THE SEAL OF THE CONFESSIONAL

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1. HISTORY: PRE-REFORMATION

Throughout Western Christendom the canon law insisted that no priest should divulge anything imparted to him in the course of auricular confession. The twenty-first canon of the Fourth Lateran Council, 1215[2], 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 poenitentiale judicio sibi detectum praesumpserit revelare, non solum a sacerdotali officio deponendum decernimus, verum etiam ad agendum perpetuam Poenitentiam in arctum Monasterium detrudendum[3]."

A similar canon was promulgated by Bishop Poore in the synodal statutes of Salisbury, 1217-1219, and his lead was followed in Durham, Winchester, Worcester, Chichester, Ely, Wells, London and Exeter[4]. The lead was again followed between 1222 and 1225 at a synod that cannot now be identified[5] but which was thought by Lyndwood to have been held at Oxford by Walter Reynolds, Archbishop of Canterbury[6]. Canon 33 stated[7]:

> "Nullus sacerdos ira, odio, metu etiam mortis audeat detegere quovismodo alicujus confessionem signo, nutu, vel verbo generaliter vel specialiter. Et si super hoc convictus fuerit, sine spe reconciliationis, non immerito debet degredare."

The seal of the confessional was not to be violated, although the punishment of the priest who broke it might change. Indeed it cannot be doubted that the seal of the confessional was a duty imposed by the pre-Reformation canon law of England[8]. Lyndwood emphasised, however, that the seal only applied to sacramental confession.[9]

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1. Ll.B. (Exon.), M.A., D.Phil. (Oxon). This article is dedicated to the memory of Evelyn Garth Moore.
2. Lat. (1215), canon 21 (X, v. 38. 12).
3. Prior to 12 15 the punishment was not only degradation or deprivation but also the undertaking of a disgraceful pilgrimage: see Gratian's *Decretum*, causa 33, quaest. 3, dis. 6, cap. 2. As to the *Decretum* see 14 *Halsbury's Laws of England* (4th ed.) 305, note 2.
4. *Councils and Synods*, (O.U.P.) ed. by Powicke and Cheney (1964) vols 1 & 2 *passim*. Such provincial synods were merely *ad hoc* pieces of legislation to bolster the existing canon law rather than the creation of new law: Jacobs, *The Fifteenth Century*, (O.U.P.) at 265.
5. See Powicke & Cheney, *op. cit.* at 139.
6. *Provinciale Angliae* (1697) at 334. This was no doubt because in at least one thirteenth century manuscript (Cambridge, Gonville & Caius Coll. 349) the text of most of the canons followed without a break after an abridged version of the canons of Oxford, 1222. The error was compounded by Wilkins' *Concilia* vol. 1 at 595.
7. The following text is that of Lyndwood, *op. cit.* at 334.
8. See de Burgh, *Pupilla Oculi* (1510) fol. XXXVVII d; Lyndwood, *op. cit.*
9. See the glosses to the words *confessionem* and *generaliter*. Bullard & Bell's translation, *Lyndwood's Provinciale*, omits the all-important glosses.

The canon law was, of course, enforced in the church courts[10] but it is unclear what approach the temporal courts may have adopted in the face of a priest's refusal to divulge information on the grounds that it would be a breach of the canon law so to do. It seems that at least by the fourteenth century the opportunity for this to have arisen was in any event rare[11]; presumably, too, there would be little inclination to undermine such enforced confidentiality when there was then an obligation upon all the laity to go to confession! It was certainly Sir Edward Cooke's view[12] that the common law recognised the seal of the confessional at this time, albeit in an attenuated form[13], but this view was based on a misunderstanding[14].

2. HISTORY: REFORMATION

The suppression of the smaller monasteries and the "voluntary" surrender of the larger houses[15] did not, of course, affect the punishment of those who might have broken the seal of the confessional[16] as other punishments had by then been provided[17]. The Reformation, however, had a profound effect on the status of the canon law in England[18].

By the Act for the Submission of the Clergy, 1533[19], section 2, the king was given authority to nominate 16 clergy and 16 laymen –

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

Those not approved were to be thenceforth –

> ". . . void and of none effect, and never be put in execution within this realm".

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10. See Helmholz, *Canon Law and the Law of England* (Hambledon Press) at 329 and *passim*. Betrayal of confessions led to clergymen being brought before the consistory courts: Houlbrooke, *Church Courts and the People during the English Reformation, 1520-1570* (O.U.P.) at 195 and 197. However, the fact that a man told a church court that he had admitted a further offence to his confessor of sexual intercourse after abjuration did not mean that the priest was thereby permitted to give evidence of the confession: Helmholz, *op. cit.* at 149.

11. The calling of witnesses before a jury was apparently not a general practice; although questions might have been asked of either a juror or a witness, it seems that the clergy were exempt from jury service at this time: Nokes, *Professional Privilege*, 66 L.Q.R. 94.

12. 2 Co. Inst. 628-629.

13. See *infra*.

14. Badeley, *The Privilege of Religious Confessions in English Courts of Justice* (1865) at 16-18; Nokes, *op. cit.* at 95. In summary, Coke relies on the statute *Articuli Cleri* (9 Edw. II, st. 1, c.10, now repealed) which provided that "thieves and approvers" should be allowed to confess their sins to priests whenever they wished and continued: "sed caveant confessores, ne erronice hujusmodi appellatores informent". However, this caveat said nothing about the secrecy of the confessions; its meaning is unclear but it seems, rather, to be concerned with information being conveyed to those in custody. Coke also relies on the case of *Friar Ranolph* in 7 Hen. V. and on *R. v. Garnet* (1606) 2 St. Tr. 217. I will deal with the latter in due course; in the former case there is no evidence that the friar was a confessor or that, even if he were, he made any statement directly or indirectly as to anything he had heard in any confession.

15. See Chadwick, *The Reformation* at 105.

16. See canon 21 of the Fourth Lateran Council *supra*. Indeed, the clergy were themselves on occasion taken before the church courts for offences in relation to confessions: see Hale's *Precedents* at 58, 126 and 136; see, too, *ibid* at 25 and 144.

17. *Supra*.

18. For a brief summary see 14 *Halsbury's Laws of England* (4th ed.) at 306-308; (1989) 1Ecc. L.J. (4) at 15-16.

19. 25 Hen. VIII, c.19.

Fortunately, as a result of a condition made by the Bishop of Lincoln when giving his consent in Convocation[20], the *status quo* was preserved by section 7:

> "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".

In 1535 the king's authority to appoint this commission was confirmed[21] and then in 1543[22] he was given authority to appoint a similar 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 this Realm and Dominions, in all Spiritual Courts and conventions".

Moreover, it was further enacted[23] that until the commission had completed its work –

> ". . . 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*[24], 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 prerogative 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".

A commission was, in fact, appointed and reported but its work was never confirmed by the king[25]. Edward VI was given a similar power to appoint a commission[26] but it does not seem to have been utilised. The Henrician statutes were repealed in the reign of Philip and Mary[27] but the repealing statute was in its turn declared to be "utterly void and of none effect" under Elizabeth and the Act for the Submission of the Clergy was revived[28]. By reason of all this legislation the canon law as applied in England[29] became part of the law of the realm[30]. Indeed, the ecclesiastical law is as much the law of the land as any other part of the law[31] and the secular and ecclesiastical jurisdictions have remained separate and complimentary systems[32].

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20. *Report of the Archbishop's Committee on Church and State* (1916) at 268.
21. 27 Hen. VIII, c.15.
22. 35 Hen. VIII, c.16, s.2.
23. Section 3.
24. Emphasis supplied.
25. Gibson, *Codex Iuris Canonici* (1761) (2nd ed.) at 951.
26. 3, 4, Edw. VI, c.11.
27. 1. Phil. & Mar., c.8.
28. 1 Eliz. I, c.1, ss. 2 & 10.
29. The canon law itself permitted modification by local custom: see 14 *Halsbury's Laws of England* (4th ed.) at 304 and 306.
30. *Ibid.* See also 1 Bl Com (14th ed.) at 82 and *Read v Bishop of Lincoln* (1889) Roscoe's Rep. 1 at 17 *per* Archbishop Benson. Although both statutes have now been repealed the ecclesiastical law has been incorporated into the law of the land.
31. *Edes v Bishop of Oxford* (1667) Vaugh. 18 at 21.
32. See, for example, *Harrison v Burwell* (1670) 2 Ventris 9 at 13 *per* Vaughn, C.J.

The question therefore is: was the seal of the confessional contrary or repugnant to the laws, statutes, and customs of the realm, or to the damage or hurt of the King's prerogative royal? As has been seen, the seal of the confessional was a concomitant of confession in the mediaeval church and in an Act for Abolishing of Diversity of Opinions in certain Articles concerning Christian Religion, 1539[33], it was enacted –

> "as well by the king's highness, as by the assent of the Lords Spiritual and Temporal, and other learned men of his Clergy in their Convocations, and by the consent of the Commons in the present Parliament assembled . . . That auricular Confession is expedient and necessary to be retained and continued, and used and frequented in the Church of God".

Although this statute was repealed in 1547[34], auricular confession was specifically enjoined in the Edwardian prayer books of both 1549 and 1552[35], each of which received the sanction of parliament[36].

3. HISTORY: POST-REFORMATION

Although they did not abrogate Lyndwood's *Provinciale*, new canons were promulgated in 1603[37]. Canon 113 ended[38] –

> "Provided always, That if any man confess his secret and hidden sins to the Minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him; we do not any way bind the said Minister by this our Constitution[39], 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 in question for concealing the same,) under pain of irregularity[40]".

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33. 31 Hen. VIII, c.14, ss.1, 2 & 3.
34. 1 Edw. VI, c.12, s.2.
35. See Phillimore, *Ecclesiastical Law* (2nd ed.) at 541-542.
36. 2 & 3 Edw. VI, c.1 and 5 & 6 Edw. VI, c.1. The latter was repealed by 1 Mar. sess. 2, c.2 but revived by 1 Eliz. I, c.2.
37. See Bullard & Bell, *Constitutions and Canons Ecclesiastical 1604* (Faith Press) at xix. "This is the only reference in post-Reformation Canon Law to the seal of the confession": *The Canons of the Church of England*, (S.P.C.K.) (1969) at xii.
38. Although quoted here in English, the authoritative text is that in Latin: Bullard & Bell, *op. cit.* at xvii.
39. This is a reference to the earlier part of the canon which imposed a duty on parsons, vicars and curates to "present to their Ordinaries . . . all such crimes as they have in charge or otherwise, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes) shall be thought to require due reformation": Badeley *op. cit.* at 31.
40. "Under pain of irregularity" meant the canonical censure of deprivation with its corollary of incapacity from taking any benefice: Blunt, *Book of Church Law* (10th ed.) at 175; Winckworth, *The Seal of The Confessional and the Law of Evidence* at 4. The canons of 1603 are binding on the clergy in ecclesiastical matters: *Matthews v Burdett* (1703) 2 Salk. 412; insofar as any of the canons may be a reiteration or declaration of ancient usages and laws of the church which had previously been received into the English law, they obtained no additional force by their incorporation into the 1603 canons: *R. v Allen* (1872) L.R. 8 Q.B. 69 at 75, *per* Blackburn, J. In either event canon 113 was binding upon the clergy. The 1603 canons do not *proprio vigore* bind the laity: *Cox's Case* (1700) 1 P. Wms 29 at 32; *Middleton v Crofts* (1736) 2 Atk. 650; *More v More* (1741) 2 Atk. 157; *R v Dibdin* [1910] P. 57 (aff. *sub nom. Thompson v Dibdin* [1912] A.C. 533); Badeley, *op. cit.* at 32 therefore argues that, as the seal of the confessional may be waived by the penitent (see *infra*), canon 113 adds nothing to the pre-Reformation position. In one sense, of course, this is correct; however, it is incorrect that, because the penitent may release the priest from his obligation, the duty is not legally binding on the priest prior to that release. Moreover, if the arguments advanced in the text are wrong and the pre-Reformation law was not binding, canon 113 itself created a binding obligation upon the priest, although if this narrow view is taken the seal only applies to "any crime or offence committed to (the priest's) trust and secrecy": see also footnote 204 *infra*.

The "royal assent and licence" were necessary before the 1603 canons could be promulgated[41] and, again, no canon could be made which was "contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of the realm"[42]. The fact that canon 113 was in fact promulgated demonstrates once more that the seal of the confessional was not regarded at that time as "contrariant or repugnant to" either the royal prerogative, the common law or the statute law, save perhaps[43] in so far as the words in brackets are concerned.

This exception was new[44] to the law and its meaning is obscure[45]. Indeed, it is possible that it has no meaning at all[46]. Nonetheless, the feeling seems to have arisen that the seal of the confessional should not apply to a confession of high treason[47]. Reference has already been made to Coke's view concerning the seal of the confessional. During the trial of Henry Garnet[48] for complicity in the gunpowder plot Coke, the then Attorney-General, argued[49] –

> "By the common law, however it were (it being *crimen laese Majestatis*) he ought to have disclosed it".

Coke quoted no authority in support of this contention and it may be grounded in his misreading of the statute *Articuli Cleri*[50]; in fact, he might have been on surer ground to have argued that a Roman Catholic priest could make no claim based on a law, namely, the Roman Catholic canon law, which was no longer a part of the law of England. Nonetheless his argument does demonstrate a view that must have been current at the time. Indeed, as at that time Parliament was particularly jealous of the Church's legislative powers, it is at least possible that Bancroft, the Bishop of London who presided at the Canterbury Convocation[51], consulted the Attorney-General as to the canon's position in relation to the common law[52]. Certainly it was Coke's view, as set out in his *Second Institutes*[53], that the seal of the confessional did not apply to high treason:

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41. Act for the Submission of the Clergy, 1533, s.1.
42. *Ibid*, s.2.
43. Although it might be argued that the exception was itself "contrariant or repugnant to . . . the customs, laws, or statutes of the realm" just because it was new, the view expressed in the text (*infra*) seems the better view.
44. Even this came to be doubted (perhaps influenced by the reception theory concerning the canon law in England: see 14 *Halsbury's Laws of England* (4th ed.) at 307) by the time Best wrote his *Principles of the Law of Evidence*, cited in Phillimore, *op. cit.* at 545-546.
45. Phillimore, *op. cit.* at 543; Badeley, *op. cit.* at 31; Winckworth, *op. cit.* at 3; Nokes, 66 L.Q.R. at 101.
46. Mere concealment of an offence was not itself a capital offence: Badeley, *op. cit.* at 31-32.
47. See Best, *Principles of the Law of Evidence,* cited in Phillimore, *op. cit.* at 545-546. However, this is by no means certain as the concealment of high treason was not a capital offence: see Badeley, *op. cit.* at 33. The doubt originally expressed in Best had disappeared by 1922: see the 12th ed., cited in Winckworth, *op. cit.* at 3. See also Nokes, 66 L.Q.R. at 101; Garth Moore, *Church Times*, 6th September, 1963; Belton, *A Manual for Confessors* at 91.
48. (1606) 2 St. Tr. 217.
49. (1606) 2 St. Tr. 217 at 246. Although this was only in argument, in 2 Co. Inst. at 628-629 Coke represented that "it was so resolved in the case of Henry Garnet, who would have shadowed his treason under the privilege of Confession". He continued, however, to concede that there was no true confession: ". . . although in deed he was only consenting, but abetting the principal conspirators of the powder treason, as by the record appeareth".
50. See footnote 18 *supra*. This was also the case in *Attorney-General v Briant* (1846) 15 L.J. Ex. 265 *per* Alderson, B. at 271.
51. See Bullard, *op. cit.* at xvii.
52. I understand that a similar consultation led to the retention of the proviso to canon 113 when the remainder of the 1603 canons were repealed in 1969.
53. 2 Co. Inst. at 628-629. His personal papers had been seized by Charles I until 1641: see the Dictionary of National Biography.

> ". . . 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[54] of confession extendeth only to felonies. . ."

The seal of the confessional nonetheless remained part of the law of England. Indeed, this receives some[55] support from *R. v. Garnet*[56] itself as, in support of Coke's argument that there was "no sacramental confession, for that the confitent was not penitent"[57] and that "it was *extra confessionem*, out of confession"[58], the Earl of Northampton concluded[59] –

> ". . . 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."

Strictly this is no support for an Anglican seal of the confessional based on its incorporation into the general law of England; nonetheless, if it exists in relation to a claim based on Roman Catholic canon law, *a fortiori* it exists in relation to English ecclesiastical law. More-especially is this so as in 1662 auricular confession once again[60] received statutory authority[61] when the use of the Book of Common Prayer was directed[62] by the Act of Uniformity[63].

It is not suprising that there are only infrequent references to the seal of the confessional in the law reports: the prosecution will only be interested if the defendant has admitted his guilt; if the defendant has admitted guilt to a priest, he is most unlikely to broadcast the fact and, if he has not, that fact would not be admissible in evidence; the priest, if he has heard an auricular confession, is unlikely to make the fact of a confession known because of the seal of the confessional. Nonetheless, the fact that there are such references at least demonstrates that auricular confession still took place and suggests that the seal of the confession was regarded as binding by those involved. These cases will now be considered.

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54. This seems to be the first suggestion that it is a "privilege". In one sense, of course, it is a privilege but Coke cannot be referring to a technical evidential meaning of that word.
55. Badeley, *op. cit.* at 19 adds: ". . . it must be remembered moreover that Garnet was not a witness, but a prisoner indicted for Treason, and therefore there could not well be any "resolution" of the Court, as to his liability to reveal anything which he had heard in confession". See also footnote 49 *supra*.
56. (1606) 2 St. Tr. 217.
57. Concerning Greenwell.
58. Concerning Catesby.
59. (1606) 2 St. Tr. 217 at 252. Badeley, *op. cit.* at 19 describes this case as "a disgrace to English jurisprudence".
60. See footnote 35 and 36 *supra*.
61. See Phillimore, *Ecclesiastical Law* (2nd ed.) at 541-542. It is enjoined in the Exhortation to Communion in the Communion Service and in the Order for the Visitation of the Sick. It was also indirectly enjoined by reason of Article 35 of the Articles of Religion and the Homily of Repentance: *op. cit.* at 542. This homily had been published in the reign of Elizabeth I. The clergy had to declare their "unfeigned assent and consent" to the Articles of Religion: Act of Uniformity, 1622, s.17. It should be borne in mind that the Act was passed against the background of the recent promulgation of the 1603 Canons: see footnote 207 and related text *infra*.
62. See 14 *Halsbury's Laws of England* (4th ed.) at 933. Both in 1552 and 1662 it was made clear that the confession might be made either to the parish priest, his curate (who might also be taking the service) or to "some other discreet and learned minister": see the Exhortation to Communion. Prior to the Reformation, "If in the ordinary way the parish priest was the proper person to hear the confessions of his parishioners and it was necessary to obtain special permission to confess to anyone else, none the less the practice grew up whereby under licence of the bishop certain members of the Mendicant Orders were authorised to hear such confessions and later it became one of the grievances against them, that they usurped in this respect the functions of the parish priest": Churchill, *Canterbury Administration*, (S.P.C.K.), vol. I at 126.
63. 13 & 14 Car. II, c.4. Surprisingly, Nokes overlooks this provision: see 66 L.Q.R. at 96.

The next[64] reported case concerned with this question was not until the end of the eighteenth century when *R. v Sparkes*[65] was heard by Buller, J. on the Northern Circuit. Unfortunately the only report is very unsatisfactory[66] but the facts seem to have been as follows: The prisoner, a Roman Catholic, had made a confession to a Protestant clergyman[67] relating to the crime for which he was indicted and that confession was permitted to be proved in evidence. 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 be regarded as a sacramental confession[68]. Indeed, Lord Kenyon expressed doubts about this decision in *Du Barre v Livette*[69]. In the latter case the question before the court was the admissibility of evidence given by an interpreter of conversations between a foreigner and his attorney. When *R. v Sparkes* was cited in argument by counsel for the plaintiff, Lord Kenyon commented[70]:

> ". . . I should have paused before I admitted the evidence there admitted."

However, he does not state the basis for his hesitation.

The question was more specifically[71] referred to in *R. v Radford*[72] but unfortunately the report is again unsatisfactory. The case seems to have been a murder case tried at Exeter assizes. In it a clergyman had prevailed upon the prisoner to confess by dwelling upon the heinousness of the crime charged against him but without giving him any caution that it could be used in evidence against him. Best, C.J. refused to allow the clergyman to state the confession, saying that he thought it –

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64. The case of *Anon.* (1694) Skinner's Rep. 404 was not concerned with the seal of the confessional; indeed, it does not seem to have been in the mind of Holt, C.J. Even if it were, it was *obiter dictum* and without argument.
65. Cited in *Du Barre v Livette* (1791) Peake 108 at 109-110. The case seems to have been heard c.1790.
66. The case was cited by Garrow for the prosecution. As Badeley, *op. cit.* at 58 points out, Garrow was not a member of that circuit and was unlikely to have been present.
67. It is not clear whether or not he was an Anglican clergyman although this may possibly be inferred from his description as a "priest".
68. It was not a sacramental confession according to the canon law of the Roman Catholic Church which presumably the penitent regarded as applying to him: see *Dictionnaire de Droit Canonique, ad v. Confessionem, Discipline Actuelle.* Nonetheless, if the clergyman were indeed an Anglican (see footnote 64 *supra*), it might have been possible to argue that any parishioner might make a legal confession according to the English ecclesiastical law. Even if this were so, however, it is doubtful whether a Roman Catholic could have approached a non-Roman Catholic priest for sacramental absolution. Thus the necessary mutuality of intention would be missing. Therefore defence counsel was incorrect in *R. v Gilham* (1828) 1 Mood. C.C. 186 at 198 when he cited *R. v Sparkes* in arguing that: ". . . a minister is bound to disclose what has been revealed to him as a matter of religious confession." It is interesting to note that he added: "And this even in the case of a Roman Catholic priest."
69. (1791) Peake 108.
70. *Ibid* at 110.
71. In *Falmouth v Moss* (1822) 11 Price 455 Baron Garrow stated at 470: "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." It will be noted that the priest is not mentioned; moreover, his claim to non-disclosure is based on a separate legal duty, not on privilege: but see footnote 54 *supra* and related text.
72. (1823), cited *in arguendo* in *R. v Gilham* (1828) 1 Mood. C.C. 186 at 197 (*ex relatione* Coleridge).

> ". . . 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."

This ruling was not, however, based on the seal of the confessional; indeed, it does not seem to have been a sacramental confession at all and the prisoner was apparently[73] convicted without the evidence being given.

Once again no sacramental confession was in issue in *R. v Gilham*[74] Admissions were made both to the gaoler and to a magistrate by a defendant who had had interviews with a chaplain whose "whole language and exhortation had unceasingly dwelt on the duty of confession before God". These admissions were admitted in evidence[75] in spite of defence counsel's argument that "the state of mind induced by the chaplain's conversations and exhortations made the confession one under duress" and their admissibility was upheld on appeal. It will be noted that nothing actually said to the chaplain was in issue. It is, therefore, surprising that in *Broad v Pitt*[76] Best, C.J.[77] stated *obiter:*

> "I think this confidence in the case of attornies is a great anomaly in the law. The privilege does not apply to clergymen[78] since the decision the other day, in the case of *Gilham*. 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."

A different view was expressed *in arguendo* by Alderson, B. in *Attorney-General v Briant*[79] where he said with reference to *R. v Gilham*:

> "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."

However this, too, misunderstands the basis of *R. v Gilham* and also perpetuates Coke's misreading of the statute *Articuli Cleri*[80].

In *R. v Griffin*[81] it seems that a sacramental confession was still not in issue. A chaplain to a workhouse had frequent conversations in his spiritual capacity with a prisoner who was charged with murder of her child but who was too ill to be moved from the workhouse. He was called to prove certain conversations that he had had with her with reference to what had occurred. He stated that

73. See the argument of counsel for the prosecution in *R. v Gilham* (1828) 1 Mood. C.C. 186 at 202.
74. (1828) 1 Mood. C.C. 186.
75. In *R. v Wild* (1835) 1 Mood. C.C.R. 452 a 13 year old was charged with murder. When he was arrested he was told by a man other than a constable: "Now kneel you down, I am going to ask you a very serious question, and I hope you will tell the truth, in the presence of the Almighty." Thereupon the prisoner made certain statements. These were held to be strictly admissable but the mode of obtaining them was disapproved of.
76. (1828) 3 C.&P. 518.
77. The judge also in *R. v Radford*, *supra*.
78. See too *Falmouth v Moss* (1822) 11 Price 455; *Greenlaw v King* (1838) 1 Beav. 137; *Russell v Jackson* (1851) 9 Hare 387 at 391.
79. (1846) 15 L.J. Ex. 265 at 271.
80. See footnote 14 *supra*.
81. (1853) 6 Cox 219.

he had visited her as her spiritual adviser to administer to her the consolations of religion[82]. Baron Alderson said:

> "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 an 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."

In the light of this intimation prosecuting council did not tender the conversations in evidence.

In *R. v Hay*[83] the defendant was charged with larceny of a watch. A Roman Catholic priest was called to give evidence because the police had received possession of the watch from him. When the oath was about to be administered the priest objected to its form, stating that his objection was –

> "Not that I shall tell the truth, and nothing but the truth; but, as a minister of the Catholic Church, I object to the part that states that I shall tell the whole truth."

Once it had been explained by the judge that the oath only required that he should tell the truth about which "you, legitimately according to law, can be asked" the priest was sworn. He was then asked from whom he had received the watch but he declined to answer as he had "received it in connexion with the confessional". The judge[84], however, 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?"

The priest declined to answer on the basis that to do so would implicate the person who gave him the watch and would "violate the laws of the Church, as well as the natural laws"; it would also lead to his own suspension for life. In spite of being told again by the judge that he was not being asked to disclose anything stated to him in the confessional the priest refused to answer and was committed for contempt.

In a footnote[85] to this case the reporter, W. F. Finlayson, commented that the judge impliedly admitted that a privilege attached to confession because he "drew a distinction which would otherwise be futile". However, on a strict reading this would seem to be wrong. All the judge in fact did was to rule that the question objected to did not in law place the priest in the position in which the priest felt that it did; thus there could not be any implied recognition of the legality of the priest's claim. Whether the judge was correct in such a restrictive ruling is another matter. It is unlikely that the seal of the confessional applies solely to words[86]; if this is so, any action which is properly part and parcel of the confession is presumably also embraced by it. However, the return of stolen property *to the priest* is not a necessary part of the confession; its return to the priest is at most a convenience and at worst an attempt to evade discovery.

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82. These words might by themselves suggest a sacramental confession, if it were not for the fact that the consolations were given during "conversations".
83. (1860) 2 F. & F. 4.
84. Hill, J.
85. (1860) 2 F. & F. 4 at 6, note (a); see, too, at 9, note (a).
86. For example, the signing of a dumb person must surely be as much included as the speaking of a person who is not dumb. See Badeley, *op. cit.* at 73.

In 1865 in an unreported case, *R. v Kent*[87], an Anglican clergyman refused to answer a question put to him by the magistrate during the committal of a woman for murder on the basis that what he knew was under the seal of the confessional. The magistrate made no attempt to force the clergyman to answer and the prisoner was nevertheless committed for trial[88]. The matter was reported in the newspapers and a question was asked in the House of Lords. The Lord Chancellor, Lord Westbury, in the course of his reply stated[89]:

> "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 purposes of justice, on the ground that his answer would reveal something that has been made known to him in 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 persuasion."

Clearly this view cannot be ignored but at the most it is of persuasive authority. It was not expressed after argument and no consideration is given to the question of a duty imposed on the Anglican clergyman by ecclesiastical law[90].

It seems that another claim to the seal of the confessional was made in an unreported case[91] in 1905. A metropolitan police magistrate committed an Anglican clergyman to prison for seven days under section 22 of the Metropolitan Police Courts Act, 1839, for a "refusal to state what had been disclosed to him in confession". There is insufficient information, however, upon which to discover whether the clergyman's claim was properly founded in the first place or whether there had been any waiver by whoever made the disclosure.

In no subsequent English[92] case has the seal of the confessional been in issue, although on a number of occasions it has been the subject of adverse[93] *obiter dicta*. On none of these occasions has the matter been argued and on none has any detailed reasoning been given. The first was in *Anderson v Bank of British Columbia*[94] where the bank had made a claim to privilege. Jessel, M. R. said[95] when commenting on the privilege of legal advisers:

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87. Cited in Hansard's Parliamentary Debates, series 3, volume 179 (House of Lords), 12th May, 1865.
88. At the trial itself defence counsel was Coleridge, later to be Lord Chief Justice. In a letter he wrote subsequently to Mr Gladstone he stated that the question was not ultimately decided as the defendant pleaded guilty. The trial judge was Willes, J., who had concluded that the question of the seal of the confessional would have had to be decided. "He took infinite pains and he was much interested, because the point, since the Reformation had never been decided. There were strong dicta of strong judges – Lord Ellenborough, Lord Wynford and Lord Alderson – that they would never allow counsel to ask a clergyman the question. On the other hand, Hill, a great lawyer and good man, *but* a strong Ulster Protestant, had said there was no *legal* privilege in a clergyman." After the case the judge told Coleridge that he was satisfied that there was a legal privilege in a priest to withhold what passed in the confessional. Coleridge's letter ended: "Practically, while Barristers and Judges are gentlemen the question can never arise. I am told it has never arisen in Ireland in the worst of times." (See, however, *Butler v Moore* (1802), *MacNally's Rules of Evidence* at 253 and *infra*.) This letter is to be found in the *Life and Correspondence of Lord Coleridge*, (1904). vol. II at 364 and is quoted in Lindsay, 12 N.I.L.Q. (1959) 160 at 164-165.
89. *Ibid* at para. 180.
90. For example, the Lord Chancellor speaks of the clergyman being "privileged", rather than of his being under a duty. However, he does recognise that in Roman Catholic canon law the seal of the confessional can only apply to a confession made by a fellow Catholic.
91. It is referred to in *Best on Evidence* (12th ed., 1922) at 121 (l).
92. As to Ireland see *infra*.
93. See, however, *Ruthven v De Bour* (1901) 45 S.J. 272.
94. (1876) L.R. 2 Ch.D. 644.
95. At 650-651: see also *per* James, L.J. at 656.

> "Our law has not extended that privilege, as some foreign laws have, to the medical profession, or to the sacerdotal profession . . . Again, in foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional, and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a Court of Justice the substance of what passed in such communication. This, again, whether it is rational or irrational, is not recognised by our law."

He expressed the same view in *Wheeler v Le Marchant*[96]:

> "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."

In *Normanshaw v Normanshaw*[97] it appeared in a suit by a husband that, subsequent to the discovery by the petitioner of an alleged act of adultery, the respondent had had an interview with a clergyman. The clergyman was called as a witness at the trial and, although there was no suggestion of a confession, he objected to disclosing the conversation or anything that occurred at the interview with his parishioner on the ground of privilege. Not surprisingly the court ruled that he had no right to withhold the information[98]:

> ". . . it was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law."

In *Gedge v Gedge*[99] a claim by a cleric to withhold a communication to his bishop was similarly disallowed.

In *McTaggart v McTaggart*[100], where the issue was the admissibility of communications made to a probation officer with a view to reconciliation, Denning, L. J. said[101]:

> "The probation officer has no privilege of his own in respect of disclosure any more than a priest, or a medical man, or a banker . . ."

In *Henley v Henley*[102] the privilege against disclosure of matters disclosed in the course of a genuine attempt at reconciliation was applied, as was to be expected, to such matters disclosed to the Vicar of Benenden irrespective of his status as a clergyman[103]. Finally, in *Attorney-General v Mulholland*[104] where a privilege was claimed by a journalist Lord Denning, M. R. said[105]:

> "The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer, but of the client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered."

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96. (1881) 17 Ch.D. 675 at 681.
97. (1893) 69 L.T. 468. In *Noverre v Noverre* (1846) 1 Robertson's Ecclesiastical Reports 428 (a Consistory court case) the co-respondent's father, a clergyman, gave evidence of the wife's confession of her adultery to him during an "interview" (see at 438) in which he was going to tell her that "the acquaintance between her and (his) son must cease." This evidence was given and received without question, although the clergyman attempted to "interpose an obstacle to the administration of justice" (see at 439) by withholding a letter.
98. *Per* Jeune, P. at 469.
99. *The Globe*, 13th July, 1909, cited in *Phipson on Evidence* (13th ed.) at 15-09.
100. [1949] P. 94.
101. At 97.
102. [1955] P. 202.
103. See, too, *Pais v Pais* [1971] P. 119.
104. [1963] 1 All E. 767.
105. At 771.

On one occasion there was a favourable ruling but once again the question was not the subject of argument and the ruling may have gone further than was necessary[106]. This was in *Ruthven v De Bour*[107] when Ridley, J. refused to allow a plaintiff in person to ask questions of a Roman Catholic priest as to his practice in the confessional:

> "You are not entitled to ask what questions priests put in the confessional or the answers given."

In 1947 the Report of the Archbishops' Commission on Canon Law entitled *The Canon Law of the Church of England* recommended that the post-Reformation canons should be brought "to a shape which is consonant with the conditions of the present time"[108] and suggested a revised body of canons, number 66 of which read[109]:

> "If any person confesses any secret or hidden sin to a Priest for the unburdening of his conscience and to receive spiritual consolation and ease of mind and absolution from him, such Priest shall not either by word, writing, or sign, directly or indirectly, openly or covertly, or in any way whatsoever, at any time reveal and make known to any person whatsoever, any sin, crime, or offence so committed to his trust and secrecy; neither shall any Priest make use of knowledge gained in the exercise of such ministry to the offence or detriment of the person from whom he received it, even if there be no danger of betraying the identity of such person; neither shall any Priest, who is in a position of authority in any place, make use of any such knowledge in the exercise of that authority."

This draft combined canon 21 of the Lateran Council (repeated in Lyndwood) with canon 113 of the 1603 Canons but with the important omission of the exemption appended to the latter.[110] It is therefore, perhaps, not surprising that when the 1969 Canons came to be promulgated it was thought best to leave the proviso to the old canon 113 unrepealed[111].

In the meantime the adherence of the Church of England to the principle of the seal of the confessional had been reaffirmed in 1959[112] by the Convocations of Canterbury and York[113]:

> ". . . this House[114] reaffirms as an essential principle of Church doctrine that if any person confess his secret and hidden sin to a priest for the unburdening of his conscience, and to receive spiritual consolation and absolution from him, such priest is strictly charged that he do not at any time reveal or make known to any person whatsoever any sin so committed to his trust and secrecy."

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106. That is, in relation to the questions as to the practice of the clergy in the confessional; such questions were presumably strictly irrelevant, however.
107. (1901) 45 S.J. 272.
108. *Op. cit.* at 84.
109. Ibid at 157.
110. See Winckworth, *op. cit.* at 3.
111. 14 *Halsbury's Laws of England* (4th ed.) at 308, note 1. This seems to have occurred after consultation with the Attorney-General: see footnote 52 *supra*. The explanation give by the archbishops in the introduction to *The Canons of the Church of England*, S.P.C.K. (1969) at xii was that since the reference to the seal of the confession in 1603 "the modern law of evidence has developed in ways which raise difficulties about the enactment of a new Canon on the seal of the confession."
112. On the 29th April, 1959. See also Phillimore, *op. cit.* at 539-540 and contrast *Poole v Bishop of London* (1859) 5 Jur. N.S. 522 at 526 *per* the Archbishop of Canterbury.
113. See *Acts of the Convocations of Canterbury and York, 1921-1970*, S.P.C.K. (1971) at 111; *The Canons of the Church of England*, S.P.C.K. (1969) at xii. Acts of Convocation have no legal effect but only moral force; "they are guide lines for pastoral work, based on sound Anglican doctrine" *per* Sir Cecil Havers, Deputy-Dean of the Arches, in *Bland v Archdeacon of Cheltenham* [1971] 3 W.L.R. 706 at 713; Kemp, *Counsel and Consent* at 200-201.
114. "Synod" in York.

The similarity of wording between this and the draft canon of 1947 is obvious; an act of Convocation, however, has no legal effect[115].

4. HISTORY: IRELAND[116]

There are four Irish cases relevant to the question of the seal of the confessional.

In *Butler v Moore*[117] the title to property under a will was in issue. During the hearing a Roman Catholic priest demurred to answering 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. Nevertheless, the case is not fully reported and no reference is made to the confessional[118]. It seems best, therefore, to regard it as being concerned with a claim extending to extra-confessional confidences made to a priest during his clerical functions[119].

In *In re Keller*[120] a Roman Catholic priest refused to answer a question in regard to a bankrupt's affairs on the ground[121] 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"[122] forbade his making such a disclosure. Other than this phraseology, which must be treated with caution[123], there is no suggestion of the matters having been disclosed in the confessional. In fact Boyd, J. said[124]:

> "I cannot recognise that there is any justification in your refusing to answer the question asked. If so, the whole of the bankruptcy law might be defeated 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. . ."

This strongly suggests that the disclosure had not been in the confessional and, indeed, the judge had previously said[125] that he was willing –

> ". . . to protect any witness . . . from being obliged to answer any question in reference to anything received in confidence in the confessional. . ."

The priest stated that he felt "bound in honour" not to answer and was committed for contempt. On applying for a writ of *habeas corpus*, however, he was discharged due to a defect in the warrant.

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115. See footnote 113 *supra*.
116. See Lindsay, 12 N.I.L.R. (1959) 160 and footnote 88 *supra*, the comment of Lord Coleridge.
117. (1802), *MacNally's Rules of Evidence* at 253.
118. Unless this is to be inferred from the claim that "the principles of his religion" forbade disclosure.
119. (Cp.) the clergyman's claim in *Normanshaw v Normanshaw* (1893) 69 L.T. 468, *supra*.
120. (1887) 22 L.R.I. 158.
121. See at 159-160.
122. But see *infra*: the "duty" may have arisen out of honour rather than any legal obligation!
123. See footnote 119 *supra* and related text.
124. At 160.
125. At 159. If the analysis in the text is correct, this statement was an *obiter dictum*.

In *Tannion v Synott*[126] the seal of the confessional was again not directly in issue. The action was one of slander and one of the witnesses called was a Roman Catholic priest. The priest made it clear that the defendant had spoken to him "as a clergyman" but that the conversation was not a confession and had taken place in the street[127]. The evidence was therefore admitted but Chief Baron Palles stated *obiter* that he would not ask the priest to depose to anything connected, directly or indirectly, with confession.

The final Irish case, *Cook v Carroll*[128], was an appeal from a circuit court. A female parishioner alleged that she had been seduced by another parishioner; their Roman Catholic priest interviewed them in his house. Subsequently the girl's mother brought an action for damages for seduction against the man. The evidence of the man and the girl differed as to what had occurred at the inverview but, when called to give evidence, the priest declined to testify[129]. The plaintiff's action was dismissed. During an appeal to the High Court against this decision the priest again refused to testify on the ground that any information he had was given to him –

> ". . . 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. Although he had no precedent upon which to rely, he reached his decision on the grounds of a harmonisation of the common law with the constitution of Eire which in express terms recognised the special position in Eire of the Holy Catholic Apostolic and Roman Church as the guardian of the faith of the majority of its citizens. It also affirmed the indefeasible right of the Irish people to develop its life in accordance with its own genius and traditions. Moreover, he held that the privilege could not be waived by one, or both, of the parties without the consent of the priest[130]. This decision, however, goes much further than the Roman Catholic canon law[131] as there is no suggestion that the interview was a confession. Indeed, (quite apart from any other reason) it could not have been a confession as, due to the number of persons present, there was no possibility of secrecy.

Cook v Carroll clearly goes beyond the legal position in England and is based on arguments different in part[132] from those applicable in England. Finally, the judge did not have to consider the position of ministers of any Church other than the Roman Catholic Church, although his words seem wide enough to cover such ministers also[133].

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126. (1903) 37 I.L.T.J. 275. The brief note about this case ends: "The decision of the Court in *R. v Gibney* (Jeff. C.C. 15) was merely that information acquired through the confession was admissible in evidence; it was not decided whether such evidence was compellable."
127. Although no doubt unusual, there is no theological or legal reason why a confession should not be heard in the street: see, for example, Box, *The Theory and Practice of Penance* (S.P.C.K.) at 74.
128. [1945] I.R. 515.
129. He was fined £10 but did not appeal.
130. *Ibid* at 524. This is contrary to the position under the Roman Catholic canon law: see *Dictionnaire de Droit Canonique, ad v Confesseur Obligation Du Secret* and Schieler-Heuser, *Theory and Practice of the Confessional*, (2nd ed.) at 469 and 485. Gavan Duffy, J. at 524 suggests that the priest is not a "cipher".
131. Gavan Duffy, J. said at 517: "No canon law was cited to me and I shall determine the issue without reference to the law of the Church."
132. There is an analogy between this decision and those in England decided on the basis of "without prejudice" negotiations such as *McTaggart v McTaggart* [1949] P. 94 at 97. However, it is one that is distinguished by Gavan Duffy, J. at 524 because of the "tri-partite character" of what at 516 he calls "the sacerdotal privilege".
133. See, for example, at 521. (Cp.) 12 N.I.L.Q. at 168-169. In 1634 the Church of Ireland had passed a canon (canon 64) in the same terms as canon 113 of the 1603 Canons of the Church of England. Its present status is unclear: see 12 N.I.L.Q. at 170, note 1.

5. WRITERS

Consequent upon the case of *R. v Hay*[134] Edward Badeley wrote a letter upon this whole question which was subsequently published as *The Privilege of Religious Confessions in English Courts of Justice*[135]. In it he makes an analysis of the cases[136] cited and the opinions of textbook writers[137] on the subject. Of the latter Taylor had referred by inference to canon 113 of the 1603 Canons but had ignored the all-important proviso[138]; only Best, however, expressed doubts as to whether disclosures to clergymen "by persons applying for spiritual advice" were unprotected. In so doing Best accepted that –

> ". . . previous to the Reformation, statements made to a Priest under the Seal of the Confession were privileged from disclosure, except perhaps when the matter thus communicated to amounted to High Treason."

Nonetheless, he did not consider the position after the Reformation save for the case law.

After his exhaustive survey Badeley concluded[139]:

> "Under these circumstances, I know not how any person can venture to affirm, that confessions are not privileged in Courts of Justice. Even if Statutes and Canons had left the privilege doubtful, which I fearlessly maintain that they have not, it exists, as we have seen, by the Common Law; and therefore the legal maxim would apply to it, "Quae Communi Legi derogant, stricte interpretari debent." In a word, if Confession is authorized, or permitted, as a religious Rite, its secrecy is authorised and permitted also; for without it, the Rite itself is neutralized, and the rules which sanction it are a dead letter; but, as was well said by Baron Alderson, in another case[140], "if you make a thing lawful to be done, it is lawful in all its consequences." "

This in its turn led Phillimore to state[141]:

> "It seems to me at least not improbable that, when this question is again raised in an English court of justice that court will decide it in favour of the inviolability of the confession, and expound the law so as to make it in harmony with that of almost every other Christian state."

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134. *Supra*.
135. Butterworths, (1865).
136. Apart from those cited by Coke, these were: *Sparkes v Middleton*, 1 Keb. Rep. 505; *Cuts v Pickering*, and *Jones v Countess of Manchester*, 1 Vent. Rep. 197; *Anon.*, Skin. Rep. 404; *Bac. Abr., tit.* Evidence, A. 2; *Vaillant v Dodemead*, 2 Atkins' Rep. 524; *The Duchess of Kingston's Case*, 20 How. State Trials 573; *R. v Sparkes*, cited in Peake's N. P. Cas. 78; *Wilson v Rastall*, 4 T.R. 753; *R. v Gilham*, Moo. C.C.R. 186; *R. v Wild*, Moo. C.C.R. 452; *Butler v Moore, MacNally's Rules of Evidence*, 253: see Badeley, *op. cit.* at 49 *et seq*.
137. Peake, *Compendium of the Law of Evidence* at 190; Starkie, *Treatise on the Law of Evidence*, vol. II at 322; Phillips, *Law of Evidence*, vol. I at 176-177; Roscoe, *Digest of the Law of Evidence in Criminal Cases* at 175; Taylor, *Law of Evidence, Vol. II at 755-777; Best, Treatise on the Principles of Evidence* at 690. See also Nokes, *op. cit*, at 96, footnotes 47 and 49; Whitehead, *Church Law* (2nd ed.) at 98; and Blunt, *The Book of Church Law* (2nd ed.), at 173-176.
138. See *supra*.
139. *Op. cit.* at 74-75.
140. *Scott's Case*, 1 Dears. & Bell's C.C.R. 67.
141. *Op. cit.* at 547. See, too, Blunt, *The Book of Church Law* (2nd ed., 1876) at 173-176.

Indeed Phipson in the 1922 edition of Best's treatise acknowledges the force of Badeley's arguments and seems to accept[142] that the seal of the confessional should be recognised by the courts. A similar view is taken by subsequent writers who have knowledge of the ecclesiastical law and its position within the common law[143]. Nevertheless, Nokes[144] and at least one[145] of the leading treatises on the law of evidence take the contrary view.

Nokes concedes[146] that it seems possible to argue that a privilege can be implied from a duty[147] and summarises his conclusion[147A] –

> "Yet the fact remains that few of the judges ever referred to their brethren's opinions, and that in none of the English cases cited was the history of this claim[148] considered, or full argument on it heard, or a definite ruling given. In the absence of either statutory provision or decision, therefore, the existence of privilege might appear still to be an open question."

It is important to note, however, that Nokes not only overlooked the statutory force of the Book of Common Prayer by reason of the Act of Uniformity, 1662, but also took the surprising view[149] that –

> ". . . it is doubtful whether a clergyman in the twentieth century is any more likely to be deprived for such conduct than a layman is likely to be censured by an ecclesiastical court for sexual immorality[150]. . ."

Although in so far as the clergyman is concerned the seal of the confessional is a duty, not a privilege, *Phipson on Evidence*[151] only considers the question within the context of evidential privileges. Moreover, it does not mention the statutory or canonical position at all. It nonetheless concludes that –

> "The privilege does not protect disclosures made to *Clergymen* (but there exists a strong body of opinion against the enforcement of the rule). . ."

Finally, *Cross on Evidence*[152] considers the position of the Roman Catholic priest,

142. Best, *op. cit.* (12th ed.) at 505.
143. Winckworth, *The Seal of the Confessional and the Law of Evidence* at 16; Garth Moore, *"Should a Priest Tell?", The Church Times*, 6th September, 1963; Garth Moore and Briden, *Introduction to English Canon Law* (2nd ed.) at 101; Lindsay, 12 N.I.L.Q. at 160; and see 71 L.T. Jo. 170.
144. 66 L.Q.R. at 94 *et seq.*
145. See *infra*. Strangely, *Cross on Evidence* (6th ed.) at 404-405 only considers the claim of the Roman Catholic priest although it cites both Nokes, 66 L.Q.R. 88 and Lindsay, 12 N.I.L.Q. 160.
146. *Op. cit.* at 94.
147. Indeed see the cases cited *infra*.
147A. *Op. cit.* at 98.
148. See footnote 145 *supra*.
149. *Op. cit.* at 101. It is especially surprising in the light of the Acts of the Convocations of Canterbury and York in 1959: see footnote 113 *supra* and relevant text.
150. The ecclesiastical jurisdiction over the laity in these and most other cases was abolished (or, at the least, made impossible of implementation) by the Ecclesiastical Jurisdiction Measure, 1963: see 14 *Halsbury's Laws of England* (4th ed.) at 308, note 10.
151. (13th ed.) at 15-09.
152. See footnote 145 *supra*.

a position in part based on a foreign law[153], but concludes that the weight of authority, judicial and otherwise, is against the existence of such a privilege.

6. THE ECCLESIASTICAL COURTS

A. The Legality of Confession

Although the ecclesiastical courts have not considered the seal of the confessional in any reported case since the Reformation, there are a number of cases in which the legality of confessions themselves has been considered.

The first of these was *Poole v Bishop of London*[154], a case which must be read against the historical background of the Victorian discipline cases[155]. The Bishop of London had revoked the licence of a stipendiary curate, the Reverend A. Poole, and Dr Lushington in his report as assessor[156] made it clear[157] that the bishop might –

> ". . . remove not only for an act cognisable under the Clergy Discipline Act, but also for a cause which would not constitute an ecclesiastical offence so cognisable; as, for instance, if the curate and his incumbent did not agree, and the bishop deemed such a state of things prejudicial to the spiritual interests of the parish, though no ecclesiastical offence was imputable to the curate . . .[I]t may be that these two classes of cases may, to a certain extent, be mixed up together."

In the event it seems that the assessor reported[158], and the Archbishop of Canterbury decided[159], that the curate's licence had been properly revoked for a cause that did not amount to a breach of ecclesiastical law[160].

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153. Although *Cross on Evidence* (6th ed.) at 404 speaks of "the canon law" it is clear that it does not refer to the Anglican ecclesiastical (or canon) law. The argument for the Roman Catholic priest is very different from that in relation to the Anglican clergyman: "The only legal arguments that could be advanced in support of the (Roman Catholic) 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 the (Roman Catholic) canon law and thirdly that the privilege is implicitly recognised in *R v Hay*." *Cross on Evidence* clearly does not think these arguments are valid. See too Nokes, *op. cit.* at 102-103. In fact a better argument would seem to be one based on analogy: "If it be an error to refuse to hold sacred the communications made to spiritual advisers, an opposite and greater one is the attempt to confine the privilege to the clergy of some particular creed." - *per* Best, cited by Phillimore, *op. cit.* at 547; see also *Cook v Carroll* [1945] I.R. 515 at 520 *et seq.* per Gavan Duffy, J.

154. (1859) 5 Jur. N.S. 522; on appeal, (1861) 14 Moo. P.C.C. 262. For further details see Brodrick and Freemantle, *Ecclesiastical Judgements of the Privy Council* at 176 *et seq.*

155. See also the letter of the Bishop of Exeter written in 1852 to the Reverend G. R. Prynne and quoted in Phillimore, *op. cit.* at 540: "As I do not think that the Church of England prohibits your receiving to confession those who seek it as an habitual practice, I do not presume to prohibit your doing so. The church seems to me to discourage such a practice; therefore I should endeavour to dissuade one who came to me in pursuance of the practice from persisting to desire it. If I had sufficient reason to believe that he had not endeavoured honestly and earnestly to quiet his own conscience by self-examination, and other acts of repentance, I should not myself admit him. More than this I must decline saying."

156. The matter was heard in consequence of a mandamus: *R. v Archbishop of Canterbury* (1859) 28 L.J. Q.B. 346.

157. (1859) 5 Jur. N.S. 522 at 523.

158. See, for example, *ibid* at 525 and 526. In the former passage Dr Lushington said: "Now, the bishop had said nothing as to contravening the laws of the church: he had spoken of the spirit and practice of the church. . ."

159. *Ibid* at 526.

160. This was certainly the view of the Dean of the Arches *in arguendo* in *Capel St Mary, Suffolk v Packard* [1927] P. 289 at 296.

It had been alleged against Mr Poole that he had asked a number of female penitents "disgusting questions" in the confessional[161]; this he denied and the denial was accepted by the Bishop of London. However, the bishop had also asked Mr Poole many questions "as to his opinions on the general subject of confessions"[162]. Having considered his answers the bishop wrote a letter stating[163]:

> "I am led, by your own admission, to regard the course you are in the habit of pursuing, in reference to confession, as likely to cause scandal and injury to the church. I feel especially that this questioning of females on the subject of violations of the seventh commandment is of a dangerous tendency[164]; and I am convinced, generally, that the systematic admission of your people to confession and absolution, which you have allowed to be your practice ought not to take place[165]."

It was these matters that led the bishop to the belief[166] that Mr Poole –

> ". . . had departed from the spirit and practice of the Church of England,and assimilated his mode of dealing with the people too much to the system of the Church of Rome."

In his turn the Archbishop of Canterbury gave as his judgment[167], not only that there was "good and reasonable cause" for the revocation of Mr Poole's licence, but also that –

> ". . . the course pursued by the appellant is not in accordance with the rubric and doctrine of the Church of England, but most dangerous, and likely to produce most serious mischief to the cause of morality and religion."

It should be noted that Mr Poole in his original interview with the Bishop of London had discussed what had been said in the confessional to his accusers. This would have been a breach of the seal of confessional[168] if those accusers had not impliedly waived their privilege by the very making of those accusations. The curate appealed to the Judicial Committee of the Privy Council[169] but it was decided that no appeal could lie and the circumstances giving rise to the case itself were therefore not discussed.

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161. Compare the allegations made in *Olavi Silverstete* (1496) Hale's *Precedents* 58: "Dominus Robertus Godard curatus et rector ibidem notatur quod e(s)t malus conciliator parochianorum suorum, eos in eorum confessionibus, ad committendum crimen adulterii sum eodem, quem dominus monuit ad comparendum coram eo crastino, certis articulis etc. responsurum post meridiem."
162. *Ibid* at 524.
163. *Ibid*.
164. This conclusion is perhaps not surprising in the light of the false allegations made against the curate. He had stated in reply that "He asked her questions, because she requested him to do so, but the questions were of as general and guarded a character as possible." *Ibid* at 526.
165. See footnote 155 *supra*.
166. (1859) 5 Jur. N.S. 522 at 525.
167. *Ibid* at 526.
168. This was so even though Mr Poole contented himself with "a general description" of what had taken place rather than, as Dr Lushington felt would have been more satisfactory, stating "to the best of his recollection, the questions he did actually put": *ibid* at 526.
169. (1861) 14 Moo. P.C.C. 263.

In *Bradford v Fry*[170] a faculty was sought for the removal of a confessional box, together with other objects,that had apparently been placed in the church by the vicar of the parish[171]. This was opposed on the basis that it was not "illegal or objectionable"[172] but the faculty for its removal was granted on the sole ground that it had been placed in the church without the authority of a faculty[173]. There was no appeal in relation to this item[174].

In *Davey v Hinde*[175] a suit was promoted in order to obtain the removal, amongst other things, of three confessional boxes and "a piece of furniture applicable for receiving confessions"[176]. The chancellor, having referred to both *Poole v Bishop of London* and *Bradford v Fry*[177], concluded[178]:

> "It is my duty to order the three Confessional Boxes and the other article of church furniture appropriate for receiving confessions to be removed from the church, on the ground that they are not articles of church furniture, requisite for or conducive to conformity with the doctrine or practice of the Church of England in relation to the reception of confession."

It is clear that the chancellor's decision accepted the legality of hearing confessions; however, (to adopt the summary of the argument put forward on behalf of the petitioner[179]) the items themselves were –

> ". . . illegal fittings in use for habitual confession. . ."

It was therefore only the hearing of confessions from regular penitents that was regarded as not being in "conformity with the doctrine or practice of the Church of England"[180].

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170. (1878) 4 P.D. 93.
171. *Ibid* at 100. He had already been proceeded against under the Public Worship Regulation Act, 1874, in relation to other matters: *Hudson v Tooth* (1877) 2 P.D. 125.
172. (1878) 4 P.D. 93 at 100.
173. *Ibid* at 100 and 104.
174. *Ibid* at 104.
175. [1901] P. 95.
176. *Ibid* at 96. It apparently had curtains: *ibid* at 118. As to their history the chancellor stated at 118: "Confessional boxes in some form or other were a usual and appropriate piece of church furniture in English churches prior to the Reformation, as they still are in Roman Catholic churches, for convenience and to forward and encourage the practice of priests receiving habitual confessions from members of their congregation. It is for the like use that they were introduced into this church and are now sought to be retained in it. The fact that no such pieces of church furniture were allowed to remain in English churches at the time of the Reformation, and that they have never been reintroduced into our churches since the Reformation by lawful authority, is cogent evidence that the practice of habitual confession in a church forms no part of the prescribed doctrine of the Church of England." A number of years ago I was on a pilgrimage in the Holy Land. Also on the pilgrimage was a woman from Northern Ireland who seemed to take a special interest in the confessional boxes of the various churches. At the end of the tour I asked what was special about their design. "Oh, nothing!" she said in a heavy brogue. "I was only looking for someone who couldn't understand my confession!"
177. *Ibid* at 119-120.
178. *Ibid* at 120.
179. *Ibid* at 104. That this would be an "abuse" was accepted on behalf of the opponents but "as to which no evidence has been or could be given in this case": *ibid* at 106.
180. See also footnote 176 *supra* and contrast footnote 155 *supra*. In *Capel St Mary, Suffolk v Packard* [1927] P. 289 at 296-297 the Dean of the Arches stated with reference to *Davey v Hinde* [1901] P. 95 at 118-119; [1903] P. 221 at 234: "I know of no authority which decides that a particular person may not go to confession habitually . . . The Chancellor seems to have confused habitual with compulsory confession." See, too, at [1927] P. 289 at 301.

Due to the wording of the chancellor's letters patent[181], the matter came back for reconsideration[182], although perhaps not surprisingly the chancellor merely read and adopted his previous judgment on this issue[183].

The next case[184] was *Capel St Mary, Suffolk v Packard.*[185] In the Consistory Court the chancellor had decided[186] –

> ". . . that the faculty for removal should include what is described as a "confessional stool," on the ground that taken in conjunction with a crucifix hanging on the wall near the stool, a notice board announcing when confessions could be heard, and certain manuals exposed in the chuch for study or sale, it constituted "an apparatus for confession which was illegal in the Church of England." "

However, the Dean of the Arches drew a distinction[187] –

> ". . . between "compulsory confession" and . . ."habitual confession" inculcated, perhaps with urgency, by the incumbent[188] . . . (A) distinction which would seriously affect the result if the incumbent's personal responsibility were in issue."[189]

He then went on to note[190] that –

> ". . . the Church of England expressly allows persons, under certain circumstances, to make confession to a minister and directs ministers to hear confessions[191] . . . While the occasions when such confessions are contemplated are deemed to be special, no limit is placed to their frequency, and it is not unreasonable, probably advisable, that when such confessions are desired they should be heard in open church rather than in a vestry or a confessional box."

In the result the "ordinary kneeling stool" that had been used for confessions, the crucifix hanging near to it to assist the devotions of those making their confessions[192], the notices giving information as to the times and opportunities for

181. See *R. v Tristram* [1901] 2 K.B. 141; on appeal, [1902] 1 K.B. 816. See, generally, 14 *Halsbury's Laws of England* (4th ed.) at 1278.
182. *Davey v Hinde* [1903] P. 221. Additional evidence was given, *inter alia,* on the merits; amongst additional authorities the *Parliamentary Return as to Confesional Boxes* was also cited: *ibid* at 224-225.
183. *Ibid* at 234. Strangely, however, his order only mentioned "the three confessional boxes" that were to be removed: *ibid*!
184. In *Markham v Shirebrook Overseers* [1906] P. 239; *sub nom. Re Holy Trinity, Shirebrook* [1905] 22 T.L.R. 278 one of the items sought to be removed from the church was a crucifix originally placed in the vestry on a chest of drawers containing the eucharistic vestments. Although the vicar raised no objection to its removal from its altered position, it was presumably this that led to his cross-examination "about confessional practices which had taken place between himself and one of the servers". The vicar gave evidence that ". . . each had confessed to the other and each had given the other absolution": see *The Times*, 15th December, 1905. Presumably, this had occurred in preparation for the Eucharist.
185. [1927] P. 289; the drafting of the resultant faculty led to [1928] P. 69.
186. The summary is taken from the judgment of the Dean of the Arches: *ibid* at 301.
187. Ibid *at 301.*
188. See footnote 180 *supra.*
189. See, for example, the position in *Poole v Bishop of London supra.*
190. [1927] P. 289 at 301.
191. Although he does not mention the seal of the confessional, he does refer expressly to canon 113 of the 1603 Canons.
192. In *St Peter St Helier, Morden, and St Olave, Mitcham* [1951] P. 303 at 316 Chancellor Garth Moore quoted this aspect with approval; see, too, *In re St Augustine's, Brinkway* [1963] P. 364 at 372-373 per Elphinstone, Ch.

confessions[193], and various manuals of devotion[194] were permitted to remain in the church.

Similarly, in *In re St Saviour's, Hampstead*[195] the chancellor was concerned amongst other things with a crucifix facing a confessional prayer desk but decided that that and another crucifix were unobjectionable[196]:

> ". . . I do not find . . . that they are used as adjuncts to unlawful services or ceremonies, or that they are, or are likely to be, objects of superstitious reverence. It has been suggested that the identity of the form of confession used in this church[197] with the Roman form involves a superstitious use of a small crucifix. I am unable to follow this. Compulsory confession is not taught, though the practice of confession is encouraged. I can see no supersitition in the penitent having before his eyes this representation of his crucified Saviour."

These cases were followed in *In re St Mary, Tyne Dock*[198] where there was "no evidence of compulsory confession or of superstitious reverence in connexion with the confessional table or chair"[199].

The question of the seal of the confessional may arise before an ecclesiastical court in either of two ways: namely, by reason of a clergyman refusing to answer during an ecclesiastical case or by reason of his prosecution for a breach of the seal. These raise different issues.

B. Refusal to answer

It is clear that there is a duty in certain circumstances on a clergyman of the Church of England to hear a confession; equally, a clergyman may hear confessions in other circumstances, although he may not hold confession out as being compulsory. Furthermore, as has been seen, the adherence of the Church of England to the principle of the seal of the confessional was reaffirmed in 1959. If a claim were made before an ecclesiastical court that a clergyman[200] should not

193. As they did not indicate that confession was deemed to be compulsory: [1927] P. 289 at 302.
194. The Dean of the Arches stated: "The Rector's views as to confession, however erroneous they may be, cannot free him from his duty to hear confessions under the circumstances stated in the Prayer Book, and cannot render illegal reasonable arrangements for hearing confessions" - *ibid* at 303.
195. [1934] P. 134.
196. *Ibid* at 139-140.
197. As to what form may be used see 14 *Halsbury's Laws of England* (4th ed.) at 940.
198. [1954] P. 369.
199. *Ibid* at 380.
200. This refers to an ecclesiastical court of the Church of England and a confession heard by a clergyman of the Church of England. By the Welsh Church Act, 1914, s.3: "As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law." Prior to disestablishment the law of the Church in Wales had been the same as that of the Church of England but thereafter, by reason of *ibid*, s.3(2), the same rules continued on the basis of a fictitious contract: see Green, *The Constitution of the Church in Wales* 97-98; 14 *Halsbury's Laws of England* (4th ed.) at 322-323. Thus the position of a clergyman of the Church in Wales, when considering the seal of the confessional, is similar to that of a Roman Catholic priest: see footnote 153 *supra*. This would seem also to be the case if a clergyman of the Church in Wales were to hear the confession of a member of the Church of England whilst officiating in an English parish, although in this case it might be argued that it should be the law of the Church of the penitent that should apply. The position is obscure but it may be doubted whether a clergyman who is neither a clergyman of the Church of England, nor a person ordained by a bishop of the Episcopalian Church in Scotland duly beneficed or licensed in England (see 14 *Halsbury's Laws of England* (4th ed.) at 670), nor an overseas clergyman acting with the permission of the Archbishop of Canterbury or York (*ibid* at 667-669), has jurisdiction to hear such a confession: the wording of the Exhortation to Communion (see footnote 61 *supra*), it is suggested, ought strictly so to be interpreted (cp. footnote 62 *supra*). As to the position in Northern Ireland see Lindsay, *op. cit.*; as to Eire see *Cook v Carroll* [1945] I.R. 515 and footnote 133 *supra*.

answer a question by reason of the seal of the confessional, it is therefore certain that it would be given sympathetic consideration. Such a refusal might arise in the course of disciplinary proceedings or of civil proceedings.

In the former it is difficult to see how a situation might arise in which the rule of practice and pleading in *Bishop of Exeter v Marshall*[201] could arise. In the latter it is again unlikely to arise, as the refusal would occur in the course of evidence sought to be adduced rather than in relation to a fact or rule of law sought to be relied upon to prove a party's case. Even if the rule were to arise, the facts and cases set out above[202] prove that the seal of the confessional has been "received, observed, and acted upon in the Church of England since the Reformation"[203]. Nonetheless the rule seems to have no application at all in such circumstances. It only applies to rules or usages of the pre-Reformation canon law and, although the seal of the confessional predates the Reformation, the post-Reformation canon law itself imposes the same obligation: matters relating to confession are *par excellence* matters *in re ecclesiastica* and canons, such as canon 113 of the 1603 Canons,[204] bind the clergy in ecclesiastical matters even if they are not a reiteration or declaration of pre-Reformation canon law[205]. It should be noted also that the Act of Uniformity, 1662, which gave the 1662 Prayer Book statutory authority and thus enjoined auricular confession[206], was passed against the background of the recent promulgation of the 1603 Canons[207].

Finally, even if the arguments advanced here are not accepted as to a clergyman's duty to respect the seal of the confessional, it is most probable that an ecclesiastical judge (especially in the light of the proviso to canon 113 of the 1603 Canons and the Acts of the Convocations of Canterbury and York in 1959) would exercise his discretion to exclude evidence in favour of the clergyman.

C. Prosecution

It is inconceivable[208] that a clergyman would not be in grave danger of being prosecuted in the church courts if he were to breach the seal of the

201. (1868) L.R. 3 H.L. 17 at 53-55 *per* Lord Westbury; see, too, *In re St Mary's, Westwell* [1968] 1 W.L.R. 513 at 516. For a detailed discussion see (1989) 1 Ecc. L.J. (4) at 15 *et seq.* and 14 *Halsbury's Laws of England* (4th ed.) at 307.
202. No doubt there is other historical evidence available also.
203. (1868) L.R. 3 H.L. 17 at 53 *per* Lord Westbury. He explained this at 54-55: ". . . (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 be questioned." It should be noted that the rule need not have been adjudicated upon by the courts.
204. The proviso to canon 113 in fact only speaks of "any crime or offence so committed to (the priest's) trust and secrecy". This is because it is a restatement of the pre-Reformation canon law in the light of the duty imposed by the rest of the canon (now repealed) to present to the Ordinary "such enormities as are apparent in the parish".
205. See footnote 40 *supra*.
206. See footnotes 61-63 and related text *supra*.
207. See Bennion, *Statutory Interpretation* (Butterworths) at 263 and 515-517. "In a word, if Confession is authorised, or permitted, as a religious Rite, its secrecy is authorised and permitted also; for without it, the Rite itself is neutralized, and the rules which sanction it are a dead letter. . ." - *per* Badeley, *op. cit.* at 75. The Act of Uniformity, 1662, has now been repealed; under the present legislation the use of the 1662 Prayer Book is authorised and its continued availability safeguarded: see 14 *Halsbury's Laws of England* (4th ed.) at 933 and 936-937.
208. *Pace* Nokes, *op. cit.* at 101 and text to footnote 149 *supra*.

confessional, whether in or out of court[209]. Such a prosecution would be brought under s.14(1)(b)[210] of the Ecclesiastical Jurisdiction Measure, 1963[211].

In the case of a priest, once an originating complaint has been laid[212], the diocesan bishop may "decide that no further step be taken"[213] but there is no similar provision in relation to proceedings against a bishop[214]. It seems that this discretion should be exercised, at least in part, on pastoral grounds[215]: "notice of his decision" must be given[216] although there is no necessity for the bishop to give any explanation or reason for it. There is no appeal from his decision[217]. Nevertheless, as can be seen from the punishments laid down for those responsible[218], to breach the seal of the confessional has always been regarded as one of the most serious of ecclesiastical offences. This is because such a breach is likely to undermine the sacramental and pastoral work of the Church itself[219] and because, once the confidentiality of the confessional has been broken, the breach of confidence can never be recalled. The Church regards confession as a sacrament[220] and the seal of the confessional as a necessary concomitant of it[221].

In so far as sentence is concerned, the proviso to canon 113 of the 1603 Canons speaks of any breach of the seal of the confessional being "under pain of irregularity", namely the canonical censure of deprivation[222]; this is still a censure that can be passed in disciplinary proceedings in an ecclesiastical court[223]. Technically, this censure is only enjoined by canon 113 in relation to a breach of the seal

209. Whether a secular or an ecclesiastical court.
210. To breach the seal of the confessional would not be an offence "involving matters of doctrine, ritual or ceremonial" under s.14(1)(a), although to maintain a doctrine contrary to the principles of auricular confession as recognised and enjoined by the 1662 Prayer Book might be: see *Bland v Archdeacon of Cheltenham* [1972] Fam. 157 at 164-165 *per* Sir Cecil Havers, Deputy Dean of the Arches; 14 *Halsbury's Laws of England* (4th ed.) at 1354.
211. See 14 *Halsbury's Laws of England* (4th ed.) at 1353.
212. See 14 *Halsbury's Laws of England* (4th ed.) at 1362.
213. Ecclesiastical Jurisdiction Measure, 1963, ss.23 and 39(1) (a).
214. Unless the proceedings were brought under s.14(1)(a): see s.40.
215. See *Bland v Archdeacon of Cheltenham* [1972] Fam. 157 at 172 *per* Deputy Dean of the Arches (these were pastoral problems within the parish, however); 14 *Halsbury's Laws of England* (4th ed.) at 1350, note 1, and 1363, note 1.
216. Ecclesiastical Jurisdiction Measure, 1963, ss.23(2), 39(2) and 40.
217. Compare *Poole v Bishop of London* (1861) 14 Moo. P.C.C. 262.
218. See footnotes 3-7 and related text *supra* and canon 113 of the 1603 Canons.
219. See Badeley, *op. cit.* at 75-78. In *Cook v Carroll* [1945] I.R. 515 at 521 Gavan Duffy, J. said: "The relation that concerns me directly is that of the Irish parish priest towards two of his parishioners and theirs towards him at a crisis, in a moment of gravest anxiety, which he will often be in a much better position to relieve than anyone else. As a rule, he is regarded as being truly the spiritual father of his people. . .; he is, therefore, more likely than others to get to the truth in a matter of extreme delicacy and so more likely than others to induce the delinquent here (seducer or calumniatrix) to make proper amends." The judge was of course (see *supra*), concerned with a wider relationship than that of priest and penitent but he continued: ". . . (W)herever intimate confidence exists between parish priest and people, it wears a sacred character of immense potential benefit to the community, both to resolve the most delicate problems of life and to shield the flock from public scandal in things of shame. . ." See, too, 12 N.I.L.Q. at 169.
220. See Box, *The Theory and Practice of Penance* (S.P.C.K.) at 7 *et seq.*
221. *Ibid* at 12. See, too, Badeley, *op. cit.* at 75: ". . . without (secrecy), the rite itself is neutralised, and the rules which sanction it are a dead letter. . ."
222. See footnote 40 *supra*.
223. Ecclesiastical Jurisdiction Measure, 1963, S.49(1)(a). A person upon whom such a censure has been pronounced may be deposed from Holy Orders: *ibid*, ss.50 and 51. The censure of deprivation had been passed upon the appellant in *Bland* v *Archdeacon of Cheltenham* [1972] Fam. 157 at 161 and 170-171; in the circumstances it was varied to one of rebuke: *ibid* at 171.

concerning "any *crime or offence*[224], so committed to the (priest's) trust and secrecy"[225] and in relation to any other breaches the censure would be at large[226]. Indeed, as section 28(f) of the Ecclesiastical Jurisdiction Measure, 1963, enacts that –

> ". . . if the accused shall be found guilty of an offence charged the chancellor shall decide such censure therefor as is warranted by the following provisions of this Measure[227]. . ."

the censure is probably at large in every case.

7. THE SECULAR COURTS

Until the Ecclesiastical Jurisdiction Measure, 1963, the ecclesiastical courts had a disciplinary jurisdiction over the laity[228]; however, this jurisdiction is no longer capable of implementation, if not actually abolished[229]. In fact the jurisdiction had already become obsolete and, as a result, a claim by witnesses not to answer questions in the lay courts in case those answers led to their being prosecuted in the ecclesiastical courts was rejected[230]. It was this that led Nokes to suggest[231] -

> "In the case of a clergyman, an answer divulging the sin of another person is doubtless distinguishable from the type of answer mentioned above[232]; but the fact of giving such an answer in breach of confessional secrecy might theoretically render the clergyman liable to deprivation. Yet it is doubtful whether a clergyman in the twentieth century is any more likely to be deprived for such conduct than a layman is likely to be censured by an ecclesiastical court for sexual immorality; and, in the absence of any modern precedent of ecclesiastical discipline for a breach of the existing 113th canon, when that breach was compelled by a secular court, such a court might reject any claim to privilege on this ground."

Such a suggestion is remarkable. The clergyman's claim is not based on a privilege against incrimination, although it is no doubt an aspect that he may also pray in aid. Furthermore, just as there is a very real danger that a clergyman will be

224. Emphasis supplied.
225. See footnotes 40 and 204 *supra*.
226. For the various ecclesiastical censures see the Ecclesiastical Jurisdiction Measure, 1963, s.49(1).
227. The possible censures range from deprivation to rebuke. Deprivation is the most severe: see *ibid*, s.49 and *Bland v Archdeacon of Chelthenham* [1972] Fam. 157 at 170-171 where the proper approach to sentencing is discussed.
228. See Phillimore, *op. cit.*, at 837 *et seq*.
229. See 14 *Halsbury's Laws of England* (4th ed.) at 308, note 10, 1266 and 1350.
230. See *Phillimore v Machon* (1876) 1 P.D. 481 at 487-489 *per* Lord Penzance; *Redfern v Redfern* [1891] P. 139 at 145 and 147 *per* Lindley and Bowen, LJJ; *Elliot v Albert* [1934] K.B. 316 at 660 and 666 *per* Scrutton and Maugham, LJJ; *Cole v P.C. 433A* [1937] 1 K.B. 316 at 333 *per* Goddard, J.; *Blunt v Park Lane Hotel* [1942] 2 K.B. 253 at 256 and 257-259 *per* Lord Clauson and Goddard, L.J.; *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] P.133 at 149-150 *per* Lord Goddard, Court of Chivalry.
231. 66 L.Q.R. at 101.
232. Namely, "an answer which would involve an admission of sin, and would therefore expose the witness to ecclesiastical censure".

prosecuted and censured for sexual immorality[233], there is grave danger that he will be proceeded against for breaching the seal of the confessional[234]. No doubt a situation in which a clergyman was compelled to answer[235] would be considered both by the diocesan bishop in exercising his discretion and by the chancellor when considering sentence[236]; nevertheless, the ecclesiastical law is part of the general law of the land and a secular court is as much under a duty to enforce it as an ecclesiastical court[237]. Thus no breach should be compelled by a secular court and the absence of any modern precedent such as Nokes suggests is irrelevant.

When considering the position of the Roman Catholic priest[238] Cross suggested that the first question is whether "the privilege" existed at the time of the Reformation and answered it with reference to Sir James Fitzjames Stephen[239]:

> "I think the modern law of evidence is not as old as the Reformation, but has grown up by the practice of the Courts, and by the 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. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in regard to legal advisers, but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them."

This may be a relevant approach in relation to a claim made by a Roman Catholic priest but it is irrelevant in relation to a similar claim made by an Anglican clergyman. As has been seen[240], it seems to have been Coke who first referred to a "privilege" in this connection, although this predated any modern rules of evidence. Indeed, this terminology (though misleading[241]) has continued to be used. In fact the claim by an Anglican clergyman is based on a legal duty imposed by substantive law rather than on a rule of evidence. Nokes states that[242] –

> ". . . it seems possible to argue that a privilege could be implied from the duty. . ."

but this seems to give an unnecessary prominence to the rules of evidence. Rather, the rules of evidence must bow to the substantive law[243] – a fact that has now been made clear both by the House of Lords in *R. v Sang*[244] and by the Court of Appeal in *R. v Harwood*[245].

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233. It is understood that a number of such prosecutions have been brought under the Ecclesiastical Jurisdiction Measure, 1963, but that in each case so far the accused has renounced his Holy Orders rather than let the matter proceed to censure.
234. See *supra*.
235. Most, if not all, clergy would refuse to answer in spite of any threats of proceedings for contempt: see, for example, the unreported case in 1905 cited in footnote 91 and related text *supra*.
236. See *supra*. If the clergyman had acted under compulsion it is likely that an order of prohibition would be issued and the conflict resolved there: see 14 *Halsbury's Laws of England* (4th ed.) at 1268.
237. See footnotes 31-32 and related text *supra*.
238. See footnote 153 *supra*.
239. See Cross, *op. cit.* at 404 quoting Stephen, *Digest of the Law of Evidence* (12th ed.) at 220.
240. See footnote 54 and related text *supra*.
241. This is compounded by the similarity between the two in that each may be the subject of waiver.
242. *Op. cit.* at 94.
243. "if you make a thing lawful to be done, it is lawful in all its consequences" – *per* Baron Alderson in *Scott's Case*, 1 Dears, & Bell's C.C.R. 67, quoted by Badeley, *op. cit.* at 75.
244. [1980] A.C. 402.
245. [1989] Crim. L.R. 285.

Lastly, even if all the above arguments are incorrect, there is still the question of a judicial discretion to prevent attempts to lead such evidence[246]. The present state of the law as to judicial discretion (both in civil and criminal cases) is unclear[247] but s.82(3) of the Police and Criminal Evidence Act, 1984, apparently recognises the existence of such an exclusionary discretion:

> "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

Moreover, as has been seen, there are a number of cases in which there are *obiter dicta* in favour of a discretion against any priest being compelled to answer questions in breach of the seal of the confessional[248].

8. SUMMARY

The seal of the confessional was part of the canon law applied in England before the Reformation. It was also part of that law which was continued in force at the Reformation, as is confirmed by the proviso to canon 113 of the 1603 Canons. This proviso is still in force and *proprio vigore* binds the clergy of the Church of England. By the Act of Uniformity, 1662, the hearing of confessions was enjoined upon those clergy in certain circumstances; the law places no limit upon the frequency of their being heard. It is unsurprising that there are infrequent references to the seal of the confessional since the Reformation; such cases as there are are inconclusive. Nevertheless, although the seal of the confessional may be waived by the penitent, the refusal by an Anglican clergyman to disclose what was said within sacramental confession is based upon a duty imposed on him by the ecclesiastical law rather than upon an evidential privilege. An Anglican clergyman in breach of that duty would be in grave danger of censure by the ecclesiastical courts and such censure might well lead to his deprivation and possible deposition from Holy Orders. The ecclesiastical law is part of the general law of the land and must be applied in both the ecclesiastical and secular courts. Both courts must therefore enforce that clerical duty and uphold any refusal by an Anglican clergyman to answer questions in breach of the seal of the confessional.

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246. Such a discretion, if it exists, applies as much to evidence in an ecclesiastical court as in a secular court.
247. See Cross, *op. cit.* at 167 *et seq.* and *R. v Sang* [1980] A.C. 402.
248. *Du Barre v Livette* (1791) Peake 108 at 109-110 *per* Lord Kenyon; *Broad v Pitt* (1828) 3 C. & P. 518 at 519 *per* Best, C.M.; *R. v Griffin* (1853) 6 Cox 219 at 219 *per* Alderson, B.; see, too, *Ruthven v De Bour* (1901) 45 S.J. 272 and Phipson, *op. cit.* at 15-09.