WHAT IS THE PLACE OF CUSTOM IN ENGLISH CANON LAW?[1]

Report of a Working Party convened by H. H. Judge RUPERT BURSELL

INTRODUCTION

It is now generally recognised[2] that as a matter of history the canon law was applied, subject to variations by local custom, in pre-Reformation England just as much as throughout the rest of Western Christendom. Indeed such local variations were permitted by the canon law itself[3]. As Professor Brooke concluded in *The English Church and The Papacy From The Conquest To The Reign of King John*[4]:

> "The English Church recognised the same law as the rest of the Church; it possessed and used the same collections of Church law that were employed in the rest of the Church. There is no shred of evidence to show that the English Church in the eleventh and twelfth centuries was governed by laws selected by itself."

The same was also true until the Reformation[5].

Nevertheless the contrary view, originally current amongst the common law judges in the time of Elizabeth I and James I (inherited from the Reformation statutes and the theories of Dr. Henry Standish), was that adopted by many lawyers. According to this view,

> "The peculiar character of the English people and the English Church is . . . strongly shown in their determination not to admit the general body of the canon law into these realms, but only such portions of it as were consistent with the constitution, the common law and the peculiar usages of the Anglican Church . . . But England possesses in her provincial constitutions, collected by Lyndewood, a Body of Domestic Ecclesiastical Law, upon which, before the Reformation, a national independent character was in many respects impressed. The common law was always disposed to recognise these constitutions, while to the general canon law it always manifested considerable averseness."

---

1. This is the title originally given to the working party. The title "What is the place of custom in English Common Law?" (1 E.L.J. at 27) is outside the scope of the society and is clearly a misprint!
2. See "The Canon Law of the Church of England" S.P.C.K. at 36; 14 Halsbury Laws of England (4th ed.) at 306.
3. X.V.3, 42 and X.1.4,11; *Dictionnaire de Droit Canonique* ad v. "coutume"; Le Bras, Le Febvre and Rambaud, *L'Age Classique* at 212-213.
4. at 113.
5. Stubbs, who had propounded a different view in the *Report of the Ecclesiastical Courts Commission (1883)*, finally conceded that Maitland's contrary view in *Roman Canon Law in the Church of England* (1898) was correct: see Bell on *Maitland*. See Helmholz *Canon Law and the Law of England* at 216, 253-256, and 261-262.

This quotation - although it reflects the unanimous view of the judges advising the House of Lords in *R. v. Millis*[6] that "The canon law of Europe does not, and never did, as a body of laws, form part of the law of England" – was not, however, that of a man trained solely as a common lawyer but that of Sir Robert Phillimore, Dean of the Arches, in *Martin v. Mackonochie*[7]. Indeed, in Phillimore's *Ecclesiastical Law*[8], he goes on to adopt the views of a common lawyer, Lord Abinger in *R. v. Millis*[9]:

> "The learned judges have, I think, satisfactorily derived it" (i.e. the ecclesiastical law of England) "from the constitutions of the ecclesiastical synods and councils in England, before the authority of the pope was acknowledged in this country. I take that part only of the foreign law to be the ecclesiastical law of England, which has been adopted by parliament or the courts of this country."

The approach of the common lawyers was therefore accepted even by English ecclesiastical lawyers[10]. Nonetheless this historical misapprehension has caused confusion. In *Burder v. Veley*[11], when the Court of Exchequer Chamber was considering the obligation of parishioners to repair the body of the parish church Tindal, C.J. stated[12]:

> ". . . or, again, according to Lyndewood, p.53, 'by Custom' (that is, by the common law) 'the burden of reparation, at least on the nave of the church, is transferred upon the parishioners'."

The gloss "that is, by the common law" is made by the Chief Justice and does not appear in Lyndewood who only says: "Consuetudo tamen transfert onus reparationis, saltem navis ecclesiae, in parochianos, et similiter cancelli quandoq; sicut satis constat in civitate Londoniensi in multis ecclesiis." Phillimore[13] gives a translation of the Latin but adds the Chief Justice's gloss without comment or acknowledgement. In fact Lyndewood was almost certainly referring to canonical custom rather than to the temporal common law.

---

6. (1844) 10 Cl & Fin. 534 at 680. The House itself was equally divided but Blackburn, J. nevertheless quoted it in his advice to the House in *Bishop of Exeter v. Marshall* (1868) L.R. 3 H.L. 17 at 35 and it was approved at 46 by Lord Chelmsford, L.C.

7. (1868) L.R. 2 A. & E. 116 at 153. See too Sir John Nicholl in *Wilson v. McMath* (1819) 3 Phillimore 67 at 78-79.

8. 2nd Ed. at 16.

9. (1844) 10 Cl. & Fin. 534 at 745.

10. See 13 Halsbury Laws of England (3rd ed.) at p10. The historical controversy was recognised in footnote (S). In the fourth edition the difference between the historical and traditional views is placed more in context: 14 Halsbury's Laws of England (4th ed.) at 306-307.

11. (1840) 12 Ad. & El. 265.

12. at 301.

13. Op. cit. at 1415. In fact temporal lawyers in England adopted the canonist's phrase *jus commune* in the thirteenth century but began to contrast "common law" both with the royal prerogative and statute; to canonists, however, the *jus commune* "meant the law that is common to the universal church, as opposed to the constitutions or special customs or privileges of any provincial church". Maitland, *Canon Law in the Church of England* at 4. In *Ever v. Owen* Godb. 432 Whitlock, J. was to say: "There is a common law ecclesiastical, as well as our common law, *jus commune ecclesiasticum*, as well as *jus comnune laicum*." See, too *Rennell v. Bishop of Lincoln* (1825) 3 Bing. 223 at 271 *per* Best, C.J.

Custom in Pre-Reformation Canon Law

In commenting on the Stubbs-Maitland controversy Professor Helmholz has commented:[14]

> ". . . the controversy was anachronistic in reading into the Middle Ages the tenets of legal positivism. Local custom . . . played a much greater role in the legal practice of the ecclesiastical courts than modern statute law would allow. It is of course true that some local customs were illegitimate under the medieval canon law and not to be allowed in practice. But many more were tolerable, though they might qualify or even contradict a papal ruling. What was missing from the Stubbs-Maitland controversy was a recognition of the wide scope that the medieval canon law left for local variations. The medieval canonists often approached the rulings found in the official texts with a freedom that modern lawyers may find daring. This freedom allowed them to modify and sometimes to disregard the clear import of the text. This same freedom is found in the local variation permitted within the canon law."

It is therefore not surprising that there was a divergence in practice as to what proof was required of a custom. Nor is it surprising the canonists themselves differed in their theories as to custom[15]. As Maitland said[16]:

> "of custom the canonist, like every other medieval lawyer, will speak civil words; but when it comes to a practical question he is by no means willing to admit that a custom excludes those general rules which he is in the habit of applying. Like his brethren of the temporal courts he has been engaged in a grand work of unification and centralisation: and so he is wont to throw on the custom a duty of strict proof. In the first place, it must show itself to be a *consuetudo praescripta*, one that has gained its right to exist by existing for a long space of time. Secondly, it must be reasonable, and its reasonableness will be judged by men who are professionally convinced of the reasonableness of the rule from which it purports to be an exception."

The canonist Hostiensis pointed out that some canonists required *longa consuetudo* and others *longaeva* to establish a custom; the former might be a period of 10 to 20 years uninterrupted by a contrary act whereas 40 years was necessary to gain the force of prescription. According to Joannis Andreae a period of 10 years was sufficient to establish a custom *praeter legem* but a period of 40 years was necessary for one *contra legem*[17]. Other canonists stated that a canon emanating from the highest legislative authority could only be set aside by a custom of not less than 100 years[18] whilst Nicholas de Tudeschis believed that papal canons could never be set aside by anyone who was their inferior[19].

---

14. *op. cit.* at 261-262.
15. See Sparrow Simpson, *Dispensations* Excursus I; Kemp, *An Introduction to Canon Law in the Church of England* at 25-32.
16. *op. cit.* at 41. According to Stephen's *Ecclesiastical Statutes* at 315 the period of 40 years chosen in An Act for Payment of Tithes, 1548, as the time for proof of a tithe "was that, as thirty years in the ecclesiastical law make a prescription for the church, so forty years are a prescription against the church. *Doubitofte v. Curteene* Cro. Jac. 452."
17. See Kemp, *op. cit.* at 26-27. Mere disuse is not sufficient, therefore: Sparrow Simpson, *op cit.* at 206-207 "The law may exist though it may have been suffered to sleep": *Wynn v. Davies* (1835) 1 Curt. 69 at 75 *per* Sir Herbert Jenner-Fust.
18. See Sparrow Simpson. *op. cit.*
19. See Kemp *op. cit.* at 27. (cp) too Lyndewood, *Provinciale Angliae* at p. 136 gloss ad. v. *Nos misericordiam*.

REFORMATION

At the Reformation the Act for the Submission of the Clergy, 1533, provided for the appointment of a commission to review "the canons, constitutions and ordinances provincial and synodal heretofore made." A proviso was added that those "which be not contrariant or repugnant to the law, statutes and customs of this realm, nor to the damage or hurt of the King's prerogative royal" should remain in force until the commission had done its work; this was fortunate as in practice no such commission was ever appointed[20]. By a further statute in 1543 a similar provision was made which embraced all "other Ecclesiastical Laws and Jurisdictions Spiritual as be yet accustomed and used here in the Church of England." These provisions thus ensured the continuance of the canon law as it was applied in England[21]. Indeed, according to Blackstone it was upon the former statute that the authority of the ecclesiastical law rested[22].

EFFECT OF THE REFORMATION STATUTES

The effect of the Reformation on the English ecclesiastical law was clear in theory but unclear in practice. As the Archbishop's Commission on the Canon Law summarised the position[23] –

> "The effect of the Tudor legislation was to leave the Church in possession of its traditional jurisprudence and the legislation of the medieval popes as the basis of its law. But exactly what chapters in the *Decretum*[24] or in the papal codes had been abrogated by the Reformation statutes or were contrary to the laws, statutes, and customs of the realm or damaging to the King's prerogative was never officially defined. Nobody attempted to disentangle what parts of the Canon Law were still in force from the parts which were no longer binding either on the principle laid down in the Act for the Submission of the Clergy or because they had never been observed as law in this country."

For this reason, in order still to be considered binding [24A] any rule and usage of pre-Reformation canon law must be pleaded and proved to have been recognised, continued and actued upon in England since the Reformation. As Lord Westbury said in *Bishop of Exeter v. Marshall*[25], the purpose of this rule of practice is so that the rule of usage relied upon may be –

> "shewn . . . to have been received and adopted as part of the law ecclesiastical recognised by the common law."

---

19. See Kemp *op. cit.* at 27. (cp) too Lyndewood, *Provinciale Angliae* at p. 136 gloss ad. v. *Nos misericordiam*.

20. For a convenient summary see *The Canon Law of the Church of England* at 45 *et seq*.

21. See, too, *Harrison v. Burwell* Ventris 9 at 13 *per* Vaughn, C.J. on the Acts of Succession 1533 and 1536.

22. 1 Bl. Com. 83.

23. *The Canon Law of the Church of England* at 47. For an example see *R. v. Millis* (1844) 10 Cl. & Fin. 534 (solemnisation of marriage).

24. As to Gratian's *Decretum* see 14 Halsbury's Laws of England, (4th ed.) at 305 note 2.

24A *Bishop of Exeter v. Marshall* (1868) LR 3 H.L. 17 at 53-55; *In re St. Mary's, Westwell* (1968) 1 W.L.R. 513 at 516. For an example of the resulting complexities see *R. v. Archbishop of Canterbury* (1902) 2 K.B. 503. See also *Filewood v. Marsh* (1797) 1 Hag. Con. 478.

25. at 55.

Strictly, therefore, this is not an example of the application of the canonical rule of a custom *contra legem* (or *desuetude* as it is sometimes called)[26] although, as a result, a pre-Reformation rule or usage may in due course become of no effect[27]. For example, as Archbishop Benson pointed out in *Read v. Bishop of Lincoln*[28] in relation to certain "canons called apostolic" –

> ". . . many of the most important of these canons nowhere now survive in use, and could nowhere be acted upon in the Catholic Church as it is."

Nevertheless it is clear from the wording of the Reformation statutes themselves that the canonical rule by which a custom might abrogate part of the written *jus commune* no longer survived, at least inasmuch as statute law was concerned[29].

CUSTOM SINCE THE REFORMATION

It is clear that some aspects of the canonical rules as to custom survived the Reformation. In *Churchwardens of Market Bosworth v. Rector of Market Bosworth*[30] in trying a case of prohibition in 1699 Treby, C. J., said [31]:

> ". . . the reason for which the Spiritual Court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath. For in some the usage of ten years, in some twenty, in some thirty years, makes a custom in the Spiritual Court: whereas by the common law it must be time whereof, etc. And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case that reason fails, for the Spiritual Court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged, that there has not been any custom allowed by their law, which allows a less time than the common law, to make a custom."

---

26. See Sparrow Simpson, op. cit. at 205 *et seq*. Non-user is insufficient: *Canon Law of the Church of England* at 64-68.

27. For a contrary view see *Canon Law of the Church of England* at 64. Contrast 13 Halsbury's Laws of England (3rd ed.) at p9 and 14 Halsbury's Law's of England (4th ed.) at 307. Indeed a rule may also become obsolete: see *Griffiths v. Reed* (1828) 1 Hag. Ecc. 195 at 210 (*purgatio indicenda*). See, further, *Phillimore v. Machon* (1876) 1 P.D. 481 at 487-489; *Redfern v. Redfern* (1891) P.139; *Blunt. v. Park Lane Hotel Ltd.* (1942) 2 K.B. 253. See, too, *Phillimore v. Machon* (1876) 1 P.D. 481.

28. (1889) Roscoe's Rep. 1 at 17. See also *Burgess v. Burgess* (1804) 1 Hag. Con. 384 at 393 *per* Sir William Scott; *Chick. v. Ramsdale* (1835) 1 Curteis 34.

29. *Martin v. Machonockie* (1868) L.R. 2 A&E. 116 at 190; *Liddell v. Westerton* (1857) Moore's Special Report 1; *Elphinstone v. Purchas* (1870) L.R. 3 A&E 66 at 91. See *Grisling v. Wood* Co. Eliz. 85 ". . . and although it was said the custom there was used, yet this cannot be good against a statute. . ." This was not an ecclesiastical case, however. In *R. v. Archbishop of Canterbury* (1902) 2 K.B. 503 both Lord Alverstone, C.J. and Riley, J at 543 and 564 respectively, when considering the interpretation of 25 Henry VIII c.20 (the statute next after the Submission of the Clergy), pointed out that a practice cannot contradict the plain words of a statute. Contrast *Gore-Booth v. Bishop of Manchester* (1920) 2 K.B. 412 at 424 and see the extreme view expressed in *The Canon Law of the Church of England* at 66-67.

30. (1699) 1 Ld Raym. 435.

31. at 435-6. See also *Cooker v. Goale* 2 Rolle's Abr 307 and *Jones v. Stone* (1700) 2 Salk. 550.

This was a case concerning repairs to a chancel but is also an example of the discretionary approach to the issue of prohibition "For the design of the motion for a prohibition: is only to excuse the plaintiffs from costs!" This discretionary approach of the common law courts was confirmed in *Full v. Hutchins*[32] where a custom as to tithes had been alleged "to be time immemorial, or at least for forty years past." Lord Mansfield in denying prohibition recited the facts of the *Market Bosworth Case* and stated[33]:

> "The same reason holds here, as in that case. The defendant himself has alleged the custom and submitted to trial; therefore there is no reason why he should have a prohibition to save himself from costs."

It follows not only that the ecclesiastical courts continued to apply the canonical principles as to custom (in some cases at least) but also, even where the common law courts would themselves apply a custom from time immemorial, a prohibition would not necessarily be issued. This is an indication, moreover, that those canonical rules as to custom were not regarded as "contrariant or repugnant to the law, statutes and customs" of the realm "nor to the damage or hurt of the King's prerogative". Were this otherwise it is inconceivable that prohibition would not always have issued.

The following cases, although not intended to be exhaustive, show continuing references to the canonical principles and also indicate in what spheres the common law courts expected their rules to be applied. They also show, however, how claims that those canonical principles should be applied became muted, if not altogether silent, as the nineteenth century progressed.

(i) *Patten v. Castleman* (1753) 1 Lee 387 - fees; church courts would apply 40 year rule; triable at common law;

(ii) *Paxton v. Knight* (1757) 1 Burr 314 - pews; church courts "will establish upon less evidence than the common law requires"; triable at common law;

(iii) *Astley v. Biddile* (1774), cited in *Stevens v. Woodhouse* 1 Hag. Con. 318 (note) - pew; ecclesiastical court applied the 40 year rule;

(iv) *Filewood v. Marsh* (1797) 1 Hag. Con. 478 - small tithes; church court recognised local custom.

(v) *Walter v. Gunner* (1798) 1 Hag. Con. 314 - pews; repair for 30-40 years insufficient to prove prescription in church court; must be "time out of mind" or ancient possession to raise presumption of lost faculty.

(vi) *Whinfield v. Watkins* (1812) 2 Phillimore 1 - dilapidations a question for spiritual courts;

(vii) *Wilson v. McMath* (1819) 3 Phillimore 67 - right of incumbent to preside at vestry meeting - "immemorial custom" at common law;

(viii) *Arnold v. Bishop of Bath and Wells* (1829) 5 Bing 316 - an ecclesiastical custom which is not immemorial cannot deprive a rector of his common law right to appoint a curate - ". . . as sufficient attention has not been paid to the question whether this was an ecclesiastical or a common law custom . . . the cause must be tried again".

(ix) *Bishop of Ely v. Gibbons* (1883) 4 Hag. Ecc. 156 - repair of chancel - "time immemorial" at common law;

(x) *Rhodes v. Oliver* (1836) 2 Har. & W. 38 - if the question of custom or no custom is distinctly raised on the libel and answer (pleadings), a prohibition lies.

---

32. (1776) 2 Cowp. 422.
33. at 425. See also 424. See, too, *Bannister. v. Hopton* 10 Mod 12 (choice of churchwardens): *Paxton. v. Knight* (1757) 1 Burr 314 (pews).

(xi) *Spry v. Directors and Guardians of the Poor at St. Marylebone* (1839) 2 Curteis 5 - ecclesiastical courts have some jurisdiction concerning fees – *per* Dr. Lushington: "It is necessary, therefore, that I should look to the limitations affixed to this jurisdiction, and see whether the particular fees sued for fall within any of the restrictions prescribed by the Courts of Canon Law. So far as I can discover . . . this (consistory) court is allowed to enforce payment of ecclesiastical dues, that is, fees due to the clergy for spiritual duties, such fees being due by custom, and the duty being actually performed. By customary fees are meant such fees as have existed so long, that the origin cannot be traced; it need not be shown that they commenced before the time of legal memory; it is sufficient to show that they have existed so far as can be discovered."[34]

(xii) *Burder v. Veley* (1840) 12 Ad. & El. 233 and 265 - the obligation of parishioners to repair the body of the parish church is triable at common law - *per* Tindal, C. J. ". . . or, again, according to Lyndewood p.53, "by custom" (that is, by the common law) "the burden of reparation, at least on the nave of the church, is transferred upon the parishioners" . . ."

(xiii) *Spry v. Gallop* (1847) Cripps, Church and Clergy Cases 28 - fee for burial only due by immemorial custom of a particular parish - the custom is triable by the common law courts and, once established, enforceable by the ecclesiastical courts.

(xiv) *Story v. Colk* (1848) 6 Not. Cas. Supplement xxxiii - election of churchwardens - ". . . I venture to entertain very little doubt that such a mode of proceeding is illegal, and the election therefore void. I do not think any mere custom could render it legal; but I do not believe that any such custom exists in this parish".

(xv) I (1855) Jur. N. S. 1178 *per* Dr. Lushington "I must consider - First, all acts of Parliament . . . Secondly, the canons in force. Thirdly, the ecclesiastical common law, if I may use such an expression. Fourthly, judicial decisions . . Fifthly, the usage and custom that have prevailed. This, indeed, more properly belongs to the ecclesiastical common law, and must be traced *quocumque modo* by any evidence or authority which can fairly elucidate the point at issue. Books of history or antiquity, the writings and acts of eminent theologians, may be justly referred to, especially for the purposes of ascertaining the principles and reasons on which usage has been founded.

(xvi) *Westerton v. Liddell* (1857) Moore's Special Report 1 - desuetude cannot override the obligations of a statute. (According to the chancellor in the London Consistory Court, the doctrine of desuetude was unknown to the Law of England[35]).

(xvii) *R v. Hall* (1866) LR 1 QB 632 - a local custom may exclude the common law right to an Easter offering and, indeed, increase the obligation.

(xviii) *Bremner v. Hall* (1866) LR 1 C.P. 748 - election of churchwardens - whether custom has "immemorially obtained" triable at common law by a jury.

(xix) *Bryant v. Foot* (1867) LR 2 Q.B 161 - the amount of a fee customarily payable upon marriage was so great that it led to the irresistible inference that it could not have existed at the time of Richard I: this in itself was sufficient to rebut the presumption, arising from modern enjoyment, that the fee had an immemorial legal existence.

---

34. In *Stokes v. Trollop* Freeman 300 "a prohibition was granted in a suit in the Consistory Court at Exeter for a mortuary, upon a suggestion that time out of mind no mortuary had been paid; because this custom is triable at common law".

35. See *Martin v. Mackonochie* (1868) L.R. 2 A&E 116 at 175 and *Ridsdale. v. Clifton* (1877) 2 P.D. 276 at 331.

(xx) *Martin v. Mackonochie* (1867) LR 3 A. and E 116 - statute law cannot be overriden by usage or desuetude[35A]

(xxi) *Elphinstone v. Purchas* (1870) LR 3 A & E 66 - as (xx).

(xxii) *Phillimore v. Machon* (1876) 1 P.D. 481 - ecclesiastical jurisdiction over false swearing impliedly taken away by statute - *per* Lord Penzance: "The attention of the Court has been drawn to a book published by Archdeacon Hale . . . from which it plainly appears that false swearing and even the breaking of solemn promises was the subject of frequent proceedings in that court. But the perusal of that book shews a great deal more; it shews that suits were entertained for a great variety of misconduct, which the warmest advocate of ecclesiastical censure would hardly seek to bring under that censure at the present day . . . The question, therefore arises how far may the argument be legitimately pushed, that whatever was once a matter of ecclesiastical cognizance and correction remains so still, unless withdrawn by express enactment."

(xxiii) *Ridsdale v. Clifton* (1877) 2 P.D 276 - the Privy Council accepted (at 331) as a correct statement of the law the view of Dr. Lushington in *Westerton. v. Liddell* (supra): "Usage, for a long series of years, in ecclesiastical customs especially, is entitled to the greatest respect; it has every presumption in its favour; but it cannot contravene or prevail against positive law, though, where doubt exists, it might turn the balance."

(xxiv) *In re: Robinson: Wright v. Tugwell* (1892) 1 Ch. 95; (1897) 1 Ch. 85 - *per* A. L. Smith, L. J: "The "warrant of law" for the black gown is constant user for centuries. Inasmuch as no positive law exists, and no objection against the legality of the use of the black gown in the pulpit, which has ranged over 300 years, can be found and there is no decision that its use is illegal, I agree with what I understand North, J. to have held - that its use is not illegal. . ."[36]

(xxv) *Davey v. Hinde* (1901) P. 95 - legality of reservations in a chancellor's letters patent a matter for the common law courts - *per* Dr. Tristram: ". . . it is laid down in all the books and cases that it is for the Common Law Courts and not for the Ecclesiastical Courts to decide questions as to the existence of a custom, or whether the custom is good or bad at law."[37]

(xxvi) *Kensit v. Dean, etc. of St. Paul's* (1905) 2 K.B. 249 - Lord Alverstone, C.J stated his view *obiter* in relation to impediments to ordination that "The word "impediment" related originally to a number of matters, some of which can no longer be regarded as such – as, for instance, bastardy, and certain defects as the loss of a limb – but included impediments which would still be regarded as a bar to ordination, such as the fact that the candidate was an unbaptized person or was not of the requisite age for the orders to which he proposed to be ordained."[38]

35A. See also *Martin v. Mackonochie* (1868) L.R. 2 P.C. 265 at 391 (usage as to lights).

36. See, too, *Hutchings v. Denziloe* (1792) 1 Hag. Con 170 (hymns); *Read v. Bishop of Lincoln* (1892) AC 644 at 659-661 (hymns, especially the *Agnus Dei*); *Marson v. Unmack* (1923) P. 163 at 167-8 (collections and voluntary); and 13 Halsbury's Laws of England (3rd ed.) at p.340(b).

37. See *Thomas v. Scrivener* (1888) 13 P.D. 128; *White v. Bowron* (1873) L.R. 4 A&E 207 at 211; *In re St. Mary's Barnes* (1982) 1WLR 531 at 532.

38. On this fascinating question see Chambers, *Faculty Office Registers* 1534-1549 at xxxviii-xxxix; *Report of the Ecclesiastical Committee on the Clergy (Ordination and Miscellaneous Provisions) Measure 1964* H.L. 113 and H.C. 200 and section 8 of the 1964 Measure itself.

(xxvii) *Archdeacon of Exeter v. Green* (1913) P 21 - procurations payable to archdeacons[39] but Chadwych-Healey Ch. stated at 39: "I do not find anything in the table (of fees) which could touch a procuration due in respect of an archbishop or a bishop although these procurations are still held to be payable, although I believe not now actually collected. . ."[40]

(xxviii) *Gore-Booth v. Bishop of Manchester* (1920) 2 KB 912 - Lord Coleridge, J. stated *obiter* at 424: "Desuetude, if a clerk were accused of illegality in not wearing the vestments prescribed, might well be pleaded. But if the wearing of such vestments had been abandoned, it would be a difficult thing to accuse a clerk of illegality for wearing them, if they had in 1662 been made lawful, and the Act had not been repealed."[41]

(xxix) *Marson. v. Unmack* (1923) P.163 - *per* Sir Lewis Dibdin, Dean of the Arches: 'I need hardly say that in public worship deviations from the services contained in the Prayer Book, unless authorized by or under the Acts of Uniformity, are unlawful. A collection made during Matins or Evensong . . . is not provided for in the Prayer Book. It is an incident occurring during a service or interposed between different portions of it, but it is no more part of the service than a voluntary played on the organ . . . Such a collection is an interlude entirely at the option of the minister, and has its sole justification in the sanction of long custom."

(xxx) *Rector, etc. of St. Magnus the Martyr v. All Having an Interest* (1925) unreported[42] - *per* Errington, Ch. as to the Stations of the Cross: ". . . the Rector informed me that while he varied from time to time the words used they were substantially the same as in the Roman Stations. He also suggested that they should be allowed as customary in this Diocese: I need hardly point out that any such argument must be based on the legal and not the colloquial meaning of custom. Even if a custom could prevail as against the Act of Uniformity, it would have to be a custom dating infinitely further back than the comparatively recent usage in our churches."

(xxxi) *In re Rector, etc. of West Tarring* (1954) 1 WLR 923 - the Home Secretary claimed that the long established right to display the royal arms in churches had "fallen into desuetude during the past hundred years" - *per* Macmorran, Ch: "It seems to me . . . that the practice with which I am dealing has a continuous existence from the reign of Henry VIII to the present time, always excepting the short reign of Queen Mary Tudor, and the suggestion that the custom has fallen into desuetude cannot be sustained for a moment."

In his Lichfield lectures the now Bishop of Chichester points out[43] that the canonical principles as to custom were discussed by two eminent canon lawyers as if they were still in force, namely Sir Simon Degge[44] in 1676 and John

39. In *Shepherd v. Payne* (1862) 12 C.B.N.S. 414 at 434-435 a practice that had been followed for centuries by which each parish was not visited geographically was held legal.

40. See Phillimore's Ecclesiastical Law (2nd ed) at 1059-1061.

41. The first sentence of this quotation is odd in light of the fact that the cases at (xvi), (xx) and (xxiii) are referred to on the same page and the learned judge had already (at 423) accepted that the rubric was "of statutory authority".

42. Reported on appeal at (1925) P.1.

43. *Introduction to Canon Law in the Church of England* at 63 et seq.

44. *Parson's Counsellor* pt. 2 Chap. 13 at 217.

Ayliffe[45] in 1726, and this accords well with the picture shown above. Nevertheless by the time that Sir Robert Phillimore came to write the first edition of *The Ecclesiastical Law of the Church of England* (1873) he only spoke of the sources of ecclesiastical law in these terms[46]:

> "The law of the Church of England is, then, derived from the leading general councils of the undivided church, from a practice and usage incorporating portions of the general canonical jurisprudence, from provincial constitutions, from canons passed by her clergy and confirmed by the crown in convocation, and from statutes enacted by parliament, that is, the crown, the spirituality and temporalty of the realm."

Moreover when dealing with "Prohibition and Mandamus"[47] it is clearly his view that "on a trial of custom, modus or prescription" it is a question properly triable according to common law principles[48] – again a picture that accords with the picture shown in the cases above. Indeed Walter Phillimore underlined this in the second edition:[49]

> "Prohibition may be granted when the Ecclesiastical Court has jurisdiction over the subject matter, but is proceeding to try it according to rules which are contrary to those of the common law. Such are called prohibition *propter defectum triationis*. They arise in cases where a custom or prescription is put in issue."

The question, nevertheless, remains whether this is a valid view of the law. It is not the view expressed in the Archbishops' Commission on Canon Law[50] nor, in part at least, is it the view of the learned editors of the third edition of Halsbury's Laws of England[51]. It should be noted, however, that both these views are based on a different interpretation of the rule in *Bishop of Exeter. v. Marshall* (supra) from the one expressed by Lord Westbury himself. In fact Lord Westbury made it clear that the rule was not concerned solely with the original application of a canonical rule or usage in England but also whether it survived the Reformation[52].

---

45. *Parergon Juris Canonici Anglicani* at (194-196).

46. At 19.

47. A chapter revised by Walter Phillimore in the second edition (1895) as "Relations between courts Spiritual and Temporal".

48. At 1442.

49. At 1116.

50. *Canon Law in the Church of England* at 64. But see the criticism above of this interpretation of *Bishop of Exeter v. Marshall*.

51. 13 Halsbury's Laws of England (3rd ed) at p.9.

52. (1868) L.R. 3 H.L. 17 at 54-55. It must be recognised that the actual case itself turned on whether the rule in question had been part of the pre-Reformation ecclesiastical law in England – a question stated in terms of a theory of reception of the canon law. Nevertheless the effect of the Reformation was also recognised by Lord Blackburn at 35-36 Willes, J. at 41, Martin, B. at 44 and Lord Chelmsford at 46. 13 Halsbury's Laws of England (3rd ed) at 9 also refers to Archbishop Benson's statement in *Read v. Bishop of Lincoln* (1889) Roscoe's Rep. 1 at 17 that many of "the canons called apostolic . . . nowhere now survive in use, and could nowhere be acted upon in the Catholic Church as it is" but this deals with a position already existing at the Reformation as does *Burgess v. Burgess* (1804) 1 Hag. Con. 384 at 393.

> ". . . if such a rule had been pleaded by the Bishop to have been the invariable usage of the Church from the earliest times down to the Reformation, (which would be evidence of its being a law of the Church,) and that it had been continued and uniformly recognised and acted upon by the Bishops of the Anglican Church since the Reformation, (which might have shewn it to have been received and adopted as part of the law ecclesiastical recognised by the common law,) the fitness of the rule ought not to be questioned."

Even if this explanation of the rule of practice and pleading is to be rejected, the reception theory approach to the postion of pre-Reformation canon law in England is not based on any recognition of the custom *contra legem*. In fact the opposite is true. It is only by reading the effects of the reception theory in the light of what is now generally accepted as the historical position that a recognition of custom *contra legem* can be postulated; yet, if the validity of the legal arguments in the *Bishop of Exeter v. Marshall* are to be rejected, it is difficult to build fresh arguments upon it from an entirely new historical perspective. The case itself must be seen in its own historical context.

PRESENT DAY

It has been seen that, even though any possibility of canonical custom overriding statute law did not survive the Reformation, some aspects of canonical custom were not treated as inimical to the common law or the royal prerogative. Do any aspects survive at the present day?

(a) *Custom praeter legem.* In pre-Reformation England a custom of only 10-20 years was sufficient in canon law to create a rule where no other rule was in force. Similarly, it is recognised in the modern ecclesiastical law that in certain circumstances usage can permit something where no positive law exists to the contrary. Examples of this are to be found in the use of a black preaching gown[53], the use of hymns in divine service[54], the taking of collection at matins and evensong and the playing of organ voluntaries[55]. Nevertheless such a usage seems to create a permitted usage rather than a binding custom and has only been recognised after "long custom"[55], in two cases over 200-300 years. This common sense approach is thus different from the old canonical rule and, indeed, is arguably inconsistent with it: if 10 or 20 years usage were sufficient to create a binding custom, reliance on longer usage which only creates a mere permission seems unnecessary.

53. *In re Robinson Wright v. Tugwell* (1892) 1 Ch. 95; (1897) 1 Ch. 85.

54. *Hutchins v. Denziloe* (1792) 1 Hag. Con. 170; *Read v. Bishop of Lincoln* (1892) A.C. 644 at 659-661.

55. *Marson v. Unmack* (1923) P. 163 at 167-168.

(b) *Desuetude or custom contra legem.* In pre-Reformation canon law contrary custom amounting to more than non-usage might abrogate positive law. Since the Reformation this could not apply to statute law. Unless *Bishop of Exeter v. Marshall* provides such an example in its rule as to the pleading and proof of pre-Reformation canon law (see above) – and the case itself cannot be regarded as an actual precedent in such regard – there seems to be no reported post-Reformation case clearly recognising a custom *contra legem*[56]. The learned editors of the third edition of Halsbury's Laws of England support their view that custom *contra legem* is part of modern ecclesiastical law[57] by reference to *R. v. Archbishop of Canterbury*[58] and *Kensit v. Dean and Chapter of St. Paul's*[59]. However, as has been seen, the latter merely contains a (possibly inaccurate[38]) *obiter dictum* (see above) and the former does not support the learned editors' summary that "a practice which has been disused since about the year AD 1400 was held to be abrogated although the form in use still required it"[60]. The same editors' statement[57] that custom *contra legem* "is consistent with" the Submission of the Clergy Act 1533 is given no further citation in its support[61]. Indeed, the Judicial Committee of the Privy Council in *Ridsdale v. Clifton*[62] accepted Dr. Lushington's view that -

> "Usage, for a long series of years, . . . cannot contravene or prevail against positive law."

(This may perhaps best be seen within the context of statute law rather than any wider meaning of "positive law".)

Can any further assistance be gleaned from the authorities? In *Veley v. Gosling*[63] both Dr. Lushington[64] and, on appeal, Sir H. Jenner Fust[65] took the view that church rates could not be abrogated by desuetude. Indeed this was the latter's view whether or not the "Common law obligation to be enforced . . . was

---

56. It seems best to regard *Gates v. Chambers* (1824) 2 Addams 177 as a change in administrative practice. *Burgoyne v. Free* (1825) 2 Addams 405 and *Seale. v. Veley* (1841) 1 Not. Cas. 170 both seem to be decided on usage as to procedural matters.

57. At P.9(1).

58. (1902) 2 K.B. 503.

59. (1905) 2 K.B. 249.

60. The judgments of Lord Alverstone C.J., at 553-554 and Wright, J. at 563 specifically state that the forms were consistent with there being no inquiry.

61. The common law knows no general rule of the obsolescence or desuetude: see *Ashford v. Thornton* 1 Barn. & Ald. 405 (trial by battle)! However the common law permits different approaches in the interpretation of ecclesiastical statutes: *Hebbert v. Purchas* (1871) L.R.3 P.C. 605; *Ridsdale v. Clifton* (1877) 2 P.D. 605; (1970) 33 MLR 197 at 201. See, too, *Jenkins v. Att-Gen of Bermuda* (1868) L.R. 2 P.C. 258; *Felton v. Callis* (1968) 3 WLR 951.

62. (1877) 2 P.D. 276 at 331.

63. (1843) 1 Not. Cas. 457.

64. (1843) 1 Not. Cas. 457 at 487.

65. (1843) 2 Not. Cas. 278 at 291-292.

the *Commune jus laicum* or the *Commune jus Ecclesiasticum*" In *Phillimore v. Machon*[66] Lord Penzance dealt with the question of desuetude at length[67], (although in *obiter dicta*), in a case concerning the ecclesiastical courts' jurisdiction over the laity for false swearing. He decided that any such jurisdiction had been impliedly repealed by statute but the ecclesiastical courts' general jurisdiction over the laity was further considered in *Redfern v. Redfern*[68] and *Elliot v. Albert*[69]. In the former, although ecclesiastical censure of the laity[70] was regarded as "obsolete"[71], the general rule against disclosure of adultery was enforced; in the latter interrogatories as to enticement were permitted because the likelihood of any ecclesiastical censure was imaginary. In *Cole v. Police Constable 443A*[72] Goddard, J considered that an admonishment for failure to attend divine worship was still at least a theoretical possibility but in *Blunt v. Park Lane Hotel Ltd.*[73], where interrogatories tending to show adultery were again in issue, Goddard, L.J. (as he had then become) said[74]:

> "Spiritual courts still have and ought to have unfettered disciplinary jurisdiction over clerical persons, but as regards the laity, except in the case of unauthorised acts in connection with the fabric or ground of a church or churchyard . . . and offences by churchwardens in respect of their office . . . their jurisdiction is obsolete and beyond recall."

Although on its face this seems to suggest an abrogation of the jurisdiction by obsolescence, not only would this be a case of non-usage rather than canonical desuetude but also in *Manchester Corporation v. Manchester Palace of Varieties Ltd.*[75] Lord Goddard, C. J. made it clear that his words indicated[76] merely that the jurisdiction was beyond recall by reason of the discretion to be exercised by the ecclesiastical judges.

In all these circumstances it is difficult to see how a canonical custom *contra legem* could ever now be enforced in the ecclesiastical courts, as the very rule permitting such a custom would itself be caught by the rule of practice in *Bishop of Exeter v. Marshall*. Only two examples of desuetude are actually put forward by the Archbishop's Commission on the Canon Law[77]. The first is that of

---

66. (1876) 1 P.D. 481.

67. At 487-489.

68. (1891) P.139.

69. (1934) K.B. 1 650.

70. (1891) P. 193 *per* Lindley, L.J. at 45 and *per* Bowen L.J. at 147. For the earlier cases see *Brownsford. v. Edwards* (1750-1751) 2 Ves. Sen. 242; *Chetwynd. v. Lindon* (1752) 2 Ves. Sen. 450 and *Finch. v. Finch* (1752) 2 Ves. Sen. 491.

71. But see *Blackmore. v. Brider* (1816) 2 Phil. 359; *Courtail. v. Homfray* (1828) 2 Hag. Ecc. 1; *Chick. v. Ramsdale* (1836) 1 Curteis 34; *Woods. v Woods* (1840) 2 Curteis 516, in each of which penance was enjoined against laymen.

72. (1937) 1 K.B. 316 at 333.

73. (1942) 2 K.B. 253.

74. At 259: see also 257 and *per* Lord Clanson at 256. The jurisdiction was not expressly abolished by the Ecclesiastical Jurisdiction Measure 1963. See s.82(2) and (4).

75. (1955) 1 All E.R. 387.

76. At 393-394.

77. *The Canon Law of the Church of England* at 67-68. A footnote draws attention to Sir H. Jenner Fust's *dictum* in *Wynn. v. Davies and Weaver* (1835) 1 Curteis 69 at 75: "The law may exist, though it may have been suffered to sleep."

the clergy wearing weapons and serving in the armed forces in time of war; yet the times in which this occurred, namely the two world wars, were "Doubtfully sufficient to establish desuetude" (as the report itself points out) and certainly did not amount to 40 years. The second is that of beating the parish bounds; however that obligation may instead be seen as impliedly replaced by statute[78].

(c) *Custom generally*. After the Reformation, in some spheres at least, the ecclesiastical courts continued to apply their own rules as to custom. What is more, the fact that the temporal courts did not always issue their prohibition where a party had chosen, or acquiesced in, the canonical approach to custom not only bears out that the approach was different from that at common law but indicates that the canon law's approach was not entirely inimical to the common law. Are there any spheres therefore in which such canonical custom may still be of force?

Due to the far narrower jurisdiction of modern church courts and the far embracing scope of statute law it is difficult to see where canonical custom may now have application if, as is argued above, there is no place for desuetude or custom *contra legem* in modern ecclesiastical law. As has been shown, even where custom *praeter legem* might have found a place, modern ecclesiastical law instead requires a long usage to found a mere permission. It has been suggested that custom may permit a liturgical practice at variance with the Book of Common Prayer or one of the authorised forms of service which is other than of minor importance[79] but such a suggestion, embracing as it does the thorny questions of a bishop's *jus liturgicum* and "lawful authority" in liturgical matters[80], is outside the ambit of this Working Party. It should however be borne in mind when giving the suggestion further consideration that it faces two major hurdles, namely: (1) the implied abrogation by statute or ecclesiastical measure[81] of any power in custom to override liturgical rites or practices authorised by statute or measure; and (ii) the need for proof that a custom that does not fulfil the stringent common law tests for custom may still have force in the ecclesiastical courts by reason of its having been recognised, continued and acted upon in England since the Reformation[82]. Indeed it is this last hurdle that any argument as to canonical custom may nowadays find most difficult to surmount. The words "since the Reformation" do not mean "at one or other time after the Reformation" but "continued and uniformly recognised and acted upon . . . since the Reformation".[83] There has been no judicial recognition of the application of canonical custom for the past 100 years and it is in some ways ironic that, although desuetude or custom *contra legem* has probably not survived the Reformation, the other canonical rules as to custom are likely no longer to be of force due only to a rule of practice and pleading.

---

78. See Phillimore's Ecclesiastical Law (2nd ed) at 1721, 1723, 1725, 1728 and 1733.

79. Ecclesiastical Law Journal No. 1 at 22-23. See Revised Canons Ecclesiastical, Canon B 5, para 1 (amending canon No. 3); Church of England (Worship and Doctrine) Measure 1974, s.1(5)(b).

80. See 14 Halsbury's Laws of England (4th ed) at 934, note 10.

81. See the Act of Uniformity 1661; Church of England (Worship and Doctrine) Measure 1974 s.1(5)(b). *Phillimore v. Machon* (1876) 1 P.D. 481.

82. *In re St. Mary's Westwell* (1968) 1 WLR 513 at 516; *Bishop of Exeter v. Marshall* (1868) L.R. 3 H.L. 17 at 53-56. This rule might be altered by the courts if it is correct to regard it as one of practice and procedure: see *Burder v. O'Neill* (1863) 9 Jur N.S. 1109; *Bishop of Norwich v. Pearse* (1868) L.R. 2 A&E 281. It is not caught by the Ecclesiastical Jurisdiction Measure 1961 ss. 45(3) and 48(5).

83. *Bishop of Exeter v. Marshall* (1868) L.R. 3 H.L. 17 at 55 *per* Lord Westbury.

CONCLUSIONS

1. Prior to the Reformation the spiritual courts applied their own rules as to custom. These rules were less stringent than those required by the common law courts.

2. After the Reformation the spiritual courts continued to apply their own canonical rules as to custom but these could no longer abrogate statute law.

3. It is unlikely that the pre-Reformation canon law rules as to custom *contra legem* (or desuetude) or rules as to custom *praeter legem* survived the Reformation but modern ecclesiastical law recognises long usage as permitting actions not otherwise covered by positive law.

4. For at least the last 100 years there has been no judicial recognition of the application of the canon law rules as to custom and it is unlikely that these rules could now be shown to pass the test laid down by the rule of practice and pleading in the cases of the *Bishop of Exeter v. Marshall* and *In re St. Mary's, Westwell.*

https://doi.org/10.1017/S0956618X00007213 Published online by Cambridge University Press