Evelin's Case⁽⁴⁾ in 1639 the parishioners surmised -

"that they had a custom within the parish whereof, etc. to elect both the churchwardens and that the Canons cannot take away their custom"

and prayed a writ of prohibition in the Court of King's Bench against the ecclesiastical court. Whereupon the Court granted a prohibition -

"to the intent it might be tried whether there were any such custom or no."

Of course if the custom alleged were a custom according to the canon law the allegation would entail an argument that the 1603 canons could not alter the general ecclesiastical law so as to bind the laity. It seems, however, that the cases must be taken as deciding that the 1603 canons cannot be contrary to the common law for in Walpoole v. Coldwell⁽⁵⁾ it was decided:

Se les Church-wardens d'un Parish hont use temps dont memory d'electer le Clark del Parish, et un suit est en

(1) Cro. Jac. 670 (King's Bench).

(2) Cro. Jac. 532 (Common Pleas).

(3) Noy 31: see also Noy 139.

(4) Cro. Car. 551 (King's Bench).

(5) 2 Rolle's Abr. 286.

l'Ecclesiastical Court a luy remover et a mister, eins un del election del Parson un prohibition gist."

This case is concerned, of course, with the election of a parish clerk who was to be elected by the minister according to Canon 91 but the same principles must apply in both cases. Moreover, in the Case of the Parishioners of Rolvendon⁽¹⁾ it was decided:

"Si les Parishioners d'un Parish hont use temps dont memorie etc. d'electer un Church-warden et le Vicar un auter, et puis un Cannon est fait que le Vicar electera ambideux, et il sit accordant, et les parishioners elect un solonque leur Custume, et l'Ordinary luy disallowe et establish les 2 elect per le Vicar, un prohibition serra grant."

This "use temps dont memorie etc." must refer to common law, and not canonical, custom and thus Coke, C.J.'s dictum cannot be taken as authority for showing that the 1603 canons do not bind the laity in re ecclesiastica. He said⁽²⁾ -

"A convocation hath power to make constitutions for ecclesiastical things or persons, but they ought to be according to the law and custom of the realm: and they cannot make churchwardens that were elegible to be donative, without act of parliament. And the canon is to be intended, where the parson had nomination of a churchwarden before the making of the canon."

Rather, the first sentence is further evidence that Coke regarded constitutions as binding if made purely in re ecclesiastica and may be taken as interpretative of Coke's meaning in his third note to the Case of Convocations (supra).

The question of canons binding the laity in re ecclesiastica was again raised in the controversy between Convocation and the

(1) Ibid at 287.

(2) Godol. 162.

Long Parliament in 1640 and a resolution passed by the House of Commons went so far as to affirm that Parliamentary confirmation of canons was necessary before they became binding not only on the laity but also on the clergy⁽¹⁾. This question came before the common law courts, in fact, in the case of Grove v. Elliot⁽²⁾ in 1670 when a prohibition was moved upon the suggestion that -

"per legem terrae no Man ought to be Judge in his own Cause, etc. nor ought any Man to be compelled to answer Articles prosecuted against him ex mero Officio etc."

As Chief Justice Vaughan stated⁽³⁾:

"As to Canons 3 Jacobi, certainly they are of force, tho' never confirmed by Act of Parliament: Yet they are the Laws which bind and govern in Ecclesiastical Affairs. The Convocation with the Licence and Assent of the King under the Great Seal may make Canons for Regulation of the Church, and that as well concerning Laicks as Ecclesiasticks, and so is Linwood. Indeed they cannot alter or infringe the Common Law, Statute Law, or King's Preorgative; but they may make Alterations, (viz. in Ecclesiastical Matters) or else they could make no new Canons: All that is required of them in making of New Canons is, that they confine themselves to Church Matters."

Indeed, in the case of Hill v. Good⁽⁴⁾ Vaughn, C.J. went so far as to state when considering the question of prohibited degrees:

"...(I)f a marriage be declared by Act of Parliament to be against Gods Law, we must admit it to be so; for by a Law (that is, by an Act of Parliament) it is so declared.

By the same reason, if by a lawful Canon, a marriage

(1) Cardwell, Synodalia, vol. I, at 385.

(2) 2 Ventris 41.

(3) Ibid at 44. Tyrrell, J. dissented.

(4) Vaughn 302.

be declared to be against Gods Law, we must admit it to be so: for a lawful Canon is the Law of the Kingdom, as well as an Act of Parliament: And whatever is the Law of the Kingdom, is as much the Law as any thing else that is so; for what is Law doth not suscipere magis aut minus."

In 1678, it was decided in the case of Cory v. Pepper⁽¹⁾ that a schoolmaster was bound by Canon 77 which forbade the teaching in a school without a licence from the Ordinary. The scope of this decision, however, is not certain from the report: the 11th canon of the Council of Lateran, 1215, had legislated for the licensing by the bishop of schoolmasters in cathedral schools but it is not clear what school was involved in this case. Of course, if the school concerned was a cathedral school, Canon 77 was no more than a re-embodiment of the pre-Reformation canon law.

In 1700 Chief Justice Holt stated obiter in the case of the Bishop of St. David's v. Lucy⁽²⁾:

"And 'tis very plain, that all the Clergy are bound by the Canons confirmed only by the King, but they must be confirmed by the Parliament to bind the Laity."

Moreover, the same view was expressed in the same year by Lord Keeper Wright in Cox's Case⁽³⁾:

"The canons of a convocation do not bind the laity without an act of Parliament ..."⁽⁴⁾

This latter case, in fact, was another motion for a prohibition against the ecclesiastical court in which a schoolmaster had been libelled for teaching without a licence from the ordinary and the Lord Keeper granted a prohibition as to the teaching of all

(1) (1678) 2 Levinz 222.

(2) (1700) Carthew 484.

(3) (1700) 1 P. Wm 29.

(4) Ibid at 32.

schools, except grammar schools, which he thought to be of ecclesiastical cognizance. Indeed in 1703 this view was given a historical justification in Matthew v. Burdett⁽¹⁾ in arguendo before the Court of the King's Bench:

"In the primitive church, the laity were present at all synods: When the empire became Christian, no canon was made without the emperor's consent: The emperor's consent included that of the people, he having in himself the whole legislative power, which our Kings have not: Therefore, if the King and clergy make a canon, it binds the clergy in re ecclesiastica, but it does not bind laymen; they are not represented in convocation; their consent is neither asked nor given."

Moreover, the following year the King's Bench had Holt, C.J. as their spokesman⁽²⁾. Speaking of the ecclesiastical courts, he said⁽³⁾:

"A jurisdiction allowed to them immemorial, must be taken to belong to them by law; but what I doubt at present is, whether this be so: and if there be any ancient canon for it, and received here before 1603, I will agree with you; but if not, no canon since, though in full convocation, can, proprio vigore, bind laymen."

On the other hand, however, the ecclesiastical lawyers were still adamant in maintaining the view that the 1603 canons bound the laity. Bishop Gibson in his Codex Juris Ecclesiastici Anglicani published in 1713, having quoted Coke's first note to the Case of Convocations (supra), went on to say⁽⁴⁾:

"By which, it is to be hoped, his Lordship did not mean, that

(1) 2 Salk. 412.

(2) Britton v. Standish (1704) 6 Mod. Rep. 188.

(3) at 190.

(4) 974. See also at * 995.

when Canons and Constitutions are framed by the Ecclesiastical Legislature about matters merely spiritual, and, being enforced by Ecclesiastical Censures for the Improvement of Discipline of the Church, are confirmed by the King as Supreme Head of the Church; that such confirmation hath not force enough to compel the Laity to submit and Conform to them, upon pain of such Censures. This would look, as if the Laity had nothing to be saved, but their Estates; nor the Clergy any thing to do, but to save themselves: and if, in the Reign of Queen Elizabeth, this Doctrin (that the Parliament's intermeddling in any matter concerning Religion, was an Invasion of the Royal Supremacy) was thought an Extreme on one side; such an entire Exclusion of the Supremacy from any effect or influence over the Laity, in matters which merely concern Religion, may well be thought an Extreme on the other side.

Much truer, undoubtedly, is the Doctrin delivered by Vaughan, in the Case of Grove and Elliot ..."

Similarly John Ayliffe in his Parergon Juris Canonici Anglicani published in 1726 stated⁽¹⁾:

"And a Constitution made by an Archbishop in a Provincial Council legally assembled binds and obliges all Persons of that Province."

In 1736, however, the question finally came directly before the Court of King's Bench in Middleton v. Crofts⁽²⁾, Middleton and his wife were articted against in the spiritual court for being married out of canonical hours, without licence or banns, and in a private house. A prohibition was prayed for and three questions were raised:

(i) Whether, by virtue of the 1603 canons, lay persons were

(1) at XXXIII.

(2) 2 Atkins 650.

punishable by ecclesiastical censures for a clandestine marriage;

(ii) whether, if lay persons cannot be prosecuted or punished by force of the 1603 canons, the court had jurisdiction of such a cause against them by the ancient canon law; and

(iii) whether, if there were such a jurisdiction under (i) and (ii), that jurisdiction had been taken away by the statute 7 + 8 William III, c.35,s.4.

Only the first two questions concern us here. The opinion of the whole court was delivered by Lord Hardwicke, C.J. and it considered at length the previous decisions of the common law courts. No notice is taken, however, of either Cory v. Pepper or Cox's Case nor of the various times the House of Commons had considered the question. Bird v. Smith is dismissed as -

"a very extraordinary case, and the decree such a one as would not be allowed as a precedent at this day, which is a good cause to suspect the reason upon which it is built."⁽¹⁾

Hill v. Good is rightly distinguished as proving "nothing in the present case"⁽¹⁾ and Vaughn C.J.'s dictum in Grove v. Elliot, although recognised as "of a different opinion from that which the court has now delivered"⁽²⁾ is contrasted with the views of Newton, Coke, Tyrrell, Holt and King. Coke's third note to the Case of Convocations being dismissed as -

"certainly misprinted, for it is neither grammar nor sense, and therefore no weight is to be laid upon ..."⁽³⁾.

Nor was the Case of the Parishioners of Rolvenden referred to in order to make it more intelligible.

(1) at 667.

(2) at 668.

(3) at 664.

The judges therefore came to the opinion -

"that the canons of 1603, not having been confirmed by parliament, do not proprio vigore bind the laity; I say proprio vigore, by their own force and authority; for there are many provisions contained in these canons, which are declaratory of the ancient usage and law of the church of England, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons"⁽¹⁾.

They based this view upon the same arguments as those made before the court in Matthew v. Burdett, viz. lack of lay representation on Convocation, and upon the argument that since the Reformation -

"When any material ordinances or regulations have been made to bind the laity as well as clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by parliament: of this proposition the several acts of uniformity are so many proofs ..."⁽²⁾.

Needless-to-say, no mention is made of Bishop Gibson's justification for the opposing view based upon arguments pro salute animae. It is important to note, however, that the binding force of pre-Reformation canon law is based not only on the general reception theory then prevalent but also on the ground that the pre-Reformation canon law had statutory authority⁽³⁾:

"this rule is warranted not only by the reason and nature of the thing, but also by a strong express declaration in parliament ..."

(1) at 653.

(2) at 657.

(3) at 669 referring to 25 Henry VIII, cc. 19 and 21 and 35 Henry VIII, c.16.

There can be no doubt that the view of the binding force of the canons on the laity as expressed in Middleton v. Crofts is now universally accepted as the law by canon and common lawyers alike. In 1753 Sir George Lee in the case of Lloyd v. Owen⁽¹⁾ in the spiritual courts stated, referring to Canon 18 of 1603⁽²⁾:

"I was of opinion ... that the Canon of 1603, was exhortatory, but did not inflict any penalty, and a prosecution could not be founded upon it against a layman, because the Canons of 1603 do not bind the laity ..."

Similarly Lord Hardwicke's view was endorsed in the case of the Bishop of Exeter v. Marshall⁽³⁾ by the House of Lords in 1866.

Yet this goes to show that between 1533 and 1736 the attitude to the ecclesiastical law had changed; in 1533 it was assumed, in spite of complaints by the House of Commons, that canons made by the Convocations in re ecclesiastica bound clergy and laity alike; in 1736 it was assumed that the Convocations could only bind the clergy. Indeed there seems no doubt that between 1533 and 1736 an actual change in the law occurred due to this change of attitude. Whether this occurred in the eighteenth century or the sixteenth to seventeenth centuries⁽⁴⁾ is not of great concern for present purposes. What is of significance, however, is that there was this shift in attitude and that it was reflected in the substantive law. The ecclesiastical lawyers were still asserting the greater scope of the ecclesiastical law as late as 1726 whereas the laity were objecting to that scope as early as

(1) 1 Lee 434.

(2) at 436 - 7. He wrongly cites Middleton's Case as Middleton v. Thorpe.

(3) (1868) L.R. 3, H.L. 17. See, further, R. v. Allen (1872) L.R. 8 Q.B. 69 at 75, per Blackburn, J..

(4) For opposing views see Sir Lewis Dibdin and Dr. Frere, *op. cit.*

the Reformation itself. Amongst the common lawyers opinions wavered⁽¹⁾ but finally the scope of the ecclesiastical law was limited by Middleton v. Crofts which in turn was accepted by the ecclesiastical courts⁽²⁾. It is not, of course, suggested that there was any conscious alteration of the law by the common lawyers but merely that their opinions naturally reflected the general political and philosophical views of their day, bolstered by an unhistorical belief in the so-called "reception" of the canon law in England⁽³⁾. Moreover, after the Reformation the common law view was bound ultimately to prevail. This process, in fact, may be compared to the position of the common law courts themselves vis-à-vis the crime of murder. In 1887 Stephen, J. in R. v. Serné⁽⁴⁾ stated that in his opinion⁽⁵⁾ -

"the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed."

Thereafter, at least in abortion cases⁽⁶⁾, the rule was restricted in practice to cases where the operation was so conducted that a reasonable man would have foreseen the risk of death or grievous bodily harm. This led Kenny, for example, in his Outlines of Criminal Law⁽⁷⁾ to limit his statement of this branch of the law

(1) It is probable that Sir Edward Coke himself is the prime example of this.

(2) It should be borne in mind that the laity, although not bound by the canons, are nonetheless affected by them: Garth Moore, *op. cit.*, at 25.

(3) See (eg) Evans v. George (1825) 12 Price 76.

(4) 16 Cox 311.

(5) at 313.

(6) See R. v. Whitmarsh (1898) 62 J.P. 711; R. v. Bottomley (1903) 115 L.T. Jo. 88; R. v. Lumley (1911) 22 Cox 635.

(7) 1st ed. (1902).

of homicide to⁽¹⁾ -

"such felonious acts as involve violence against an unwilling victim." -

and according to Turner⁽²⁾ the House of Lords adopted this view of the law in D.P.P. v. Beard⁽³⁾ by using the phrase "felony of violence" instead of the word "felony"⁽⁴⁾. If these learned authorities are correct the strict law had become abrogated by the courts⁽⁵⁾; it should be noted, however, that the Royal Commission on Capital Punishment⁽⁶⁾ took the view that the rigorous form of the rule remained the law.

Needless-to-say, the clergy were bound by their own constitutions prior to the Reformation and this was enforced by the ecclesiastical courts; of course the common law courts intervened when the scope of the canon law came into conflict with that of the common law. It is true that this was later interpreted by the common law courts to support their idea of the "reception" of the canon law, as in Evans v. Ascuithe⁽⁷⁾ but this does not alter the general position. At the Reformation, moreover, these canons were given statutory authority by the Act of Submission (supra).

The Long Parliament's resolution in 1640, however, questioned whether the clergy could be bound by their canons passed in Convocation. This must, of course, be seen against the

(1) at 137.

(2) Modern Approach to Criminal Law at 258 - 259.

(3) (1920) A.C. 479.

(4) at 507.

(5) That judges make law is acknowledged by Lord Diplock in Home Office v. Dorset Yacht Co. Ltd. (1970) 2 All E.R. 294 at 324 B.

(6) (1953) Cmd 8932, para. 85.

(7) Palmer 457 at 469.

background of the controversy over the 1603 canons and the laity; in addition Convocation endeavoured to make further canons in 1640 but ^{they} were never of any force even in the ecclesiastical courts⁽¹⁾. Yet the question mark raised remained in spite of dicta to the contrary. In 1610 in the Case of Convocations⁽²⁾ Coke had stated -

"A convocation may make constitutions, by which those of the spirituality shall be bound, for this, that all, or by representation, or in person, are present ..."

Similarly Holt, C.J. had no doubts as to the binding of the clergy when he said in the Bishop of St. David's v. Lucy⁽³⁾:

"And 'tis very plain, that all the Clergy are bound by the Canons confirmed only by the King ..."

In Matthew v. Burdett⁽⁴⁾, however, it was underlined that the clergy were only bound in re ecclesiastica; on the other hand in 1741 in More v. More⁽⁵⁾ Lord Hardwicke, L.C. affirmed that the 1603 canons certainly are -

"prescriptions to the ecclesiastical courts, and likewise to clergymen"⁽⁶⁾ -

and again -

"No ecclesiastical person can dispense with a canon, for they are obliged to pursue the directions in them with the utmost exactness, and it is in the power of the crown to do it only."⁽⁷⁾

(1) Cooper v. Dodd (1850) 7 Not. Cas. 514 at 516, per Sir H. Jenner Fust.

(2) 12 Co. Rep. 72.

(3) (1700) Carthew 484 at 485.

(4) (1703) 2 Salk. 412.

(5) (1741) 2 Atkins 157.

(6) at 158.

(7) at 159.

In Middleton v. Crofts⁽¹⁾ it had been taken for granted that the clergy were bound in re ecclesiastica. In the Bishop of Exeter v. Marshal⁽²⁾, however, Willes, J. stated⁽³⁾:

"...(I)t is clear that the Canons of 1603 do not, proprio vigore, bind the laity, nor the clergy as to their temporal possessions ... and an advowson is a temporal possession. As to how far, otherwise than in conscience, Canons of 1603, not declaratory of ancient canons adopted into the law of England before the records of Parliament, bind the clergy, I reserve my opinion."

Nonetheless in spite of this caution and the fulminating of the Long Parliament, it cannot seriously be doubted that the canons of Convocation, duly enacted, bind the clergy in re ecclesiastica as long as they do not infringe the bounds set by the Act of Submission. There would, of course, be no point in the enactment of the 1969 canons if they did not bind the clergy and, although this in itself is no argument, the courts would be loathe to upset the accepted position. (There is, however, the question dealt with below as to the 1603 canons which ran contrary to the pre-Reformation canon law, if any.) Moreover, in the case of Forbes v. Eden⁽⁴⁾ in a suit instituted by a clergyman of the Episcopal Church of Scotland in the civil courts to set aside certain canons passed in 1863 for the purpose of cementing the union between that Church and the Church of England and Ireland Lord Cranworth gave as his opinion⁽⁵⁾:

"A religious body, whether connected with the state or not,

(1) (1736) 2 Atkins 650.

(2) (1868) L.R. 3 H. L. 17.

(3) at 42 - 43.

(4) (1867) 2 Sc. + Div. 568.

(5) at 584.

forms an imperium in imperio, of which the Synod is the supreme body, when there is not, as there is in the Church of England, a temporal head. If this is so, I feel it impossible to say that any canons which they establish are ultra vires. The authority of the Synod is supreme. It may indeed be that a Synod, or general assembly, of a religious body has no power to affect civil rights already acquired under existing canons or rules. But that is very different from saying that the canons or rules themselves have no force among those who have no such complaint to make."

It is true that the analogy between Forbes v. Eden and the question under discussion is far from complete but the common sense position would seem to be the same.

The legal position of deaconesses vis-à-vis the Acts of Convocation have already been discussed⁽¹⁾ and it was concluded that the legal status of a deaconess was neither greater nor smaller than the legal status of any other woman in the Church of England. The deaconess was a creation (so far as the modern law is concerned) of an Act of Convocation which had no more than moral force. In 1969 the Canons purported also to legalise the position of the deaconess. For example Canon D 1 (3) states:

"The bishop may permit a deaconess in any church or chapel within his jurisdiction at the invitation of the minister thereof :

a To read in case of need the services of Morning and Evening Prayer and the Litany, except those portions reserved to the priest, and to lead in prayer ..."

and Canon D 2 sets out the ministerial function of a deaconess. Setting aside the question of necessity, however, as also the

(1) Chapter III.

question whether the word "minister" may include a woman in the Book of Common Prayer⁽¹⁾, it is doubtful whether the Canons can alter the status of the deaconess. Canon D 1 (4) specifically states that -

"The order of deaconesses is not one of the holy orders of the Church of England, and accordingly deaconesses may accept membership of any lay assembly of the Church of England without prejudice to the standing of their order."

Deaconesses are thus recognised by the canons as lay members of the Church and the canons only proprio vigore bind the clergy; there is, of course, no question of these particular canons embodying pre-Reformation canon law. Section 17 of the Ecclesiastical Jurisdiction Measure, 1963 enacts:

"Proceedings under this Measure may be instituted against an archbishop, any diocesan bishop or any suffragan bishop commissioned by a diocesan bishop or any other bishop or a priest or deacon who ... holds preferment in any diocese or ... resides therein as the case may be."

It is extremely unlikely that the word "deacon" may here be construed so as to include "deaconess" because of the particularity of the section's wording and therefore the deaconess is also beyond the disciplinary provisions of the ecclesiastical law⁽²⁾. It remains, however, that the 1969 Canons do bind the clergy in re ecclesiastica and it seems that those of the clergy to whom these canons are directed are bound by them. Thus the bishop must licence any deaconess⁽³⁾ and before doing so must satisfy

(1) If it may not, the canon of course runs counter to the Act of Uniformity, 1661, and is therefore of no effect at least as far as the Book of Common Prayer is concerned.

(2) No criminal proceedings may be brought other than those authorised under the Measure: s.69.

(3) D 3 (1).

himself that "adequate provision has been made for her salary," etc⁽¹⁾; in addition he must keep a register of all admitted or licensed deaconesses⁽²⁾. Thus, although it is probable that the deaconess is not herself bound by the Canons⁽³⁾, those canons do bind others.

Many of the 1603 Canons refer to the ecclesiastical courts and the next question that arises is to whether there are lay officials who are bound by the canons. Neither Middleton v. Crofts nor any other case has decided they are not bound so far as their official acts are concerned. Burn in the preface to his Ecclesical Law⁽⁴⁾ states:

"...(W)ith respect to those officers of the ecclesiastical court which are laymen, as registrars, proctors, and apparitors (and we may add also churchwardens, who are officers attendant on the courts of visitation, there to give information of offences); for as to these, the temporal courts in the adjudications which have been made do proceed upon a supposition that these canons are in force. But according to the foregoing doctrine, the distinction must be

(1) D 3 (3).

(2) D 3 (4).

(3) Unless they may be regarded as consensually bound. See (eg) Forbes v. Eden (1867) 2 Sc. + Div. 568 at 576, per Lord Chelmsford. A similar anomalous position arises concerning lay readers and laity licensed to administer the chalice.

(4) 2nd edition at XX + XXI. The same point is made in The Canon Law of the Church of England at 77 and Phillimore, *op. cit.*, vol. II at 1076. Garth Moore in his Introduction to English Canon Law at 126 (note 4) points out that "ecclesiastical personae such as chancellors and churchwardens might in some circumstances find themselves the objects of such proceedings."

this: That the regulation of the officers according to the measures prescribed by these canons, is not so much of necessity, as of convenience; that the canons in these respects are a good rule to go by, but not of peremptory obligation; and therefore that the authority which the court exerciseth over its officers according to these canons, is not from the canons themselves, but from that power which every court hath over its own officers, by the common law, by the ancient canon law, and by every law; for without this, there could be no courts at all."

This jurisdiction is confirmed, moreover, by More v. More⁽¹⁾ where Lord Hardwicke, L.C. stated⁽²⁾:

"It is very surprising, when canons, with respect to marriages, have laid down directions so plainly for the conduct of ecclesiastical officers and clergymen (which, though they have not the authority of an act of parliament, and consequently are not binding upon laymen, yet certainly are prescriptions to the ecclesiastical courts and likewise to clergymen) that there should be such frequent instances of their departing from them, and introducing a practice entirely repugnant to them. V.62. Can. 102, etc., in 1603, all of them extremely plain in their directions to ecclesiastical officers and clergymen: one would think no body ever read them, neither the officers of the spiritual courts nor clergymen, or they could not act so diametrically opposite them."

The Ecclesiastical Jurisdiction Measure, 1963, s.82 (2)(c) abolishes the jurisdiction of consistory courts to hear and determine proceedings against lay officers of a church and thus

(1) (1741) 2 Atk. 157.

(2) at 158. This may rather be an example of the canons' affect on the laity: see p.158 footnote (2).

abolishes the jurisdiction over churchwardens unless it may be argued that proceedings may still lie against them in their capacity as lay officers of the court⁽¹⁾. It seems that the inherent jurisdiction of any court to discipline its own officers remains in spite of s.17 of the Measure. An example of this jurisdiction prior to 1963 may be found, for example in In the Goods of Lady Hatton Finch⁽²⁾ where a proctor was suspended for three months for making an extortionate charge for taking out probate in common form. Moreover, if this is so, chancellors themselves ought to fall within the ambit of the ecclesiastical law in spite of being "non-ecclesiastical personae"⁽³⁾ although whether the present court system is wide enough to embrace them may be doubted⁽⁴⁾. On the other hand, the Ecclesiastical Jurisdiction Measure, 1963, did nothing to affect "any prerogative of Her Majesty the Queen"⁽⁵⁾ and it would therefore seem that it would be within the Queen's prerogative to establish a court to try any particular and necessary offence⁽⁶⁾.

(1) See Smythes' Case, Palmer 318: "Et fuit resolve per Cur', q̄ Extortion de Officers de Court Ecclesiastical p̄ fers p̄ letters d'administration fuit punishable p̄ Indictment al common Ley sans ayd de ascun Stat'."

(2) (1830) 3 Hag. Ecc. 255.

(3) This phrase is taken from Introduction to English Canon Law at 126. They cannot be regarded as "lay officers of a church." N.B. The indefinite article.

(4) Ecclesiastical Jurisdiction Measure, 1963, s. 17. This jurisdiction could also be regarded as obsolete.

(5) S.83 (2) (a).

(6) See Chap. VI at 210 et seq..

One question remains, however, concerning the 1603 Canons. Canon 122 stated concerning the sentences of deprivation and deposition -

" ... no such sentence shall be pronounced by any person whomsoever, but only by the Bishop, with the assistance of his Chancellor, the Dean (if they may conveniently be had), and some of the Prebendaries, if the court be kept near the Cathedral Church, or of the Archdeacon, if he may be had conveniently, and two other at the least grave Ministers and Preachers, to be called by the Bishop when the court is kept in other places."

In Watson v. Thorp⁽¹⁾ this canon was discussed in arguendo:

"Powlett v. Head was decided by bishop Gibson, who having high notions of personal authority, always sate in Court with his chancellor ...

The difference between suspension and deprivation exists in this, that the former may be pronounced by the chancellor of the diocese, the latter by the bishop alone. All chancellors can suspend; the dean of the Arches can even deprive, but he alone of all ecclesiastical judges is vested with this power"⁽²⁾

Eleven years later Sir John Nicholl gave as his opinion in Saunders v. Davies⁽³⁾ in the Court of Arches:

"...(D)eprivation is a penalty which it is not at its (the Court's) option to award; that, and deposition, being specially reserved by the canon to the diocesan."

However, Sir H. Jenner Fust in the same court in Clarke v. Heathcote⁽⁴⁾ was not so certain of the true meaning of the canon⁽⁵⁾:

(1) (1811) 1 Phillimore 269.

(2) at 277.

(3) (1822) 1 Addams 291.

(4) (1845) 4 Not. Cas. 321.

(5) at 322.

"I am not prepared to say, if I were of opinion that this is a case for degradation, whether this Court has the power, or the Archbishop of Canterbury has the power, of pronouncing such a sentence; whether there should not be a certain number of bishops present."

In 1682 and again in 1690⁽¹⁾ the Court of Delegates confirmed sentences of deprivation pronounced by the Dean of the Arches whereas in H.M. Procurator General v. Stone⁽²⁾ in 1808 Sir William Scott in the Consistory Court of London stated that the sentence of deprivation must be pronounced by the bishop⁽³⁾. On a strict reading of canon 122 it seems at least open to the interpretation that any chancellor may pronounce such a sentence without assistance if the presence of others is inconvenient. The practice seems to have been, however, that only the Dean of Arches had the power to deprive sitting alone⁽⁴⁾ and this was supported by writers on ecclesiastical law⁽⁵⁾. The present position is governed by the Ecclesiastical Jurisdiction Measure, 1963, parts VIII and IX.

Finally, the question must arise as to the position of the 1603 Canons in the light of the 1969 Canons. The passing of the new Canons necessarily repeals the 1603 Canons and that is assumed by the retention of the proviso to canon 113 of the 1603 Canons relating to the seal of the confessional⁽⁶⁾. The 1603

(1) Pullen v. Clewer 1 Hag. Ecc. (Appendix B) 2 and Rich v. Gerard 1 Hag. Ecc. (Appendix B) 7.

(2) 1 Hag. Con. 424.

(3) at 433.

(4) Burgoyne v. Free, 2 Hag. 406; Hussey v. Radcliffe, 5 Jur., N. S. 1014; Bishop of London v. Boswell, 14 Moo. P.C. 395; Bishop of Norwich v. Pearce, 2 Adm. + Eccl. 281.

(5) Phillimore, op. cit., vol. II at 1399; Halsbury, op. cit., at 237.

(6) See below.

Canons, however, embodied the pre-Reformation canon law in many respects (supra) and the pre-Reformation canon law had received statutory authority by the Act of Submission, 1533, s.7 and 35 Henry VIII, c.16, s.3. Indeed, the whole rationale of Middleton v. Crofts that the laity were not bound by the 1603 canons proprio vigore is that the laity were bound by those canons which embodied the pre-Reformation canon law⁽¹⁾. What then is the position of those 1603 canons which embody the pre-Reformation canon law but are repealed by the 1969 canons? Putting aside the problem of obsolescence⁽²⁾, are the clergy still bound by the pre-Reformation canon law embodied in those 1603 Canons? If so, the 1603 Canons might still be of some evidentiary value regarding that canon law.

It has been considered above whether or not the clergy were bound by the 1603 Canons. If the pre-Reformation canon law received actual statutory force by the Act of Submission, 1533⁽³⁾, it might be argued/^{that} that law could not be abrogated by any subsequent canon⁽⁴⁾. Indeed, this would explain the meaning of Willes, J.'s dictum in the Bishop of Exeter v. Marshal⁽⁵⁾ in which he reserved his opinion as to whether or not the clergy were bound by the 1603 canons (supra). Section 7 of the Act of Submission, 1533, provided for the canons to be "used and executed as they were afore the making of" the Act but this could refer either to what canons were to be so used and executed or to what their force was to be. The statute 35 Henry VIII, c.16, s.3 enacts that the canons and the canon law "shall be

(1) 2 Atk. 650 at 653.

(2) See below.

(3) See above at 70.

(4) Act of Submission, 1533, s.2.

(5) (1868) L.R. 3 H. L. 17 at 42 - 43.

occupied, exercised and put in ure for the time;" no mention is made as to what force they should receive. Section 7, however, is interpreted by the learned editors of Halsbury's Laws of England as continuing "the authority whatever it was which the canons already possessed"⁽¹⁾, citing Archbishop Bensen in Read v. Bishop of Lincoln⁽²⁾. But the Archbishop merely states that the canons "have authority"⁽²⁾. If the Henrician statutes are merely declaratory of the canons' previous authority the 1969 canons can alter the pre-Reformation canon law without question. If, on the other hand, they give the pre-Reformation canon law statutory force it might be argued that it could not be altered by the enactment of subsequent canons. That subsequent canons could only cover such fields as are not already covered by the pre-Reformation law seems to be an unnecessarily narrow view, however, and, if the Henrician statutes give statutory force to the pre-Reformation law, they also give statutory force to the general canonical rule that canons may be repealed by subsequent canons. Thus it seems that the 1603 canons could repeal the pre-Reformation canon law in re ecclesiastica and the same rule must apply to the 1969 canons in their repeal of those 1603 canons which embodied the pre-Reformation canon law.

(1) op. cit., at 9 note (i).

(2) (1889) Roscoe's Report 1 at 17.

ADDENDUM

There is no doubt that a canon cannot override a previously enacted statute⁽¹⁾. On the other hand, it is not clear whether a subsequent statute necessarily overrides a canon already having the force of law⁽²⁾. In the Report of the Archbishop's Commission on Canon Law, The Canon Law of the Church of England⁽³⁾, it is suggested⁽⁴⁾ -

"That a statute does not automatically override a canon may be inferred also from the fact that, when Parliament extended the hours between which Canon 62 of 1603 permits marriages to be solemnized, it was thought necessary for the Convocations to amend the Canon."

This inference is not convincing, however: the Convocations would no doubt have felt that the canons should be seen to correspond with the general canon law if that law had been altered by Parliament⁽⁵⁾.

In a memorandum in Anglican-Methodist Unity. Report of the Joint Working Group 1971 Mr. W.S. Wigglesworth Q.C.⁽⁶⁾ adopts a

- (1) See the Act for the Submission of the Clergy, 1533 (25 Henry VIII, c.19), s.2; Case of Convocations (1610), 12 Co. Rep, 72 and pp.141 et seq. supra.
- (2) For a general discussion see Chapter 9.
- (3) Published in 1947.
- (4) At 67, footnote 1. The other examples do not help as there is no suggestion that the ecclesiastical courts did not consider themselves bound by the statute.
- (5) In similar circumstances which could arise W.S. Wigglesworth Q.C. has suggested that the canons "could be expressly modified if that course were thought to be desirable": Anglican-Methodist Unity. Report of the Joint Working Group 1971 at 31.
- (6) Dean of the Arches.

quotation from the report already referred to⁽¹⁾:

"The immediate effect of such legislation is to create two different laws on the same subject - the canon and the statute. If the statute is accepted and acted upon by Ecclesiastical authorities - whether expressly or tacitly - a contrary custom is established which overthrows the old Canon Law and substitutes the statute in its place ... But this result is not brought about by statutes, proprio vigore, but by their acceptance by the Church and consequent establishment as custom ..."

It is clear that this view of the effect of a subsequent statute⁽²⁾ upon a canon⁽³⁾ is regarded as correct⁽⁴⁾ as he continues⁽⁵⁾ -

"If ... the Bill becomes an Act the ecclesiastical authorities will proceed with the Service of Reconciliation and thereby accept and act upon the new Statute. This acceptance of the Statute will modify the Canons."

This opinion must command respect but no authorities for the view have been put forward and it may be doubted whether the common law courts would readily accept the contention that a statute in no circumstances automatically overrides a previous canon. The Case of Convocations⁽⁶⁾ was concerned with new canons not in accordance with previous statute law but it is by no means unlikely that, if the instant question had been before the court, it would have come to a similar conclusion⁽⁷⁾ -

(1) at 31. The quotation adopted is not reproduced in toto. Mr.

Wigglesworth was himself a member of the commission.

(2) In this case the proposed Anglican-Methodist Reconciliation Act 19 .

(3) Canon C1.

(4) No mention is made of the footnote quoted above, however.

(5) at 31.

(6) (1610), 12 Co. Rep. 72.

(7) at 72.

"that if a canon law be against the law of the land, the Bishop ought to obey the commandment of the King, according to the law of the land ..."

Nonetheless at the present time no final conclusion can be reached and in practice no conflict is likely ever to come before either the common law or the ecclesiastical courts.

CHAPTER VI

THE LAITY

In the previous chapter it was concluded that the Canons Ecclesiastical do not proprio vigore bind the laity but that, in so far as they embody pre-Reformation canon law, they are so binding. In addition, it was considered that ecclesiastical officers were bound by the canons proprio vigore as part of an ecclesiastical court's inherent jurisdiction⁽¹⁾ but doubts were expressed as to the effect of the Ecclesiastical Jurisdiction Measure, 1963, on this jurisdiction. It is now necessary to consider how far, if at all, the ecclesiastical courts retain their ancient jurisdiction over the laity. If this jurisdiction remains to any degree a fortiori the jurisdiction over ecclesiastical officers qua officers, and not as members of the laity may still be exercised by the ecclesiastical courts.

It is no longer necessary to consider the great breadth of jurisdiction which the ecclesiastical courts originally exercised on the basis of Mother Church's concern pro salute animae. As Phillimore commented⁽²⁾ -

"as every act of a Christian man may be said to have some reference to his duty towards God, it is difficult to say why, upon this principle, jurisdiction upon every subject should not be exercised by the spiritual court"

and this view at times was shared by the ecclesiastical courts themselves⁽³⁾. In the nineteenth century, however, this jurisdiction was severely restricted by Parliament: all matrimonial

(1) It may also be argued that this jurisdiction rests upon consensual agreement: the basis for such a view may be found by implication in Forbes v. Eden (1867), 2 Sc. + Div. 568.

(2) Ecclesiastical Law of the Church of England, vo.II at 1075.

(3) See above.

and testamentary causes were transferred to the temporal courts by the Court of Probate Act, 1857⁽¹⁾ and the Matrimonial Causes Act, 1857⁽²⁾ thus causing the prerogative courts and those courts with peculiar jurisdiction⁽³⁾ to cease to exist; suits of defamation were removed from ecclesiastical cognisance by the Ecclesiastical Courts Act, 1855⁽⁴⁾; the Tithe Act, 1836⁽⁵⁾ substituted tithe rent charges recoverable by distress⁽⁶⁾ for tithes enforceable by the Church courts; and compulsory church rates were abolished under the Compulsory Church Rates Act, 1868⁽⁷⁾. Indeed, virtually the whole of the Church's civil jurisdiction over the laity was thereby abolished, the only exceptions being the jurisdiction relating to the fabric and ornaments of the church, the churchyard and churchwardens⁽⁸⁾. On the other hand the Church's criminal jurisdiction⁽⁹⁾ over the laity remained unimpaired save that the ecclesiastical courts' jurisdiction over laity brawling in consecrated precincts was abolished by the Ecclesiastical Courts

(1) 20 + 21 Vict., c.77. Yet many canonical features remained (eg) the concept of domicile. See also note (9) infra.

(2) 20 + 21 Vict., c.85. See also note (1).

(3) Royal Peculiars, of course, still remain.

(4) 18 + 19 Vict., c. 41.

(5) 6 + 7 William IV, c. 71.

(6) And, if necessary, by a writ of possession obtained in the temporal courts.

(7) 31 + 32 Vict., c. 109.

(8) Phillimore, *op. cit.*, at 1076. See, further, the Archbishop's Commission's Report on Ecclesiastical Courts, S.P.C.K. (1954).

(9) "Adultery was regarded by the ecclesiastical courts as a quasi-criminal offence, and it must be proved with the same strictness as is required in a criminal case," per Tucker, L.J. in Ginesi v. Ginesi (1948) P. 179 at 181.

Jurisdiction Act, 1860⁽¹⁾.

Statute law apart, however, there is the further possibility that the ecclesiastical courts' jurisdiction over the laity has fallen into desuetude or become obsolescent⁽²⁾. The common law knows no general rule of law by which obsolescence can make an otherwise binding regulation of no effect. The most famous example of this is the case of Ashford v. Thornton⁽³⁾ in which trial by battle was claimed in, and recognised by, the Court of King's Bench and was only circumvented by a hastily passed act of Parliament⁽⁴⁾. On the other hand the canon law recognises custom contra legem -

"Sicut enim moribus intentium in contrarium nonnullae leges hodie abrogatae sunt ita moribus utentium ipsae leges confirmantur"⁽⁵⁾ -

and there seems no reason why this rule of law was not confirmed

(1) 23 + 24 Vict., c.32. Jurisdiction in brawling cases is a fascinating sideroad of the history of the English Legal System: the ecclesiastical courts had jurisdiction both under the general canon law (Palmer v. Roffey (1824), 2 Addams 141; Dawe v. Williams (1824), 2 Addams 138; Burder v. Selmes (1853) 1 Spinks 114) as well as by 5+6 Edward VI, c.4. Disturbing a church service was a misdemeanour at common law (R. v. Parry (1686), Tremaine's Pleas of the Crown 239) and the common law courts' jurisdiction is now regulated by statute (1 Elizabeth I, c.2; 1 Mary ssess. 2, c3; 23+24 Vict. c.32; 52 George III, c.155).

(2) In the authorities these two terms seem to be used interchangeably. It is intended outside quotations to restrict the term "desuetude" to the canon law and "obsolescence" to the common law.

(3) 1 Barn. + Ald. 405.

(4) 59 George III, c. 46.

(5) Decretum, c.3., D.IV.

by 35 Henry VIII, c. 16⁽¹⁾. Although it may be argued that such a rule of law is contrary to the common law and therefore void, it is a mistake to equate inconsistency with incompatibility, the test envisaged by the Reformation statutes⁽²⁾. If this were not the case it would seem that there could not be particular rules for the interpretation of ecclesiastical statutes⁽³⁾. In Hilder v. Dexter⁽⁴⁾ Lord Halsbury stated that the worst person to construe a statute is the person who is responsible for its drafting and this is the general rule of interpretation of statutes⁽⁵⁾. Yet in the case of Hebbert v. Purchas⁽⁶⁾ the Privy Council referred to the introduction of a proviso by the House of Lords in the Act of Uniformity, 1661, and its rejection by the House of Commons together with the reasons for the rejection, assigned by the latter in the conference which ensued, as an indication of the intention of the legislature. Moreover, in Ridsdale v. Clifton⁽⁷⁾ the Privy Council referred to a discussion between the bishops, who framed or revised the rubric on vestments, and the Presbyterian

(1) This view is also that of the learned editors of Halsbury, vol. 10 at 9 although they regard the relevant statute as being 25 Henry VIII, c.19. Such a view seems tacitly to be accepted in Ayliffe, Parergon Juris Canonici, at 194 et seq..

(2) The problem of canonical custom and the common law is dealt with further, below.

(3) See Maxwell on Interpretation of Statutes at 25. This is not a complete parallel as this rule of interpretation does not necessarily flow from canonical rules.

(4) (1902) A.C. 474.

(5) This rule seems to be accepted as a general rule by the Law Commission's Report on the Interpretation of Statutes, see (1970) 33 M.L.R. 197 at 201.

(6) (1871), L.R. 3 P.C. 605.

(7) (1877), 2 P.D. 276.

divines at the Savoy Conference in 1662 as showing the meaning attached to it by the former. In any case these two latter cases at least go to show that the rules of the common law may be different when applied to merely ecclesiastical matters. Thus, even if the canonical rules as to desuetude are not now part of the ecclesiastical law, the common law's general rule as to obsolescence may perhaps be modified when concerned with ecclesiastical matters.

In Burgess v. Burgess⁽¹⁾ the office of the judge was promoted against parties living together incestuously. In ordering their separation Sir William Scott in the Consistory Court commented regarding certain canons promulgated by Archbishop Peckham in 1288⁽²⁾ -

"In the older canons, which, perhaps, can hardly be considered as carrying with them all their first authority, a solennis poenitentia is enjoined before the Bishop of the Diocese."

In this case penance was remitted due to the health of the parties, as was also the case in Chick v. Ramsdale⁽³⁾ in which Dr. Lushington remarked⁽⁴⁾:

"Whatever may have been the reasons for the performance of penance in former days, certainly they do not apply with equal force at the present time."

These would seem, however, not to be examples of desuetude but

(1) (1804), 1 Hag. Con. 384.

(2) at 393.

(3) (1835), 1 Curteis 34.

(4) at 37.

rather examples of a court's discretion in sentencing⁽¹⁾. Similarly in Gates v. Chambers⁽²⁾, where a clergyman was articted against in the Court of Arches for violation of Canon 48 by officiating out of his diocese without licence or permission, and where it was stated by Sir John Nicholl⁽³⁾ that -

"It is well known that (separate) licences to preach were in use both before, and for some time after, the Reformation: but, for the last century or two, in consequence of the clergy being better educated, or for some other reason, they have fallen into desuetude; and are now included in "letters of orders" or in the "licences of ministers to particular cures" "

it would seem it was the administrative issue of licences to which reference was being made.

The case of Burgoyne v. Free⁽⁴⁾ seems best explained upon the basis of a court's natural reluctance to overthrow long accepted modes of procedure. It was argued on behalf of Free that by the canon law appeal lay from a commissary to the diocesan whereas it was argued inter alia in reply that the uniform course of request had been from the commissary to the metropolitan and "that the

(1) In Woods v. Woods (1840), 2 Curteis 516 an incestuous marriage was declared null and void but penance was dispensed with. In Griffiths v. Reed (1828), 1 Hag. Ecc. 195 Sir John Nicholl stated: "The "purgatio indicenda" is now a practice become obsolete...". On the other hand, in Courtail v. Homfray (1828), 2 Hag. Ecc. 1 penance was directed to be performed as originally decreed in a defamation suit.

(2) (1824), 2 Addams 177.

(3) at 192.

(4) (1825), 2 Addams 405.

practice so acquiesced in, had become settled law"⁽¹⁾. The Court of Arches held "generally, for the reasons stated above" for the latter view⁽²⁾. Similarly in Seale v. Veley⁽³⁾ on a question of church rates Dr. Lushington was unwilling to stray from long accepted practices. He stated⁽⁴⁾:

"I apprehend that the learned Judge acted very much upon the precedent in the book published by Archdeacon Hale. I do not know that all the forms of proceeding found there ought to be followed, without considering the cases - precedents upward of a century back."

And, he went on⁽⁵⁾:

"I am not aware that there is any precedent in modern times which sanctions the course now pursued."

Although this may by implication be seen as an example of custom contra legem and thus of desuetude of the law as found in the time of Hale's Precedents, this is really pushing the reasoning of Dr. Lushington further than it naturally goes. It is better taken as an example of a judge erring on the side of certainty of the law in the absence of better proof and argument, as the words "without considering the cases" shows.

Church rates were again in consideration in Veley v. Gosling⁽⁶⁾. With reference to a new mode of making church rates Dr. Lushington said⁽⁷⁾:

"It has ... been argued, that admit it I must, for the ancient remedies are no longer fitted for the times we live in. That argument has been already answered by a higher

(1) at 413.

(2) at 414.

(3) (1841), 1 Not. Cas. 170.

(4) at 171.

(5) at 172.

(6) (1843), 1 Not. Cas. 457.

(7) at 487.

authority, the Court of Queen's Bench; but if it had not, am I judicially to decide that that which the law has not altered is inefficient for its purpose or extinguished as obsolete? Did the Court of King's Bench so treat the wager of Battel (sic) in the case of Ashford v. Thornton, though a more revolting or unchristian practice could not have been retained from the ages of the darkest barbarism? What said Lord Ellenborough? "The general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be: whatever prejudices, therefore may justly exist against this mode of trial, still, as it is the law of the land, the Court must pronounce judgment for it." (1)

The same point, indeed, was made by Sir H. Jenner Fust on appeal in the Court of Arches (2):

"The next question is, in what manner is this Common law obligation to be enforced? I do not think it necessary to go into the question whether this Common law was the Commune jus laicum or the Commune jus Ecclesiasticum: if the former it would be proper for the temporal Courts to enforce it; if the latter, it would fall within the province of the spiritual Courts: it is still the Common Law of the land, and if it be the Common law of the land, as Chief Justice Tindal says, "the parishioners have no more power to throw off the burden of the repair of the Church, than that of the repair of bridges and highways; the compelling of the performance of

(1) The case referred to in the Court of Queen's Bench is presumably Burder v. Veley (1840), 12 Ad. + Ell. 233, affirmed on appeal by the Court of Exchequer Chamber sub. nom. Veley v. Burder (1840), 12 Ad. + Ell. 265.

(2) (1843), 2 Not. Cas. 278 at 291-2.; see also sub. nom. Gosling v. Veley (1853), 4 H.L. Cas. 679.

the latter obligation belonging exclusively to the temporal Courts, whilst that of the former has been exercised usually, though perhaps not necessarily exclusively, by the spiritual Courts from time immemorial."

It was thus the opinion of both Dr. Lushington and Sir H. Jenner Fust that neither desuetude nor obsolescence could abrogate church rates⁽¹⁾. If, however, the obligation was ^{under the} / common law any comments as to the ecclesiastical law were obiter dicta.

In 1868 it was held in Jenkins v. Attorney-General of Bermuda⁽²⁾ that the issue of the writ de vi laica removenda from the common law side of the Court of Chancery in England had fallen into obsolescence as the same relief could be given by injunction in a case of obstruction to the induction of a party to a benefice to restrain all interference therewith. It is not clear, however, whether in no case could the writ issue⁽³⁾.

In Phillimore v. Machon⁽⁴⁾ the eminent ecclesiastical lawyer and chancellor, Walter Phillimore, endeavoured to institute a suit in the Court of Arches by letters of request against a layman for falsely swearing before a surrogate to an affidavit to lead to the issue of a marriage licence. The Dean of Arches, Lord Penzance, held that the court had no jurisdiction as it had in any case been inferentially withdrawn by statute, but in the course of his judgment dealt obiter with the problem of desuetude at length. He said⁽⁵⁾:

(1) In Burder v. Veley (1840), 12 Ad. + Ell. 265 it is assumed that church rates are the matter of the common law but see Sir H. Jenner Fust in Veley v. Gosling (supra).

(2) (1868), L.R. 2 P.C. 258.

(3) Compare Felton v. Callis (1968), 3 W.L.R. 951 where the issue of the writ ne exeat regno was in question. The writ's obsolescence, however, was in some doubt: see at 955.

(4) (1876), 1 P.D. 481.

(5) at 487.

"...(I)t was contended that the power of punishing false swearing, pro salute animae, had undoubtedly in old time resided in the ecclesiastical Court, and that, as no statute had directly taken that power away, the Court was bound to assert and exercise it⁽¹⁾. Speaking generally, and setting aside for the moment all questions as to the clergy, it cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical Courts, would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers where they still exist, if they do exist, is likely to benefit the community."

Of course the arguments from practicability and sociology are irrelevant in so far as the true legal position is concerned; indeed Lord Penzance himself made this clear when he spoke of "where they still exist, if they do exist." On the other hand he did seem to let these arguments have some weight⁽²⁾:

"The question, therefore, arises how far may the argument be legitimately pushed, that whatever was once a matter of ecclesiastical cognizance and correction remains so still, unless withdrawn by express enactment."

He went on⁽³⁾ -

"...I can only express my surprise that, with the ordinary criminal courts of this country open to him, for the prosecution and punishment of this offence, ... any person should have thought it worth while to make this experiment for the

(1) He admitted, *ibid.*, that he "was not aware of direct statute-able authority rendering such matters ... no longer the subject of ecclesiastical correction."

(2) at 488.

(3) at 489.

revival of a jurisdiction which, if it has not expired, has so long slumbered in peace."

Lord Penzance was, of course, speaking solely of rights de jure ecclesiastico and presumably for this reason he did not consider the law relating to tithes. Tithes were originally a merely ecclesiastical revenue and ecclesiastical courts only had cognizance of them⁽¹⁾. When dioceses were divided into parishes the tithes of each parish were allotted to its own particular minister, first by common consent, or by the appointment of lords of manors, and afterwards by law. Yet, whether by statute or by common law, the right of the parsons of the several parishes to tithes, and to demand and enforce the payment of them, became part of the general law of the land⁽²⁾. It was decided in Andrews v. Drever⁽³⁾ that the mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator. Similarly in Payne v. Esdaile⁽⁴⁾ the House of Lords decided, following Andrews v. Drever, that, apart from statute, non-payment afforded no defence to an action for tithes by a lay impropriator in the City of London. It therefore seems that these are further examples of obsolescence not defeating a right at the common law⁽⁵⁾.

The problem of desuetude next arose in rather a different context. After jurisdiction in matrimonial affairs had been transferred by statute to the common law courts the question

(1) Priddle and Napper's Case (1612), 11 Co. Rep. 15 at 25.

(2) Cripps on Church and Clergy (8th ed.) at 452 quoting Attorney-General v. Eardley (Lord) (1820), 8 Price 39 and Shelford, Law of Tithes.

(3) (1835), 3 Cl. + Fin. 314.

(4) (1889), 13 App. Cas. 613.

(5) This does not mean that the common law may not recognise custom contra legem in matters purely de jure ecclesiastico.

arose in Redfern v. Redfern⁽¹⁾ whether a respondent could decline to make the usual affidavit as to documents on the grounds that to do so might leave her open to ecclesiastical censure. The rule had been considered by Lord Chancellor Hardwicke in three cases arising between 1750 and 1752. In Brownsford v. Edwards⁽²⁾ he said⁽³⁾:

"The general rule is, that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land. Incest is undoubtedly punishable in ecclesiastical courts, and such a crime is generally excepted out of the acts of pardon. The ecclesiastical court has conusance of incest in two respects, diverso intuitu: first to judge of the legality of the marriage, and to pronounce sentence of nullity ... The other is to censure and punish persons guilty by ecclesiastical censure, as for fornication, adultery, etc. Nor is it material what the nature of the punishment is. It is a punishment which must be performed or got rid of by commutation, which is like a fine."

In Chetwynd v. Lindon⁽⁴⁾, although no direct reference to ecclesiastical courts was made, it was decided that, although parties may demur to discover any thing which may prove illicit cohabitation, or what may subject them to pains, penalties or ecclesiastical censures, etc, a charge of conspiracy or an attempt to set up a bastard child is not demurrable to, not being per se an indictable offence. The Lord Chancellor desired the bill to be read out to ascertain what charges there were of a kind to subject the defendant to any penal laws of the kingdom and

(1) (1891) P.139.

(2) (1750-1), 2 Ves. Sen. 242.

(3) at 245.

(4) (1752), 2 Ves. Sen. 450.

commented⁽¹⁾ -

"She may demur to the discovery of anything which may prove cohabitation. The question is, whether it is so charged, as, if confessed in the answer, would be a ground for a criminal prosecution in a court of law ..."

This seems to be based, however, upon the restricted efficacy of a demurrer in such circumstances. Similarly in Finch v. Finch⁽²⁾ the question was whether or not a layman had a legitimate son and Lord Hardwicke commented⁽³⁾:

"As to the first objection to it, that it will subject him to ecclesiastical censures, and that the court will not subject him to answer on oath, which is like an oath ex officio, that is true: but there is nothing upon this that will do it ..."

It is therefore clear that even in the mid-eighteenth century the general rule was receiving a restricted interpretation, if only for technical reasons: certainly a bastard child was good evidence in an ecclesiastical court of incontinence. Yet in Redfern v. Redfern the general rule as to disclosure of adultery was still enforced and the learned Lord Justices Lindley and Bowen in obiter dicta regarded the rule as properly embracing the fear of any ecclesiastical censure. Lindley, L.J. said⁽⁴⁾:

"But adultery, like other forms of fornication and lewdness, exposes the guilty party to ecclesiastical censure and punishment ... and discovery may be resisted on this ground. It is true that ecclesiastical punishment for such offences is practically obsolete; but I cannot say that the jurisdiction of the courts in this respect has ceased. Indeed the enactment to which I am about to refer⁽⁵⁾ is based on the theory

(1) at 451.

(2) (1752), 2 Ves. Sen. 491.

(3) at 493.

(4) (1891) P.139 at 145.

(5) 32 + 33 Vict., c.68, s.3.

that adultery is punishable, and that no person, therefore, is bound to answer any question tending to prove himself or herself guilty of it."

And Bowen, L.J. commented⁽¹⁾:

"In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form ... Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated."

It is interesting to note that according to Lindley, L.J. such jurisdiction over the laity was "practically obsolete" and according to Bowen, L.J. "technical and obsolete". It is true that such cases were no longer as frequent as they had been but it may be doubted whether they had entirely ceased. Remembering that volumes of ecclesiastical reports are few and far between, covering in the main only a short span of years, it is not without note that penance was enjoined against laymen in reported cases in 1816, 1828, 1835 and 1840⁽²⁾. It is very probable that further unreported cases might be found in the nineteenth century if searches were to be made in diocesan registries. That is not to say, however, that there were any such cases in 1942 when in Blunt v. Park Lane Hotel Ltd⁽³⁾ the scope of the above rule was restricted to self-inculpation relating to adultery. Yet, before fully considering Blunt's Case, it is necessary to look at the

(1) at 147.

(2) Blackmore v. Brider (1816), 2 Phillimore 359 (Court of Arches);
Courtail v. Homfray (1828), 2 Hag. Ecc. 1 (Court of Arches);
Chick v. Ramsdale (1835), 1 Curteis 34 (Consistory Court);
Woods v. Woods (1840), 2 Curteis 516 (Consistory Court).

(3) (1942) 2 K.B. 253.

cases decided after Redfern v. Redfern having a bearing on the problem of desuetude.

The case of R. v. Archbishop of Canterbury⁽¹⁾ may perhaps be seen as an example of custom contra legem and desuetude⁽²⁾ but it is unlikely that the case can properly be taken so far. In that case a practice disused since c.1400 A.D. was held to be abrogated although the form in use required it. On the confirmation of a bishop elect the public proclamation takes the form:

"Oyez: All manner of persons who shall or will object to the confirmation and election ..., let them come forward and make their objections in due form of law, and they shall be heard"⁽³⁾

- yet it was held, following the Case of the Confirmation of the Election of Bishops⁽⁴⁾ and Bishop Temple's Case⁽⁵⁾, that there was no jurisdiction in such a case to entertain objections to the confirmation founded on questions of doctrine and, therefore, no mandamus would lie. Although on the face of it this seems to be an example of desuetude, it seems better to regard it as repeal of the canon law by the Appointment of Bishops Act, 1533⁽⁶⁾, s.5, which speaks of letters patent to the archbishop "requiring and commanding such archbishop ... to confirm the said election". If the word "confirm" is used in its canonical sense then the objections should have been entertained⁽⁷⁾ but in answer to such an argument in the Case of the Confirmation of the Elections of

(1) (1902) 2 K.B. 503.

(2) See, for example, Halsbury, op. cit., at 9 (e).

(3) Phillimore, op. cit., vol. I at 48.

(4) (1848), 5 Not. Cas. Supplement, IX and XVIII, and 11 Q.B. 483.

(5) Reported by Phillimore, op. cit., at 50.

(6) 25 Henry VIII, c. 20.

(7) For a short summary of the ancient canon law see Stephens,

Ecclesiastical Statutes, vol. I at 157.

Bishops Lord Denman, C.J. said⁽¹⁾:

"The Canon Law forms no part of the Common Law of this realm, unless practice can be shewn to the contrary; and the burden of proof rests on the parties opposing."

It is true that in that case Coleridge and Patteson, J.J. were of opinion that a mandamus should lie whereas Denman, C.J. and Erle, J. were of the contrary view. In Bishop Temple's Case the Vicar-General followed the views of the two latter judges, saying⁽²⁾:

"I am of opinion that I have no power whatever to review the choice of the crown in regard to Dr. Temple being a fit and proper person to be bishop of the see of Exeter ... I think it is their duty if they think the choice of the crown has been erroneous to go to her Majesty and beseech her, or humbly request her not to issue her mandate for the confirmation of the election."

In the case of Kensit v. Dean and Chapter of St. Paul's⁽³⁾ the appellant, a layman, had objected at a service of ordination that one of the deacons had taken part in the services of a church in which certain breaches of prescribed ritual had taken place and an information was brought against the appellant charging him with unlawful disturbance of divine service contrary to s.2 of the Ecclesiastical Courts Jurisdiction Act, 1860. The case turned upon the question whether or not such an allegation, if true, was an impediment or notable crime within the meaning of the ordination service, and it was held that it was not such an impediment or notable crime. The court stated as its opinion, however, in an obiter dictum⁽⁴⁾ that -

"The word "impediment" related originally to a number of

(1) (1848), 5 Not. Cas. Supplement at XLII.

(2) at 55.

(3) (1905) 2 K.B. 249.

(4) at 256 - 7.

matters, some of which can no longer be regarded as such - as, for instance, bastardy, and certain physical defects as the loss of a limb or an eye - but included impediments which would still be considered as a bar to ordination, such as the fact that the candidate was an unbaptised person or was not of the requisite age for the orders to which he proposed to be ordained."

The impediments so referred to as "no longer to be regarded as such" were rare even in the period 1534 - 1549⁽¹⁾. As to dispensation for deformity, only five were counted in the above period and none of those occurred after 1538. Blackstone stated⁽²⁾ that -

"A bastard was ..., in strictness, incapable of holy orders; and though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church; but this doctrine seems now obsolete."

Yet in the appendix to the Report of the Ecclesiastical Committee on the Clergy (Ordination and Miscellaneous Provisions) Measure, 1964, it was stated⁽³⁾ that it was generally considered necessary for a faculty to be obtained before a candidate for holy orders born out of wedlock could be ordained deacon or priest and that such a person could not be consecrated bishop. The position as regards illegitimacy is now regulated by s.8 of the 1964 Measure by which the impediment is removed, yet it is not clear whether this section was merely included ex abundanti cautela or, in fact, altered the law. The position as to deformity remains untouched by statute, however, and is not completely without interest in the light of those who, being blind, are ordained. Do such people require an archbishop's dispensation⁽⁴⁾? Even if in practice they

(1) Chambers, Faculty Office Registers 1534 - 1549 at XXXVIII - XXXIX.

(2) 1 Bl. Com. 447.

(3) H.L. 113; H.C.200.

(4) (ie) a faculty.

do obtain such a dispensation may they be consecrated bishop? The answer to these questions cannot be given until all the cases have been fully considered but it is clear that both Blackstone and the Court of King's Bench envisaged the possibility of desuetude.

In the Archdeacon of Exeter v. Green⁽¹⁾ Chancellor Chadwyck-Healey considered the question of archi-deaconal procurations payable by the clergy who are incumbents of parishes cited to attend the annual visitation of the archdeacon within whose jurisdiction their benefices are situated, and said regarding bishop's procurations⁽²⁾:

"I do not find anything in the table (of fees) which would touch a procuration due in respect of the right of an archbishop or a bishop although these procurations are still held to be payable, although I believe not now actually collected."

This, however, was an obiter dictum, the question before the learned chancellor being archidiaconal procurations, many of which still remained⁽³⁾. On the other hand Lord Coleridge, J. in Gore-Booth v. Bishop of Manchester⁽⁴⁾ in an action of quare impedit had to consider whether the Bishop was justified in his refusal to institute a clerk duly presented by the patron of a benefice and in so doing had to consider the legality of the wearing of certain eucharistic vestments. His judgment on this question is obiter,

(1) (1913) P.21.

(2) at 39. It is interesting that the learned editors of Halsbury, op. cit., at 130 (e) do not consider the question of desuetude.

(3) See Halsbury, op. cit., at 130 (e). Certain of these archidiaconal procurations were released: Shephard v. Payne (1862), 12 C.B.N.S. 414 (affirmed (1864), 16 C.B.N.S. 132, Ex. Ch.). They were finally abolished by the Ecclesiastical Jurisdiction Measure, 1963, s.82(3).

(4) (1920) 2 K.B. 412.

the learned judge having already decided that the bishop was justified in his refusal due to the illegality of certain of the clerk's practices, but in considering the rubric in the 1662 Prayer Book as to ornaments he commented⁽¹⁾:

"Desuetude, if a clerk were accused of illegality in not wearing the vestments prescribed, might well be pleaded. But if the wearing of such vestments had been abandoned, it would be a difficult thing to accuse a clerk of illegality for wearing them, if they had in 1662 been made lawful, and that the Act had not been repealed."

The rubric, being an intergral part of the Book of Common Prayer itself appended to the Act of Uniformity, has statutory authority and therefore this dictum by a common lawyer is of particular interest. The rationale of his dictum, indeed, can only be that it is not contrary to the common law that an ecclesiastical statute should be abrogated by contrary custom. As to the second part of his dictum the learned judge is merely underlining that the abrogating custom would not necessarily create a new custom as to what vestments had to be worn. The position is now, of course, governed by The Vestures of Ministers Measure, 1964, but a similar problem could still arise if a change in vestment were made outside the scope of s.1 of the Measure or without consultation with the P.C.C.⁽²⁾. Chancellor Errington in the case of the Rector and Churchwardens of St. Magnus the Martyr v. All Having An Interest⁽³⁾ in considering the question of church ornaments stated:

"He (the Rector) also suggested that they should be allowed as customary in this Diocese: I need hardly point out that any such argument must be based on the legal and not the colloquial meaning of custom. Even if a custom could prevail

(1) at 424.

(2) See s.2.

(3) Unreported at first instance but reported on appeal at (1925) P.1.

as against the Act of Uniformity, it would have to be a custom dating infinitely further back than the comparatively recent user in our churches."

The word "infinitely" is the problem here. At common law a custom to be legal (to use Chancellor Errington's phraseology) must have existed from time immemorial and an arbitrary date has been set on legal memory as the first year of the reign of Richard I, 1189. If a custom has existed for a long time, however, and there is no actual disproof of it since 1189, there is a strong presumption that it has existed since time immemorial and, unless any other objection can be maintained against it, it will be upheld⁽¹⁾. On the other hand, if the custom could not have existed in 1189 the custom has no legal force at common law⁽²⁾. Obviously a custom running contrary to the Act of Uniformity could only do so since 1662 and therefore could not be a common law custom. The canon law, however, recognises a custom as being legal if it has existed for forty years and it must be to such a custom that the learned Chancellor referred. The Chancellor left the question open, it is true, as to whether or not such a custom could abrogate statute law but it is noteworthy that he did not completely rule out such a possibility.

In 1934 in Elliott v. Albert⁽³⁾ the Court of Appeal again considered the problem of a plea of self-incrimination. In an action for enticement of the plaintiff's husband the defendant successfully resisted discovery of certain documents on the ground that they might tend to expose her to ecclesiastical censure and punishment. The plaintiff then sought to administer certain interrogatories which the defendant in turn declined to give. As to discovery Scrutton, L.J. said⁽⁴⁾:

(1) Allen, Law in the Making (6th ed). at 131.

(2) Simpson v. Wells (1872), L.R. 7 Q.B. 214.

(3) (1934) K.B. 650.

(4) at 660, referring to Redfern v. Redfern.

"Lord Lindley in 1890 said that ecclesiastical censure as a punishment is practically obsolete, and I should think that is still more true in 1924. I should not think there is likely to be any ecclesiastical censure and punishment for enticing away a wife's husband. That plea was allowed by the Master and the judge and was not appealed from further."

And Maugham, L.J. made similar comments on the question of interrogatories⁽¹⁾:

"In my opinion, if the danger of ecclesiastical censure is shown to be imaginary there is no reason, according to the modern law, for refusing to allow the interrogatory to be put, and I go further and say that, in my opinion, the person to whom the interrogatory is administered is not entitled to answer a proper question, such as the question involved here, on the ground of the fanciful suggestion that some ecclesiastical censure may follow."

Thus the learned Lord Justices' views both about discovery and interrogatories were based not so much on complete desuetude of ecclesiastical censure but rather on the imaginary danger of the enforcement of such a jurisdiction.

Three years later Goddard, J. (as he then was) in Cole v. Police Constable 443A⁽²⁾ said⁽³⁾:

"...(I)f a man is prevented from attending his parish church he may have the right to present himself at another place of worship. I am not satisfied that the Act (of Uniformity) gives him a right to demand admission. What I think it does provide is that if he were, as in theory he might be, prosecuted in the spiritual court to be admonished for not attending, he would have a good defence to the suit by saying

(1) at 666.

(2) (1937) 1 K.B. 316.

(3) at 333.

that he presented himself in accordance with the Act at some other place of worship and was not admitted."

Goddard, J., therefore, considered that any desuetude was due to non-enforcement in practice, not to desuetude in law. It is in the light of this that his comments in Blunt v. Park Lane Hotel, Ltd⁽¹⁾ should be considered. In that case the question of answering interrogatories tending to show adultery was before the Court of Appeal. Goddard, L.J. said⁽²⁾:

"Is there, then, except in a case of a clerk in holy orders, any reasonable likelihood that such interrogatories would expose a person to ecclesiastical penalties. It is purely fantastic to suppose anything of the sort."

And again⁽³⁾:

"Spiritual courts still have and ought to have unfettered disciplinary jurisdiction over clerical persons, but as regards the laity, except in the case of unauthorised acts in connection with the fabric or ground of a church or churchyard, e.g., Daunt v. Crocker, and offences by churchwardens in respect of their office, Lee v. Hawtrey, their jurisdiction is obsolete and gone beyond recall."

This dictum most naturally reads as a suggestion that part of the ecclesiastical courts' jurisdiction over the laity is completely abrogated due to desuetude but perhaps in the light of Goddard, L.J.'s remarks in Cole v. Police Constable 443A (supra) and the fact that such a conclusion was not strictly necessary to his decision (see Elliott v. Albert) his remarks should not be pushed to their limit. In the same case, Lord Clanson stated⁽⁴⁾:

"...(C)ounsel for the plaintiff next based his claim for his

(1) (1942) 2 K.B. 253.

(2) at 257.

(3) at 259.

(4) at 256.

client's protection on the wider ground that if she was called on to answer the suggested interrogatories her answer might expose her to punishment in the ecclesiastical courts for adultery or for unchastity. The point might well have been good in the eighteenth century when such punishment was still in fact meted out in those courts. The historical position as to this is usefully stated by Bowen, L.J. in Redfern v. Redfern, but I feel no doubt that (save possibly as regards the case of a spiritual person) this jurisdiction of the ecclesiastical courts has fallen into abeyance and must be treated as obsolete."

Although, again, this may be taken as indicating an abrogation of jurisdiction, it seems best to treat it as being based on the fancifulness of the danger of its being exercised. This would seem also to be the opinion of the learned editors of Halsbury who refer to Goddard, L.J.'s dictum as authority for the proposition that "Proceedings against the laity solely pro salute animae ... have now fallen into disuse and are not likely to be revived"⁽¹⁾. This view of the cases was in fact confirmed in the case of Manchester Corporation v. Manchester Palace of Varieties Ltd⁽²⁾ in the Court of Chivalry. That court had not sat for 200 years and although the defendants did not raise the question of obsolescence Lord Goddard, C.J., the Surrogate, considered the question and, in particular, drew the analogy of the spiritual courts' jurisdiction over the laity. He referred to his judgment in Blunt v. Park Lane Hotel Ltd⁽³⁾ and continued⁽⁴⁾ -

"I there endeavoured to show the reason why this jurisdiction had become obsolete and beyond recall without the intervention

(1) Halsbury, op. cit., at 179.

(2) (1955) 1 All E.R. 387.

(3) Supra.

(4) at 393-4.

of a statute. It is because judgments of ecclesiastical lawyers of the highest eminence have said that such jurisdiction is not in accordance with modern thought, and ought no longer to be exercised. In the ecclesiastical courts the office of the judge cannot be promoted in a criminal cause without leave: see Maidman v. Malpas. In view of the pronouncements on this subject by LORD PENZANCE and others, it is unthinkable that any diocesan chancellor or Dean of the Arches would permit such a suit nowadays to be promoted. I refer to this matter particularly because it seems to me to indicate a method by which any abuse of this court's undoubted jurisdiction can be prevented ... If, therefore, it is laid down as a rule of this court, ... that leave must be obtained before any proceedings are instituted, it would, I think, prevent frivolous actions, and if this court is to sit again it should be convened only where there is some really substantial reason for the exercise of its jurisdiction."

Although Maidman v. Malpas⁽¹⁾ was referred to by Lord Goddard in Blunt v. Park Lane Hotel Ltd, only in the Manchester Corporation Case did he make it entirely clear that the desuetude is based merely on judicial discretion which in certain circumstances might nonetheless be otherwise exercised⁽²⁾.

There are thus two possibilities:

(i) a claim to a privilege which fails as that privilege has ceased to exist due to desuetude; and

(ii) a claim to a privilege which is in itself recognised but the claim to which is overruled on the grounds that it would be fanciful to regard the claimant as being in any danger of prosecution if he does inculcate himself.

(1) (1794), 1 Hag. Con. 205.

(2) Indeed it is submitted that its exercise is not entirely unthinkable in the case of such persons as deaconesses and layreaders.

It is the latter position which is taken by Lord Goddard.

The problem of custom contra legem, however, seems next to have been considered in the Report of the Archbishops' Commission on Canon Law⁽¹⁾. The Commission referred to the case of the Bishop of Exeter v. Marshall⁽²⁾ where the question before the House was whether a clerk who had held preferment in one diocese was, on being presented to a living in another diocese bound to produce letters testimonial and commendatory from his former bishop. In the course of Blackburn, J.'s opinion (jointly with Pigott and Lush, J.J.) he said⁽³⁾:

"...(T)hough in the proviso at the end of statute 25 Hen. 8, c.19, for continuing the ancient canon law until the intended reformation thereof should be completed, no mention is made of custom or usage, yet there are words of the same import; and in the Act 35 Hen. 8, c.16, for prolonging that power during the King's life, the proviso for continuing the ancient canons is repeated, and more clearly penned thus: 'Such canons constitutions, etc. as be accustomed and used here.'"

The words covered by the "etc." included the "Ecclesiastical Laws or Jurisdictions Spiritual, as be yet accustomed and used here in the Church of England" which were not "repugnant contrariant or derogatory" to statute law or the royal prerogative. Thus Blackburn, J. was making the point already made above that the whole of the provincial English canon law was given statutory cognizance at the Reformation in so far as it was not repugnant to the common law. It is doubtful whether he particularly had in mind

(1) The Canon Law of the Church of England at 63 et seq. It is worthy of note that one of the members of the commission was the Honourable Sir Harry Bevir Vaisey, D.C.L., one of the Justices of His Majesty's High Court of Justice and a one-time Chancellor.

(2) (1868), L.R. 3 H.L. 17.

(3) at 35-6.

the problem of canonical custom and it is likely that the words "custom or usage" refer to that part of canon law as a whole not embodied in the canons. It is not therefore a conclusive authority for the proposition that canonical custom is not repugnant to the common law. The Commission states, however, that the Bishop of Exeter v. Marshall⁽¹⁾ -

"emphasized the two important points, that post-Reformation custom continues pre-Reformation custom as law and that post-Reformation contrary custom abrogates pre-Reformation custom and deprives it of the force of law, but it must not be thought that these principles do not extend to post-Reformation custom."

They go on to point out⁽²⁾, quoting Suarez' De Legibus ac Deo Legislatore⁽³⁾ that contrary custom is -

"more than non-user: "it is necessary that the omission be a true one, that is, one in opposition to a legal obligation: it must also occur at the time for which the precept commanded the action, since the omission of an action when no action was obligatory is no indication of a will to disregard a law or refuse to accept it, as is self-evident."

It seems that the Commission in relying on the Bishop of Exeter v. Marshall as an authority regarding custom contra legem did so in relation to the question there considered as to the proof of ecclesiastical law. Blackburn, J., adopting Lord Hardwicke's words in Middleton v. Crofts, considered that in order to decide what part of the general canon law had been "received and allowed" in England it was necessary⁽⁴⁾ -

(1) Op. cit., at 64.

(2) Ibid at 64 - 5.

(3) (1612) VII, c. XVIII, 7.

(4) (1868), L.R. 3 H.L. at 36.

"to proceed upon sure foundations, which are the general nature and fundamental principles of the constitution, Acts of Parliament, and the resolutions and judicial opinions in our books, and from these to draw our conclusions."

Merely to refer to works on the general canon law as applied on the continent was, of course, insufficient; it is a fundamental principle that the burden of proof rests upon the plaintiff⁽¹⁾ and this includes bringing his claim within the ambit of the law. It is in this context that Willes, J's. comments⁽²⁾ should be seen:

"... I observe simply that there is no proof of the adoption into the law of England of a canon repugnant to the right of the patron to present any fit person; and the canons, or rather the reading of the canons, upon which this plea is founded, are, or is, ... inconsistent with such right, and therefore no part of the law."

Similarly Lord Chelmsford remarked⁽³⁾:

"Even then, if the ancient law of the Church gave such power to the bishop as is relied upon in the plea, as there is no proof that it was ever "allowed by general custom and consent within this realm," if this power exists some other ground of support must be sought for it."

And Lord Westbury also concluded⁽⁴⁾:

"If it had been pleaded and proved that this alleged old rule and usage had been received, observed and acted upon in the Church of England since the Reformation, it is possible that it might have been shewn that this particular kind of testimony was, by law, an essential criterion of the moral idoneity

(1) See (e.g.) Henderson v. Henry E. Jenkins (1969) 3 W.L.R. 732, per Lord Pearson at 745.

(2) (1868), L.R. 3 H.L. at 41.

(3) at 46-7.

(4) at 53.

of the clerk, but this is not the case actually raised by the plea; and it may be matter of regret that from the defects of the pleading the real defence, probably, has not been raised. The plea does not distinctly state that by ecclesiastical law, as received and prevailing by general consent and custom throughout the realm, and therefore part of the common law, the certificate of the former bishop is a necessary condition of the fitness of the clerk; nor does it aver that it has been the invariable practice and usage of the Church, and of the Anglican Church in particular, for the bishop to whom the clerk is presented to require and receive from the former bishop such a testimonial. In fact there is no statement of the usage or practice of bishops in this respect, but simply an averment that the clerk did not at any time bring with him a sufficient testimony, as he, the Bishop of Exeter, was bound and ought by the laws ecclesiastical of England to require, have, and receive from the bishop of the diocese whence the clerk came."

And he went on⁽¹⁾:

"...(I)f such a rule had been pleaded by the bishop to have been the invariable usage of the church from the earliest times down to the Reformation, (which would be evidence of its being a law of the Church,) and that it had been continued and uniformly recognised and acted upon by the bishops of the Anglican Church since the Reformation, (which might have shewn it to have been received and adopted as part of the law ecclesiastical recognised by the common law,) the fitness of the rule ought not to be questioned."

The editors of Halsbury's Laws of England⁽²⁾ state that "in order

(1) at 54 - 5.

(2) at 9. It is not clear what ecclesiastical statutes necessarily fall outside the rule.

to show that any old rule and usage is now binding it must be pleaded and proved" and from this -

"the following rule may be deduced ..., namely, that (unlike the statute law) the common law of the realm in matters ecclesiastical may become obsolete and abolished by general and long-continued non-user and custom to the contrary."

In Halsbury's Statutes of England it is stated categorically⁽¹⁾ that -

"The rule that canons must be proved to have been continued and acted upon derives from the doctrine of desuetude (under which canons become obsolete by long continued non-user) which formed part of the canon law before the Reformation."

Presumably this is the point upon which the Archbishop's Commission also relied but, if this is so, it is unfortunate that they were not more specific. In fact it does not seem necessary to regard the necessity to plead and prove the law in question as being any more than a particular application of the general onus on a plaintiff satisfactorily to prove his case. Especially in the light of the exigencies of the canon law at the Reformation it is not surprising if a court demands that the ecclesiastical law should be proved with precision. Although the ecclesiastical law cannot be regarded as a foreign law to be proved by expert witnesses, nonetheless there is no reason why in practice a court should not insist upon a particular pleading of the law relied upon before it⁽²⁾. Even soon after the Reformation the opinion of four doctors of the civil law was sought on a difficult point concerning induction⁽³⁾; in Stephens v. Totty⁽⁴⁾ arguments were

(1) (3rd ed.) vol. 10, at 24, citing R. v. Archbishop of Canterbury (supra).

(2) Compare (eg) Rules of the Supreme Court, O.18, r.18.

(3) Christopher Dean's Case, Noy 134.

(4) Noy 45.

heard from civilians about releases of legacies and in Heath v. Atworth⁽¹⁾ about the Court of Arches.⁽²⁾

More particularly, it is certain that the question of desuetude could not have been further from the minds of the judges in the Bishop of Exeter v. Marshall. Any other view is inconsistent with the dictum of Blackburn, J. that⁽³⁾ -

"We think that the conclusion is irresistible, that unless this condition was made part of the law of England in the early times, when the law was being formed, it could not become so subsequently, except by statute. No such statute exists."

In R. v. Chancellor of St. Edmundsbury and Ipswich Diocese. Ex parte White⁽⁴⁾ the question before the court was whether or not an order of certiorari lies to an ecclesiastical court and Wrottesley, L.J. said⁽⁵⁾:

"In the interests of all concerned, and particularly of litigants, a long settled practice of a court of record, extending in this case over hundreds of years, is not to be disturbed except by establishing that a departure from it is necessary in order to do justice to an applicant who can get justice in no other way, and to whom the court has always had jurisdiction to grant the relief prayed for."

This is obviously based, however, not on any argument relating to obsolescence (in fact it shows, rather, that the common law cannot become obsolete) but on the courts leaning towards certainty in the law.

(1) 2 Dyer 24 b.

(2) For other occasions on which civilians were consulted see Chap. IX at 263 - 264.

(3) (1868), L.R. 3 H.L. at 37.

(4) (1947) K.B. 263; affirmed (1948) 1 K.B. 195.

(5) at 216.

In the case In re the Rector, etc. of West Tarring⁽¹⁾

Chancellor Macmorran had to consider the issue of a faculty to authorise the display of the royal arms over the vestry door of the parish church. The Home Secretary had claimed previously that he had the right on behalf of the Queen to give or withhold his consent to such a use. The Chancellor by a letter claimed that the matter was purely one for the Consistory Court whereupon the Home Secretary recognised a long established custom to display the royal arms in churches but claimed its desuetude. In his judgment the learned Chancellor denied the Home Secretary's claim in general and continued⁽²⁾ -

"It seems to me ... that the practice with which I am dealing has a continuous existence from the reign of Henry VIII to the present time, always excepting the short reign of Queen Mary Tudor, and the suggestion that the custom has fallen into desuetude cannot be sustained for a moment."

Thus the question as to whether the ecclesiastical law recognises desuetude did not have to be decided; the most that can be said is that the learned Chancellor did not dismiss the possibility out of hand. Two years later, however, in a session of Church Assembly Chancellor Wigglesworth stated emphatically,⁽³⁾ when referring to the Privy Council cases on liturgical discipline, that -

"The principle that contrary custom for a period of forty years could alter law was not a principle of the law of England; it was a principle of the Canon Law of the Western Church, and so far as he knew had never become a part of the law of England since the Reformation in relation to case law.

(1) (1954) 1 W.L.R. 923.

(2) at 926.

(3) Church Assembly, Spring Session, 1956, Report of Proceedings, London (1956), XXXVI, at 34.

Indeed, had it become so, they would not now feel the fetters they did feel, though very lightly, of the decisions of the Privy Council of more than forty years ago."

Indeed the learned Chancellor's observations gain greater weight in the light of s. 45 (3) of the Ecclesiastical Jurisdiction Measure, 1963, which enacted that the Court of Ecclesiastical Causes Reserved is not bound by any decision of the Judicial Committee of the Privy Council "in relation to matter of doctrine ritual or ceremonial." Such a provision would not have been necessary if that learned Chancellor's observations were regarded as being incorrect.

Lastly, in In re St. Mary's, Westwell⁽¹⁾ Lord Dunboyne, Commissary General of the City and Diocese of Canterbury, in considering an application for the sale of communion vessels stated:

"The line of cases culminating in Exeter (Bishop) v. Marshall seems to confirm that no directive, rule or usage of pre-Reformation canon law is any longer binding on this court unless pleaded and proved to have been recognised, continued and acted upon in England since the Reformation; and even if any prohibition of the sale of Communion plate on the open market did ever exist, its recognition certainly has not continued to the present day."

From one point of view, of course, this is authority for desuetude of the ecclesiastical law but, if the view of the Bishop of Exeter v. Marshall taken above is correct, it is no more than an application of the adjectival, as opposed to substantive, rule of law that pre-Reformation law and its post-Reformation usage must be pleaded. The prohibition referred to was contained in a Constitution of Archbishop Edmund in 1236 and the latter view is particularly apt in the face of the Commissary General's terminology - "and even if any prohibition ... did ever exist its

(1) (1968) 1 W.L.R. 513.

recognition certainly has not continued to the present day."

(Emphasis supplied).

A clear case from authority cannot therefore be made out for the survival of the canonical rules as to desuetude based on custom contra legem. In principle it might still be argued that it survived the Reformation but there is no doubt that this would run contrary to the weight of opinion of both ecclesiastical jurists and, especially, of common lawyers⁽¹⁾. It is best to see the various references to the desuetude of the jurisdiction over the laity to be references to pragmatism and historical fact than to any overriding rule of law⁽²⁾.

Certainly there can be no question of the ecclesiastical courts' jurisdiction over the laity in matters of church fabric or grounds having fallen into desuetude, as Goddard L.J. pointed out in Blunt v. Park Lane Hotel, Ltd⁽³⁾. Although borderline cases might have arisen between those cases relating purely, for example, to church grounds and those relating merely to a disciplinary jurisdiction, in the light of the above discussion they cannot be regarded as other than academic. If those who made "many unlawful paths" over the churchyard⁽⁴⁾ might be seen as falling within the former, presumably a man who "being in the steeple ringing amongst many others" and who "did make water which fell upon the heads of some of the parishioners"⁽⁵⁾ would fall within the latter.

(1) Who, because of the order of prohibition, have the last word.

(2) This is borne out by the need for an act of parliament, the Statute Law (Repeals) Act, 1969, to abrogate those ecclesiastical statutes which the Law Commission regarded as obsolete

(3) (1942) 2 K.B. 253 at 259.

(4) William Stock (1630), Hale's Precedents 253.

(5) John Beard (1638), Hale's Precedents 260.

There remains, however, the question whether the jurisdiction over the laity has been abolished by legislation. The jurisdiction over churchwardens in their capacity as church officers has now been abolished by s.82 (2) (c) of the Ecclesiastical Jurisdiction Measure, 1963, and, because of the wording of the preamble to that Measure, the question arises as to whether it embraces the jurisdiction over all the laity. As Dyer, C.J. stated in Stowel v. Lord Zouche⁽¹⁾, the preamble is "a key to open the minds of the makers of the Act, and the mischiefs they intend to redress" and the preamble to the 1963 Measure states that it is passed -

"to reform and reconstruct the system of ecclesiastical courts of the Church of England, to replace with new provisions the existing enactments relating to ecclesiastical discipline, to abolish certain obsolete jurisdictions and fees, and for purposes connected therewith."

Does this include the abolition of the jurisdiction over the laity?

Section 1 of the Measure enacts that there shall be a consistory court for each diocese with the original jurisdiction conferred on it by the Measure. Its original jurisdiction is conferred by s.6 which includes, inter alia, disciplinary proceedings against the clergy and⁽²⁾ -

"any proceedings ... which, immediately before the passing of this Measure, it had power to hear and determine, not being proceedings jurisdiction to hear and determine which is expressly abolished by this Measure".

Section 82 is headed "Abolition of obsolete jurisdictions, courts,

(1) (1569), 1 Plowd. 353 at 369; see also per Lord Davey in Powell v. Kempton Park Racecourse Co. Ltd (1899) A.C. 143 at 185.

(2) S.6 (1)(e).

etc." and subs. 2 states -

"There are hereby abolished -

...

(c) the jurisdiction of consistory courts to hear and determine proceedings for the recovery of tithe or against lay officers of a church or by way of suit for perturbation of seat.

..."

Thus the jurisdiction over the laity is not "expressly abolished" and remains unimpaired⁽¹⁾. Indeed this point of view seems to be reinforced by s.82 (4) which enacts that -

"No person shall be liable to suffer imprisonment in consequence of being excommunicated,"

a punishment not included within those censures to which persons may be liable under the Measure⁽²⁾. Although by s.17 "Proceedings under this Measure" may be instituted against the clergy (this does not, of course, include deaconesses) and detailed rules are laid down to regulate such proceedings, a jurisdiction over the laity is not excluded as s.6 (1) (a) particularly refers to "proceedings upon articles charging an offence under this Measure"⁽³⁾ against the clergy. There is thus no ambiguity in the Measure which might lead a court to consider the intention of those who made the Measure as expressed outside the Measure

(1) But see Ecclesiastical Jurisdiction Measure 1963, s. 69, post.

(2) S.49. By s.50 deposition from holy orders is a sentence which may be passed by the bishop in certain circumstances. This argument, of course, is not final as the Measure does not in general relate to holders of any office in a Royal Peculiar: s.83(3). On excommunication see R. v. Dibdin (1910) P.57.

(3) Emphasis supplied.

itself⁽¹⁾. Indeed by s.69 -

"No proceedings by way of a criminal suit, other than those authorised by Parts IV, V and VI of this Measure, shall be instituted against a person in the consistory court of a diocese or in the Court of Ecclesiastical Causes Reserved and no proceedings so authorised shall be instituted except in accordance with those Parts of this Measure: ..."

(The proviso to the section saved any proceedings pending under any Act or Measure repealed by the 1963 Measure). It seems, therefore, that although there is no procedure by which criminal proceedings may be brought against the laity in a consistory court the laity may still be in breach of the ecclesiastical law⁽²⁾.

Without doubt there is some form of jurisdiction over the laity exercisable by the consistory courts as s.5 of the Faculty Jurisdiction Measure, 1964, states:

"(1) If in any proceeding for a faculty ... it appears to the court that any person being a party to the proceeding was responsible wholly or in part for the introduction into or removal from a church ... of any articles without the necessary faculty ... the court may order the whole or any part of the costs ... to be paid by such person.

(2) In any proceeding the court may by way of special citation add as a further party to the proceeding any person alleged to be so responsible or partly so responsible and not already a party and notwithstanding that such person resides out of the diocese."

(1) See Hebbert v. Purchas (1871), L.R. 3 P.C. 605 and Ridsdale v. Clifton (1877), 2 P.D. 276. If there had been such an ambiguity it would seem that the report of the Commission on the Ecclesiastical Courts, 1951, might have been considered as well as the views of Church Assembly : vide Ridsdale v. Clifton.

(2) The same point is made by Garth Moore in his Introduction to English Canon Law at 59.

This jurisdiction, however, may be best seen as quasi-criminal⁽¹⁾. A layman may be compelled to give evidence in an ecclesiastical court⁽²⁾ and any contempt of an ecclesiastical court is punishable in the High Court⁽³⁾.

If the view taken here is correct, there still remains a disciplinary jurisdiction over the laity even if it may not be exercised in the existing ecclesiastical courts⁽⁴⁾. Even though, for pragmatic and sociological reasons, this jurisdiction is likely to remain quiescent as far as the ordinary laity are concerned, this conclusion is of vital importance as it relates to deaconesses, lay readers, chancellors and others who neither fall within the disciplinary ambit of the Ecclesiastical Jurisdiction Measure, 1963, nor the abolition of such jurisdiction over "lay officers of a church"⁽⁵⁾ but who nonetheless should be subject to ecclesiastical discipline as much as the clergy⁽⁶⁾. Because of s.69 of the 1963 Measure the jurisdiction cannot be exercised in the consistory court of the Court of Ecclesiastical Causes Reserved but the Queen, the Supreme Head of the Church of England, may by the Judicial Committee Act, 1833, s.4 refer to the Judicial Committee by a general Order-in-Council (continuing

(1) See also Ecclesiastical Jurisdiction Measure, s.60 (2)

(2) Ibid, s. 81 (1).

(3) Ibid, s. 81 (3).

(4) The question of a visitor's jurisdiction over laymen, (eg) a cathedral organist, is regarded as being outside the scope of the present work.

(5) N.B. the indefinite article.

(6) It is interesting to note that a layman made a similar suggestion in a letter published in The Church Times, 29th January, 1971 - a suggestion covering diocesan secretaries and treasurers of the P.C.C. as well as churchwardens.

in force until rescinded) any matters whatsoever which she may think fit and the Judicial Committee is to consider those matters and to advise on them in the same way as appeals⁽¹⁾. This jurisdiction is limited to the giving of advice and therefore may be inapposite for the enforcement of this jurisdiction.

Nevertheless, by s.8 of the Act of Supremacy, 1588 -

"such jurisdictions privileges superiorities and pre-eminencies spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation order and correction of the same and of all manner of errors heresies schisms abuses offences contempts and enormities .." were united and annexed to the imperial crown of the realm. It was under this provision that King James II set up the Court of High Commission, which was declared illegal by the Bill of Rights, 1688, s.1, together with all other commissions of a like nature. However, any provision concerning the procedure for the enforcement of existing law could not be regarded as illegal. Nor would such a provision fall outside the scope of the advice given by the Judicial Committee in In re the Lord Bishop of Natal⁽²⁾:

"It is a settled constitutional principle or rule of law, that, although the Crown may by its prerogative establish courts to proceed according to the common law, yet it cannot

(1) It was under this provision that advice was given as to the status and jurisdiction of Anglican bishops in the colonies: In re the Lord Bishop of Natal (1864), 3 Moo. P.C. (N.S.) 115.

(2) supra. See also Dodwell v. Oxford University (1680), 2 Vent. 33 per curiam at 34: "No court other than such as proceed according to law can be, unless by prescription or Act of Parliament."

create any new court to administer any other law ... and it is laid down by Lord Coke in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament."

The sovereign, in fact, may grant a court with either a limited or unlimited jurisdiction to hear actions according to the common law⁽¹⁾ and the ecclesiastical law is now part of the common law of the land. By s.83 (2) of the 1963 Measure -

"Nothing in this Measure affects -

(a) any prerogative of Her Majesty the Queen ..."

and the law in relation to the laity, not having been expressly abolished and being as it is, part of the common law, there seems nothing in principle against the Queen's establishing a court to exercise the jurisdiction. Of course it has to be admitted that in practice such a move would not be made without the sanction of Parliament. On the other hand, if any attempt were ever to be made to enact disciplinary procedures in relation to church officers not in holy orders, the fact that the law relating to those persons has not been abolished (but only the procedures by which to enforce it) may be of some assistance in obtaining that sanction which is so jealously exercised by Parliament in ecclesiastical affairs.

(1) Com. Dig., Courts (P,1).

CHAPTER VII

THE SEAL OF THE CONFESSIONAL

Perhaps the best example of the common lawyer's attitude to the ecclesiastical law is to be found in the realms of the law of evidence and the question of the seal of the confessional. The claim by an Anglican clergyman⁽¹⁾ to a privilege against the disclosure of confessional secrets is based upon the pre-Reformation canon law in so far as it received statutory authority by the Act for the Submission of the Clergy, 1534⁽²⁾, and was confirmed (with one possible alteration) by Canon 113 of the Constitutions and Canons Ecclesiastical, 1603⁽³⁾:

The 21st Canon of the Fourth Lateran Council, 1215, stated:
"Caveat autem omnino sacerdos, ne verbo, aut signo, aut alio quovis modo aliquatenus prodat peccatorem. Sed si prudentiori consilio indiguerit, illud absque ulla expressione personae caute requirat. Quoniam qui peccatum in poenitentiali iudicio sibi detectum praesumpserit revelare, non solum a sacerdotali officio deponendum decernimus, verum etiam ad agendam perpetuam Poenitentiam in arctum Monasterium detrudendum."

A similar canon was promulgated by Bishop Richard Poore in the synodal statutes of Salisbury, 1217 - 1219, and his lead was

- (1) A similar claim by a Roman Catholic priest is based upon the Roman catholic canon law and must therefore be argued on different principles.
- (2) 25 Henry VIII, c.19.
- (3) The relevant part of Canon 113 is still in force. In so far as this canon may be seen as affecting the rights and duties of the clergy only it is, of course, fully binding upon them; in so far as it affects the rights and duties of the laity it embodies pre-Reformation canon law and is binding on them also.

followed in Durham, Winchester, Worcester, Chichester, Ely, Wells, London and Exeter⁽¹⁾. Indeed there can be no doubt that the seal of the confessional was a duty imposed by the pre-Reformation canon law in England⁽²⁾. This law received statutory authority in 1534 except in so far as it was not "contrariant nor repugnant to the Laws, Statutes and Customs of this Realm"⁽³⁾ and there can be as little doubt that the seal of the confessional was not so regarded except, perhaps, in so far as it extended to the non-disclosure of treason⁽⁴⁾.

Certainly Sir Edward Coke in his Institutes⁽⁵⁾ had no such doubts even though his view as to the common law was based on a fallacious reading of the statute Articuli Cleri⁽⁶⁾, which states with reference to those claiming sanctuary and abjuring the realm⁽⁷⁾:

"Qui terram abjuraverint, dum sint in Strata publica, sunt in pace Domini Regis, nec debent ab aliquo molestari; et dum sint in Ecclesia, custodes eorum non debent morari infra coemiterium, nisi necessitas, vel evasionis periculum, hoc requirat: nec arctentur confugere, dum sint in Ecclesia,

(1) Councils and Synods, ed. By Powicke + Cheney (1964), vols I and II., passim. Such provincial constitutions were merely ad hoc pieces of legislation to bolster the existing canon law rather than to create new law: Jacobs, The Fifteenth Century, at 265.

(2) de Burgh, Pupilla Oculi (1510) foLXXXVVII d; Lyndwood, Provinciale Angliae (1697) 334, 335.

(3) 25 Henry VIII, c.19, s.7.

(4) This restriction was unknown to the canon law but is not surprising in the light of the Reformation thinking about the monarchy.

(5) 2nd Institutes 628 - 9.

(6) 9 Edward II, st.1. repealed by the Statute Law Revision Act, 1863

(7) Ibid, c.10.

quin possint habere vitae necessaria, et exire libere pro obsceno pondere deponendo. Placet etiam Domino Regi, ut latrones vel appellatores quodocunque voluerint possint sacerdotibus sua facinora confiteri: sed caveant confessores, ne erronee hujusmodi appellatores informant."

To this Coke comments⁽¹⁾:

"Latrones vel Appellatores. This branch extended only to thieves and approvers indicted of felony, but extended not to high treason: for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the King and the whole realm; therefore this branch declareth the common law, that the privilege of confession extendeth only to felonies ...: so as this branch beginneth with thieves, extendeth only to approvers of thievery or felony, and not to appeals of treason; for by the common law, a man indicted of high treason could not have the benefit of clergy ..., nor any clergyman privilege of confession to conceal high treason ...; and albeit this act extendeth to felonies only, as hath been said, yet the caveat given to the confessores is observable, ne erronee informant."

It was seen from this that Coke interpreted the words "caveat confessores ne erronee informant" as forbidding disclosure of confessional secrets but that he restricted this to indictments of felony on the grounds that, when a statute treats of matters of an inferior description, it cannot extend to those of a superior⁽²⁾. If this is a correct reading of Coke, then there can

(1) There are minor discrepancies between this text as given by Coke and that given by the Statutes of the Realm (R.C. 1810), vol I, 172 but they do not materially affect the sense.

(2) Although Coke speaks of the privilege extending only to felonies it is clear that he is merely concerned with its non-extension to treason: he is not concerned with misdemeanours.

be no doubt that as regards the meaning of "ne erroneice informant" he was incorrect. The official translation of the statute⁽¹⁾ reads:

"... but let the Confessors beware that they do not erroneously inform such Appellors."

It would seem that this meant that they should take care lest they (a) erroneously instructed the appellor, (ie) the approver⁽²⁾, in his religious duties or (b) gave them information from those outside the gaol⁽³⁾. It cannot mean "inform AGAINST" the appellor. Thus the statute Articuli Cleri cannot be regarded as authority for the privilege of the confessional at common law. This does not mean, however, that Coke was wrong in regarding the privilege as being in tune with the common law other than in its application to high treason. Indeed, in this context it should always be remembered that Coke was very jealous of any encroachments on the common law.

This is important because canon 113 of the 1603 Canons, when dealing with the duty of both clergy and churchwardens to present in ecclesiastical courts for spiritual offences, contains this exception:

"...(W)e do not in any way bind the said Minister by this our Constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy, (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same,) under pain of irregularity"⁽⁴⁾.

(1) See page 214, note (6) supra.

(2) Noke, 66 L.Q.R. at 95, note 36.

(3) See Shorter Oxford Dictionary. "Inform" III and Lewis and Short's Latin Dictionary "informo". Also see Best, Principles of the Law of Evidence, 4th ed., at 723.

(4) Although the Latin text is authoritative this is the usually accepted translation: Bullard, Constitutions and Canons Ecclesiastical, 1604 at 118 - 119.

Although it is rather widely stated⁽¹⁾ this canon sets out (the passage in brackets for the moment apart) the pre-Reformation canon law and as such bound both clergy and laity alike⁽²⁾.

The question arises, however, as to the purport of the passage in brackets. It is usually taken to mean that the privilege of the confessional does not extend to cases of high treason⁽³⁾. If this is so - and it is difficult to see what else its meaning may be⁽⁴⁾ - it is necessary to consider whether this limitation is a result of the saving clause of the Act for Submission or whether it is the result of a misreading of the statute Articuli Cleri.

There does not seem to be any suggestion of such a limitation before the case of the Trial of Henry Garnet⁽⁵⁾ for complicity in the gunpowder plot. This case is one of the two authorities relied upon by Coke in support of the passage from his Institutes quoted above and in that case the only suggestion that such a limitation exists is made by Coke himself in arguendo as Attorney-General⁽⁶⁾:

"By the common law, howsoever it were (it being crimen laesae Majestatis) he ought to have disclosed it."

Yet he quoted no authority in support of his contention and it seems at least possible that it is grounded in his own misreading of the statute Articuli Cleri. The other authority on which he relies in the Institutes is the Duchess of Kingston's Case⁽⁷⁾ but

(1) This has some interest in the light of the extension of the privilege by the Irish courts (infra).

(2) Middleton v. Crofts (1736) 2 Atkyns 650, per Lord Hardwicke, C.J. at 653.

(3) E. Garth Moore in The Church Times, 6th September, 1963, Best, Principles of the Law of Evidence, 12th ed., at 503.

(4) Nokes, op. cit., at 101; Belton, A Manual for Confessors, at 91.

(5) 2 How. St. Tr. 217.

(6) Ibid at 246.

(7) 11 St. Tr. 243.

that case makes no reference at all to the privilege of the confessional. The question remains, nonetheless, as to how such a limitation, if not part of the common law, came to be incorporated in Canon 113. Coke's Second Institutes was not published until 1642 and his personal papers were seized by Charles II until 1641⁽¹⁾ and therefore his writings could not have affected the issue. It is, of course, possible that the misreading was current in that period⁽²⁾. It is equally possible, however, that Bancroft, Bishop of London, to whom the drafting of the canons was confided⁽³⁾, may have consulted Coke, the then Attorney-General, on the canon's position vis-a-vis the common law since Parliament was at that time particularly jealous of the Church's legislative powers⁽⁴⁾. The limitation may perhaps have entered into the canons in this roundabout fashion. Nonetheless, the limitation is of such longstanding that it is doubtful whether it could be overset other than by Parliament.

The Anglican clergyman's claim that he is privileged from disclosing confessional secrets, when asked to do so in a court of law, is based on the argument that any disclosure, if made, would be a breach of the ecclesiastical law and as such a breach of the general law of England⁽⁵⁾. On the other hand, a similar claim by a Roman Catholic priest is based on the argument that any disclosure, if made, would be a breach of Roman Catholic canon

(1) Dictionary of National Biography.

(2) As was the case later: Attorney-General v. Briant (1846) 15 L.J. Ex. 265, per Alderson, B. at 271.

(3) Bullard, op. cit., at XVIII.

(4) I believe a similar consultation led to the retention of the proviso to Canon 113 when the other 1603 canons were repealed.

(5) Edes v. Bishop of Oxford. Vaughan 18, per Vaughan, C.J. at 21 and R. v. Dibdin (1910) P. 57, per Farwell, J. at 135. See also Nokes 66 L.Q.R., at 100 et seq although he misunderstands the basis of the claim.

law⁽¹⁾ and as such a breach of a foreign law. It is necessary to bear this distinction in mind as it is often misunderstood in the academic discussions on the point. It should be noted, however, that neither claim places any reliance on an argument based on self-incrimination: an argument concerned with the disclosure of one's own past wrongdoing⁽²⁾ and not, as here, concerned with a plea that the instant disclosure would be an offence in itself.

It is next necessary to consider those cases which have been cited in connection with the privilege. These may be divided into three classes⁽³⁾: (a) those cases having no direct relevance at all; (b) those containing obiter dicta; and (c) those concerned with actual claims to such a privilege.

Those cases which have no direct relevance are those concerning professional privilege. The claim to professional privilege is based on the need for complete candour between persons in certain professional relationships with their clients and was summarised by Lord Langdale, M.R. concerning the legal profession in Reece v. Trye⁽⁴⁾:

"The unrestricted communication between parties and their professional advisers has been considered of such importance as to make it advisable to protect it even by the concealment

(1) See Dictionnaire de Droit Canonique, vol. IV ad v. Confesseur, for an easily accessible discussion. Such a claim must, therefore be argued on very different grounds: see Best, *op. cit.* at 723. In the Trial of Henry Garnet who was Superior General of the Jesuits in England it was nowhere suggested that the privilege was confined to Anglican clergy.

(2) See Nokes, An Introduction to Evidence, 4th ed. at 206 and 209 and Cross on Evidence, 3rd ed. at 227 et seq. (Cp) R. v. Hay (1860) 2 F. + F4 per Hill, J. passim.

(3) (Cp) Nokes, 66 L.Q.R. at 96.

(4) (1846), 9 Beav. 316 at 319.

of matter without the discovery of which the truth of the case cannot be ascertained."

This rationale is wide enough in its scope to cover the priest/penitent relationship but, in fact, the claim to the privilege of the confessional is not based on an appeal to public policy but to binding rules of substantive law against disclosure. It would thus fall outside the rule which is confined to legal advisers and their clients⁽¹⁾ and the claim would therefore fail as did those made by a Pursuivant of the Herald's College⁽²⁾ and surgeons⁽³⁾. The clergyman's claim is based on entirely different grounds.

The case of R. v. Wild⁽⁴⁾ must also be distinguished as it is concerned solely with the admission into evidence of confessions made by an accused. Unfortunately it seems to have been considered in the context of the privilege of the confessional because of the ambiguity of the word "confession" in this context and because of the nature of the inducement used. In that case a 13 year old boy was charged with murder and a man present at his arrest, who was neither a policeman nor a clergyman, said to him:

"Now kneel you down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty."

The boy in consequence made certain admissions and these the court held to be admissible in evidence⁽⁵⁾.

(1) Wilson v. Rastall (1792). 4 T.R. 753; Sparke v. Middleton, 1 Keble 505; Cuts v. Pickering, 1 Ventris 197. See also Vailant v. Dodemead (1742) 2 Atkyns 524.

(2) Slade v. Tucker (1880) L.R. 14 Ch. D. 824.

(3) Duchess of Kingston's Case, 11 St. Tr. 243; R. v. Gibbons (1823) 1 C. + P. 97.

(4) (1835) Moo. C.C.R. 452.

(5) This must be a correct decision; if not, no sworn evidence in court would be admissible.

On the other hand the case of Falmouth v. Moss⁽¹⁾ may be seen either as falling within the above category or as an obiter dictum on the existence of the privilege of the confessional. In that case Baron Garrow stated⁽²⁾:

"The cases confine (the privilege of non-disclosure) to instances of Counsel, Attornies and Solicitors, who have hitherto been held to be excepted, in respect of this privilege, from all the rest of mankind ... Still, beyond these excepted persons the privilege has never been yet extended."

Of more value are those cases which specifically mention clergymen when considering the admissibility of evidence. All of these presently dealt with, however, merely contain obiter dicta. In Du Barre v. Livette⁽³⁾, for example, the question before the court was the admissibility of evidence given by an interpreter of conversations between a foreigner and his attorney. Counsel for the plaintiff cited in arguendo the case of R. v. Sparkes⁽⁴⁾, a case in which a Roman Catholic had confessed to a Protestant clergyman and evidence of the contents of that confession was permitted to be given. Commenting on this case, however, Lord Kenyon said⁽⁵⁾:

"...I should have paused before I admitted the evidence there admitted."

Indeed, the position in Sparke's Case was peculiar in that from the penitent's point of view a Protestant clergyman could not

(1) (1822) 11 Price 455. See also Anon., Skinner's Rep. 404 but this would seem to be of little value and to fit more happily into the first category.

(2) Ibid at 470.

(3) Peake N.P.C. 78

(4) Unreported.

(5) Peake N.P.C. 78.

have jurisdiction to hear his confession⁽¹⁾ and it was thus not truly a confession; on the other hand it is not clear whether from the Protestant clergyman's point of view it should be regarded as a sacramental confession⁽²⁾. This case, of course, points the distinction between the privilege of the confessional and that of lawyer and client: the former is based on the clergyman's duty⁽³⁾ whereas the latter is based on the client's right.

The case of Henley v. Henley⁽⁴⁾ should also be mentioned in this context. The Vicar of Benenden heard of the parties' matrimonial difficulties and on his own initiative acted as conciliator. At court he gave evidence as to the circumstances of the conversation but not as to what was said. Here there was no confession⁽⁵⁾ and no emphasis was placed on the clerical capacity of the conciliator. It was held, however, that the conversation fell within the privilege attaching to the evidence of persons acting as conciliators in matrimonial disputes.

Similarly in R. v. Gilham⁽⁶⁾ there was no sacramental confession. In that case a confession made in consequence of persuasion by a clergyman but not to him, and without any hope of

(1) See Dictionnaire de Droit Canonique, ad. v. Confession, Discipline Actuelle.

(2) See Lyndwood, op. cit., at 334 gl. ad. v. Confessionem. Of course this antedates the Reformation. It is not at all clear what amounts to sacramental confession according to the ecclesiastical law.

(3) That is not to say that the clergyman may waive the privilege of his own volition.

(4) (1955) P.202. See also Pais v. Pais (1970) 3 All E.R. 491.

(5) Indeed quite rightly no mention of confession is made throughout the case.

(6) (1828) 1 Mood. C.C. 186.

temporal benefit, was held to be admissible. Counsel for the accused gave it as his opinion in arguendo, citing R. v. Sparkes, that -

"... a minister is bound to disclose what has been revealed to him as a matter of religious confession"

but no judicial pronouncement is reported on this question. In the light of this latter fact it is therefore surprising to find Best, C.J. in Broad v. Pitt⁽¹⁾ stating:

"I think this confidence in the case of attornies is a great anomoly in the law. The privilege does not apply to clergymen, since the decision the other day, in the case of Gilham."

He immediately continued, however:

"I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence"⁽²⁾.

Indeed, misunderstanding of R. v. Gilham seems to have been current for Alderson, B. commented in the course of argument in Attorney-General v. Briant⁽³⁾ -

"That case was not well argued; there was a statute upon the subject which was not referred to. I think the words are: 'Let confessors beware that they do not disclose that which they receive from prisoners excepting in treason.' The exception proves the rule."

(1) (1828) 3 C. + P. 518 at 519; see also R. v. Radford cited in R. v. Gilham at 197.

(2) The fact that evidence is obtained by illegal means is no bar to its admissibility at common law. On the other hand it may be doubted whether a court should countenance breach of the law in the face of the court. This is certainly the way an ecclesiastical court would have viewed the problem.

(3) (1846) 15 L.J. Ex. 265 at 271. He not only misunderstood R. v. Gilham but also the statute Articuli Cleri.

It seems that the learned Baron was referring to the statute Articuli Cleri and his view is thus as unreliable as that of Best, C.J.

In both Greenlaw v. King⁽¹⁾ and Russell v. Jackson⁽²⁾ the privilege of the legal adviser and his client is compared unfavourably with the position of doctors and clergymen. On the other hand Alderson, B. was still upholding the opposite view⁽³⁾ in R. v. Griffin⁽⁴⁾. In the latter case the chaplain to a workhouse had frequent conversations in his spiritual capacity with a female prisoner and was called at her trial to prove those conversations. The chaplain stated that he had visited her as her spiritual adviser to administer to her the consolations of religion. Alderson, B. thereupon stated:

"I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because without unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule; but I think such evidence ought not to be given."

As a result the content of the conversations was not led by the

(1) (1838) 1 Beav. 137.

(2) (1851) 9 Hare 387.

(3) It is not necessary to see the upholding of the privilege of the confessional as the opposite view. If the two privileges are seen as entirely separate (as they are differently based) the source of confusion drops away and one may properly say that a clergyman does not share the lawyer's privilege as to advice given. Confession, though it may include spiritual guidance, is not the giving of advice.

(4) (1853) 6 Cox 219.

prosecution.

On the other hand, Jessel, M.R. in Anderson v. Bank of British Columbia⁽¹⁾ and Wheeler v. Le Marshant⁽²⁾ came out strongly against a privilege of the confessional. In the latter case he said⁽³⁾:

"Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected."

More recently Lord Denning, M.R. both in McTaggart v. McTaggart⁽⁴⁾ and Attorney-General v. Mulholland; Attorney-General v. Foster⁽⁵⁾ stated that the clergyman, like the banker or medical man, has no privilege in respect of disclosure.

These judicial opinions, however, have all been obiter dicta. The cases in which the privilege was actually before the court will next be dealt with. The first of these is the Trial of Henry Garnet⁽⁶⁾ in which the Superior of the Jesuits in England demurred against his disclosing certain conversations "because it was matter of secret confession and would endanger the life of divers men"⁽⁷⁾. The case is not at all clear but it seems that this demurrer was rejected, not because there was no such privilege, but because the disclosures were made outside the confessional. Coke as Attorney-General argued inter alia that -

"Greenwell's was no sacramental confession, for that the confitent was not penitent"

(1) (1876), L.R. 2 Ch. D. 644.

(2) (1881), 17 Ch. D. 675.

(3) at 681.

(4) (1949) P. 94.

(5) (1963) 2 Q.B. 477.

(6) 2 How. St. Tr. 217.

(7) at 242.

and that -

"Catesby told it unto him extra confessionem, out of confession ..."

Indeed it was this argument which appealed to the Earl of Northampton for he concluded that⁽¹⁾ -

"...Tho' this discovery were by confession, yet it was no supersedeas to your former knowledge from Catesby ...; and if it were none, then it can be no protection for faith putrified ... Hereby ..., it appears, that either Greenwell told you out of confession, and then there needs be no secrecy; or if it were in confession, he professed no penitency, and therefore you could not absolve him."

It was thus no sacramental confession⁽²⁾.

The next case to come before the courts was R. v. Sparkes⁽³⁾ heard by Buller, J. on the Northern circuit. Unfortunately the only report is very unsatisfactory⁽⁴⁾ but the facts seem to be as follows : The prisoner, a Roman Catholic, had made a confession to a Protestant clergyman⁽⁵⁾ relating to the crime concerning which he was indicted and that confession was permitted to be given in evidence at the trial. The report states that -

"There the prisoner came to the priest for ghostly comfort, and to ease his conscience oppressed with guilt."

It would seem, however, that this confession, even though made for "ghostly comfort", cannot strictly be regarded as sacramental

(1) at 252.

(2) See Lyndwood, op. cit., at 334 gl. ad. v. confessionem.

(3) Cited in Du Barre v. Livette, Peake, N.P.C. 78 at 78.

(4) The case was cited by Garrow for the prosecution and Garrow, not being a member of the Northern Circuit, was unlikely to have been present, as Badesley points out in The Privilege of Religious Confessions (1865) at 58.

(5) It is not clear whether or not he was Anglican.

confession⁽¹⁾ and Lord Kenyon expressed doubts about the decision in Du Barre v. Livette⁽²⁾ as we have seen.

The reporting of R. v. Radford⁽³⁾ is also unsatisfactory but it seems to have been a murder case tried at Exeter Assizes in 1828 -

"Where a clergyman had prevailed on the prisoner to confess, by dwelling on the heinousness of the crime charged against him ... without giving him any caution that it would be used in evidence against him. BEST, C.J. refused to allow the clergyman to state the confession, saying that he thought it dangerous after confidence thus created, which would throw the prisoner off his guard, and the impression thus produced, to allow what he then said to be given in evidence against him."

Counsel for the defence in R. v. Gilham⁽⁴⁾ suggested that such evidence could not have been excluded -

"because it was a breach of confidence in the clergyman to give it, because a minister is bound to disclose what has been revealed to him as a matter of religious confession" and to this end he cited R. v. Sparkes. Counsel for the prosecution commented⁽⁵⁾ -

"In Rex v. Radford ... the learned JUDGE thought that it was improper in that case in the clergyman to violate the confidence reposed in him by the prisoner, and expressed a strong opinion to that effect; and, as the evidence was not wanted for the crown, it was not pressed, and the prisoner was convicted without it."

(1) See Badesley, op. cit., at 59.

(2) See footnote 2 page 226 supra.

(3) Cited in arguendo in R. v. Gilham (1828) 1 Mood. C.C. 186 at 197.

(4) at 197.

(5) at 202.

It seems, therefore, without a fuller report of the case that it cannot be seen as an authority for the existence of the privilege of the confessional. Indeed, in the light of some judge's comments in Broad v. Pitt⁽¹⁾ it is probably best to regard it as an example of the exercise of judicial discretion⁽²⁾.

It is also best to see R. v. Griffin⁽³⁾ in a similar light. In that case Alderson, B., having commented obiter that a clergyman giving spiritual assistance to a prisoner should be in the same position as that of an attorney and his client, went on to state⁽⁴⁾:

"I do not lay this down as a general rule; but I think such evidence ought not to be given."

Whereupon counsel for the prosecution made no further attempt to tender the clergyman's evidence.

In R. v. Hay⁽⁵⁾ the privilege of the confessional was claimed by a Roman Catholic priest who was asked from whom he had received possession of a stolen watch which he had handed to the police. The priest refused to answer this question on the grounds that he received the watch "in connexion with the confessional." Hill, J. thereupon stated:

"You are not asked at present to disclose anything stated to you in the confessional; you are asked a simple fact - from whom did you receive that watch which you gave to the policeman?"

(1) (1828) 3 C. + P. 518.

(2) See Cross on Evidence at 322: "... (T)here may be cases in which it is impossible to say that the evidence in question lacks the requisite degree of relevance, and yet it might be unfair to admit it, having regard to its probative value as contrasted with its prejudicial propensity ..."

(3) (1853) 6 Cox 219.

(4) at 219.

(5) (1860) 2 F. + F. 4.

Upon the priest's continued refusal to answer he was committed for contempt.

This case was decided upon the grounds that the actual receipt of the watch from the penitent was an extra-confessional act⁽¹⁾ and Nokes⁽²⁾ treats it as "not showing any occasion for privilege" and therefore as a case "not strictly relevant" to the question of the privilege of the confessional. This is too literal a reading of the case, however, and W.F. Finlayson, the reporter of the case, says in a note⁽³⁾ -

"It has been erroneously supposed that the learned Judge denied that any privilege attached to confession; but, as will be seen, he did not deny it; on the contrary, impliedly admitted it, and drew a distinction which would otherwise have been futile."

It should be noted, moreover, that this was a case of a Roman Catholic priest liable to discipline under the Roman Catholic canon law and not, as would be the case of an Anglican clergyman,

(1) The point was nowhere taken that a Roman Catholic priest was in a different position from an Anglican. This may be regarded as sound in that such a privilege, if it exists, should logically be extended to non-Anglicans. As Best argued in his Principles of the Law of Evidence (4th ed.) at 723, "If the refusing to hold communications to spiritual advisers sacred is an error, an opposite and greater one is the attempt to confine the privilege to the clergy of some particular creed." The point was never taken in the Trial of Henry Garnet.

(2) 66 L.Q.R. at 97.

(3) (1860) 2 F. + F. at 6, note (a). Cross, op. cit., at 245 says: "... (I)t is perhaps just arguable that the case impliedly recognises a privilege in the case of communications."

to prosecution under the laws of England⁽¹⁾,

Five years after R. v. Hay an Anglican clergyman refused to answer a question put to him by a magistrate during the trial of a woman for murder⁽²⁾. The clergyman alleged that what he knew was under the seal of the confessional. The magistrate did not press him, probably because there was sufficient other evidence to justify his returning the prisoner for trial. This case cannot, of course, be regarded as of any authority either for or against the proposition under consideration but it is of interest in that it prompted some extrajudicial comments on the law from Lord Westbury, the Lord Chancellor, in debate in the House of Lords. He said⁽³⁾:

"There can be no doubt that in a suit or criminal proceeding a clergyman of the Church of England is not privileged so as to decline to answer a question which is put to him for the purpose of justice, on the ground that his answer would reveal something that has been made known to him in a confession. A witness is compelled to answer every such question and the law of England does not extend the privilege of refusing to answer to Roman Catholic clergymen who have obtained the information in confession from a person of their own religious persuasion."

Apart from the fact that this comment by Lord Westbury was purely extrajudicial and that he gives no arguments for his view, it would seem that the learned Lord Chancellor did not consider the question at all from the viewpoint of an Anglican clergyman and the laws ecclesiastical.

In Normanshaw v. Normanshaw⁽⁴⁾ in a suit for divorce it

(1) Pace Hill, J. it was not a question of incrimination.

(2) R. v. Kent (unreported), cited in Hansard's Parl. Debates, series 3, vol. 179 (H. of L.), 12th May, 1865.

(3) Ibid, para. 180.

(4) (1893) 69 L.T. 468.

appeared that, subsequent to the discovery by the petitioner of an alleged act of adultery, the respondent had an interview with a clergyman who at the trial was called as a witness on behalf of the petitioner. The clergyman objected to disclosing the conversation or anything that took place at the interview with his parishioner. The court, however, ruled that he had no right to withhold the information. Indeed, it is clear from the report that the conversations were not made as part of a sacramental confession and were thus extraconfessional. The clergyman was attempting to extend the privilege of the confessional to any interview he might have had with one of his parishioners; in this respect, however, his conversations were no more privileged than those of a doctor with his patient or a banker with his client⁽¹⁾. It is in this context that Jeune, P's comment that⁽²⁾ -

"it was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law" -

should be considered.

The case of Ruthven v. De Bour⁽³⁾ is unfortunately nowhere reported at length. In an action for libel the plaintiff, who was conducting his own case, asked a Roman Catholic priest in cross-examination whether a priest who heard confessions was not bound to put certain questions to those who confessed. Although the question may have been put in an offensive manner it was prima facie a question as to the usage of the Roman Catholic priesthood. Ridley, J. ruled however, that the plaintiff was not entitled -

(1) A privilege is now recognised concerning marriage counsellors: see Pais v. Pais (supra).

(2) (1893) 69 L.T. at 469.

(3) (1901) 45 Sol. Jo. 272. (Cp) Poole v. Bishop of London (1861), Judgments of the Judicial Committee of the Privy Council, 176.

"to ask what questions priests put in the confessional or the answers given."

In that this ruling may be taken to exclude questions on the usage of the priesthood in the confessional it is submitted that the case goes further than the privilege warrants. Ridley, J.'s comments are of interest, however, in that his obiter dicta treat Roman Catholic priests as falling within the privilege.

Lastly, in Gedge v. Gedge⁽¹⁾ the claim by a clergyman to withhold a communication to his bishop was disallowed. However, it appears that the communication in this case was not made within the confessional; it was thus extra-confessional and was on a par with Normanshaw v. Normanshaw.

In Ireland⁽²⁾ there are four cases that are relevant to the question. The first - Butler v. Moore⁽³⁾ - was concerned with title to property under a will. During the hearing a Roman Catholic priest demurred to a question put to him on the grounds that his knowledge of the matter -

"arose from a confidential communication made to him in the exercise of his clerical functions, and which the principles of his religion forbid him to disclose ..."

Smith, M.R., however, overruled the demurrer. Nowhere in the case is any mention made of the confessional⁽⁴⁾ and it is thus best treated as being concerned with a claim to a privilege extending to extra-confessional confidences made to a priest during the exercise of his clerical functions⁽⁵⁾.

(1) The Globe, 13th July, 1909, cited in Phipson on Evidence (10th ed.) at 252.

(2) See J.R. Lindsay, 12 N.I.L.Q. (1959) 160 at 165 et seq.

(3) (1802), MacNally's Rules of Evidence 253.

(4) Unless, possibly, this may be surmised from the reference to the disclosure forbidden by his religion.

(5) (Cp) Normanshaw v. Normanshaw (supra).

In In re Keller⁽¹⁾ a Roman Catholic priest refused to answer a question in regard to a bankrupt's affairs on the grounds⁽²⁾ that it would elicit a disclosure of matters of which he became cognisant "simply and solely because of (his) being a priest" and because his "duty" forbade him to make such a disclosure. Other than this phraseology⁽³⁾ there was no question of the matters having been disclosed in the confessional and Boyd, J. said⁽⁴⁾:

"I cannot recognize that there is any justification in your refusing to answer the question asked. If so, the whole of the bankruptcy law might be defected by the simple expedient of getting a gentleman of your position to occupy a position of trust with regard to the bankrupt; and that would be fatal to the administration of justice ..."

He had previously said, however, that he was willing⁽⁵⁾ -

"to protect any witness ... from being obliged to answer any question in reference to anything received in confidence in the confessional ..."

Similarly in Tannian v. Synott⁽⁶⁾, although the Roman Catholic priest had deposed that the defendant had spoken to him as a clergyman, the conversation had taken place in the street⁽⁷⁾ and was not a confession. Palles, C.B. stated obiter that he would not ask the priest to depose to anything connected, directly or indirectly, with confession. The evidence was admitted, however,

(1) (1887), 22 L.R.I. 158.

(2) at 159-160.

(3) Which must be treated with caution.

(4) at 160.

(5) at 159. This is obiter and might in any case be taken as a reference to his judicial discretion.

(6) 37 I.L.T.J. 275.

(7) There is no reason in principle why a confession should not be heard in the street.

on the grounds that it was extra-confessional.

The case of Cook v. Carroll⁽¹⁾ was an appeal from a circuit court. A Roman Catholic priest interviewed in his house a female parishioner, who alleged that she had been seduced, together with another parishioner whom she held responsible. Subsequently the girl's mother brought an action for damages for seduction against the man and the priest was called to give evidence of what passed at the interview. Both the man and the girl gave evidence of the conversation and their stories did not tally. The priest refused to testify and was fined for contempt. He did not appeal against the imposition of the fine but during the hearing of the appeal against the decision in the original action he again declined to give evidence on the grounds that any information he had was given to him⁽²⁾ -

"as parish priest, When parishioners come to consult the parish priest, what they tell the priest is given on the understanding of secrecy and should not be revealed under any circumstances."

Gavan Duffy, J., distinguishing the position in England, held that the priest was not guilty of contempt and that the communications were privileged. Moreover, he held that the privilege could not be waived by one of the parties without the priest's consent⁽³⁾. There seems no doubt, however, that this goes far beyond the privilege of confessional and that the decision runs contrary to the position under English law⁽⁴⁾. On the other hand, it is

(1) (1945) I.R. 515.

(2) at 516.

(3) There is no suggestion that the interview was a confession in the technical theological sense. It is doubtful whether the priest has any say as to whether or not the secrecy may be waived: see note (1) page 235 (infra).

(4) Normanshaw v. Normanshaw and Gedge v. Gedge (supra).

important as it raises the question whether the privilege may be waived by the penitent⁽¹⁾ or, indeed, by the priest⁽²⁾ alone.

It is now necessary to turn to the arguments put forward by textbook writers against the privilege⁽³⁾. These writers are epitomised by G.D. Nokes⁽⁴⁾ and Professor Rupert Cross⁽⁵⁾ and it is intended to confine consideration to these two.

Nokes argues that, although there is no doubt that the canon law prior to the Reformation insisted on the duty not to divulge

- (1) It is probable that the Anglican position is the same as that under the Roman canon law. "Le penitent peut, en ce qui la concerne, délier son confesseur du secret, soit en général, soit pour tel point ou à l'égard d'une personne déterminée, qui sera astreinte ou non au sigillum. La permission du penitent no peut jamais être presuée, mais doit être expresse et complètement libre": Dictionnaire de Droit Canonique, ad v. Confesseur Obligation Du Secret. See further Schieler-Heuser, Theory and Practice of the Confessional, 2nd ed. (1906) at 469 and 485. Gavan Duffy, J. at (1945) I.R. at 524 suggests the priest is a "cipher".
- (2) See Broad v. Pitt (1828), 3 C.+ P. per Best, C.J. at 519.
- (3) For writers supporting the privilege see Badeley, The Privilege of Religious Confessions (1865): Best, Principles of the Law of Evidence, 4th ed. (1866); Phillimore, The Ecclesiastical Laws of England 2nd ed. at 543 et seq.; Moore, "Should a Priest Tell?" The Church Times, 6th September, 1963 and Introduction to English Canon Law at 95-96; Winckworth, The Seal of the Confessional and the Law of Evidence (1952); Lindsay, 12 N.I. L.Q.160. And see further 71 L.T. Jo. 170.
- (4) 66 L.Q.R. at 94 et seq.,
- (5) Cross on Evidence, 3rd ed. (1967) at 244 et seq.

confessional secrets and although⁽¹⁾ -

"it seems possible to argue that a privilege could be implied from the duty"

not to divulge, nevertheless -

"as the law of evidence was then fragmentary and undeveloped, it is not certain that this inverted benefit of clergy was recognised."

It is submitted, however, that the privilege is the necessary corollary of the duty. Whatever may have been the position of the canon law before the Reformation, once the laws ecclesiastical became an integral part of the laws of England (receiving statutory authority from the Act for the Submission of the Clergy⁽²⁾) the law of evidence must of necessity recognise and give effect to a duty enforced by the substantive law. To argue otherwise is to give the adjectival law far too great a prominence. This also seems to be a complete answer to Professor Cross when he quotes Sir James Stephen⁽³⁾:

"I think the modern law of evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favour of auricular confessions to Roman Catholic priests were not likely to be made ..."

It seems that the existence of the privilege has been denied too often merely because the laws ecclesiastical have been assumed

(1) 66 L.Q.R. at 94.

(2) 25 Henry VIII, c. 19.

(3) Op. cit., at 245, quoting Stephen, Digest of the Law of Evidence, (12th ed) at 220. It may probably be conceded that the prejudice would extend to auricular confessions by Anglican clergy. Both writers fail to realise that the position of the Anglican clergyman is different from that of the Roman Catholic priest.

to be in the same position vis-a-vis the common law as is the Roman Catholic canon law. Once this is realised, the arguments against the privilege attaching to Anglican clergy fall away. Professor Cross, for example, states that⁽¹⁾-

"So far as the argument based on the possibility of self-incrimination is concerned, we have seen that it is doubtful whether the privilege protects answers that would criminate the witness by any foreign system of law, and it is still more doubtful whether it would be held to extend to answers prohibited by the canon law"⁽²⁾.

Leaving apart the question of self-incrimination⁽³⁾, this cannot be a true statement of the law so far as the ecclesiastical law is concerned. As Vaughan, C.J. commented in Edes v. Bishop of Oxford⁽⁴⁾-

"If Canon-Law be made part of the Law of this Land, then is it as much the Law of the Land, and as well, and by the same Authority, as any other part of the Law of the Land ...; therefore, the Canon-Law in force here is the Law of the Land."

Nokes also considers the post-Reformation history of the privilege but dismisses Garnet's Case on the grounds that⁽⁵⁾-

"the commissioners, without considering whether any privilege at all existed or could then apply to a Catholic confession, overruled the protest not of a witness but of the prisoner

(1) Op. cit., at 245.

(2) Presumably the Roman Catholic canon law. The fact that the ecclesiastical law may be called the canon law - see (eg) E. Garth Moore, An Introduction to English Canon Law - is a source of confusion in itself.

(3) Supra.

(4) Vaughan 18 at 21.

(5) Op. cit., at 95.

under interrogation, ostensibly on the ground that the information was extra-confessional."

Yet, as has been seen, the commissioners impliedly recognised the existence of the privilege; moreover, there seems no reason why the privilege should be any different for a witness who happens also to be the prisoner. Nokes then goes on to divide⁽¹⁾ the English cases into those "not strictly relevant" (amongst which he includes R. v. Hay) and those "containing obiter dicta" (the conflict amongst which he explains⁽²⁾ on the grounds "of those unconscious prejudices of which the Bench can never be free") and concludes⁽²⁾:

"In the absence of either statutory provision or decision ... the existence of privilege might appear still to be an open question."

It is true that he refers to the Act for Submission⁽³⁾ but he nowhere discusses the effect of the statutory authority thus given to the pre-Reformation duty not to disclose confessional secrets. On the other hand he does refer in a concluding passage entitled "Connected Privileges"⁽⁴⁾ to Canon 113 of 1603 and comments that⁽⁵⁾

"in the absence of any modern precedent of ecclesiastical discipline for breach of the existing 113th canon, when that breach was compelled by a secular court, such court might reject any claim to privilege on this ground."

It is submitted, however, that such a precedent, whether or not it

(1) at 96 - 97.

(2) at 98.

(3) at 95, note 39: "The earlier canons had been temporarily and conditionally recognised by 25 Hen. 8, c. 19, ss. 1,2; repealed by 1+2 Ph. + M. c.8; revived by 1 Eliz. c.1." This, however, gives an inaccurate picture of the force of the statute.

(4) at 100.

(5) at 101.

is forthcoming, is irrelevant. The question before a court faced with a demurrer against answering such a question is not whether or not the clergyman, if he breaks the seal of the confessional, will be disciplined in the ecclesiastical courts (as would be the consideration if the plea were one of self-incrimination⁽¹⁾) but whether the clergyman is under a duty imposed by the substantive law itself not to answer the question put to him. Once this latter question is answered in the affirmative it is submitted that the court must recognise the privilege. The principle in issue is not whether the clergyman would be likely to be prosecuted but whether the court should tolerate a breach of the law committed in its presence⁽²⁾.

According to Professor Cross⁽³⁾ -

"there is very little judicial authority on the subject (of the privilege of the confessional), but such as there is is, like the opinion of all the text-writers, against the existence of any privilege according to English law."

The relevant authorities have already been considered and it has been seen that they are not in fact against the existence of the privilege⁽⁴⁾. It must be denied, too, that the opinion of all text-writers is against the privilege⁽⁵⁾.

(1) See Nokes, An Introduction to Evidence, at 209. If this were the case, the line of cases ending in Blunt v. Park Lane Hotel Ltd. (1942) 2 K.B. 253 would be in point.

(2) Cross points out, *op. cit.*, at 59: "In the case of a claim to privilege by a witness, the burden of establishing the privilege would be borne by the witness." This is undoubtedly true but does not, of course, invalidate the present point.

(3) *Op. cit.*, at 245.

(4) Cross himself admits that "there seems to be better ground for recognising this privilege than several that are established under modern English law ..."

(5) See, for example, those quoted in footnote (3) at page 235.

Professor Cross then goes on to state that⁽¹⁾ -

"The only legal arguments that could be advanced in support of the priest's refusal to testify concerning statements in the confessional would be first, that the privilege must have existed at the time of the Reformation, and it has not been displaced by any statute or authoritative decision since that date; - secondly, that disclosure would incriminate the priest by canon law; thirdly that the privilege is implicitly recognised by the decision in R. v. Hay".

He dismisses the first point by reference to the quotation given above from Sir James Stephen yet, as has been seen, this quotation seems to be concerned with the position of the Roman Catholic priest and quite ignores the arguments on behalf of the Anglican clergyman based on the statutory authority of the laws ecclesiastical. On the second ground Professor Cross again seems to be concerned solely with the Roman Catholic priest as he says⁽²⁾ -

"we have seen that it is doubtful whether the privilege protects answers that would criminate the witness by any foreign system of law, and it is still more doubtful whether it would be held to extend to answers prohibited by the canon law."

Of course, as has been seen, the Anglican claim is neither based on a plea of self-incrimination nor is it based on any appeal to a foreign law. Lastly, Professor Cross admits⁽³⁾ that -

"it is perhaps just arguable (that R. v. Hay) impliedly recognises a privilege in the case of communications"

but he denies that this can -

"displace the bulk of authority which, though inconclusive, is undoubtedly against the existence of the privilege."

(1) Op. cit., at 245.

(2) Ibid.

(3) Ibid.

It is submitted, however, that the argument for the privilege does not rest on R. v. Hay but on the Act for Submission; moreover, the bulk of authority is not "undoubtedly against the existence of the privilege."

As a result of his denial of the existence of the privilege, Professor Cross relies upon the judicial discretion⁽¹⁾ -

"to uphold a witness's claim to be privileged from answering certain questions even though no privilege exists as a matter of law it seems, and even though the questions are relevant and necessary for the purpose of the particular proceedings." Most judges, he feels, "would probably sympathise"⁽²⁾ with Best, C.J. when he said obiter in Broad v. Pitt⁽³⁾ that -

"I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner, but if he chooses to disclose them, I shall receive them in evidence."

He points out, nonetheless, that the exercise of the discretion must depend on the value of the confidentiality being weighed against the demands of justice in the particular case⁽⁴⁾. It is submitted, however, that in the light of what has already been said there is no need to make an appeal to such a discretion and that a judge should not in any event countenance the disclosure of matters which a priest is bound in law not to divulge.

It must, of course, be admitted that Professor Cross' view, coupled with that of Nokes, is of great weight in so far as it is concerned with the claim to the privilege by Roman Catholic priests. On the other hand, it is submitted that they are both incorrect in extending this denial to the claim made by the

(1) Op. cit., at 26, quoting Att.-Gen. v. Mulholland: Att.-Gen. v. Foster, (1963) 2 Q.B. 477.

(2) Ibid, at 245 - 246.

(3) Supra.

(4) Op. cit., at 26.

Anglican clergyman. The two claims are separately and differently based and, the anomalies of the Henrician settlement being what they are, the claim of the Anglican clergyman is considerably stronger than that of his Roman Catholic counterpart. Indeed, the latter's claim is perhaps better based on a plea for reciprocity than on the Roman Catholic canon law alone⁽¹⁾.

If the view presently put forward is correct, the question inevitably arises as to how a misunderstanding of the law has been so widely accepted. The misunderstanding is explained, however, when it is remembered that for some years the hearing of auricular confessions was regarded as being contrary to the teaching of the Church of England and that the practice of confession⁽²⁾ is far more common amongst Roman Catholics than Anglicans. Moreover, the lack of proper study of the ecclesiastical law must of necessity be blamed for the ignorance concerning the basis of the Anglican claim. The fact that so much emphasis is placed on those cases concerned with the privilege created by the lawyer/client relationship, to the detriment of the privilege of the confessional, is probably explained by the fact that some clergy have put forward claims which are too widely based and the further fact that those concerned with denying the claim are trained solely in the discipline of the common law.

(1) See Best, op. cit.: contra, Nokes, op. cit., at 100.

(2) It is interesting to note, however, that it is nowhere suggested in Poole v. Bishop of London (1861), Judgments of the Judicial Committee of the Privy Council, 176, that auricular confession as such is illegal.

CHAPTER VIII

RELATIONS WITH THE TEMPORAL COURTS

The relationship between the ecclesiastical and secular courts until the time of the Reformation has already been discussed and, although a discussion of the fusion of the ecclesiastical and common laws would be incomplete without some consideration of their relationship until the present day, it is unnecessary to go into the question at length⁽¹⁾. As has already been pointed out, there were of necessity borderline cases which might theoretically have been assigned to either jurisdiction depending upon whether one's standpoint was that of the common lawyer or the canonist; in practice, however, the final decision lay with the royal courts⁽²⁾ and this position was the philosophic basis of the Reformation statutes. As Eyre, C.J. said in Home v. Camden⁽³⁾, when delivering the unanimous opinion of the judges to the House of Lords⁽⁴⁾ -

"(T)he King's temporal courts, and your lordships in the last

(1) Compare the treatment given to this subject by Sir Robert Phillimore in The Ecclesiastical Law of the Church of England, 1st ed., vol. II at 1429 et seq. to that of his son, Sir Walter Phillimore, in the 2nd ed. of the same work at 1108. See also the discussion of this question as regards the Court of Chancery by Jones in The Court of Chancery. Almost all the law on prohibitions is discussed in the Mayor of London v. Cox (1866), 2 H.L. 239 and Martin v. Machonochie (1878), 3 Q.B.D. 730 and (1879), 4 Q.B.D. 697 sub. nom. Machonochie v. Lord Penzance (1881), 6 App. Cas. 424, the former being a civil case.

(2) See R. v. Chancellor of St. Edmundsbury and Ipswich Diocese (1947) K.B. 263, per Lord Goddard, C.J. at 272.

(3) (1795) 2 H.Bl. 533.

(4) at 536.

instance, are by the constitution of this country, to declare the common and expound the statute law, and that the possibility of two different rules prevailing upon the same law, one in the King's temporal courts, and the other in the courts of peculiar jurisdiction, ought not to exist, and is effectually prevented without any unreasonable interference, or breaking in upon the courts of peculiar jurisdictions, by the temporal courts issuing their prohibitions in every such case."

This was the reason, too, why a prohibition lay against the ecclesiastical courts for the insisting upon proof by two witnesses⁽¹⁾ although it did not lie in every instance as, for example, two witnesses were necessary to prove a will⁽²⁾ - a rule now embodied in the common law⁽³⁾. As Holt, C.J. explained in Breedon v. Gill⁽⁴⁾ -

"When the Ecclesiastical Courts are possessed of a cause, which is merely of spiritual conusance, the Courts at Common Law allow them to pursue their own methods in the determination of it; but when, in such cause, collateral matter arises, which is not of their conusance properly, there the Courts of Common Law enforce them to admit such evidence as the Common Law would allow."

Not only was the procedure of the court liable to regularisation by the common law courts in such cases but an action on the case was maintainable against a chancellor for excommunicating a party for refusing to obey an order which the court had no authority to

(1) See, for example, Anon. Hobart 188 (legacy) and Bishop of Exeter v. Marshall (1867), L.R. 3 H.L. 17 per Willes J. at 40 (payments).

(2) Shotter v. Friend (1690) 2 Salk. 547.

(3) See now Wills Act, 1837, s.9.

(4) 1 Ld. Raym. 221.

make⁽¹⁾. Similarly, where a judge of a spiritual court excommunicated a man for a cause of which he had not the legal cognisance, he was also liable to be indicted at the suit of the King⁽²⁾. In these circumstances it is hardly surprising that it began to be suggested that the ecclesiastical courts were courts of inferior jurisdiction.

Indeed Sir Frederick Pollock argued in Ricketts v. Bodenham⁽³⁾ "... (T)he prohibition must go, for want of jurisdiction appearing, according to the rule referred to before, that, in the case of inferior courts, nothing will be intended in favour of the jurisdiction."

To this Littledale, J. pointed out that the cases referred to were - "cases of common law courts, which are inferior to the Courts of Westminster Hall; but ecclesiastical courts are not so."

Whereupon Sir Frederick Pollock continued:

"The fact that this Court will restrain the ecclesiastical courts by prohibition shews that they are inferior to this Court, so far as the present argument is concerned; though, in some sense, they may be termed superior courts."

The caveat of Littledale, J. seems to have gone unheeded, however. In Burder v. Veley⁽⁴⁾ the Court of Exchequer Chamber considered the question as to when prohibition lay against an ecclesiastical court. As Lord Denman, C.J. pointed out⁽⁵⁾ -

"There is no title in our law under which, if we look to the facts appearing in the several cases, more confusion and contradiction may be found. If we were from these bound to lay down a practical rule for arranging, by classes, where the

(1) Beaurain v. Scott (1813) 3 Camp. 388.

(2) Boraine's Case (1809) 16 Ves. Jun. 346 (writ of assoiler).

(3) (1836), 5 Ad. + Ell. 433 at 446.

(4) (1840), 12 Ad. + Ell. 233.

(5) at 253.

writ ought to be refused and where granted, the difficulties of the task might probably be found insurmountable."

The learned Chief Justice continued, however⁽¹⁾:

"But the principle itself, however hard to apply, is clear. It is this; that, if any inferior court will entertain a suit, which appears by the libel in the outset, or is shewn on the face of the proceedings, to be beyond its jurisdiction, the courts of Westminster Hall have no discretion to award or refuse the writ, but are bound to award it."

Similarly in R. v. Twiss⁽²⁾, on a prohibition being sought against the Consistory Court of London, Cockburn, C.J. stated⁽³⁾:

"...(T)his Court ought not to assume that the inferior court will go beyond its competency and jurisdiction ..."

In Martin v. Mackonochie⁽⁴⁾ the jurisdiction of the Queen's Bench Division to prohibit the Judicial Committee of the Privy Council was discussed and Cockburn C.J. stated obiter⁽⁵⁾:

"...(I)t is the province of this Court to restrain all tribunals not forming part of the High Court of Justice, or having appellate jurisdiction over it, within the limits of their respective jurisdictions; and among the tribunals so within its restraining authority are the Ecclesiastical Courts. Of these the Judicial Committee of the Privy Council, in its character of a Court of Appeal from these courts, forms a part, and is, therefore, as such - however high its position and authority in other instances - so long as it is exercising ecclesiastical jurisdiction, subject to our controlling jurisdiction by way of prohibition."

In so stating the learned Chief Justice based his conclusions on

(1) at 253.

(2) (1869), L.R. 4 Q.B. 407.

(3) at 413.

(4) (1878), 3 Q.B.D. 730.

(5) at 747.

the fact that the court could prohibit the Court of Delegates and the Judicial Committee was given only the appellate jurisdiction of the Court of Delegates. As Mellor, J. said⁽¹⁾ -

"It cannot be doubted ... that in this matter that High Court is as much subject to review by this Court, in the exercise of its authority, as the Court of Delegates was."

In Combe v. Edwards⁽²⁾, however, Lord Penzance, as Dean of the Arches, had some harsh things to say of this view. A clergyman had been charged with committing several illegal ceremonial acts during the celebration of divine service and the offences were found to be proved. The defendant failed to comply with an order to file a declaration that he would in future abstain from such acts and, on proof of the repetition of the offences, the court suspended the defendant ab officio et a beneficio on motion without fresh articles being promoted. The promoter thereupon proved by affidavit that the defendant had officiated subsequently to the date of the suspension and had repeated certain of the acts originally in question and moved the court to enforce the sentence of suspension. Before this motion was disposed of, however, the Queen's Bench Division prohibited the Dean of Arches from enforcing a similar decree of suspension in Martin v. Mackonochie (supra). Lord Penzance, whilst being "satisfied that the decree of suspension made in this case is a valid one"⁽³⁾, deferred his judgment until the rule was made absolute in Martin v. Mackonochie. In so doing he commented⁽⁴⁾ in regard to the objections made in the common law courts:

"As far as this Court is concerned, it is a complete answer to all these objections to point out that, in the case of

(1) at 742.

(2) (1877), 3 P.D. 103.

(3) at 118.

(4) at 108.

Mr. Purchas, the Judicial Committee of the Privy Council, which is the Court of Appeal from this Court of Arches, did suspend Mr. Purchas "ab officio et a beneficio" upon monition and without further articles, upon the sole ground of his having treated a decree of the Court with contempt and contumacy ... (T)hat decision appears to me to be in entire conformity with the ancient law and practice of the Ecclesiastical courts"⁽¹⁾.

It is therefore not surprising that Lord Penzance expressed himself strongly when he at last delivered judgment in Combe v. Edwards⁽²⁾:

"... I venture to think that the result has caused a very general surprise. It has been a surprise I imagine to the learned members of the Judicial Committee of the Privy Council to learn that the Court of Her Majesty in Council is an "inferior Court", and as such subjected to the control and supervision of the Common Law Courts, and still more so to find that this supervision by a sweeping use of the word "jurisdiction", extends to the regulation of their own procedure and practice. Nor will the reason given for this asserted authority be perhaps wholly satisfactory. That the Common Law Courts have been used to issue writs of prohibition to the Court of Delegates, when they handled matters not within their jurisdiction, is undoubted. And that the Sovereign in Council now exercises, amongst many other functions, the functions which the Delegates used to discharge in ecclesiastical suits is also beyond dispute. But does it follow from these premises that when this ecclesiastical jurisdiction was transferred by Act of Parliament to a tribunal of the highest dignity, in which the Sovereign herself (personally authorizing the judgment) takes a part,

(1) Referring to Hebbert v. Purchas, (1872), L.R. 4 P.C. 301.

(2) (1877), 3 P.D. 103 at 119.

this tribunal became at once an "inferior Court", and subject as such to the writ of prohibition - simply because some of the duties which it discharges are those which an inferior Court had previously been used to discharge? In a word, is it the character and position of the Court itself, or is it the character of the jurisdiction which it exercises, which makes it liable to be controlled by prohibition?"

Two comments must be made about this view of the ecclesiastical courts. First, the learned Dean concedes that the fact that prohibition lay to the Court of Delegates necessarily meant that that court was an "inferior court"⁽¹⁾ and, second, he relies upon the dignity of the tribunal and the sovereign's authority to exclude prohibition. However, if this latter view were correct, this would mean that prohibition could not lie even if the court were to act outside its jurisdiction. Such a hierarchical view of the two systems could never solve the possible clashes in jurisdiction satisfactorily.

The next year Lord Penzance himself pronounced Mackonochie guilty of contumacy and suspended him ab officio et a beneficio for three years for failing to appear before the Court of Arches in answer to a summons concerning his repeated "unlawful practices" in the performance of divine service in spite of two monitions. Thereupon Mackonochie sought a prohibition in the common law courts, the case finally reaching the House of Lords sub nomine Mackonochie v. Lord Penzance⁽²⁾. The House of Lords ruled that the question was one of ecclesiastical procedure alone, the suspension merely being a proper step in regularly instituted proceedings, and that prohibition did not lie. Lord Blackburn

(1) It should be noted that in Martin v. Mackonochie (supra) the Judicial Committee of the Privy Council is nowhere called "inferior". See also Hutton's Case, Hob. 15.

(2) (1881), 6 App. Cas. 424.

stated⁽¹⁾:

"Prohibition is the common law proceeding by which any of the superior courts at Westminster ... are enabled to restrain, amongst others, the Courts Ecclesiastical from acting in excess of their jurisdiction; but it does not enable the temporal Court to act as a Court of Appeal from the Court Ecclesiastical, so as to correct any irregularity or even injustice which may have been done by the Ecclesiastical Court, if done in the exercise of their jurisdiction."

It does not seem, however, that Lord Blackburn was intending to imply by the use of the words "superior courts" that the ecclesiastical courts were inferior; rather, he was distinguishing those common law courts having jurisdiction to grant a prohibition from those lesser common law courts not having such a power.

The corollary of the attitude of the common law courts was applied in the case of R. v. Editor, Printers and Publishers of the Daily Herald, ex parte the Bishop of Norwich⁽²⁾. A statement which tended to prejudice the fair hearing of a complaint preferred in the Consistory Court had been published by the defendants and a writ of attachment for contempt was sought in the King's Bench Division. In delivering the judgment of the court Lord Heward, C.J. stated⁽³⁾:

"The jurisdiction is inherent, and just as by virtue of that jurisdiction this Court may correct an inferior court such as a Consistory Court, so also in proper circumstances it may protect an inferior court of the same kind."

In R. v. Archbishop of Canterbury, ex parte Morant⁽⁴⁾ orders of certiorari and mandamus were sought against the archbishop. A

(1) at 443 - 444.

(2) (1932) 2 K.B. 402.

(3) at 412.

(4) (1944) K.B. 282; (cp) R. v. Legislative Committee of the Church Assembly, ex parte Haynes-Smith (1928) 1 K.B. 411.

parochial church council passed a resolution that certain provisions of the Benefices (Exercise of Rights of Presentation) Measure, 1931, should apply in view of the existence of a vacancy in the benefice. On the failure of the churchwardens to agree to the proposed presentation it became necessary for the patron to obtain the bishop's approval. This he refused and the patron appealed to the archbishop to review the bishop's decision. The archbishop declined to allow the patron to be represented by counsel and failed to disclose to the patron certain documents before him. On his upholding the bishop's decision the patron applied for an order of certiorari to quash the archbishop's decision and for an order of mandamus to direct the archbishop to hear and determine all issues of law and fact and to receive all relevant evidence and to permit the patron to appear by counsel. The Court of Appeal held that the archbishop was not exercising a function analogous to that of a person hearing a lis inter partes and that he was under no obligation to act in a quasi-judicial manner.

This attempt was followed in the next year by the case of the Attorney-General v. Dean and Chapter of Ripon Cathedral⁽¹⁾. Under the cathedral statutes the regulation and direction of all services vested solely with the Dean and there were to be "full choral services" every Sunday morning and evening throughout the year. The Dean instructed the organist that all the canticles were to be sung to chants and not to musical settings and the plaintiff, at the relation of the Royal Society of Organists, thereupon brought an action in the common law courts claiming that the Dean's direction was in breach of the cathedral statutes. The statutes were made under the Cathedrals Measures, 1931 and 1934 and Uthwatt, J. held that⁽²⁾ -

(1) (1945) Ch. 239.

(2) at 248-9.

"There is much to be said for the view that in light of the history of the law, of the source from which the measure and scheme came, and the particular subject matter under consideration, the jurisdiction of the High Court is impliedly excluded for all purposes, saving, of course, the jurisdiction over the ecclesiastical courts by mandamus and prohibition. . . The point is open to doubt and I have not come to any certain conclusion on it. But I have come to the conclusion that, assuming there is jurisdiction in the High Court, this is not a case in which the jurisdiction ought to be exercised, and I propose to deal with this case on these lines."

The jurisdiction at issue was that of making a declaration as to the construction of the Measure but in essence the action was one to enforce the ecclesiastical law in the common law courts and without recourse to the proper jurisdiction. As Uthwatt, J. said⁽¹⁾

"The question posed, therefore, is whether the jurisdiction . . . ought to be exercised in a case where any substantive relief, based on the meaning attached to the provision construed, must be sought in another jurisdiction."

Of course if the ecclesiastical court in the exercise of its jurisdiction misconstrued a statute then prohibition would lie⁽²⁾ but the action in the instant case amounted to far more than preventing the ecclesiastical courts from stepping outside their proper jurisdiction.

The position of the ecclesiastical courts vis-a-vis the common law courts was authoritatively stated, however, in R. v. Chancellor of St. Edmundsbury and Ipswich Diocese. Ex parte White⁽³⁾. Before the Divisional Court the preliminary point was

(1) at 249.

(2) Gould v. Gapper, (1804), 5 East 345.

(3) (1947) K.B. 263 (Divisional Court); (1948) 1 K.B. 195 (Court of Appeal).

taken that the court could not proceed because certiorari does not lie to a consistory court. The court upheld this point⁽¹⁾ and in delivering his judgment Lord Goddard, C.J. said⁽²⁾:

"The unbroken and universal practice shows that it has never been considered that certiorari lies to a spiritual court. I think it is useful to ascertain if possible, the principle which underlies the reason for saying that although prohibition may lie, certiorari will not. I think it is to be found very largely in the proposition that certiorari will only lie to an inferior court. The question arises, therefore, whether the courts Christian or spiritual courts are inferior courts in the true sense of the word "inferior", that is, inferior to this court; and it no doubt is an attractive argument to say that they must be inferior to this court or this court would not grant a prohibition against them."

He concluded that⁽³⁾ -

"ecclesiastical courts are not inferior courts; they are as unfettered in spiritual causes as is the Supreme Court in temporal causes."

Prohibition lies because the boundaries must be drawn between the two separate jurisdictions enforcing separate systems of laws⁽⁴⁾.

(1) It seems that prohibition is wide enough to do away with the necessity of certiorari. If a chancellor, for example, were to impose a penalty outside his jurisdiction, such as a fine, prohibition lies: see Case of Oaths ex Officio, 12 Co. Rep.26; R. v. Twiss, (1869), 10B.+S.298; R. v. Tristram, (1898), 2 Q.B. 371 at 374 and 378; (1899),80 L.T.414; (1902) 1 K.B.816. A common law action may also lie in which damages may be recovered against a chancellor: Beaurain v. Scott (1812), 3 Camp. 388.

(2) (1947) K.B. 263 at 269.

(3) at 274.

(4) at 271.

The duty of demarcation was given to the common law courts and this the learned Chief Justice explained by the following reason⁽¹⁾:

"As a line had to be drawn and as it was from the common law courts that the prerogative writs came to be issued, it was not unnatural that the King's Bench should assume the right of issuing writs of prohibition to the spiritual courts prohibiting them from entertaining a case because it was outside the statutes *Circumspecte Agatis* and *Articuli Cleri*, and was a temporal matter within the jurisdiction of the common law courts. The King had issued the writ in the first instance, then his courts, which became the proper medium for issuing the prerogative writ, and to that extent thereby the Court of King's Bench controlled the activities of the ecclesiastical courts."

This does not explain, however, why this control did not make the ecclesiastical courts "inferior" (in some sense of the word) to the common law courts. This was left to the Court of Appeal where it was pointed out by Wrottesley, L.J. that⁽²⁾ -

"...the word "inferior" as applied to courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts but also Palatine courts and Admiralty courts are inferior courts. But there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, namely, whether in its proceedings, and in particular in its judgments, it must appear that the court was acting within its

(1) at 272.

(2) (1948) 1 K.B. 195 at 205 - 206.

jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde. In the latter sense it is nowhere suggested that the ecclesiastical courts were inferior."

Prohibition, therefore, is a necessary part of the demarcation of the jurisdictions but the possibility of its issue does not make the ecclesiastical courts "inferior courts". It cannot be used to enable the temporal courts to act as courts of appeal to correct irregularities or injustices which may occur in the proper exercise of the ecclesiastical jurisdiction⁽¹⁾. On the other hand mandamus will lie to compel an ecclesiastical court to take cognisance of a case within its jurisdiction⁽²⁾. Although there seems to have been some attempt to whittle away the ecclesiastical jurisdiction by means of the prerogative writs the temporal courts in the main are quick themselves to prevent this abuse of their procedure⁽³⁾.

It is interesting to note, too, that the spiritual courts on occasion hastened to protect themselves. In 1492, for example, William Machyn was brought before the Commissary of London because⁽⁴⁾ -

"procuravit Henricum Grene, Thomam Jakeson et Thomam Randes vocari, ac vexari in curia seculari, occasione et pretextu, (et) citacionis sue ad curiam ecclesiasticam et lite inter eosdem in illa curia ecclesiastica pendente et nondum decisa iudice eciam omnibus partibus inhibente."

(1) Mackonochie v. Lord Penzance, (1881), 6 App. Cas. 424, per Lord Blackburn at 444.

(2) R. v. Archbishop of Canterbury, (1856), 6 E1. + B1. 546.

(3) See for example, Hallack v. Chancellor, etc. of Cambridge University, (1841), 1 Q.B. 593.

(4) Laurencii Veteri Judaismo (1492) Hale's Precedents 32.

Unfortunately the reactions of the ecclesiastical courts can only rarely be gleaned from the reported cases but Rolle's Abridgement also gives another insight into ecclesiastical reactions⁽¹⁾:

"Issint si un Jury done un faux vertict enter party et party, uncore sils sont sue pur cest perjury en l'Ecclesiastical Court un prohibition gift."

The fact that litigants were prepared to play off one jurisdiction against the other only underlines the necessity for one jurisdiction to have the last say as to where the boundaries should be drawn between the two jurisdictions. Because of the Reformation, that jurisdiction was necessarily that of the common law.

NOTE

A final word should perhaps be added on signification, "the procedure by which the royal chancery at the request of a residential bishop would issue to the local sheriff a writ for the capture and detention, until absolved, of any person who had remained excommunicate for more than forty days"⁽²⁾. Such procedure was not part of the general canon law and in England made its appearance with the ordinance of William the Conqueror regarding ecclesiastical courts⁽³⁾. It was the intention of this ordinance to sever the Church courts from their link with the English law and its procedures but William, realising that ecclesiastical discipline would be no stronger than the ability to enforce it, lent the weight of the secular arm to be used if the spiritual penalty failed. Undue emphasis should not be placed on

(1) 2 Rolle's abr. 304. Prohib, citing 13 H.7 Kell. 39b.

(2) I am indebted for this definition and the account which follows to F.D. Logan, Excommunication and the Secular Arm in Medieval England at 17 - 19.

(3) See Chapter 1, page 1.

heresy cases as they were "in no way formative" in the development of the procedure against excommunicates⁽¹⁾. Before 1382 recourse had to be made to the procedure against excommunicates even in heresy cases. In that year bishops were commissioned to demand directly the assistance of royal officials in handling heretics. In 1401 with the statute de heretico comburendo⁽²⁾ heresy became a secular offence punishable by death by burning and, although there was no statutory basis for a writ de heretico comburendo until 1534⁽³⁾, such a writ was in fact issued before the statute of 1401 was enacted⁽⁴⁾.

(1) Logan, op. cit., at 68 - 70.

(2) 2 Henry IV, c. 15.

(3) 25 Henry VIII, c. 14.

(4) Against William Sawtre in 1401.

P A R T I I I

CHAPTER IX

CONCLUSION

It has been seen how since the Reformation the ascendancy of the common law, coupled with sociological attitudes against ecclesiastical jurisdiction, has led to the gradual obsolescence of many parts of ecclesiastical jurisdiction⁽¹⁾. This in turn led to a falling off in those specialising in the field of ecclesiastical law which, again, led to common lawyers being given audience in ecclesiastical courts.

It has already been seen that during Cromwell's visitations the study of canon law, as such, was discontinued at Oxford and Cambridge and this gave encouragement to the study of the civil law⁽²⁾. These civilians acquired thereby the sole right of audience in the Church courts and by 1535 doctors of the civil law were living together at premises known as Doctor's Commons⁽³⁾. This society was legally incorporated in 1767 and between them its members had virtual⁽⁴⁾ control of all ecclesiastical courts in England. Canon 130 of 1603 ordered, for example :

"For the furtherance and increase of learning, and the advancement of civil and canon law, it is ordained that no

(1) In the 20th century there are also theologians who deny the place of canon law in the framework of the Church on earth.

(2) See chapter III.

(3) For a brief outline of the history of Doctor's Commons see Kemp, Introduction to Canon Law in the Church of England. For a fuller history see W. Senior, Doctor's Commons and the old court of Admiralty; W.H. Godfrey in London Topographical Record Illustrated XV; and Sketches of the Lives of English Civilians

(4) See, however, Marchant, The Church under the Law, Appendix II at 247.

proctor, exercising in any of the archbishop's courts, shall entertain any cause whatsoever, and keep and retain the same for two court days without the counsel and advice of an advocate, under pain of a year's suspension from his practice; neither shall the judge have power to release or mitigate the said penalty, without express mandate and authority from the archbishop."

The society thus had a virtual monopoly and it guarded it with care. In the case of R. v. Archbishop of Canterbury⁽¹⁾ an application was made to the Court of King's Bench for a mandamus to the archbishop to issue his fiat to the Vicar-General of the province of Canterbury for the purpose of making out a rescript under his seal commanding the Dean of Arches (as president of Doctor's Commons) to admit a Dr. Highmore as an advocate in the Court of Arches. Dr. Highmore had taken his degree of doctor of laws at Cambridge⁽²⁾ but the fiat had been refused as he had been admitted to deacon's orders. The mandamus, however, was also refused⁽³⁾. As Lord Ellenborough, C.J. said⁽⁴⁾:

"...nothing appears to shew that Dr. Highmore has any legal right to what he claims, more than any other of His Majesty's subjects: therefore, however sorry we may feel for the disappointment of the individual who has consumed his time and substance in a fruitless pursuit, we cannot interfere."

Proctors had a similar monopoly⁽⁵⁾ and this monopoly was jealously

(1) (1807) 8 East 213.

(2) By usage and practice an advocate was admitted if he had taken a doctor of laws' degree: See Ayliffe Parergon at 54.

(3) Thus only within the last few years has it been possible for a clergyman to practise in an ecclesiastical court.

(4) at 219-220.

(5) Ecclesiastical Court Act, 1813, (53 George III, c.127), s.9.

guarded by the courts. In Evans v. Knight⁽¹⁾ Dr. Lushington applied to the Prerogative Court of Canterbury to allow further interrogatories to be administered and he founded his application on the affidavit of a solicitor. Sir John Nicholl refused the application, however, saying⁽²⁾ -

"Here the application is founded on the affidavit of the solicitor: - the solicitor is not known to the Court; the proctor who is dominus litis, and the party, are alone known to the Court; and there is another reason why the proctor ought to have made the affidavit in preference to the solicitor, viz. that the proctor has a knowledge of the practice of the Court, and knows what circumstances ought to have weight, whereas the solicitor is a mere stranger of whom the Court knows nothing."

The numbers of those practising in the ecclesiastical courts were never large - in 1746 there were 34 proctors and in 1843 only 26 advocates⁽³⁾ - and when the probate and matrimonial jurisdictions were taken from the ecclesiastical courts in 1857⁽⁴⁾ the death knell of Doctor's Commons began to toll. In the same year the college was empowered to surrender its charter and in 1861 the library was sold followed by the estate the next year. In 1832 the Lord Chancellor, Lord Campbell⁽⁵⁾, said in giving evidence before the Ecclesiastical Courts Commissioners⁽⁶⁾:

(1) (1820) 3 Phillimore 413.

(2) at 423.

(3) Kemp, op. cit. at 38.

(4) Court of Probate Act, 1857 (20 + 21 Victoria, c.77) and the Matrimonial Causes Act, 1857 (20 + 21 Victoria, c.85).

(5) One of the five visitors of the college.

(6) Quoted in R.J. Phillimore, The study of the civil and canon law in its relation to the state, the church and the universities at 38.

"I have the most sincere respect for the civilians as a body, and I should think that any alteration of the law that would not preserve the learning which is now to be found among the civilians would be very objectionable."

In about 30 years this had come to pass and ex necessitate rei the ecclesiastical courts admitted barristers to practise before them. In Mouncey v. Robinson⁽¹⁾ the Chancery Court of York admitted articles approved and signed by a barrister who was practising in the Arches Court of Canterbury, but not a member of Doctor's Commons, although the Church Discipline Act, 1840, required the approval and signature of an advocate practising in Doctor's Commons. Nonetheless, in 1875 the Court of Arches in Burch v. Reid⁽²⁾ held that a defendant could only enter an appearance in person or by a proctor and in 1876 in Crisp v. Martin⁽³⁾ it further held that a respondent could not appear by a solicitor of the Supreme Court of Judicature who was not also a proctor duly qualified and admitted according to the ancient practices of the Court of Arches. The reason for this had already been expressed by Sir H. Jenner Fust in Fell v. Bond⁽⁴⁾ when he said⁽⁵⁾ -

"Some facts must be laid before me to show ... not only that an additional number of Proctors is required, but that Attorneys and Solicitors are sufficiently acquainted with the Ecclesiastical Law to conduct the business of the Court."

As a result solicitors were expressly empowered to practice in the ecclesiastical courts by the Solicitors Act, 1877⁽⁶⁾.

The effect of the closure of Doctor's Commons may be seen

(1) (1868) 37 L.J. Eccl. 8.

(2) (1873) L.R.4 A. + E. 112.

(3) (1876) 1 P.D. 302.

(4) (1849) 7 Not. Cas. 31.

(5) at 39.

(6) 40 + 41 Victoria, c.25, s.17.

from the fact that Sir Robert Phillimore was a member of Doctor's Commons whereas his son, Sir Walter Phillimore, was a barrister-at-law⁽¹⁾. A number of practitioners seem to have combined the qualifications of barrister-at-law and Doctor of the Civil Law⁽²⁾.

Even by 1883 the effects were being felt by the ecclesiastical courts. In evidence given before the Royal Commission on Ecclesiastical Courts, in answer to a question by the Archbishop of Canterbury on the existence of civilians since the abolition of Doctor's Commons, Canon Liddon referred to the threatened ruin of ecclesiastical law as a subject and ecclesiastical lawyers as a profession⁽³⁾. Nor was this an isolated opinion⁽⁴⁾:

"Archbishop of Canterbury: It is not very easy to find ecclesiastical judges now-a-days, is it?

Rt. Hon. A.J.B. Beresford-Hope M.P.: Not at all so. That comes so much from the dearth of ecclesiastical lawyers."

Similarly⁽⁵⁾:

"Archbishop of Canterbury: The difficulty, of course, is in finding a sufficient number of persons who have given their attendance to the study of ecclesiastical law?

The Rev. Malcolm MacColl: No doubt.

Archbishop: And the alterations in the courts which have made ecclesiastical law no longer what it once was, a lucrative profession with a career of its own?

Mr. MacColl: Quite so. At present I suppose that the race of ecclesiastical lawyers is pretty well extinct, and there is

(1) See Phillimore Ecclesiastical Law, (1895), 2nd ed., title page.

(2) e.g. Dr. W. Phillimore and Dr. Deane, Q.C.

(3) Report of Ecclesiastical Courts Commissioners, vol.II at 361.

For this and the two following references I am indebted to E.W. Kemp, op. cit., where they are quoted at 54 - 55.

(4) Report of Ecclesiastical Courts Commissioners, vol.II at 308

(5) Op. cit., at 311.

no possibility of its being revived.

Archbishop: It has not quite come to that, I hope, as yet, looking round the table, but still they are in process of extinction?

Mr. MacColl: Yes, I mean that."

R.A. Marchant comments in his book The Church under the Law published in 1969⁽¹⁾:

"The writer has heard two diocesan chancellors admit that they knew no church law before their appointment, and he suspects that the same is true of most modern chancellors," and in the light of such admissions Mr. MacColl might well feel his prophecy to have been fulfilled⁽²⁾, although it cannot be doubted that there are still those who do make a study of the laws ecclesiastical.

Canon 130 based the reason for the monopoly on "the furtherance and increase of learning, and the advancement of civil and canon law" and in deference to the same position the common law courts in the seventeenth century would ask civilians to give expert evidence on the canon and civil laws⁽³⁾. In Christopher Dean's Case⁽⁴⁾, for example, the opinion of four doctors of the civil law on the question of a general mandate for the induction of a minister was shown to the common law court on a special

(1) at 240 (footnote).

(2) Reference may also be made to the Law List to see how many solicitors who cannot have studied the ecclesiastical law nonetheless hold themselves out to practice in that discipline.

(3) This is not the same as the writ de melius certiorando concerning his answer to which the Bishop of Norwich was fined £20 in Anon. 3 Dyer 305b because his answer did not certify the legality of the marriage in question.

(4) Noy 134.

verdict. Similarly in Stephens v. Totty⁽¹⁾ Popham, C.J. allowed arguments before him by civilians in a prayer for a prohibition and the same procedure was followed in Heath v. Atworth⁽²⁾ on a general demurrer. In 1782 Lord Mansfield brought Doctors Wynne and Scott into the King's Bench to hear arguments on the validity of ransom bills given at sea⁽³⁾ and in 1845 civilians were consulted in R. v. Serva (The Felicidade)⁽⁴⁾. Nor was this a one way traffic: in an anonymous case⁽⁵⁾ the Bishop of London moved a question for the opinion of the justices of Serjeant's Inn concerning the assets of an intestate.

In the Chancellor of Gloucester's Case⁽⁶⁾ a prohibition was denied on the grounds that the competency of a chancellor can only properly be tried by the ecclesiastical courts:

"Mes si un Chancellor soit sue en Court Christian d'ettre deprive pur insufficiencie ne aiant conusans del Canon ley, nul prohib gist, pur ceo que ils font la proper Judges de son abilitie, et nemy les Judges del Common ley."

No doubt this was decided having in mind the immense amount of learning involved in studying the Corpus Juris Canonici as a whole, the extent to which it was modified by local custom in its application to England and the further extent to which it had been abrogated at the Reformation. Lord Goddard, C.J. in R. v. Chancellor of St. Edmundsbury and Ipswich Diocese⁽⁷⁾ presumably also had this in mind when in comparing the common law and the

(1) Noy 45.

(2) 2 Dyer 240b. See also Le Caux v. Eden, 2. Doug. 594 (note); Rous v. Hassard, 2 Doug. 602; Anthon v. Fisher, 3. Doug. 166.

(3) Senior, op. cit., at 107.

(4) The Times, 17th November and 4th December, 1845.

(5) 2 Dyer 232a.

(6) 2 Rolle's Abridgment 286.

(7) (1947) K.B. 263.

canon law he said⁽¹⁾:

"...(T)hey were two separate jurisdictions, as separate for many purposes as can well be imagined."

It is therefore surprising to find Lord Denman, C.J. saying in Burder v. Veley⁽²⁾:

"Matters of mere process and practice, which may be in a great measure oral and traditionary, are perhaps familiarly known only to the court to which they belong; but, as to the principles of ecclesiastical law, we have in truth the same means of knowledge, access to the same sources of instruction, and the same opportunities, in all respects, of forming a correct opinion."

It is true, of course, that the same sources are open to all but it is to overstate the case by far to suggest that all have "the same opportunities, in all respects". As any lawyer must admit, the technique to apply to the sources is as important as the sources themselves. It may be doubted whether Lord Denman would have faced the invasion of the common law by a civilian with the same equanimity as he did the invasion of the canon law by the common lawyer. The mere fact of the common law courts' jurisdiction in prohibition made it imperative on occasion for them to consider the ecclesiastical law but to suggest that the common law techniques could be applied to the canon law without loss goes too far. Indeed the result of such an attempt may be seen in the liturgical cases of the nineteenth century. Chancellor Garth Moore in the Rector and Churchwardens of Bishopswearmouth v. Adey⁽³⁾ pointed out that⁽⁴⁾ -

"Because the Book of Common Prayer has statutory authority

(1) at 273.

(2) (1840) 12 Ad. + E11. 233 at 259-260.

(3) (1958) 1 W.L.R. 1183.

(4) at 1187.

it does not mean that it is itself a statute. Nor does it mean that it is to be interpreted as one would interpret the statute itself. It is the work of clergymen and its rubrics are directives written by clergymen for clergymen, in language which, for a directive, is clear enough, but which from a lawyer's angle leaves many loose ends and much to be desired, and which one would not employ, for example, in the drafting of a conveyance."

In the nineteenth century, however, the Judicial Committee of the Privy Council interpreted the rubrics with such strictness⁽¹⁾ that it was found necessary to enact⁽²⁾ by the Ecclesiastical Jurisdiction Measure, 1963, s.45(3) that⁽³⁾ -

"In the exercise of its jurisdiction under this Measure the Court of Ecclesiastical Causes Reserved shall not be bound by any decision of the Judicial Committee of the Privy Council in relation to matter of doctrine ritual or ceremony."

Once Doctor's Commons was abolished it became a matter of

(1) It is not the application of the rules of statutory interpretation that is wrong. Those rules are elastic enough to allow the rubrics to be interpreted as directives. It is the failure to recognise that they are directives just because they are embodied in a statute that is reprehensible.

(2) This is only one view of the scope of the sub-section. It may also be regarded as being declaratory of the law that in cases such as Ridsdale v. Clifton (1877) 2 P.D.276 and Read v. Bishop of London (1892) A.C.644, where rights to the possession of property cannot have arisen consequent upon previous decisions, a court should be slow to exclude any fresh light which may be brought to bear upon the subject as, for example, by fresh historical evidence: see Halsbury's Statutes of England (3rd ed.) vol. 10, at 274.

(3) See also s.48(5).

necessity for common lawyers to be given a right of audience in ecclesiastical courts and for ecclesiastical judges to be drawn from their midst. Yet this naturally has the tendency to fuse the two systems of law. An example may perhaps be found in the Rector and Churchwardens of Bishopswearmouth v. Adey where the learned Chancellor felt bound⁽¹⁾ -

"to draw attention in this case ... to the doctrine of necessity, a doctrine which has its place in the common law of England, though its limits have never been exactly defined. It has an even older place in the jus commune of the Church and is, if anything, there more firmly entrenched.' Necessity is in fact a principle long recognised by canon law⁽²⁾ and the relevance of the common law doctrine is only to show that the principle is not contrary to the common law and therefore was not abrogated at the Reformation. Reference should be made to canonical authorities when applying the principle in ecclesiastical cases but in fact the learned Chancellor in his Introduction to English Canon Law in discussing necessity seems to be applying the common law doctrine of necessity to the ecclesiastical law. He says⁽³⁾ :

"It is the doctrine of necessity, known to all branches of the law of England, though about which there is singularly little authority ... It is submitted that the doctrine applies equally to matters ecclesiastical."

If this is indeed the intention of the learned Chancellor it may be regretted as it is possible that necessity is of wider application in the canon law than in the common law.

A more certain result of common lawyers replacing civilians

(1) (1958) 1 W.L.R. 1183 at 1190.

(2) See Dictionnaire de Droit Canonique, sub. nom. Nécessité.

(3) at 64 - 65.

may be seen, however, in the question of the seal of the confessional⁽¹⁾. Because of a misunderstanding of the basis of the claim by an Anglican priest Professor Cross equates the claim to that made by Roman Catholic priests - a claim based in fact on an appeal to a foreign law - and thus dismisses it. As Professor Cross' textbook is rightly regarded as the leading authority on evidence by practitioners today, they are unlikely to consider the matter more deeply if faced by such a problem. As a result the Anglican priest's privilege could well be lost through ignorance and neglect.

A similar difficulty arises in regard to pre-Reformation canon law still in force today. As Lord Dunboyne, Com.-Gen., pointed out in In re St. Mary's, Westwell⁽²⁾ -

"The line of cases culminating in Exeter (Bishop) v. Marshall seems to confirm that no directive, rule or usage of pre-Reformation canon law is any longer binding on this court unless pleaded and proved to have been recognised, continued and acted upon in England since the Reformation ..."

The purpose of this rule is probably a wise one recognising as it does that much of the canon law was abrogated at the Reformation and that this necessitated such pleading when ecclesiastical matters came before a common law court. It is no doubt wise also to continue this rule when the ecclesiastical courts themselves are peopled by common lawyers. Nonetheless it does seem tacitly to recognise that in this complicated field of the law it is best not to rely solely on a judge's knowledge of that law. Moreover, if this applies to the judiciary, it applies equally to practitioners. Although they prepare their cases and advise on the law, it is not surprising if they are unable, through pressure of

(1) See Chapter VII.

(2) (1968) 1 W.L.R. 513 at 516.

time or lack of training, to complete the researches necessary into the early Church law. If this is so, those parts of the law which rarely come before the courts, or are to be found in the more obscure authorities, are likely in time completely to be forgotten. With the residuum of learning disappearing with the passing of Doctor's Commons and the generation that then practised there is now no way of learning ecclesiastical law in depth⁽¹⁾ save than by a number of years self-education.

The question whether the ecclesiastical law still recognises custom contra legem has already been discussed in relation to the necessity of pleading pre-Reformation canon law. It remains to be seen whether there are any cases in which the canonical, rather than the common law, view of custom has been recognised in an ecclesiastical case. It has already been concluded that it was the common law view of custom that was applied in the election cases relating to churchwardens and parish clerks⁽²⁾:

"Si les Church-wardens d'un Parish hont use temps dont memory d'electer le Clark del Parish ..."⁽³⁾

It seems on the other hand that the Church courts may still have been applying the canonical view of custom. In Cooker v. Goale⁽⁴⁾, for example, mortuaries were again in issue:

(1) Halsbury's Laws of England, vol. 10, is no more than a practitioner's starting point. The last edition of Cripps on Church and Clergy was published in 1937 and the last edition of Phillimore's Ecclesiastical Law in 1895. Both are indispensable but are difficult to obtain; neither are replaced by Garth Moore's Introduction to the Canon Law or Dale's The Law of the Parish Church, nor are they intended to be.

(2) Chapter V supra.

(3) Walpole v. Coldwell, 2 Rolle's Abr. 286.

(4) 2 Rolle's Abr. 307.

"Si le Parson de B. en London libel en le spiritual Court sur un Custome, que si un Parishioner de B. moruit en B. et est port et bury en un auter Parish en London, et sont done al Parson un Gown, un Pulpit-cloth, et un paire of Gloves, que mesme choses doint ettre done a luy; un prohibition gift a trier cest Custome si ceo soit deny, car un custome poet ettre fait per plus briefe temps que al Common ley."

The same reasoning, indeed, was used by Treby, C.J. to justify the common law courts' trial of the issue whether or not a custom existed in Churchwardens of Market Bosworth v. Rector of Market Bosworth⁽¹⁾:

"...(T)he reason for which the Spiritual Court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath. For in some cases the usage of ten years, in some twenty, in some thirty years, makes a custom in the Spiritual Court; whereas by the common law it must be time whereof, etc. And therefore since there is so much difference between the laws, the common law will not permit that Court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case that reason fails, for the Spiritual Court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged, that there has not been any custom allowed by their law, which allows a less time than the common law, to make a custom."

At first sight the inference seems clear from these two cases that the ecclesiastical courts were still prepared to apply the canonical view of custom rather than the common law. Nevertheless in Cooker v. Goale the reasoning is the traditional one and does not prove conclusively that there had been an attempt to apply the

(1) (1699) 1 Ld. Raym. 435 at 435-436.

canonical view. Similarly, although Treby, C.J. states in the Market Bosworth Case that the Church court adjudged "that there has not been any custom allowed by their law" the statement that that law "allows a less time than the common law" may well be his own gloss based on the traditional reasoning in order to base his a fortiori argument. It cannot therefore be certain that the Church court itself had ruled that there was no custom according to the ten, twenty or forty year rules. Certainly in Jones v. Stone⁽¹⁾ two years later the libel in the Church court was that by custom time out of mind the vicars of N. had, by themselves or others, said and performed divine service in the chapel of Chawbury and that the present vicar of N. had neglected. Dr. Ayliffe in his Parergon is nonetheless putting forward the canonical view in 1726⁽²⁾:

"If a Custom be contrary to an Ecclesiastical Law, or the Good of the Church, which is sacred, then forty Years Prescription is requir'd."

Again, although there cannot be certainty for the reasons already given, it may be that the ecclesiastical courts were still applying the canonical principles in 1757. In Paxton v. Knight⁽³⁾ the Court stated⁽⁴⁾:

"They have adjudged the adverse prescription to be a good one: which they could not try; and which they will establish upon less evidence than the common law requires."

In Astley v. Biddle⁽⁵⁾, also, churchwardens placed another person in a pew with Astley, who had taken a house to which the pew had belonged for forty years, but the Peculiars Court of Canterbury

(1) 2 Salk. 550.

(2) Parergon Juris Canonici Anglicani at 196, citing X.1.4.11.

(3) 1 Burr. 314.

(4) at 315.

(5) (1774), cited in Stevens v. Woodhouse, 1 Hag. Con. 318 (note).

admonished them not to disturb him. This may well be based, however, on the presumption of a lost modern faculty although it was stated by Sir William Scott in Walter v. Gunner⁽¹⁾ that -

"mere presumption is not sufficient, without some evidence, on which a faculty may reasonably be presumed. The strongest evidence of that kind, is the building and repairing time out of mind: for mere repairing for 30 or 40 years will not exclude the Ordinary ..."

The case of Full v. Hutchins⁽²⁾ in 1776 is however clear, as Lord Mansfield stated categorically in his judgment that the plaintiff had alleged a custom in the ecclesiastical court⁽³⁾ -

"to be time immemorial, or at least for forty years past."

This was a case concerning tithes and it was highly unlikely that the alternative allegation would have been pleaded if the ecclesiastical courts never at that time considered the canonical view of custom. This fact in itself adds cogency to the view that in the cases already cited the Church courts were in truth prepared to apply the canonical view.

No evidence that the Church courts continued so to do in the nineteenth century seems to be forthcoming although the dearth of reports may in some measure account for this. Certainly such a lack is not to be wondered at since the civilians themselves disappeared. Mention should, however, be made of two other cases. In In re Robinson⁽⁴⁾ the Court of Appeal held that it was not illegal for a Church of England clergyman to wear a black gown in the pulpit when preaching as its legality was sanctioned by the continuous use of centuries uncontrolled by positive law or

(1) (1798) 1 Hag. Con. 314.

(2) 2 Cowp. 422.

(3) at 423.

(4) (1892) 1 Ch. 95 (North, J.); (1897) 1 Ch. 85 (Court of Appeal).

judicial decision. This, of course, is not based on custom as such but the lack of any prohibition against such apparel. The second case is Kensit v. Dean and Chapter of St. Paul's⁽¹⁾, concerned with the impediments to ordination, in which the court stated⁽²⁾ -

"The word "impediment" related originally to a number of matters, some of which can no longer be regarded as such - as, for instance, bastardy, and certain physical defects as the loss of a limb or eye ..."

This matter has already been discussed⁽³⁾ but it may again be pointed out that the General Assembly nonetheless found it necessary to pass The Clergy (Ordination and Miscellaneous Provisions) Measure, 1964, s.8 which states that -

"No person shall be refused ordination as deacon or priest or consecration as bishop on the ground that he was born out of lawful wedlock."

The realm in which fusion can most readily be seen, however, is that of practice and procedure. Practice is in most instances a question for the courts themselves to regulate⁽⁴⁾ although in doing so the courts act carefully. In Lyon v. Furness⁽⁵⁾, for example, on a question whether answers on oath were to be dispensed with Sir John Nicholl pointed out⁽⁶⁾:

(1) (1905) 2 K.B. 249.

(2) at 256 - 257.

(3) Chapter V supra.

(4) See, for example, the Practice Statement (Judicial Precedent) (1966) 1.W.L.R. 1234 in which Lord Gardiner L.C. announced the intention of the Lords of Appeal in Ordinary no longer to treat former decisions of the House of Lords as binding in every case.

(5) (1820) 3 Phillimore 316.

(6) at 316.

"...(T)his is one of the many instances which point out the danger of the Court's relaxing its rules of practice ..."
In Evans v. Evans⁽¹⁾ Sir H. Jenner Fust refused to depart from the rules of the canon law which demanded the evidence of two witnesses to prove adultery⁽²⁾ and in Simmons v. Simmons⁽³⁾ Dr. Lushington found himself bound to follow that ruling. The learned Chancellor commented⁽⁴⁾ -

"With respect to the admission of a single witness to prove an act of adultery in these Courts, the case of Evans v. Evans has distinctly prescribed the rule which I, as Judge of the Consistory Court, am bound to follow. I am bound to follow the decision of the Dean of the Arches, whatever it be, and however much I may regret (as I do) that there should be any difference in rules of evidence between Ecclesiastical Courts and those of the Common law. It is a fearful discrepancy, in my opinion, that a man might be executed on evidence which would not be sufficient in law to prove a charge of adultery, even by way of defence."

Instead Dr. Lushington⁽⁵⁾ -

"... endeavoured .. to discover whether any help can be derived from analogy to cases decided at common law. The decisions in those Courts cannot however furnish a direct analogy for this reason, that, except in cases of treason which rests on particular acts of Parliament, the Courts of Common Law do not require two witnesses. The nearest analogy is in the case of an accomplice, and the law in strictness

(1) (1844) 3. Not. Cas. 416.

(2) A prohibition lies, however, if the matter is not of spiritual cognisance: see, for example, Shotter v. Friend, 2 Salk, 547.

(3) (1847) 5 Not. Cas. 324.

(4) at 340.

(5) Simmons v. Simmons (1847) 1 Robertson 566 at 573 - 574.

seems to be that, save in cases of treason, the sole and unsupported evidence of an accomplice is sufficient; though in practice, at the present day, it is usual with the Judge, where the evidence of an accomplice stands uncorroborated in material circumstances, to direct an acquittal. That general probability will not suffice ... appears ... in Phillips on Evidence ..."

This use of the common law as a guide is, indeed, of particular importance as the canon law had its own rules relating to accomplices as Sir. H. Jenner Fust had himself pointed out in Trower v. Hurst⁽¹⁾:

"The evidence of particeps criminis has always been received. In Dr. Free's case, witnesses were examined as to the intimacy between them and the party cited; and although the Court always looks at such evidence with distrust, yet it is not competent for the Court to reject the evidence of such witnesses, if they choose to tender themselves ..."

Again in Taylor v. Taylor⁽²⁾ Dr. Lushington commented on the unsatisfactory state of the canon law in insisting on two witnesses and then went on⁽³⁾:

"The question, then, is, whether the evidence in this case is sufficient or not. Dr. Bayford has raised a doubt as to the nature of corroborative evidence in such a case; what is to corroborate the evidence of Tucker, as the other witnesses do not speak to the same facts and circumstances? That is a very important question, and if it was required by any Statute that there should be the evidence of two witnesses, I confess I should have entertained great doubt whether the Statute did

(1) (1845) 4 Not. Cas. 52.

(2) (1848) 6 Not. Cas. 558.

(3) at 563.

not require two witnesses to the transaction in question. But here we have no Statute at all; it is a rule of Court, and nothing but a rule of Court."

Meanwhile the question of the viva voce examination of witnesses in ecclesiastical courts had been brought before Parliament at the instigation of Sir Robert Phillimore. In Ingram v. Wyatt⁽¹⁾ Sir John Nicholl in arguendo had said that he might properly order a witness to be examined orally although he did not in fact take that step. It was, however, taken in 1852 by the Consistory Court of St. David's and the Court of Arches⁽²⁾ decided that, although an irregularity, it was not such an irregularity as to constitute the suit null and void. Two years later Sir Robert Phillimore's bill was passed in the form of the Ecclesiastical Courts Act, 1854⁽³⁾, and, as he pointed out in the Preface to The Principal Judgments delivered in the Court of Arches 1867 to 1875⁽⁴⁾ -

"Causes have ever since been conducted at the hearing exactly as they are at Nisi Prius. The pleadings are in cases of heresy necessarily fuller; but in other cases the introduction of viva voce evidence and certain Rules and Regulations promulgated by Dr. Lushington, for the Arches Court, in 1867, have led to a great improvement in the pleadings."

Previously the evidence of witnesses was taken in writing before an examiner sitting in private without the presence of counsel⁽⁵⁾.

(1) 1 Hagg. 38. See Williams v. Price (1852) 2 Robertson 545.

(2) Williams v. Price (supra).

(3) 17 + 18 Victoria, c.47. Such evidence was already admissible in the Judicial Committee of the Privy Council by statute.

(4) at VIII.

(5) Ibid. at VII-VIII.

The new law obviously necessitated new rules of evidence and they were to be found ready made in the common law. In Fyler v. Fyler⁽¹⁾ Dr. Phillimore, after consultation with the Dean of the Arches, adopted the rule that, whenever an application for permission to take oral evidence was made, the application would be granted unless good cause to the contrary was shown by the other party⁽²⁾. The present practice is that oral evidence is admitted without such an application.

In Burder v. O'Neill⁽³⁾ Dr. Phillimore applied before the Dean of the Arches, Dr. Lushington, to examine a clergyman against whom a suit for immorality under the Church Discipline Act, 1840, had been brought. This application was refused but Dr. Lushington decided that in proceedings under the Act the evidence of two witnesses was unnecessary and gave the following reasons⁽⁴⁾.

"(F)irst, because evidence is now taken orally, and according to the rules of the common law; and next, because I think the rules of evidence are subject to modification by course of law. Lord Ellenborough, on one occasion, somewhat contemptuously refused to consider cases reported in Siderfin and Keble, and said "We do not sit here to take our rules of evidence from those ancient authorities." My intention is, to the best of my ability, to abide by the rules and practice of the courts of common law in the construction of evidence given in this case."

In Bishop of Norwich v. Pearse⁽⁵⁾, however, Dr. Phillimore, Dean of the Arches, reconsidered the question of the admissibility of

(1) (1854) 2 Spinks 69.

(2) at 70.

(3) (1863) 9 Jur. N.S. 1109.

(4) at 1110.

(5) (1868) L.R. 2 A. + E. 281.

the evidence of an accused clergyman and overruled Burder v. O'Neill⁽¹⁾. Having been convicted, the defendant appealed to the Judicial Committee of the Privy Council but the question of admissibility was not raised. On three other occasions similar evidence was allowed to be given by Dr. Phillimore and on none of these occasions was an objection taken to the evidence on appeal⁽²⁾. Indeed, such evidence was admissible in the ecclesiastical courts before an accused could give evidence in his own defence in a common law court⁽³⁾. In this instance the practice of the common law was assimilated to that of the ecclesiastical law.

In practice there is now a complete fusion of the law of evidence in the two jurisdictions⁽⁴⁾. Although in theory objection could be taken to oral evidence being given, it is difficult to envisage in what circumstances "good cause" could be shown. Moreover, although technically the decision in Burder v. O'Neill⁽⁵⁾ was confined to proceedings under the Church Discipline Act, it is now accepted that, where oral evidence is given, a material fact need not be proved by two witnesses⁽⁶⁾.

Another example of fusion - indeed, an example which it is difficult properly to assess - is in the realm of precedents. In common law courts even in historical times reasons were not given for decisions⁽⁷⁾ and the typical judgment in the canon law courts

(1) In Bishop of Norwich v. Berney, cited in L.R.2 A.+E. at 285, the Judicial Committee of the Privy Council had observed that the question perhaps required reconsideration.

(2) Principal Judgments at XII and 127.

(3) Ibid. at XI.

(4) Additional aids are admitted in the common law courts in the interpretation of ecclesiastical statutes: see above.

(5) supra.

(6) Halsbury, Laws of England, vol. X at 494.

(7) 3 Co. Rep. preface V.

through the centuries did not cite authorities⁽¹⁾. By the eighteenth century precedents were being cited, as can be seen from Phillimore's Reports of Cases in the time of Sir George Lee. However, in the late fifteenth century and early sixteenth century they do not seem to be cited, as can be seen from Hale's Precedents. It may be that there is not sufficient published material on which to make a final judgment on this question but precedent depends to a large extent upon law reporting⁽²⁾ and such reports were not available for ecclesiastical courts whereas they were for the common law courts. If it is correct to see the ecclesiastical judges following the common law lead in this matter - and it should be remembered that the civilians were judges also in the admiralty courts - the effect on the ecclesiastical law in giving it greater certainty and rigidity must be incalculable⁽³⁾, The other incalculable effect of fusion is the change from inquisitorial to accusatorial procedure: a change which seems to have occurred at the same time as the other changes in procedure already considered.

The question must be considered, however, whether there is any realm in which there may still be a conflict between the common law and the canon law. In the majority of cases, of course, there can be no conflict as the ecclesiastical law has been part of the general common law since the Reformation. Nonetheless, one possibility still remains. The canon law, although permitting divorce a mensa et thoro, did not permit divorce a vinculo. When divorce was permitted in England the position of

(1) J. Duncan M. Derrett, Law in the New Testament at 176, note 3.

(2) Cross, Precedent in English Law at 18.

(3) It should be noted that in Bishop of Norwich v. Pearse

(supra) Dr. Phillimore refused to follow Dr. Lushington's decision in Burder v. O'Neill.

the Established Church was regularised by statute. The present law is contained in the Matrimonial Causes Act, 1965⁽¹⁾, s.8(2) which enacts:

"No clergyman of the Church of England or the Church of Wales shall be compelled -

(a) to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living; or

(b) to permit the marriage of such a person to be solemnised in the Church or Chapel of which he is the Minister."

The position is therefore clear if the remarriage of a divorced person is in question. Moreover, no difficulty can arise if the previous marriage has been annulled as the canon law recognised that such a marriage was void ab initio. However, what is the position if the previous marriage is voidable⁽²⁾ on grounds not recognised by the canon law⁽³⁾? It may be that the words of s.8(2) are apt to cover such marriages⁽⁴⁾ but the words "whose former

(1) 1965, c.72.

(2) Unsoundness of mind at the time of the marriage; suffering from venereal disease in a communicable form at the time of the marriage; pregnancy at the time of the marriage by some person other than the petitioner: see the Nullity of Marriage Act, 1971, s.2.

(3) (ie) prior to 1937. See Ewing v. Wheatley (1814), 2 Hag.Con. 175 at 183; Sullivan v. Sullivan (1818), 2 Hag.Con. 238; Moss v. Moss (1897) P.263; see also Ayliffe, Parergon at 361.

(4) The wording of s.9 of the Clergy (Ordination and Miscellaneous Provisions) Measure, 1964, covers the situation more aptly although even then the position is not free from doubt. Section 5 of the Nullity of Marriage Act, 1971, does not seem to take the matter any further.

marriage has been dissolved" most readily apply to cases of dissolution and not nullity cases. If they do not cover the case of a person whose previous marriage is by statute voidable, can a clergyman refuse to celebrate the remarriage of such a person?

It may be argued that as the ecclesiastical law is part of the general common law any amendment of the common law ex necessitate also amends the ecclesiastical law⁽¹⁾. This may be true but it is submitted that the one does not necessarily flow from the other⁽²⁾. As has been pointed out at the common law the interpretation of ecclesiastical statutes may differ from the interpretation of other statutes and in other matters, only if there is a conflict between the two laws, does the common law prevail. Indeed, whether such a conflict arises in any given case depends on the outlook of the common lawyers. It can be argued, therefore, that the common law may recognise that in certain circumstances the ecclesiastical law differs from the law to be applied in other branches of the law. The common law may thus recognise that a marriage voidable by statute is nonetheless a valid marriage for the purposes of the ecclesiastical law. By the Deceased Wife's Sister's Marriage Act, 1907⁽³⁾, s.1. a marriage with one's deceased wife's sister, previously void, was validated. By s.4, however, nothing in the Act relieved a clergyman from any ecclesiastical censure to which he would have been liable if the Act had not been passed by reason of his having contracted such a marriage. In R. v. Dibdin⁽⁴⁾ this provision was discussed obiter

(1) See, for example R. v. Dibdin (1910) P.57 at 81 per Darling, J.

(2) See The Canon Law of the Church of England at 66-67 and the memorandum by Mr. W.S. Wigglesworth, Q.C. in Anglican-Methodist Unity Report of the Joint Working Group 1971 at 30-31. See, however, the addendum to chapter V, supra.

(3) 7 Edward VII, c.47. Now repealed.

(4) (1910) P.57.

by Bray, J.⁽¹⁾ and he stated⁽²⁾ -

"Under s.4 the clergyman of the Church of England having contracted such a marriage is still to be considered contrary to God's law. Why is this, except that in the Church of England such a marriage is still to be considered contrary to God's law?"

On the other hand Farwell, L.J. explained (also obiter) that⁽³⁾ -

"This section appears to me to be based on St. Paul's advice to the Corinthians as to eating of meats offered to idols: it is lawful but not convenient because of the possibility of its being a stumbling block to weaker brethren."

At least one common lawyer was prepared, therefore, to agree that the common law can allow one law to apply to one class of persons but not to another without there being any conflict.

It may be, therefore - and it is submitted that this is the most logical explanation of those statutes considered above - that the ecclesiastical law has remained unaltered by what may be seen as enabling statutes applying in all other branches of the law. However, if this is not so, is there any duty to celebrate the marriage of a person who was a party to a marriage voidable by statute, while his previous marriage partner is still alive?

In R. v. Dibdin⁽⁴⁾ Fletcher-Moulton, L.J. stated obiter that⁽⁵⁾ -

"One of the duties of clergymen within this realm is to perform the ceremony of marriage, and parishioners have the right to have that ceremony performed in their parish church."

On the other hand, although it is a breach of duty for a minister

(1) Dissenting in the Divisional Court.

(2) at 89.

(3) at 134.

(4) supra.

(5) at 126.

to refuse to marry persons entitled so to be married in his church for which he is liable to be punished in the ecclesiastical courts⁽¹⁾, it is a duty otherwise unenforceable. No mandatory injunction would issue, either because the duty is one of personal service or because it is a duty cognisable only at ecclesiastical law⁽²⁾. It is doubtful, too, whether a clergyman who refused to perform the ceremony is liable to an action for damages⁽³⁾ or to be indicted for the refusal⁽⁴⁾. Thus, even if there is a duty upon the clergyman, it may be difficult or even impossible to enforce.

Either of the views put forward above may validly be entertained but the fact that it is necessary to go to such an extreme to find a realm where the fusion of the common law and the ecclesiastical law may not be complete shows the stage which that fusion has otherwise reached. It has been seen that at the Reformation the common law was given dominance in cases of conflict and the study of the canon law was discouraged. In the nineteenth century the practice in the ecclesiastical courts was by necessity taken over by the common lawyers in its entirety and a fusion of practice and procedure also occurred. At the present time, for all practical purposes, there is a complete fusion between the ecclesiastical and the common law.

(1) Agar v. Holdsworth (1758) 2 Lee 515: see also Rugg v. Bishop of Winchester (1868) L.R. 2 P.C.223.

(2) Attorney-General v. Dean and Chapter of Ripon Cathedral (1945) Ch. 239.

(3) Davis v. Black (1841), 1 Q.B.900; see also Agar v. Holdsworth (supra).

(4) R. v. James (1850), 3 Car. + Kir. 167.

SALIENT DATES REFERRED TO IN CHAPTER IX

- 1535 Study of canon law at Oxford and Cambridge discontinued.
- 1767 Incorporation of Doctor's Commons.
- 1854 Ecclesiastical Courts Act, 1854: viva voce examination allowed in the ecclesiastical courts.
- 1857 Probate and matrimonial jurisdictions given to the common law courts.
- 1861-2 Closure of Doctor's Commons.
- 1863 Burder v. O'Neill: evidence of two witnesses unnecessary in Church Discipline Cases. Rules and practice of the common law courts basically to be followed.
- 1868 Mouncey v. Robinson: Chancery Court of York admits articles under the Church Discipline Act, 1840, approved and signed by a barrister already practising in the Arches Court of Canterbury.
- Bishop of Norwich v. Pearse: evidence of accused clergyman admitted.
- 1877 Solicitors Act, 1877: solicitors empowered to practise in ecclesiastical courts.

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