Religious Confession Privilege at Common Law: A Historical Analysis

A thesis presented in fulfillment of the requirements of Murdoch University for the degree of Doctor of Philosophy

A. Keith Thompson
August 2006
I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary institution.

..........................................................  
Anthony Keith Thompson
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ABSTRACT

Since English lawyers started writing text books about the law of evidence, they have denied that religious confession privilege exists at common law. However, that statement of the law surprises those who recognise confessional secrecy dating back into the first millennium AD. It is also counter-intuitive in Federal Australia since the one human freedom which the Constitution has guaranteed since 1901 is the “free exercise of any religion”.¹

This thesis analyses the legal conclusion that there is no religious confession privilege at common law against available historical materials. Those materials include the origin of confessional secrecy in Christian practice and the entrenchment of that practice in canon law; the recognition and even the reception of canonical practices in the custom that became the common law; and all the English common law cases that have affirmed or denied religious confession privilege whether in passing or in an arguably precedential way. The reason why clear evidence of the existence of the privilege even seventy years after the English Reformation has been ignored by the text writers is traced to an uncorrected interpretive error made by the text writer Peake in 1801.² His error has been uncritically followed and affirmed by later commentators and judges. However, until Gavan Duffy J decided Cook v Carroll³ in Ireland in 1945 and the Supreme Court of

¹ Commonwealth of Australia Constitution Act (63 & 64 Vict, c 12) (The Australian Constitution 1901), section 116.
³ Cook v Carroll [1945] Ir Rep 515
Canada decided *R v Gruenke*\(^4\) in 1991, there was no reported decision on religious confession privilege anywhere in the British Commonwealth. All else that had been written was at best obiter dicta.

The factors that influenced those two courts to recognise not a narrow religious confession privilege but a more encompassing confidential religious communications privilege are then measured against Australian jurisprudence to suggest whether the High Court of Australia would come to a similar conclusion.

\(^4\) *R v Gruenke* (1991) 3 SCR 263
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PREFACE

Since 1991 I have been employed as International Legal Counsel by The Church of Jesus Christ of Latter-day Saints servicing the Pacific Area out of Sydney, Australia. Occasionally, that work has involved me in advising ecclesiastical personnel on the extent of religious confession privilege in the secular jurisdictions where they provide pastoral care to members of that Church. Though I was not surprised to learn that the police in Australia and New Zealand were unaware of the law that privileged the clergy from the disclosure of confessional secrets, I was surprised to meet a New South Wales District Court Judge in 1999 who seemed similarly unilluminated. When faced with what I have come to learn is one of the strongest religious confession privilege statutes in the world¹, not only would the Judge not accept that the words of that statute denied him the opportunity to review the evidence concerned for confessional status and relevance, he found it inconceivable that Parliament could have intended to deny him that access.

While preparing for that 1999 case², I discovered that several lay members of the New South Wales Parliament had expressed almost entirely opposite expectations where religious confession privilege was concerned. For example, after he had expressed his dismay that one of Her Majesty’s Counsel should have called for the gaoling of a priest who would not testify of that which he had learned in confession, the Hon. B.H. Vaughan said “[it] became necessary to legislate what every member of this House, and probably

¹ Evidence Act 1995 (NSW), s.127 not only privileges the contents of a religious confession from disclosure; it states that the member of the clergy concerned need not even confirm whether there was a confession. Arguably, that second protection makes the member of the clergy the final judge of whether or not what was heard was a confession within the meaning of the section.

² *R v Mills* (1999) District Court, Orange, NSW, heard 1 September 1999, unreported.
every person in the community, would have taken for granted – that a clergyman in the circumstances is protected from the sanctions of the law\(^3\).

I have since learned that the Church’s decision not to appeal the District Court Judge’s decision on the religious confession privilege point - because a successful appeal would have unsettled what the Church considered was a just result on the criminal facts of that case - is one of many eminently practical reasons why there have been very few reported cases on religious confession privilege\(^4\). Suzanne McNicol has observed that one reason why the New South Wales decision to create such a strong religious confession privilege statute was “sensible”\(^5\), was because it would “reduce...unnecessary friction between church and state”\(^6\). The Churches are similarly concerned that child abuse cases, which generate secular anger against ancient privileges, are not the perfect stage upon which to consolidate principled constitutional freedom for this manifestation of religious practice.

Further research was prompted by the discovery that while evidence law texts almost universally denied religious confession privilege at common law, those denials were not borne out by the cases cited as authority for those denials. I developed a growing suspicion that several of the early revered text writers had simply quoted one another without independently verifying what the sources actually said.

\(^3\) Parliamentary Debates (N.S.W.) Legislative Council, 21 November 1989, p 12829.

\(^4\) Other reasons of course include that the confidential nature of religious communications make it a rarity for law enforcement authorities to find out that such evidence exists and the fact that law enforcement authorities are reluctant to bring such testimony when they recognise “the undeniable fact that ministers will universally disobey a law compelling confidential confessional communications” (McNicol, SB, Law of Privilege, Sydney, Law Book Co, 1992, p 329).

\(^5\) McNicol, op cit, p 337.

\(^6\) McNicol, op cit, pp 330, 337.
Though there were two monographs on religious confession privilege at common law and a Roman Catholic canon law masterpiece on the origin of the seal of confession, I ultimately felt I had enough material to write a book of my own on the subject. No one had previously explained how the seal of confession in Catholic canon law had found its way into the common law, nor treated thoroughly the reasons why it was said to have been extinguished. This was territory where I was ill-equipped to go by myself, since my previous dissertations in law had only involved methodical historical research in common law records since case reporting began.

I am thus grateful to the Law Faculty at Sydney University who first accepted my enrolment to treat the subject at a Doctoral level and suggested that it was worthy of full PhD treatment rather than the slightly shorter thesis that is required as a part of an SJD degree. Les McCrimmon was a great help during the research phase of the project. I regard his observation that a proper understanding of the common law behind modern religious confession privilege statutes should change the way courts interpret them, as his greatest contribution to my work. That insight suggested that a proper understanding of religious confession privilege could lead to more tolerant judicial interpretations of religious confession privilege statutes which would improve freedom of religion in practice. The Supreme Court of Canada’s 1991 decision in *R v Gruenke* has confirmed

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the thought that a multicultural society based on constitutional freedoms and equality will not allow the public interest in the search for truth and justice to trump all other values.

Also at Sydney, Terry Carney and Hilary Astor helped reduce my prolix sentences and think outside my conventional structural boxes. Helen Irving’s life before law school as a gifted historian was a particular blessing and I have appreciated the time she took to read draft chapters about history. Lee Aitken and Fiona Burns also provided some helpful suggestions.

At Auckland, Julia McMahon O’Higgins was the law school librarian when I was a law undergraduate in the 1970s. She was an absolute treasure when it came to understanding obscure historical citations. Shortly after I commenced researching towards the doctorate, she found me sitting in that University’s Law Library some 25 years after we had first met and she insisted I consult her whenever I felt the urge. She simply would not let me reimburse even the postage after she had spent hours finding obscure historical references which authenticated the true story of Friar John Randolf’s demise. Other great research helpers were: Eileen Crane, whose close friends at Harvard and Yale finally found for me the two missing first edition Evidence law texts I could find nowhere else; Stephen E. Smith who rapidly helped me track down electronic copies of Canadian commentary while he was completing his first law degree at Queens, and Mark Durham who took time away from his own doctoral work at Yale to help me track down yet another first edition Evidence text.

11 Though Sir Edward Coke cited his case as authority for his treason exception to religious confession privilege (Coke, Sir E, *The Second Part of the Institutes of the Laws of England*, New York, Garland Publishing Co, 1979, p 629), there was no trial and the Friar was murdered in prison after some years’ incarceration, by a fellow inmate.
However, the greatest help and academic mentoring has come from Gabriel Moens. I have followed his career since I first met him as the Garrick Professor of Law at the University of Queensland. I have met him again on some of his teaching stints at Loyola and Brigham Young Universities in the United States and more recently at Notre Dame and Murdoch Universities in Western Australia. Gabriel has given me the checklists that I needed to get unstuck and to complete the thesis. He has done things that supervisors are not supposed to have to do with PhD students – he has tidied my grammar, and painstakingly helped me chop up remaining long sentences when I thought I had finished all such editing. When I have considered all else he does and all else for which he is justifiably renowned, I am grateful that he was genuinely interested enough in my work to convince Murdoch University to take me on and see the thesis through to what, I hope, is a worthy conclusion.

I would be remiss indeed, if I did not mention my Legal Assistant at work, Alice Debchi, my secretary Susan Watkins who holds a PhD in history of her own, and my wife Anita. Alice has typed the whole thesis, save a few pages. When I have typed, she has proofread and tidied the formatting because everyone who knows me, knows that I know nothing about the mysteries of word processing computer software. Additionally Alice is a master at helping me think outside my boxes and her deep knowledge of and interest in English history has often corrected my antipodean misconceptions. Sue’s experience and encouragement has kept me going – assuring me so often that my PhD academic struggles were not unique. Anita however, is the one who has borne the brunt of it all. Though I like to say that my thesis was largely written when I was already away from the family and from her on business in dingy hotel rooms on desert islands, Anita knows how many times she sacrificed time we might have spent together because I went downstairs, to the office on a Saturday – or to one more library. On a 2001 trip to
England, she was the one who encouraged me to go to Oxford. There I found and copied the original eighteenth and early nineteenth century first edition texts which no one would send me on interlibrary loan because they were too fragile and she took the photo of me on the floor of that empty library - surrounded by piles of musty books, oblivious to the world and completely absorbed because at last I had the original editions. She has been with me to all the law libraries I have physically used: Sydney, Melbourne, Auckland, New South Wales, Macquarie, QUT, Australian Catholic University, Utah, J Reuben Clark, and Oxford to name most but not all of them. Anita always believed I could finish but was at her most helpful when in my misguided hesitancy about changing Universities for the home straight, she almost plead with me to accept Gabriel’s kind offer to supervise me through to completion.
INTRODUCTION

When John H Wigmore produced the first edition of his monumental work on evidence in the United States in 1904,¹ he stated:

It is perhaps open to argument whether a privilege for confessions to priests was recognised in common law courts during the period before the Restoration. The only available data appear to be an indecisive incident in the Jesuit trials under James I, and a statute of much earlier date and of ambiguous purport, together with the general probabilities to be drawn from the recognition of Papal ecclesiastical practices prior to Henry VIII. But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a privilege.²

Though the work has been both edited and revised since,³ the essential “no [religious confession] privilege at common law”⁴ message has not been varied and it has been

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¹ Wigmore, JH, A Treatise on the Anglo-American System of Evidence in trials at common law: including the statutes and judicial decisions of all jurisdictions of the United States and Canada, Boston, Little Brown, 1904.

² Wigmore, JH, Evidence in trials at common law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 869.

³ 1st edition 1904; 2nd edition 1923; 3rd edition 1940; McNaughton Revision in 1961 with a most recent 1999 supplement current as at the time of this writing.

⁴ The quoted words form part of the heading which introduces the quote in note 2 in the 1961
accepted as an authoritative statement of the British common law by the majority of succeeding American lawyers. But Wigmore’s summary gloss upon religious confession privilege at common law is not a uniquely American interpretation. The majority of British and Australian evidence text writers have agreed with his conclusion, and he has also had significant direct influence in Australia.

It will be the purpose of this thesis to test this historical conclusion and summary against the primary materials which Wigmore and other text writers have used to support it. Those materials include the historical and canonical practices from which the common law evolved, and the common law decisions recorded from the genesis of legal reporting through to the present day. This thesis will not address the modern law reform question of whether there should be a religious confession either in twenty-first century common law or in statute. That is a question for another thesis. What this thesis will do is review in careful detail, the historical materials which still exist, to authoritatively establish that there not only was a religious confession privilege at common law extant at the Restoration, but that it has never been extinguished and thus survives to the present day.

Because the text writers almost universally deny these assertions, primary materials

McNaughton Revision.


7 For example, the Australian Law Reform Commission has stated that “[i]t is generally accepted that the better view of the common law cases is that no privilege is recognised as arising out of the priest-penitent (or minister-parishioner) relationship” though “the law in Ireland acknowledges such a privilege … formulated using Wigmore’s four conditions” (ALRC, Report No 26 (1985), Vol 1, para 202, p 253).
are the focus of this thesis. For these purposes, primary materials means case law, canon law and established legal history. However before I set out the places where I have found those primary materials, it is necessary to state that readers will find more cases about legal professional privilege discussed in this work than they might expect in a thesis about religious confession privilege. That is because many text writers have conflated legal professional privilege and religious confession privilege. I will argue that these two privileges have separate and discrete origins in common law. However, it is necessary to review cases about legal professional privilege to establish just what the facts were, to decide whether the conclusions drawn from them about religious confession privilege had any substance at all. Sometimes, the generalisations of the text writers may seem fair on a superficial review of the facts because a clergyman was involved. However, if it was claimed that a communication with a clergyman was entitled to "legal professional privilege" because he was consulted as a professional confidante despite the fact that no religious confession was made, then it is not accurate to draw a "no religious confession privilege" principle from the decision. Similarly, cases about confession to someone other than a member of the clergy, and cases about criminal confessions by members of the clergy, ought not to be generalised as authority against religious confession privilege either.

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8 These are not the facts of a specific case. It is the hypothetical conflation of several, including Anonymous (1693) Skin 404; 90 ER 179-180 and Greenlaw v King (1838) 1 Beav 137; 48 ER 890.

9 R v Gilham (1828) 1 Moody 186; 168 ER 1235 and R v Wild (1835) 1 Moody 452; 168 ER 1341. These cases may also be considered as cases about whether spiritual duress or inducement should make certain confessions inadmissible. They are discussed in detail in chapter four.

The historical and canonical practices from which the common law evolved will be treated in detail because despite academic recognition that canon law has had a large influence on common law, the nature of that contribution has never been satisfactorily identified where religious confession privilege is concerned. Richard Nolan, the Irish barrister who contributed the article entitled “The Law of the Seal of Confession” to the original Catholic Encyclopedia in 1913, certainly strove to do just that. But his “Catholic” purpose and his muted conclusion against the existence of a modern religious confession privilege at common law, have had limited impact on legal scholarship. Bursell’s more recent claim that religious confession privilege has always existed and still exists, has similarly not attracted much attention in legal texts because it reads like a conservative Anglican apologetic. Others have been less complete in either their treatment of the canon law, or its historical antecedents. Finlason’s contribution in the editorial footnotes to his report of *R v Hay* in 1861 maintained that confessions in Anglican practice were sacramental and that Hill J was wrong to have found Father Kelly in *Hay* guilty of contempt – in effect Finlason’s thesis was an early version of Bursell’s view that religious confession privilege

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11 For example, Helmholtz has observed that there are “three evident ways” in which the canon law and English common law related – they clashed, they cooperated and they reciprocally influenced one another (Helmholz, RH, *Canon Law and the Law of England*, London and Ronceverte, The Hambledon Press, 1987, p 2). Milsom says that it was ecclesiastics with canonist learning “who guided the common law in its greatest formative period” (Milsom, SFC, *Historical Foundations of the Common Law*, London, Butterworths, 1969, p 15).


14 Note that liberal Anglicans hold that confession went out with the English Reformation. For example, Norman Doe quotes the 1938 Doctrine Commission as authority for his proposition that the 1603 canons only bind in conscience (Doe, N, *The Legal Framework of the Church of England*, Oxford, Clarendon Press, 1996, p 354). JH Blunt (*The Book of Church Law*, 10th ed, London, New York and Bombay, Longmans Green & Co, 1905, p 173) and Judge Rupert Bursell (“The Seal of the Confessional”, *Ecclesiastical Law Journal* (1990) 84, 87) state that the secrecy of confession has the virtual force of statute law and will concede only that it was used less frequently when it was made voluntary. See more detailed discussion in chapter three, infra, pp 112-124.

15 *R v Hay* (1860) 2 Foster & Fin 4; 175 ER 933.
existed in English law and still existed in 1861. Badeley’s monograph in 1865\(^{16}\) was a very Catholic defence of religious confession privilege written in response to the publicity that accompanied \textit{R v Constance Kent},\(^{17}\) including the debate that the case occasioned in both houses of parliament.\(^{18}\) Winckworth’s essay, “The Seal of the Confessional and the Law of Evidence”\(^{19}\) concluded in 1952 only that “the question has never really been raised in any English court since the Reformation”.\(^{20}\) Hogan and Yellin writing respectively in 1951\(^{21}\) and 1983\(^{22}\) both doubted Wigmore’s suspicion that there was no religious confession privilege in Reformation pre-history,\(^{23}\) but did not consider whether that raised questions about the alleged non-existence of the privilege after the Reformation – they simply accepted that it does not exist thereafter.\(^{24}\) And though Wright and Graham’s more complete historical review\(^{25}\) disagreed with the Wigmore interpretation of the history,\(^{26}\) they effectively

\(^{16}\) Badeley, E, \textit{The Privilege of Religious Confessions in English Courts of Justice considered in a letter to a Friend}, London, Butterworths, 1865.

\(^{17}\) \textit{R v Constance Kent} (1865), unreported but referred to in Attlay’s \textit{Famous Trials of the Nineteenth Century}, 1899, p 113. See also Tiemann, WH and Bush, JC, \textit{The Right to Silence}, 2\textsuperscript{nd} ed, Nashville, Abingdon Press, 1983, pp 117-120, and Phipson, SL, \textit{Best’s Law of Evidence}, 11\textsuperscript{th} ed, London, Sweet & Maxwell, 1911, pp 565-566. The absence of any legal report of the case is the understandable consequence of Constance Kent’s guilty plea following the depositions hearing where the religious confession privilege issue was raised.


\(^{20}\) Ibid, p 15.

\(^{21}\) Hogan, EW, Jr, “A Modern Problem on the Privilege of the Confessional” (1951) 6 \textit{Loyola LR} 1.


\(^{23}\) Hogan, op cit, pp 7-13; Yellin, op cit, pp 96-101.

\(^{24}\) Hogan, op cit, p 13; Yellin, op cit, p 101.


\(^{26}\) Ibid, pp 29-30, 35.
agreed with Nolan that the privilege was extinguished by institutionalised anti-Catholic prejudice after the seventeenth century.\footnote{Ibid, p 42.}

This thesis will relate the historical roots of the common law and customary canonical practices to the case law which evolved from them. That approach will enable a more balanced view and conclusion than results from Wigmore’s doubt of religious confession privilege in history and his denial of religious confession privilege in common law. The resulting understanding of this ancient privilege has growing significance in a secular world which doubts any value premised solely in religious belief and practice.

The thesis divides the subject into seven chapters. In chapter one I observe that the misinterpretation of cases in 1790,\footnote{R v Sparkes (1790), unreported but cited by Garrow, counsel for the plaintiff in Du Barré v Livette (1791) 1 Peake 108, 170 ER 96.} 1828\footnote{R v Gilham (1828) 1 Moody Cr Cas 186, 168 ER 1235.} and 1881\footnote{Wheeler v LeMarchant (1881) 17 Ch D 675.} has significantly misrepresented common law on religious confession privilege ever since. Even though these errors have been much repeated in subsequent commentary and judicial decisions, I suggest that a complete review of religious confession privilege is required – a review which takes account of what the historical practices were and what the cases actually said.

Chapters two and three will deal with the history of religious confession and of religious confession privilege in England. In chapter two, I commence by identifying the shifts in perspective required of modern lawyers to understand historical legal institutions and practice, with particular recognition of the modern difficulty in

\footnote{Ibid, p 42.}
understanding a society where church and state were undivided. I then use Coke’s commentary\textsuperscript{31} upon Edward II’s Statute Articuli Cleri\textsuperscript{32} in the fourteenth century and his prosecution arguments as Attorney-General in Garnet’s case\textsuperscript{33} to identify recognition of religious confession in common law to the beginning of the seventeenth century. That recognition will necessarily introduce consideration of the influence of canon law and ecclesiastical religious confession practice upon common law both before and after the English Reformation. In chapter three I will then identify the development of the canon law pertaining to religious confession and will trace the evolution of the Catholic seal of confession and its diluted reception into Anglican canon law as a part of the law of England.

In the next three chapters, four, five and six, I discuss the common law after Garnet’s case. In chapter four, I begin treatment of the common law between the seventeenth and twentieth centuries with the insight that the law of evidence has largely grown up “around” religious confession privilege. That insight is helpful in explaining why it is that the evidence law texts treat religious confession privilege in a superficial way as if religious confession privilege were a sub-category of legal professional privilege. That categorisation also explains why religious confession privilege has often been confused with legal professional privilege, and why cases about irregular confession and confessions obtained under duress have not been distinguished from cases about religious confession privilege. Chapter four concludes that the residual inaccuracy that lingers in evidence law texts cannot be said to have extinguished religious confession privilege from the common law.


\textsuperscript{32} 9 Edward II St.1.

\textsuperscript{33} Garnet’s case (1606) 2 Howell’s State Trials 217.
In chapter five I explain how better analysis of the cases discussed in chapter four reveals them as authority for the proposition that there are two distinct privileges arising at common law from religious confession practice. These are, first, a narrow religious confession privilege, and secondly, a broader, non-discriminatory religious communications privilege. The existence of this broader privilege sourced in judicial discretion which weighs competing public policies, is demonstrated with late twentieth century decisions from the English House of Lords\textsuperscript{34} and the Supreme Court of Canada.\textsuperscript{35}

In chapter six I discuss the theories that have been advanced to explain how or why religious confession privilege was lost to the common law. Because Sir George Jessel MR’s error in his obiter statements against the privilege in \textit{Wheeler v LeMarchant}\textsuperscript{36} will have been identified in chapter one, that theoretical justification for the extinction of the privilege will only be refreshed. Similarly brief reference will be made to the idea that the English Reformation somehow extinguished religious confession privilege since that theory will have been discredited in chapter two. But the suggestions that pure anti-Catholic prejudice and the need for a religious confession privilege statute demonstrates a void at common law\textsuperscript{37} will be examined in detail and dismissed.

In chapter seven of the thesis, I review Australian authority relating to religious confession privilege, though noting that there is no binding decision such as would conclusively answer the question, “Is there a religious confession privilege at common law in Australia?” That uncertainty is identified as the unsurprising result of

\begin{itemize}
  \item \textsuperscript{34} \textit{D v NSPCC} [1978] AC 171.
  \item \textsuperscript{35} \textit{R v Gruenke} (1991) 3 SCR 263.
  \item \textsuperscript{36} \textit{Wheeler v LeMarchant} (1881) 17 Ch D 675.
  \item \textsuperscript{37} \textit{R v Gruenke} (1991) 3 SCR 263, 287-288 per Lamer CJ.
\end{itemize}
a complete absence of decided cases on religious confession facts in Australia’s residual common law jurisdictions. But obiter dicta comments about religious confession privilege by Sir Owen Dixon in the High Court and Chief Justice Spigelman in the New South Wales Court of Criminal Appeal are closely reviewed for their likely contribution to a common law decision on religious confession privilege, should such a case arise in the future. In the absence of any conclusive authority on the point, I then review other ideas that are likely to have some influence on whether a common law religious confession privilege would be recognised in Australia or not.

Those ideas include insights

(a) that recent judicial statements to effect that common law privileges or immunities cannot be abrogated without clear and unambiguous statutory words, may protect common law religious confession privilege if a court could be convinced that religious confession privilege was indeed well established;

(b) that existing religious confession privilege statutes in Victoria, Tasmania, the Northern Territory, New South Wales and the

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38 Queensland, Western Australia and South Australia at the time of this writing.

39 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73.


42 The original Victorian statutory religious confession privilege was created by the *Evidence Act 1890*, c 55, 54 Vict No 1088. The current statute is the *Evidence Act 1958*, section 28(1).

43 The original Tasmanian statutory religious confession privilege was the *Evidence Act 1910*, section 96. However, Tasmania adopted the Uniform Commonwealth *Evidence Act* in 2001 (Tasmanian *Evidence Act 76/2001*) and it was proclaimed effective 1 July 2002.

44 The *Evidence Ordinances 1939*, section 12.

45 The *Evidence (Religious Confessions) Amendment Act 1989* inserted section 10(6) into the New South Wales *Evidence Act 1898*. The current provision is section 127 of the New South Wales *Evidence Act 1995*. 
Commonwealth\textsuperscript{46} would exert “gravitational pull”\textsuperscript{47} in Australian jurisdictions without such statutes;\textsuperscript{48} and

(c) the notion that Australia’s commitment to various international human rights instruments which affirm constitutionally established freedom of religious belief in Australia may provide some protection for religious confession privilege in the future.

However, though I suggest that the High Court of Australia might recognise religious confession privilege at common law if a suitable case arose for adjudication, I concede that Australian trial courts and even intermediate Courts of Appeal\textsuperscript{49} in Australia may not answer so confidently.

The thesis concludes with my finding that there always has been a religious confession privilege at common law. Further, that even though judges looking for relevant evidence may have been inclined to narrow its scope, that judicial habit does not justify the textual denials that religious confession privilege has ever existed. However, I conclude that if the High Court of Australia is ever asked to decide a religious confession privilege case in a common law jurisdiction, it will likely follow the approach taken by the Supreme Court of Canada and prefer a “case by case” discretionary religious communications privilege\textsuperscript{50} over a fixed religious confession

\textsuperscript{46} The current provision is section 127 of the Commonwealth Evidence Act 1995. The Uniform Commonwealth Evidence Act was adopted by the Australian Capital Territory in 1995, by Tasmania in 2001 and Norfolk Island in 2004.

\textsuperscript{47} The quoted words are original to Mason P in \textit{Akins v Abigroup Ltd} (1998) 43 NSWLR 539, 547-548. Both Beazley, JA and James, J reference the concept in discussion of a proposed common law sexual assault communications privilege in \textit{R v Young} (1999) 46 NSWLR 681, respectively at p 719, para 205 and p 743, para 326.

\textsuperscript{48} Queensland, South Australia and Western Australia.

\textsuperscript{49} These words were used to describe the New South Wales Court of Criminal Appeal by Spigelman CJ in \textit{R v Young} (1999) 46 NSWLR 681, at p 698, para 84 and at p 699, para 88.

\textsuperscript{50} \textit{R v Gruenke} (1991) 3 SCR 263.
privilege category.\textsuperscript{51} That is not so much because Australia’s constitutional protection of freedom of religion\textsuperscript{52} is equivalent to Canadian charter protection,\textsuperscript{53} but because such a broader accommodative approach resonates with Australian multicultural values and international human rights obligations.\textsuperscript{54}

\textsuperscript{51} Gruenke was decided by a majority of 7-2. The minority (Heureux-Dube and Gonthier JJ) preferred that a fixed religious confession privilege category be recognised rather than a discretionary privilege because the lack of certainty implicit in a discretionary approach could have an undesirable chilling effect on religious practice.

\textsuperscript{52} Section 116. The \textit{Commonwealth of Australia Constitution Act 1900} (63 & 64 Vict, c 12) was passed by the Imperial Parliament in July 1900 and was proclaimed to take effect on 1 January 1901.

\textsuperscript{53} The Canadian Charter of Rights and Freedoms came into force as Schedule B to the \textit{Canada Act 1982} (UK) Clause 11 on 17 April 1982. In Canada it is known as the \textit{Constitution Act 1982}.

\textsuperscript{54} See particularly the High Court of Australia judgements in \textit{Daniels Corporation v ACCC} [2002] 192 ALR 561.
CHAPTER ONE

REVIEW OF RELIGIOUS CONFESSION PRIVILEGE IN EARLY EVIDENCE TEXTS

Introduction

Wigmore is a relative latecomer to the field of evidence law commentary.¹ He credits Thayer and Stephen as his authoritative predecessors,² but there were many others, and the number of editions which were published of the more popular texts³ manifest the demand for understanding of this new body of law.⁴

This thesis recognises that development at the beginning of the nineteenth century in the pioneering work of Peake,⁵ who was also the reporter of the alleged leading case

¹ The first edition of his monumental work on Evidence Law was published in 1904 (Wigmore, JH, A Treatise on the Anglo-American System of Evidence in trials at common law: including the statutes and judicial decisions of all jurisdictions of the United States and Canada, Boston, Little Brown, 1904).


³ For example, Roscoe published the original text of Digest of the Law of Evidence in 1827 (London, Joseph Butterworth and Son), but Powell’s 18th edition was still in demand when it was published in 1907 (London, Stevens and Sweet and Maxwell). Similarly, the 11th edition of Taylor’s Treatise on the Law of Evidence, originally published in 1848 (London, A Maxwell & Son), was published in 1920 (Matthews, JB and Spear, GF, A Treatise on the Law of Evidence by his Honour the Late Judge Pitt Taylor, London, Sweet & Maxwell Ltd).

⁴ Sir James Stephen observed in 1876 “that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries” (Stephen, JF, A Digest of the Law of Evidence, London, MacMillan and Co, 1876, p 172).

⁵ Professor Julius Stone (whose work was revised and published by WAN Wells after his death) notes that the pioneering texts on the law of evidence were those written by Peake (A Compendium of the Law of Evidence, London, E&R Brooke and J Rider & E Rider, 1801), Phillipps (A Treatise on the Law of Evidence, London, E & R Brooke and J Rider and by E Rider, 1814) and Starkie (A Practical Treatise of
on the subject of religious confession privilege – *Du Barré v Livette*.\(^6\) Peake’s conclusion that “a confession to a clergyman or priest … [is] not within the protection of the law”\(^7\) was followed as gospel by contemporary text writers and judges alike, without any apparent critical review of his conclusion from the case cited.

When Park J adopted Peake’s summary of the law in *R v Gilham*\(^8\) in 1828, he compounded the problem. For Park J’s generalisation of Peake’s conclusion against religious confession privilege\(^9\) as authority for the admissibility of evidence allegedly obtained under spiritual duress in *R v Gilham*, was thereafter cited as the leading authority against any religious confession privilege. Indeed, Park J’s obiter statement against religious confession privilege in *R v Gilham* endured as the most authoritative word upon the subject until Sir George Jessel’s several obiter comments against religious confession privilege in the English Court of Appeal between 1876\(^10\) and 1881.\(^11\) However Winckworth has suggested that Peake’s influence is in evident

\[^{6}\] *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 86.

\[^{7}\] Peake, op cit, Vol 1, p 175.

\[^{8}\] *R v Gilham* (1828) 1 Moody 186; 168 ER 1235.

\[^{9}\] *R v Gilham* (1828) 1 Moody 186, 198; 168 ER 1235, 1239.

\[^{10}\] *Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644.

\[^{11}\] *Wheeler v LeMarchant* (1881) 17 Ch D 675. Though Sir George Jessel MR’s decision in *Slade v Tucker* (1880) 14 Ch D 824 is sometimes also referenced as authority against religious confession privilege, the case contains no express reference to that privilege and simply denies that professional privilege extends to pursuivants of the Herald’s College.
even Sir George Jessel’s dictum in *Wheeler v LeMarchant* for he observes “how closely Lord Jessel [sic] followed Peake’s dictum”.12

This chapter will review these three influential textual and judicial conclusions against the primary materials from which they were drawn, to enable assessment of their validity as a true statement of the common law in the nineteenth century. The question of whether the errors identified invalidate the common law as thereafter developed, will be deferred till later in the thesis, after all of the other influences upon that common law development have also been considered. Thus insulated, the prevalent nineteenth century legal view of religious confession privilege at common law will then be weighed against the historical and canonical materials from which the common law grew – the subject of chapters two and three. However chapter one will establish that a reconsideration of the nineteenth century common law on religious confession privilege is in order.

**The error in *R v Sparkes***

*Du Barré v Livette*14 was a case about legal professional privilege. The issue was whether an interpreter used by defence counsel in a case of jewellery theft, could be subpoenaed to provide evidence of a conversation between Livette (one of the defendants) and his defence counsel. Lord Kenyon CJ gave judgement as follows:

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13 Unreported but referred to in *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 86.

14 *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96.
The relation between attorney and client is as old as the law itself. It is absolutely necessary that the client should unbosom himself to his attorney, who would otherwise not know how to defend him. In a case like the present, it is equally necessary that an interpreter should be employed ... everything said before that interpreter was equally in confidence ... he was the organ through which the prisoner conveyed information to the attorney, and ... it ought equally to remain locked up in the bosoms of those to whom it was communicated.\footnote{Du Barré v Livette (1791) 1 Peake 108, 110; 170 ER 96, 97.}

Straightforward enough, but the case has religious confession privilege interest because the plaintiff's counsel raised in his argument an unreported case one year previous (R v Sparkes), where "Mr Justice Buller on the Northern circuit"\footnote{Du Barré v Livette (1791) 1 Peake 108, 109; 170 ER 96, 97.} had permitted a confession of the crime indicted made by a papist prisoner to a Protestant clergyman "to be given in evidence on the trial", with the result that the prisoner "was convicted and executed".\footnote{Idem.} Plaintiff counsel adduced the case to show that confidentiality per se did not protect communications. Accordingly, since the interpreter was not the beneficiary of any recognised privilege, his evidence should be admitted. Because the Sparkes’ case report is not available, we can only conjecture at the reasons why Mr Justice Buller denied the claim of religious confession privilege made for Sparkes.\footnote{For example, like Sir Edward Coke who had prosecuted at Henry Garnet’s trial (Garnet’s case (1606) 2 Howell’s State Trials 217, 245-246), Buller J may have considered that the confession in R v Sparkes was not a “sacramental confession” since a papist cannot make a sacramental confession to anyone other than a Catholic priest. If that were true, the communication in R v Sparkes arguably might not qualify as a religious confession at law on theological grounds. However, in light of the firm position Buller J took on the narrow scope of legal professional privilege in Wilson v Rastall (1792) LTR 753; 100 ER 1283; (1775-1802) All ER 597 (discussed in more detail in chapter four, pp 151-153), it seems unlikely that Buller J was making a technical theological distinction.} What is more enduring, is that even though...
Lord Kenyon CJ distinguished *R v Sparkes* on its facts\(^{19}\) and said that the religious communication in that case was not essential, he still said he would “have paused before [he] admitted the evidence there admitted.”\(^{20}\) Clearly Lord Kenyon CJ had a different view of religious confession privilege than had Buller J only one year previously. Buller J appears to have considered that established authority prevented any extension of the attorney privilege.\(^{21}\)

Though it is surprising that Peake (who reported the *Du Barré v Livette* case, and who also authored evidence texts titled *Nisi Prius Cases* and *A Compendium of the Law of Evidence*) should prefer Buller J’s view, it appears that Peake’s opinion as the commentator has endured. For not only did Starkie\(^{22}\) and Park J\(^{23}\) expressly follow Peake, but a whole line of other commentators did so as well,\(^{24}\) until Sir George Jessel’s obiter opinions upon religious confession privilege in 1876 and 1881\(^{25}\) found

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\(^{19}\) Lord Kenyon CJ chose not to accept plaintiff counsel’s submissions on the basis that “this case materially differs from that cited” and the prisoner in the *Sparkes* case did not need to make that communication to enable his attorney to adequately defend him (*Du Barré v Livette* (1791) 1 Peake 108, 110; 170 ER 96, 97).

\(^{20}\) *Du Barré v Livette* (1791) 1 Peake 108, 110; 170 ER 96, 97.

\(^{21}\) Buller J later said there were “cases where it [was] much to be lamented” that privilege for confidences did not extend (*Wilson v Rastall* (1775-1802) All ER 597, 600). Since he noted that a confidential privilege in respect of communications to a medical person in the *Duchess of Kingston’s case* ((1776) 20 Howell’s St Trials 355) had been declined, it is evident that he considered he was following an established and broad rule of precedent that confined confidential privilege to “attornies” and their clients.


\(^{23}\) *R v Gilham* (1828) 1 Moody 186; 168 ER 1235.

\(^{24}\) See infra, pp 17-19.

\(^{25}\) While Sir George Jessel MR opined upon religious confession privilege in both *Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644 and *Wheeler v LeMarchant* (1881) 17 Ch D 675, the latter is more frequently cited.
greater favour with contemporary commentators. To demonstrate and make put the point beyond any doubt, Peake’s commentative conclusion that “a confession to a clergyman or priest ... [is] not within the protection of the law” was followed by Phillipps in the 1815 second and in the 1843 ninth editions of his Treatise on the Law of Evidence; Roscoe in the 1827 original text of his often revised Digest of the Law of Evidence (without variation in the conclusion either in the fifteenth edition in 1928 or the eighteenth edition of Roscoe’s Nisi Prius in 1907); Gresley in his Treatise on the Law of Evidence in 1827, Taylor in his Treatise on the Law of Evidence in 1848 and in the eleventh edition in 1920; Powell in the 1859 second

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26 The first edition of SM Phillipps' Treatise on the Law of Evidence in 1814 (published in London by E & R Brooke & J Rider, and by E Rider) interprets Du Barré v Livette as authority only for the proposition that “a person who acts as interpreter between an attorney and his client, stands precisely in the same situation as the attorney himself, and under the same conditions of secrecy” and does not generalise the conclusion as Peake had done as early as 1801. But when the second edition of Phillipps’ work was published a year later in 1815, the conclusion that privilege does not extend outside the legal profession had been generalised to read “[t]his privilege extends to the three enumerated cases of counsel, solicitor, and attorney; but it is confined to those cases alone” (Treatise on the Law of Evidence, 2nd ed, London, J Butterworth and Son, 1815, p 104).


28 Phillipps, SM, Treatise on the Law of Evidence, 2nd ed, London, J Butterworth and Son, 1815, p 104, where he wrote simply that “this privilege extends to the three enumerated cases of counsel, solicitor and attorney [but not elsewhere, where] ... it is much to be lamented that the law of privilege is not extended”. His first edition in 1814 had not so generalised the precedential rule. See note 26 supra.


30 Roscoe, H, A Digest of the Law of Evidence, London, Joseph Butterworth and Son, 1827, p 72, where he said that “physicians, surgeons and divines are bound to disclose [confidential] communications”.

31 Hawke, A, Roscoe’s Digest of the Law of Evidence, 15th ed., London, Stevens and Sons & Sweet and Maxwell Ltd, 1928, p 178, where it was said, “Other professional persons, whether physicians, surgeons or clergymen, have no such privilege”.

32 Powell, M, ed, Roscoe’s Nisi Prius, 18th ed, London, Stevens and Sweet and Maxwell, 1907, p172, where it was said, “So physicians, surgeons and divines are not privileged from compulsive disclosures of communications, howsoever confidential”.

33 Gresley, RN, A Treatise on the Law of Evidence, Philadelphia, Nicklin PH & Johnson T, 1837, p 281, where Gresley said that “the still more sacred confidence which criminals often repose in their spiritual adviser receives no recognised protection”.

34 Taylor, JP, A Treatise on the Law of Evidence, London, A Maxwell & Son, 1848, Vol 1, p 618, where he said, “[t]hus clergymen and medical men are bound to disclose any information, which by acting in their professional character they have confidentially acquired”, though he does discuss the conflicts which this strict rule invokes in its contest with the canonical rules of both the Catholic and Anglican churches (ibid, pp 619-621).
edition of his *The Principles and Practice of the Law of Evidence*,36 (and by W Blake Odgers in the 1910 ninth edition called *Powell’s Principles and Practice of the Law of Evidence*37); Hageman in his 1889 *Privileged Communications as a Branch of Legal Evidence*;38 and Phipson in the 1892 first edition of his *Law of Evidence*39 (though Phipson later reconsidered his research when he edited the eleventh edition of Best’s *Law of Evidence* in 191140); but Peake himself was cited as one of the authorities in Phillipps’ 181541 and 184342 editions. Peake’s decision to cite the *Duchess of Kingston’s case* as one of the authorities for the absence of both clerical and medical privileges43 (though the *Duchess’s case* only dealt with medical privilege), seems also to have profoundly influenced the first edition of Roscoe’s Digest in 182744 and the second edition of Powell’s *Principles and Practice* in 1859,45 since those authors

35 Matthews, JB & Spear, GF, *A Treatise on the Law of Evidence by His Honour the Late Judge Pitt Taylor*, London, Sweet & Maxwell Ltd, 1920, Vol 1, pp 622-624, where His Honour’s statement of the law is not varied at all and his discussion of canon law is merely reworded in part with no effective change in meaning.

36 Powell, E, *The Principles and Practice of the Law of Evidence*, London, John Crockford, 1859, pp 79-80, where Powell says, “[t]he rule of privileged communications ... does not extend to communications made confidentially to stewards, medical men or clergymen”, though he does note judicial “indisposition to receive communications made to clergymen as such”.


38 Hageman, JF, *Privileged Communications as a Branch of Legal Evidence*, Littleton Colorado, Fred B Rothman & Co, reprint of the 1889 edition, pp 122-125, where he says “[t]he clerical minister, or priest ... is not privileged as attorneys and legal advisers are ... in the absence of statutory protection, clergymen are bound to disclose any information acquired by them confidentially in their professional character”.

39 Phipson, SL, *The Law of Evidence*, London, Stevens and Haynes, 1892, p 109, where he says, “[p]rofessional privilege is strictly confined to the case of legal advisers; and does not extend to that of doctors, priests, confidential friends, clerks, stewards or pursuivants”.


cite the Duchess’s case as their only or principal authority (respectively) for the absence of a clerical privilege.

Peake’s indirect influence on generations of subsequent judges and commentators cannot be fully calculated, though since his text is cited, he is certainly partly responsible for Park J’s proposition that R v Sparkes conclusively decided that “a minister is bound to disclose what has been revealed to him as a matter of religious confession”.

The error in R v Gilham

Richard Gilham was “tried and convicted ... in 1828 ... for the wilful murder of Maria Bagnall ... but [sentence] was respited ... in order that the opinion of the Judges might be taken whether the various confessions of the prisoner, after his interviews with the chaplain, ought ... to have been received in evidence”. Gilham and Maria Bagnall had both been servants in the house of Mrs Coxe at Bath. Gilham had been interviewed on various occasions about the murder, including an examination at the Coroner’s inquest into Maria Bagnall’s death. The day after he was arrested, he admitted having stolen goods from Mrs Coxe, his employer, but steadfastly denied the murder, though he told the gaoler that he thought he would be hanged for his

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47 R v Gilham (1828) 1 Moody 186, 198; 168 ER 1235, 1239.

48 R v Gilham (1828) 1 Moody 186; 168 ER 1235.

49 Idem.
thefts. The gaoler told him not to “add lies to crime”,50 expressing his firm opinion that Gilham was guilty of Maria Bagnall’s murder as well, and suggesting that Gilham might find solace in reading the Bible and in talking with the chaplain of the gaol as a spiritual advisor.

At length, Gilham accepted the gaoler’s invitation to meet the chaplain, and two extensive interviews with him on the same day followed. In particular, the chaplain emphasised to Gilham the need for complete repentance, which entailed the confession of all his sins; the need to repair any injury done to his fellow man and to the laws of his country; and his belief that Gilham had done “the dreadful deed” and could not be reconciled to God without confession.

After the chaplain departed, and despite a very clear caution from the gaoler that he was obliged to pass on anything he learned from Gilham to the mayor and magistrates, Gilham confessed his commission of Maria Bagnall’s murder to the gaoler. The following day, the mayor saw Gilham in the gaoler’s room and said that he believed Gilham wanted to tell him something. When Gilham affirmed that he did, the mayor cautioned him that anything he said “would probably be given in evidence against you”,51 but Gilham confessed the murder anyway. It was assumed in all the reported argument and in the judgements that the chaplain was a clergyman, and the argument revolved around the defence contention that the conviction could not be sustained because the confession had been “illegally obtained”.52 Because Gilham’s confessions “were ... made under the influence of hopes and terrors created in the

50 R v Gilham (1828) 1 Moody 186, 187; 168 ER 1235.
51 R v Gilham (1828) 1 Moody 186, 191; 168 ER 1235, 1237.
52 R v Gilham (1828) 1 Moody 186, 193; 168 ER 1235, 1238.
prisoner’s mind, both by the gaoler and the chaplain; they were ... not voluntary and consequently were inadmissible”. The prosecution countered that even if the confession made to the gaoler was “not receivable in evidence, still the confession made to the mayor was receivable” since it had been preceded by a clear caution.

It is evident that no clergyman or priest received a confession from Gilham, and neither Gilham nor such priest sought to assert a religious confession privilege in respect of any confessional communication. All the argument in the case instead revolved around the question of whether the spiritual advice given by the chaplain amounted to an illegal inducement which invalidated the probative value of Gilham’s confessional evidence.

While Mr Justice Littledale at first instance had thought that none of the mayor’s warnings to Gilham that his confession might be used against him “could do away with the effect which the chaplain had produced in his mind”, Gilham’s case “differed from those cases where a confession [had] ... been made under circumstances which prevented its being received in evidence”. Counsel for the prisoner sought to have the conviction set aside because the “confession or set of confessions [had been] illegally obtained”, and he sought to favourably compare the spiritual inducements used to elicit the confessions in this case with other cases,

53 Idem.
54 R v Gilham (1828) 1 Moody 186, 193; 168 ER 1235, 1237.
55 Idem.
56 R v Gilham (1828) 1 Moody 186, 193; 168 ER 1235, 1237.
57 R v Gilham (1828) 1 Moody 186, 193; 168 ER 1235, 1238.
where the “undue means” used to elicit confession had invalidated that evidence, though that undue means involved only “the impression of hope or fear”.58

The case thus concerned the need for a more precise definition of what inducements would render general confessional evidence inadmissible. Though the inducements relied upon in the argument were admittedly spiritual in nature, and while Richard Gilham may have felt that he confessed for a religious purpose, no religious confession privilege was asserted nor decided upon. The one reference to the law of religious confession privilege arose in Park J’s commentary upon R v Radford,59 where Best CJ had “refused to allow the clergyman to state the confession”.60

Disagreeing with Best CJ’s refusal to allow confessional evidence to be given in R v Radford, Park J then opined – and it is this opinion that has been cited as authority for the absence of any religious confession privilege in English common law:

And his lordship could not have excluded this evidence because it was a breach of confidence in the clergyman to give it, because a minister is bound to disclose what has been revealed to him as matter of religious confession, Rex v Sparkes, cited Peake, N.P.C. 79, 1 Starkie on Evidence, 105.61

Park J’s reliance upon the Peake and Starkie analysis of Buller J’s decision in R v Sparkes led him into error. That error does not originate in the statement of what

58 R v Gilham (1828) 1 Moody 186, 194; 168 ER 1235, 1238.
59 Unreported and only referenced in the Gilham report as an 1823 decision of Best CJ on circuit at the Exeter Summer Assizes.
60 R v Gilham (1828) 1 Moody 186, 197; 168 ER 1235, 1239.
61 R v Gilham (1828) 1 Moody 186, 198; 168 ER 1235, 1239.
was decided in *R v Sparkes*, but in Peake and Starkie’s failure to add that Buller J’s
decision in that case had been disapproved by Kenyon CJ in *Du Barré v Livette*, the
only place where *R v Sparkes* had been mentioned at all.

Peake’s failure to identify the difference between Buller J (*R v Sparkes*, unreported)
and Kenyon CJ (*Du Barré v Livette*, reported) is the more difficult to understand since
the only report available about either case was the report made of *Du Barré v Livette*
by Peake himself. Perhaps it can be fairly observed that Peake preferred the
unreported conclusion of Buller J in *R v Sparkes* about religious confession privilege
when he heard it cited by counsel in argument before Kenyon CJ in *Du Barré v
Livette*, before Kenyon CJ rejected it. If that is a fair observation, it is surely ironic
that the reporter’s analysis of the common law where religious confession privilege is
concerned, has prevailed over that of the Chief Justice of the day. But in his
enduring though brief reference to Peake and Starkie on the point in his judgement in
*R v Gilham*, Park J apparently knew none of this. He simply relied on Peake’s
summary of the law.

The first edition of Peake’s *A Compendium of the Law of Evidence* in 1801 cites
only *R v Sparkes*, an unreported case in 1790 and the *Duchess of Kingston’s case* (a
1776 case where the Duchess asserted that her communications as a patient with
her physician were privileged) as authority for his conclusion that “a confession to a
clergyman or priest ... [is] not within the protection of the law”.

Starkie’s 1824 *Practical Treatise on the Law of Evidence* cites Peake’s *Nisi Prius Cases* (referred to by Park J), *Butler v Moore* and *Vaillant v Dodemead* as authority for his proposition that “it has ever been held that a minister is bound to disclose that which has been revealed to him in a matter of religious confession”. The authors of his eighth American and fourth London edition in 1860, citing only the additional authority of *R v Gilham*, make no change in Starkie’s original text.

This blind following of earlier commentators without reference back to the primary case materials has misled later commentators and the judges who have relied on them into the mistaken view that religious confession privilege had no support whatever in common law. An accurate understanding of the decision in *R v Sparkes* and its limited value as precedential authority is an important step in disabusing modern lawyers of this error.

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67 *Butler v Moore* (1804-1806) 2 Sch & Lef 249. *Butler v Moore* is discussed in chapters four (pp 149-150, 159) and five (pp 219, 221) where its dismissal as precedential authority by WM Best (A Treatise on the Principles of Evidence, London, S Sweet, 1849, pp 459-460) and Mayor Clinton as the Judge in an 1813 US case (*The People v Phillips* (1813) NY Ct. Gen. Sess., reprinted in “Privileged Communications to Clergymen”, *The Catholic Lawyer* 1 (1955) 198) on account of its marked anti-Catholic bias, are referenced.

68 *Vaillant v Dodemead* (1743) 2 Atk 524; 26 ER 715. This case about legal professional privilege with only generalised comment confining privilege to “persons of the profession, as counsel, solicitor or attorney” is discussed in detail in chapter four, p 140.


The error in *Wheeler v LeMarchant*

The issue in *Wheeler v LeMarchant* was whether legal professional privilege extended to protect communications between a solicitor and his client’s surveyor. That submission was denied on the simple grounds that while germane to the subject matter of the litigation, the written exchanges before the dispute arose were not communications by or with a “representative ... employed as an agent ... to obtain the legal advice of the solicitor”. Sir George Jessel MR’s full obiter quotation cited by both Powell’s 9th edition and Taylor’s 11th reads as follows:

[T]he principle [protecting confidential communications] is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice necessary even for the protection of his life, or of his honour, to say nothing of his fortune. There are many communications which are quite unprotected, but which must be made because, without such communications being made, the ordinary business of life cannot be carried on. The communication made to a medical man, whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, is not protected. All communications made to the priest in the confessional, on matters perhaps considered by the penitent to be more important even than

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71 *Wheeler v LeMarchant* (1881) 17 Ch D 675; 50 LJ Ch 793; [1881-5] All ER 1807.

72 *Wheeler v LeMarchant* [1881-5] All ER 1807, 1811 per Cotton LJ.


the care of his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature on which advice is sought, with respect to a man's honour or reputation, are not protected.

Therefore it must not be supposed that there is any principle which says that every confidential communication which, in order to carry on the ordinary business of life, is necessary to be made, is protected. The protection is of a very limited character. It is a protection in this country restricted to the obtaining the assistance of lawyers as regards the conduct of litigation, or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things necessary in the shape of communication to the legal advisers are protected from production or discovery, in order that that legal advice may be obtained safely and sufficiently.75

No authority was cited anywhere in Sir George Jessel's judgement. Two cases were cited in Brett LJ's judgement when, with Cotton LJ, he concurred in the result, but neither is relevant to religious confession privilege. However, the report indicates that Anderson v Bank of British Columbia76 was referred to in argument. This was a case in the Court of Appeal over which Sir George Jessel presided as Master of the Rolls six years earlier. Since he cited authority for his similar obiter denial of religious confession privilege in Anderson v Bank of British Columbia, it is appropriate to review his reasoning there to determine whether it supports his restated denial of religious confession privilege in Wheeler v LeMarchant.

75 Wheeler v LeMarchant [1881-5] All ER 1807, 1809.

76 Anderson v Bank of British Columbia (1876) LR 2 Ch D 644; [1874-80] All ER 396. Anderson is also cited by some commentators as authority for the non-existence of religious confession privilege at common law (for example, GD Nokes ("Professional privilege" (1950) 66 LQR 88, p 98 note 56 who does not accept the proposition outright). But it is not mentioned at all by Phipson, Odgers rewriting Powell, or any of the editions of Cross here cited.
In *Anderson v Bank of British Columbia*, the English Court of Appeal declined a submission that legal professional privilege extended to cover information prepared for the client by its overseas bank after litigation had started even though it was argued that the client's request for information was a direct and necessary result of his solicitor's request for the information. While it was accepted that the privilege extended "to all communications made by the client to the solicitor through intermediate agents", and though the client submitted that his London bank was in fact acting as his solicitor's agent for the purposes of collecting the requisite information from Canada, the court did not accept that the bank "in transmitting that information, was discharging a duty which properly devolved upon the solicitor". For Mellish LJ, "the object here was, not to obtain evidence, but to learn what the facts were, in order to know whether the claim should be resisted". The statements confirm the English Court of Appeal's late nineteenth century conviction that evidential privileges should be construed narrowly so as to ensure that all the relevant evidence might be available for consideration.

Sir George Jessel MR quoted only Lord Cottenham's decision in *Reid v Langlois* before stating that the common law "has not extended that privilege, as some foreign laws have, to the medical profession, or to the sacerdotal profession". Lord Cottenham had said:

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77 *Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644; [1874-80] All ER 396.

78 *Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644, 649 per Jessel MR.

79 Ibid, p 650 per Jessel MR.

80 Ibid, p 652 per Jessel MR.

81 Ibid, p 655.

82 *Reid v Langlois* (1849) 1 Mac & G 627; 41 ER 1408.

83 *Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644, 650. In 1880, Sir George Jessel MR similarly dispatched an argument that a "Puirsuivant" of the Herald's College acting as a confidential
Now the argument turned on this, that although a party may communicate with his legal advisor, and that production of the documents arising out of that communication will be protected, yet if the message is sent through a third person in writing it is not protected. It is obvious that no such distinction as this can be maintained; the object is to protect the party who wishes to take the advice of professional men.84

Sir George Jessel MR elaborated “that privilege” further:

We know that in some foreign countries communications made to a medical man are privileged upon the ground that it is desirable that a man shall be perfectly free in his communication with his medical man as that he shall be free in his communications with his lawyer. That has not been recognised in this country. 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. When Lord Cottenham says “professional men” he means members of the legal profession and nothing else – “and he would be

genealogist in supporting a formal protest against a pedigree was not acting in the same capacity as a barrister or solicitor. Indeed, he put the matter quite simply in terms reflective of his reasoning in Anderson when he said “professional advice in England is confined to legal advice” (Slade v Tucker (1881) LR 14 Ch D 824, 827).

84 As quoted by Sir George Jessel MR in Anderson v Bank of British Columbia (1876) LR 2 Ch D 644, 650.
prevented from taking such advice if there was the hazard of having it revealed on entering into a contest with an opponent.\(^{85}\)

Of the four judges who heard the appeal in *Anderson v Bank of British Columbia* in the Court of Appeal,\(^{86}\) only Sir George Jessel MR and James LJ commented on the common law as to the state of religious confession privilege.\(^{87}\) When one reviews the cases referred to in argument\(^ {88}\) and more particularly those referred to in all seven judgements (that is, in both *Anderson v Bank of British Columbia* and *Wheeler v LeMarchant*), there is no reference to any case that dealt directly with religious confession privilege.\(^ {89}\) All of the cases discussed were about the metes and bounds of legal professional privilege. It does not seem that any of these judges considered that religious confession privilege might have been a separate and discrete head of privilege from that which Lord Cottenham had discussed as the privilege of professional men.\(^{90}\)

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85 *Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644, 650-651.

86 Jessel MR, James LJ, Mellish LJ and Baggally JA.

87 The other two judges were Brett and Cotton LJ.

88 In *Anderson v Bank of British Columbia*, those cases were *Greenough v Gaskell* (1833) 1 My & K 98; *Reid v Langlois* (1849) 1 Mac & G 627; 41 ER 1408; *Curling v Perring* (1835) 2 My & K 380; 39 ER 989; *Steele v Stewart* (1843) 1 Ph 471; 41 ER 711; *Lafone v Falkland Islands Company* (1857) 4 K & J 34; 70 ER 14, 17; *Ross v Gibbs* (1869) Law Rep 8 Eq 522; *Woolley v North London Railway Company* (1869) Law Rep 4 CP 602; *Casey v London Brighton and South Coast Railway Company* (1870) Law Rep 5 CP 146; *Skinner v Great Northern Railway Company* (1874) Law Rep 9 Ex 298; and *Chartered Bank of India v Rich* (1863) 4 B & S 73; 32 LJ (QB) 300; 122 ER 387.

89 The cases referred to earlier in this chapter (*R v Sparkes, Du Barré v Livette* and *R v Gilham*), despite their errors, are not mentioned and neither are *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528; *R v Wild* (1835) 1 Moody 452; 168 ER 1341; *R v Griffin* (1853) 6 Cox Cr Cas 219 and *R v Hay* (1860) 2 Foster & Finlason 4; 175 ER 933 which are treated in subsequent chapters and more directly approach the point.

90 In chapters two and three, I document the origins of religious confession privilege long before legal professional privilege was mooted. A significant portion of chapter four will identify the confusion that has resulted from a failure to recognise the separate existence of the two privileges despite some superficial similarities.
The context of Lord Justice James’ obiter comment about religious confession privilege, was again the need to define legal professional privilege. He observed that the established legal professional privilege rule had not been changed by Vice-Chancellor Stuart’s “casual and hasty generalization [in *Ross v Gibbs*]91 not called for by the facts of the case”.92 In *Ross v Gibbs*, the Vice-Chancellor was submitted to have licensed the argument “that any communication made by a person with a view to litigation, whoever that person is, must be protected”.93 Lord Justice James’ recoil was:

> If the rule had been as was supposed to be laid down in that case, all that is said in text books by learned authors with regard to the origin of the principle, and with regard to the justification of the privilege – all that is said about its being confined to lawyers and not extending to doctors and priests ... the whole of that would be, to my mind, puerile nonsense.94

With the benefit of hindsight, Lord Justice James’ observation appears ironically as a “hasty generalization” in its own right. For this comment about religious confession privilege was unnecessary in a case about the metes and bounds of legal professional privilege when litigation was in prospect, and he cited no authority. And the irony is deeper than that. For neither Vice-Chancellor Stuart nor Lord Cottenham had any idea that they were generalising about religious communications privilege when they wrote their respective judgements in *Reid v Langlois*95 and *Ross v*

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91 *Ross v Gibbs* (1869) Law Reports 8 Eq 522.
92 *Anderson v Bank of British Columbia* (1876) Law Reports 2 Ch D 644, 656.
93 Idem.
94 Idem.
95 *Reid v Langlois* (1849) 1 Mac & G 627; 41 ER 1408.
Certainly these two “casual and hasty generalizations [were] not called for by the facts of [the Anderson v Bank of British Columbia] case” and equally represent a departure from the common law where religious confession privilege is concerned. Though they concurred in the result in Anderson v Bank of British Columbia, neither Mellish LJ nor Baggallay JA saw any similar need to generalise. Wheeler v LeMarchant is the decision of Sir George Jessel MR most often cited as authority for the absence of a religious confession privilege at common law after 1890. For example, when Phipson wrote his original text in 1892, he wrote:

Professional privilege is strictly confined to the case of legal advisers; and does not extend to that of doctors, priests, confidential friends (Wheeler v LeMarchant 17 Ch.D. 681), clerges, stewards, or pursuivants of the Herald’s College employed to oppose enrolment of a pedigree (Slade v Tucker, 14 Ch.D. 824). (Italics original)

However, when he added full notes to his eleventh edition of Best’s Law of Evidence, (including comments on Wheeler v LeMarchant) to the extended coverage of Best’s original text which had doubted the common interpretive denial

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96 Ross v Gibbs (1869) Law Rep 8 Eq 522.
97 Anderson v Bank of British Columbia (1876) Law Reports 2 Ch D 644, 656 per James LJ.
98 Idem.
of religious confession privilege, Phipson was more guarded. He also left intact both Best’s doubt of the standard denials of the privilege and Best’s certainty that there was a religious confession privilege “previous to the Reformation”. On this occasion, Phipson wrote of *Wheeler v LeMarchant*:

> In 1881, ... where the question was whether letters between solicitors and surveyors were privileged, and the court held that they were not, with the exception of those prepared confidentially after dispute, Jessel, M.R., observed that “the principle protecting confidential communications is of a very limited character”, and that, amongst others, “communications made to a priest in the confessional, in matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected”.

However, Phipson’s rather more direct statement in the 5th edition of his own work, suggest that he believed strong obiter statements in *Normanshaw v Normanshaw*, *Gedge v Gedge* and *Wheeler v LeMarchant* put the extinction of religious confession privilege beyond doubt. In that work, he wrote that “the privilege attaching

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103 Ibid, pp 458-460.
108 *Normanshaw v Normanshaw* (1893) 69 LTR 468. This case is discussed in chapters four (pp 159 and 162) and five (pp 184-187).
109 *Gedge v Gedge* cited only from 1909 newspaper reports in Phipson (*Globe*, 13 July 1909 and *Times* 14 July 1909), “where a claim made by a cleric to withhold a communication to his Bishop was disallowed” (Phipson, op cit, Book II, p 188).
to confidential professional disclosures is confined to the case of legal advisers and does not protect those made to clergymen"\textsuperscript{110} despite what he had written the same year in his 11\textsuperscript{th} edition of Best’s work which is quoted above.

The editors of the 13\textsuperscript{th} edition of his work in 1982\textsuperscript{111} seem equally convinced in their straightforward assertion that “[t]he privilege does not protect disclosures made to clergymen”,\textsuperscript{112} citing again \textit{Normanshaw v Normanshaw}, \textit{Gedge v Gedge} and \textit{Wheeler v LeMarchant}. However, like Phipson himself, they do not acknowledge Jeune P’s prefatory comments in \textit{Normanshaw v Normanshaw} “that each case of confidential communication should be dealt with on its own merits [though] ... in the present instance, he saw no reason why the witness should not speak as to his conversation with the respondent”.\textsuperscript{113}

While Odgers, who rewrote and rearranged \textit{Powell’s Principles and Practice of the Law of Evidence}, in the ninth edition,\textsuperscript{114} notes Best, Stephen and Taylor’s objections to the simple assertion that “[c]ommunications to clergymen and priests are strictly not privileged”,\textsuperscript{115} he concludes his commentary with a full quote from Jessel MR in \textit{Wheeler v LeMarchant} dismissing the privilege.\textsuperscript{116} However, he does not include any

\begin{itemize}
\item \textsuperscript{110} Ibid, Book II, p 188.
\item \textsuperscript{112} Ibid, para 15-09. However, these authors concede idem that “there exists a strong body of opinion against the enforcement of the rule”, citing \textit{R v Griffin} (1853) 6 Cox Cr Cas 219; \textit{Broad v Pitt} (1828) 3 Carr & P 518; 172 ER 528; \textit{R v Hay} (1860) 2 Foster & Finlason 4; 175 ER 933; \textit{Re Keller} (1887) 22 LR Ir 158; \textit{Tannian v Synott} (1903) Ir LT 275 and \textit{Ruthven v De Bour} (1901) 45 Sol J 272.
\item \textsuperscript{113} \textit{Normanshaw v Normanshaw} (1893) 69 LTR 468, 469.
\item \textsuperscript{114} Odgers, WB, \textit{Powell’s Principles and Practice of the Law of Evidence}, 9\textsuperscript{th} ed, London, Butterworths, 1910.
\item \textsuperscript{115} Ibid, p 240.
\item \textsuperscript{116} Idem. The full quote is recorded in context supra at pp 25-26.
\end{itemize}
indication that this obiter statement was made in a case about extending legal professional privilege to surveyors. Taylor’s 1928 authors\textsuperscript{117} similarly cite the same full quote from Jessel MR in \textit{Wheeler v LeMarchant}\textsuperscript{118} to justify their statement that “clergymen and medical men are bound to disclose any information which by acting in their professional character they have confidentially acquired”\textsuperscript{119} without noting its obiter context.

Both \textit{Cross on Evidence}'s seventh English edition\textsuperscript{120} and its sixth Australian edition\textsuperscript{121} cite Sir George Jessel MR’s “dictum” in \textit{Wheeler v LeMarchant} “against the existence of the privilege”,\textsuperscript{122} though with some variation in the strength of the statements against the existence of religious confession privilege. While the 1990 English version of the text says that “the opinion of all the text-writers … is against the existence of any privilege”,\textsuperscript{123} and the 2000 Australian edition bluntly states “[t]here is no such privilege at common law”,\textsuperscript{124} both note that it “must have existed at the time of the Reformation”.\textsuperscript{125}

\begin{flushright}
\textsuperscript{117} Matthews, JB and Spear, GF, \textit{A Treatise on the Law of Evidence by His Honour the late Judge Pitt Taylor}, 11\textsuperscript{th} ed, London, Sweet & Maxwell Limited, 1920.
\textsuperscript{118} Ibid, Vol 1, p 622.
\textsuperscript{119} Idem.
\textsuperscript{121} Heydon, JD, \textit{Cross on Evidence} 6\textsuperscript{th} Australian ed, Butterworths, Sydney, Adelaide, Brisbane, Canberra, Melbourne, Perth, 2000.
\textsuperscript{122} Cross, Sir R and Tapper, C, op cit, p 447; Heydon, JD, op cit, p 743.
\textsuperscript{123} Cross, Sir R and Tapper, C, op cit, p 447.
\textsuperscript{124} Heydon, JD, op cit, p 743.
\textsuperscript{125} Cross, Sir R and Tapper, C, op cit, p 447; Heydon JD, op cit, p 743.
\end{flushright}
As will be seen, Nokes’ gloss on Sir George Jessel MR’s dictum in *Wheeler v LeMarchant* as one of many cases “extending over 250 years which suggest or assert that no privilege exists”\(^{126}\) is much more accurate. He also points up the irrelevance of many of the cases that are cited against the privilege.\(^{127}\) McNicol has similarly cited Sir George Jessel MR’s dictum behind her observation that there is “a paucity of judicial authority to support the claim that there is no privilege arising out of the priest-penitent relationship”.\(^{128}\)

Sir George Jessel MR’s often quoted denial that a religious confession privilege has ever existed in English law, is thus questionable.

**Conclusion to chapter one**

The primary materials underlying the nineteenth century commentary on the law of evidence have not been adequately considered. When the facts of the decisions in *R v Sparkes* (1790) as reported in *Du Barré v Livette* (1791), *R v Gilham* (1828) and *Wheeler v LeMarchant* (1881) are reviewed against the denial of any religious confession privilege attributed to them by the majority of the text writers, it is difficult to accept that they justify that authority. It is similarly difficult to accept the bald proposition that either Buller J’s opinion in *R v Sparkes* or Park J’s statement of his understanding of the law in *R v Gilham* could have changed the pre-existing law (whatever that was) since Chief Justice Kenyon contemporaneously disagreed with Buller J and Park J was clearly mislead by Peake and Starkies’ commentary. But Sir George Jessel MR’s obiter statements in *Anderson v Bank of British Columbia* (1876)\(^{1326}\)

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\(^{126}\) Nokes, GD, “Professional Privilege”, 66 LQR 88, 97-98.

\(^{127}\) Ibid, pp 96-97.

and *Wheeler v LeMarchant* (1881) stand in a different category since they can be interpreted as his simple assertion of what the common law of England had become, regardless of the past. Before that interpretation can be weighed, it is necessary to identify what the law relating to religious confession privilege was in the past – and since that law originated in custom, the next part of the thesis will closely review the relevant custom in its social and canon law historical context.
CHAPTER TWO

RELIGIOUS CONFESSION PRIVILEGE IN HISTORICAL CONTEXT

Introduction

The purpose of chapters two and three of the thesis is to demonstrate with historical and canonical evidence, that religious confession was practised and privileged in law before the Magna Carta was signed in 1215. It was still practised, privileged and recognised in legal practice in the seventeenth century when Sir Edward Coke published his Second Part of the Institutes.1 This part of the thesis will therefore attempt to rebut Wigmore’s assertion that:

[the only available data [in favour of pre-Reformation common law religious confession privilege] appear to be an indecisive incident in the Jesuit trials under James I, and a statute of much earlier date and ambiguous purport, together with the general probabilities to be drawn from the recognition of Papal ecclesiastical practices prior to Henry VIII.2

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Chapter two will focus on the historical materials and chapter three on the significance of the canonical law and practice. However, to enable modern lawyers to correctly understand the historical and canonical evidence that will be cited, chapter two will begin by reminding readers that some modern ideas must be set aside to understand historical evidence. Specifically, the modern idea that the church and state do and must always live in separate and distinct domains, does not help a modern lawyer understand the significance of historical and canonical materials. Similarly, the modern idea that the common law is what one finds in the cases, does not assist understanding before those cases were reported at all or before they were reported in a consistent and scholarly way. Lawyers in different times have understood the relationship between case law and statute law as common law in different ways. Custom and practice played a much larger role in the formation of common law before there were extensive law reports.

The evidence then considered will include Sir Edward Coke’s recognition of religious confession privilege in his *Second Part of the Institutes*\(^3\) on the strength of the Statute Articuli Cleri in 1315;\(^4\) the validity of his assertion that treason was an exception to the privileges of the church known as “sanctuary and abjuration”, “benefit of clergy” and “privilege of confession”; that “benefit of clergy” and “privilege of confession” were separate ‘privileges’; and the facts, reasoning and decision in *Garnet’s case* in 1606\(^5\) when religious confession privilege was defensively asserted in a highly antagonistic environment.

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\(^3\) Coke, op cit, p 629.

\(^4\) 9 Edward II St.1.

\(^5\) *Garnet’s case* (1606) 2 Howell’s State Trials 217.
Chapter three will consider the origins of the seal of confession in canon law and its recognition in secular law; King Henry VIII’s retention of the existing established religious doctrines and practices (including the seal of confession with penalty) despite his religious reformation; and the historical and current influence of canon law upon secular law where religious confession privilege is concerned. In particular it will weigh the conservative opinions of Bursell\(^6\) and others\(^7\) to the effect that ecclesiastical law is still “a part of the general law of [England]”\(^8\) against the more liberal implication of Doe\(^9\) and others\(^10\) that any residual effects of canon law may now be discounted when they collide with the dictates of secular policy. Despite his pessimistic conclusion that the common law protection of religious confession privilege was probably lost during the centuries of Catholic persecution which followed the English Reformation, Nolan’s arguments in favour of the existence of religious confession privilege in common law until at least after Coke, will be reviewed for contemporary relevance.\(^11\)

I conclude chapters two and three with the finding that religious confession was practised and privileged in legal practice before and after the English Reformation.

Accordingly, Wigmore’s discounting of the available historical materials documenting


\(^8\) Bursell, op cit, p 108.


religious confession privilege was an inaccurate gloss upon them. More evidence was available than *Garnet’s case*¹² which he characterised as “an indecisive incident in the Jesuit trials under James I”¹³ and the Statute Articuli Cleri,¹⁴ which he said was of “ambiguous purport”.¹⁵ His mere acknowledgment of the “general probabilities to be drawn from the recognition of Papal ecclesiastical practices prior to Henry VIII”¹⁶ is also the reasonable subject of criticism. The seal of confession as a sacrament of the Catholic Church was never, as Wigmore asserts, only an “ecclesiastical practice”,¹⁷ and endures in established Anglican canon law to the present day.¹⁸

The problem with modern perspective

Both Milsom¹⁹ and Helmholz²⁰ say that modern lawyers frequently misunderstand historical legal practice and institutions because they assume an “anachronistic viewpoint”.²¹ They ask “unreal questions ... [that are] preoccupied with today’s details”²² that would have no meaning to a medieval English layperson, let alone a

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¹² *Garnet’s case* (1606) 2 Howell’s State Trials 217.


¹⁴ 9 Edward II St.1.

¹⁵ Idem.

¹⁶ Wigmore, op cit, Vol 8, p 869.

¹⁷ Idem.


²¹ Milsom, op cit, p xii; Helmholz, op cit, p 101.

²² Idem.
medieval English lawyer, if there were such a person. Two particular modern patterns of thinking have to be recognised if the origins and place of religious confession privilege in English common law are to be correctly understood. Those patterns are the modern notion that church and state are or should be legally separate, and the idea that the common law is that body of reported judicial decisions, separate from the statutes, which provides guidance as to what the courts will do in the future when faced with similar cases.

**Church and state**

To someone living in the twelfth century in England, the very concept of the separation between church and state is hard, if not impossible, to comprehend. In that hypothetical person’s mind, there was no separation between the church and the state and the two together constituted the governing influence in life. They presided at birth and marriage, and they pronounced upon the disposal of goods following death. The idea of any separation between church and state “introduces a sort of polytheism utterly repugnant to medieval thought”. It thus requires a change in thinking if twenty-first century lawyers are to understand the role of the church in medieval England. The idea that ecclesiastical courts had final legal jurisdiction in

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23 While Paul Brand traces the origin of the English legal profession to the twelfth century (*The Origins of the English Legal Profession*, Oxford, UK and Cambridge, USA, Blackwell, 1992), he is not convinced that such lawyers as there were could be described as anything more than “narrators” (ibid, p 85) in that century. It is not until the late thirteenth century in the reign of Edward I when he finds “controls on practice” (ibid, p 115) and “the education of professional attorneys” (ibid, p 119) that he is satisfied with the use of the term, “the legal profession”.

24 Plucknett says that it is Machiavelli (1469-1527) “who gave us the word ‘state’ and filled it with the content we now associate with it” (*Plucknett, TFT, A Concise History of the Common Law*, 5th ed, London, Butterworths, 1956, p 41).


26 Plucknett, op cit, p 40.
questions of marriage, bigamy, divorce and adultery, estate administration, crime and contract, is unfamiliar to us. Pollock and Maitland helped explain this involvement of the church in secular matters when they wrote:

Every layman, unless he were a Jew, was subject to ecclesiastical law. It regulated many affairs of his life, marriages, divorces, testaments, intestate succession; it would try and punish him for various offences, for adultery, fornication, defamation; it would constrain him to pay tithes and other similar dues; in the last resort it could excommunicate him and then the state would come to its aid. Even the Jews ... were ... within the sphere of ecclesiastical legislation and subject to some of the processes of the spiritual courts.

Though complete ecclesiastical jurisdiction in criminal matters endured beyond the twelfth century only in respect of the clergy, the essential and continuing premise for the church interest in criminal matters arose out of its acknowledged jurisdiction over matters of sin. Where matters arising from marriage were concerned,

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27 Holdsworth says that the church “claimed criminal jurisdiction in all cases in which a[n ecclesiastical] clerk was the accused”; contractual jurisdiction where its justification was the need “to enforce all promises made with oath or pledge of faith”; and “jurisdiction over matrimonial and testamentary causes” (op cit, p 614), which last jurisdictions were not really removed from the church until 1857 when Probate and Divorce Courts were established by the Statute 20, 21 Victoria c 77 and c 85 respectively (Holdsworth, ibid, pp 624, 630).


29 Holdsworth, op cit, Vol 1, p 615.

30 Helmholz says “that the medieval and ecclesiastical courts regularly exercised jurisdiction over secular crimes like theft and murder” (Helmholz, RH, Canon Law and the Law of England, London and Ronceverte, The Hambledon Press, 1987, p 120), particularly where such jurisdiction was “allowed by local custom or where secular justice was not available to punish a crime” (p 122). However, he adds the insight even when secular justice did provide a remedy “[c]ommission of a secular crime ... clearly might bar a man from seeking ordination ... for crimes were also sins and must therefore have brought the sinner within the Church’s admitted competence” (p 122). Berman observes that the real issue was the church’s effective denial of jurisdiction over sin to the secular courts from the end of the eleventh century. From that time onwards, a “sharp procedural distinction” meant that “[a]ny act punishable by royal or other law officials was [t]henceforth ... punished as a violation of secular law and not as sin ...
Holdsworth notes simply that “the temporal courts had no doctrine of marriage”. He then points up the complexities of the jurisdiction thus left to the church since issues of dowry, inheritance, legitimacy, de facto marriage, and divorce all fell into church jurisdiction by practical consequence.

In what became the law of contract, it was the element of a promise with a religious oath that both attracted and justified in medieval minds ecclesiastical involvement and some parallel jurisdiction, even while the royal courts sought complete control. The Church was thus an omnipresent player in medieval life. It was as involved in the regulation of day-to-day life as the modern state and could invoke the aid of the King’s officers to apprehend and force compliance from its recalcitrants. In any event, “the temporal consequences of excommunication [which was the most severe penalty that the church could invoke] were obvious.”

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31 Holdsworth, op cit, Vol 1, p 622.

32 Idem.

33 Helmholz observes that while the ecclesiastical court judges would obey a writ of prohibition from the King instructing them to stop their trial in a temporal matter, the church would often have the last word by threatening ecclesiastical sanctions against the litigants in the temporal court if they continued their use of the royal judicial machinery (see op cit, chapter five, “Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian”, p 77).

34 Holdsworth says that “[t]he process by which the ecclesiastical courts enforced obedience to their decrees was excommunication … If the excommunicate did not submit within forty days, the ecclesiastical court signified this to the Crown, and thereon a writ de excommunicato capiendo issued to the sheriff. He took the offender and kept him in prison till he submitted. When he submitted the bishop signified this, and a writ de excommunicato deliberando issued“ (Holdsworth, op cit, Vol 1, pp 630-631).

35 Holdsworth, op cit, Vol 1, p 631.
[a]n excommunicated person ... cannot do any legal act, so that he cannot act, or sue anyone, though he himself may be sued ... And if he has obtained a writ it is not valid. For except in certain cases, it is not lawful either to pray or speak or eat with an excommunicate either openly or secretly. 36

Holdsworth observes that the law is not much altered in Blackstone’s day (eighteenth century), when an excommunicate still “cannot ... serve upon juries, cannot be witness in any court, and ... cannot bring an action either real or personal, to recover lands or money due to him”. 37 The Church’s place at the centre of what we now consider very secular matters, gave it a position of privilege that is unfamiliar in the absence of extensive ecclesiastical jurisdiction. But in Bracton’s time, the word ‘privilege’ itself was used to earmark that piece of ecclesiastical jurisdiction which was reluctantly preserved to the church even after the King’s secular courts had assumed general criminal jurisdiction. 38

Thus, if someone from Bracton’s (thirteenth century) or Henry VIII’s (sixteenth century) England were asked whether the law recognised a religious confession privilege, the question would cause confusion. Milsom and Helmholz are right. 39 To obtain a meaningful answer, we would have to ask different questions – perhaps, “Would a judge in one of the King’s temporal courts ever ask a priest to disclose a

36 Idem.
37 Idem.
38 “Privilegium clericale” or ‘benefit of clergy’ is discussed infra, pp 61-66. By successfully claiming to be a member of the clergy, a person accused of crime was delivered into the relevant Bishop’s custody for trial in the Bishop’s court. Church courts would not adjudicate capital punishment though even pre-trial imprisonment could last for years (Pollock, Sir F, & Maitland, FM, The History of English Law, 2nd ed, Cambridge University Press, 1968, Vol 1, p 444).
secret learned in the confessional, and would that judge send the priest to gaol if disclosure of such secrets was refused?” Both questions would be answered in the negative, but the reasons are difficult to frame without anachronism.

In essence, the reasons are fivefold. First, priests could not be tried in a secular court. This was not just a criminal prohibition. A personal suit against a religious clerk could only be brought in an ecclesiastical court. Secondly, since not only priests, but lesser clergy, were entitled to claim “benefit of clergy” when charged with serious criminal matters other than treason, it is difficult to imagine a royal judge threatening priests with some early contempt equivalent. For an effective claim of “benefit of clergy” resulted in the immediate transfer of criminal cases to an ecclesiastical court unless the charge was high treason. Thirdly, until Pope Innocent IV (1243-1254) “prohibited priests from acting as judges” in the thirteenth century, the judges in the King’s Courts were frequently priests and were thus unlikely to try and coerce a disclosure which they knew would subject a priest to severe ecclesiastical penalties. Even after this thirteenth century prohibition took

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40 Pollock, Sir F, & Maitland FW, *The History of English Law*, Cambridge University Press, 1968, Vol 1, p 446. Note, however, that this statement is only a general statement of “the full extent of the clerical [jurisdictional] claim” (idem). Despite Thomas A’Becket’s martyrdom in 1170, ecclesiastical jurisdiction over the clergy, was in a state of continuing erosion until “benefit of clergy” was finally abolished in 1827 (7, 8 George IV, c.28).

41 “Benefit of clergy” is discussed infra, pp 61-66.

42 Pollock and Maitland observe that misdemeanours (transgressio) “enjoyed no exceptional privilege” but felonies ranking between transgressio and treason were within the criminal jurisdiction over clergy reserved to the church as early as the thirteenth century (Pollock and Maitland, op cit, Vol 1, pp 444-446). Note also that Father Henry Garnet’s trial (Garnet’s case (1606) 2 Howell’s State Trials 217) resulted in his execution for various reasons including arguably, because his defence of religious confession privilege was held inapplicable in a case of treason. Garnet’s case is considered in detail infra, pp 77-81.


44 The Catholic canon law applicable through the entire medieval period and applicable during the reign of Henry VIII is discussed in detail in chapter three. For current purposes, it is sufficient to note that Canon 21 of the Fourth Lateran Council in 1215 subjected a priest disclosing a confession or giving any
practical effect, the King’s judges still belonged to the church and would know that confessional disclosures would have serious ecclesiastical consequences both for the priest, and perhaps for the judge personally as the coercive agent. Fourthly, though Pope Innocent III (1198-1216) condemned Thomas A’Becket’s denial of the royal right to further punish an ecclesiastical clerk who had “already suffered degradation” (an innovative double jeopardy argument), Becket’s martyrdom for this principle gave it a currency that would likewise have seen a temporal judge hesitate before compelling a priest to breach a vow with ‘foreign’ legal consequence. Fifthly, members of the Catholic Church through the years between Bracton and Henry VIII subscribed to the view that the priest receiving a confession did not know the confession himself, but only as God’s representative. Catholic judges could thus be expected to shrink at the vicarious prospect of compelling God in their courtroom.

hint of a penitent’s identity, to deposition from the priestly office and confinement thereafter in a monastery to do perpetual penance (Nolan, op cit, p 649). The influence of clerics who served as judges in the secular courts on respect for church privileges is discussed in chapter three, pp 101-103.

45 Helmholz treats the interplay and competition of ecclesiastical sanctions, including excommunication against litigants and even judges as effective deterrent to the pursuit of remedies in the King’s courts, notwithstanding the powers of the King’s writs of prohibition which were used to restrain the courts of the church. See particularly his chapters entitled “The Writ of Prohibition to Court Christian before 1500” and “Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian” in Canon Law and the Law of England, London and Ronceverte, Hambledon Press, 1987, pp 59-100.

46 Pollock and Maitland, op cit, Vol 12, p 455.


48 While McNicol (McNicol, SB, Australia, Law of Privilege, Law Book Co, 1992, p 326), among others, has doubted that modern courts would respect a self-incrimination defence citing ecclesiastical legal penalty following confessional disclosure, the argument would have been compelling in medieval times when it is unlikely that a priest would be tried before temporal courts in the first place.

49 Nolan cites the great English canonist Lyndwood as authority for this response to any malicious judge who presses to know the details of a confession (Nolan, RS, “The Law of the Seal of Confession” (1913) 13 Catholic Encyclopedia 649, 651). Holdsworth advises that Lyndwood “finished his commentaries upon the provincial constitutions of the Archbishops of Canterbury in 1438” (Holdsworth, op cit, Vol 1, p 582). Taylor notes this same argument from the canonist Mardus (sixteenth century) in his Treatise
Plucknett puts modern understanding of church/state separation in its historical context, when he says that “the spirit of the Renaissance [questioned]...law itself”. He notes that Machiavelli’s novel “distinction between public and private morality” evolved “the State, as a sort of anti-Christ, to wage war with the idea of law”, and he explains the difference between historical and modern understanding with the statement:

Instead of the medieval dominion based upon divine right and subject to law, we have the modern State based upon force and independent of morality. And so, where many a medieval thinker would ultimately identify law with the will of God, in modern times it will be regarded as the will of the State.

Holdsworth gives this dawning of the modern notion of ‘state’ some English context when he explains Henry VIII’s “theory of Royal Supremacy”. For Henry VIII, says Holdsworth, “[t]he Crown is ... supreme over all persons and causes”, including the church, and Henry promoted this theory through Parliament in his statutory preambles. For Holdsworth, this new theory, which denied the Church autonomy in ecclesiastical matters, was the catalyst that broke the medieval paradigm, since

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51 Idem.
52 Idem.
53 Ibid, p 41.
parliamentary acts of law promoted by a King with an agenda, had turned the old theory upside down.  

The contests between the church and state over jurisdiction will be further detailed in chapter three as the influence of historical canon law upon common law is explained. That detail will further confirm that the modern concept of separated church and state was not comprehensible until after the Renaissance and the Reformation. For it was not until then that questions were raised about the foundational medieval paradigm which accepted that the rights of Kings and that revelations of law came from God through His Church.

**The common law**

When twenty-first century Anglo-American lawyers speak of the common law, they speak of that body of reported judicial decisions, separate from the statutory codes of their nations, which provide guidance upon what the courts will decide in similar cases in the future. Black’s law dictionary acknowledges the customary origins of common law, but it is the definitional reference to “judgments and decrees of courts ... [and] judicial decisions, as distinguished from legislative enactments” that resonates as a definition of common law in a contemporary lawyer’s mind. Black defines common law thus:

> As distinguished from statutory law created by the enactment of legislators, the common law comprises the body of those principles and rules of action ...

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which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England. In general, it is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments.\textsuperscript{56}

Milsom says that “the common law [is] the acceptance for all England of a single rule on any matter, the suppression of contrary customs leaving ... something special ... deep-rooted enough to survive ... [as] the slow result of institutional centralisation”.\textsuperscript{57}

But despite the “single rule on any matter” which looms large in the modern mind, the common law began from materials\textsuperscript{58} that existed before there were law reports. Those materials were the customs of discrete geographical communities and the decisions of the courts which governed them.\textsuperscript{59}

In his “The Path of the Law”,\textsuperscript{60} Justice Oliver Wendell Holmes Jr sought to expose paradigmatic thinking about law when he said:

\begin{quote}
History must be part of the study [of law], because without it we cannot know the precise scope of rules which it is our business to know ... it is a part of the rational study, because it is the first step towards an enlightened skepticism,
\end{quote}

\textsuperscript{56} Idem.


\textsuperscript{58} Idem.

\textsuperscript{59} Idem.

\textsuperscript{60} Holmes, OW, Jr, \textit{The Path of the Law}, Bedford Massachusetts, Applewood Books.
that is, towards a deliberate reconsideration of the worth of those rules ... It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists upon blind imitation of the past.61

While it is certainly true that social morés and pressures can influence the common law of the twenty-first century, in our age of “rapid social change ... we [are more accustomed to] make use of [direct] legislation”62 to accommodate the law to the social pace of life.63 In an earlier age, these necessary accommodations were facilitated by dexterous lawyers whose lateral thinking furnished courts with palatable ways around older rules in the interests of contemporary justice.64 Oliver Wendell Holmes Jr confirms that judicial lawyers have also participated in this quest to accommodate contemporary needs when the solutions suggested by the available precedents do not feel quite right even in an age of abundant legislation. He has written:

The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in

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61 Ibid, pp 20, 21.
62 Milsom, op cit, p xii.
63 Idem.
64 Milsom is emphatic that “lawyers have always been preoccupied with today’s details, and have worked with their eyes down” (idem), so that they have seldom seen “the violence” (idem) their work has done to “the conceptual economy” (idem) of their present, or the vast social and economic changes to which they have incrementally contributed.
every human mind. But certainty generally is illusion ... behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding ... We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it.65

But Milsom explicitly confirms the genealogy of common law in historical custom when he writes that:

the materials of the common law ... were the customs of true communities ... but within each body of custom, what we think of as the law was not marked off from other aspects of society ... the needs of society were divers and constant, and they were for the most part supplied by the customary obligations resting upon ordinary people.66

In his 1991 article in the Oxford Journal of Legal Studies, AWB Simpson summarises the shift in thinking that is necessary if modern lawyers are to really understand where any particular common law doctrine came from, and what it means in the present – including, the writer suggests, the doctrine of religious confession privilege. To really understand, modern lawyers must abandon their picturesque and even fanciful notion that:

65 Holmes, OW, Jr, op cit, p 16.
66 Milsom, op cit, p 2.
the common law system and the rules and principles are in fact nothing more than the products of an inexorable Darwinian movement towards economic efficiency, which for some reason or other, lay dormant for six hundred years or so, but suddenly burst out in the 19th century to produce the tort of negligence and the rule in *Hadley v Baxendale* and other marvels.  

Fortunately, he continues, that one system view of legal history has been outgrown, so that:

there is now a generous sympathy with the idea that you cannot really understand law without attending to both its history, and to the way in which the operations of the various legal systems and the professional culture of lawyers, interacts with what may ... be called society generally. At a theoretical level, what is involved is a denial of the notion that law is in a simple sense autonomous, [and] that its development can be understood ... by an analysis of legal reasoning alone.  

The message of legal history is that there was common law before there were law reports of any kind. That common law originated in custom. In the context of this thesis, the custom and common law of England respected and privileged the sacraments of Catholicism, including the sacrament of confession before the Reformation.

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68 Ibid, p 111.
One final observation about our twenty-first century expectation of what constitutes the common law from which we extract our precedents is appropriately made before the historical evidence for a religious confession privilege before Henry VIII is discussed in detail. That point is that the ancient statutes were as much a part of the common law in medieval times as were judicial decisions. While the term ‘common law’ in its widest sense, still embraces both statute and common law, when searching for precedential authority, modern lawyers narrow that generality to reference only that law made by judges in cases.\(^{69}\) While modern statutory law can codify or change the common law, it is not generally referenced as a source of common law in its own right. If it is referenced at all for precedential guidance, a modern reference involving a statute is to a case which considered similar statutory language to see how it was interpreted by a judge in that case. In historical times, the King’s statutes were regarded in the same way as a modern judicial interpretation. The King was an authoritative judge, and the statutes were his statements of the common law. This point may be succinctly made with an example from Coke’s commentative treatment of religious confession privilege.

Pre-Reformation statutes and common law

In his \textit{Second Part of the Institutes}, Sir Edward Coke cited the Statute Articuli Cleri of 1315\(^{70}\) as one of his authorities for the existence of a religious confession privilege in common law with these words:

\[^{69}\text{See Black’s definition of common law supra, pp 48-49.}\]

\[^{70}\text{9 Edward II St.1.}\]
This branch declareth the common law, that the priviledge of confession extendeth only to felonies ... and not to appeales of treason.\footnote{71 Coke, Sir E, \textit{The Second Part of the Institutes of the Laws of England}, New York, Garland Publishing Co, 1979, p 629.}

Though Wigmore thought this early statute “ambiguous”,\footnote{72 Wigmore, JH, \textit{Evidence in trials at common law}, Revised by John T McNaughton, Boston, Little Brown, 1981, Vol 8, p 869.} it was common law authority for Coke. Milsom confirms Coke’s interpretation when he says:

To lawyers in the fourteenth century a statute was not something external to the law: it was an internal alteration, and it lived in its context so that its application was neither mechanical nor unalterable.\footnote{73 Milsom, op cit, pp 365-366.}

While the Statute Articuli Cleri may seem “ambiguous” if we expect it to fulfil the function of a modern statute, it is not “ambiguous” at all when we understand that the King was using a statute to answer a petition and clarify the common law. Since the whole statute is lengthy, only that section which deals with religious confession privilege need be considered to highlight the interrelationship of what is now called the common law, with custom and statute. That is, the King’s judicial declaration of what the law is and will be in the future. Translated from the original Latin\footnote{74 Since neither Coke nor his commentators have provided a full translation of the relevant portion of Cap X, the writer commissioned a translation from the original Latin. The original Latin text is most readily available at pp 628-629 of Coke’s Second Institute (Coke, Sir E, \textit{The Second Part of the Institutes of the Laws of England}, New York, Garland Publishing Co, 1979). The author is indebted to Dr Will Richardson of the Classics and Ancient History Department at the University of Auckland for this translation.} it reads:
Also, whenever any who flee to the church abjure the land \textit{(abjurant terram)},\footnote{The parenthesised italicised original Latin words are those upon which Coke chose to comment. His commentary and its accuracy will be discussed infra, pp 58-61.} according to the custom of the Kingdom, the laity or their enemies prosecute them and they are dragged away from the public street and hanged or decapitated \textit{(decapitantur)} forthwith, and while they are in the church they are guarded by armed men within the cemetery and sometimes within the church so closely that they cannot leave the sacred place for the purpose of setting aside their superfluous weight \textit{[that is, emptying their bowels]}, and it is not permissible that the necessaries of life be served to them.

Reply: While they are in the church their guards must not linger within the cemetery, unless necessity or the risk of escape requires this. Nor should fugitives be confined while they are in the church so that they cannot have the necessaries \textit{of life} \textit{(quin possint habere vitae necessaria)} nor go outside freely in order set down their unmentionable load. Our Lord the King also requires that thieves and approvers \textit{(latrones vel appellatores)} may, whenever they wish, confess their crimes to priests; but the confessors must take care that they do not wrongfully inform these approvers.

Holdsworth writes that “these articles \textit{[Articuli Cleri]} were an attempt to delimit accurately the sphere of the lay and spiritual jurisdictions, and they were the basis of all subsequent legislation\footnote{Holdsworth suggests that Edward III added clerical immunities to “exempt priests from liability to arrest while performing divine service”, and he added clerical powers in relation to heresy (Holdsworth, \textit{WS, A History of English Law}, 2\textsuperscript{nd} ed, Boston, Little Brown & Co, 1923, Vol 1, p 585).} upon this subject during the remainder of the medieval period”.\footnote{Idem.} These articles were framed as a church petition for redress of perceived
anomalies in the law during a period when the influence of the church was waning from the high point achieved after Becket’s martyrdom (1170). Thus the petition evidences the problem and the response is the King’s judicial solution. Modern statutes simply state law. In this example, the judicial and deliberative component of early legislative process is manifest. The issues which the king resolved are stated as problems for judicial solution and the King’s answers are his judgement. The only difference between a judicial case and the questions which drew forth the King’s judgement laid down in his statute Articuli Cleri, was that this was a hypothetical case without individual parties – though as in court, it was framed as a petition. While we would be reluctant to cite a statute as if it were some kind of judicial statement of the common law today, the interplay between church, Parliament and King which is demonstrated in the statute Articuli Cleri, shows that the King’s role as a judge in the fourteenth century amounted to a judicial decision of what the common law of the realm would be from that time forward.

The problems upon which the King was asked to pronounce, appear to have been: first, what to do with abjurers who had illegally returned to England and sought sanctuary a second time to avoid the customary penalty (hanging or decapitation); secondly, how to stop the perceived sacrilege involved in having armed men present in a church or cemetery to prevent the escape of returned abjurers, or the provision of life support to either returned abjurers or those who had outstayed the forty days’ grace before they must abjure; and finally, how to appropriately manage the guards appointed to prevent escape from the sanctuary, some of whom were overzealous to the point that they would not let returned abjurers outside to take simple toilet breaks.

The King’s solution for the time was: to direct that guards might only stay in the church cemetery if there was a real risk of escape; to confirm that such intensive one-on-one guarding as prevented nourishment and toilet breaks was excessive and a sacrilege and should cease; and to confirm that it was consonant with his will that felons be able to confess their sins in accordance with the established canon law of the land.

The section of Articuli Cleri that dealt with clerical concern about secular intrusions into holy church sanctuaries, demonstrates that the statutes of medieval times interrelated with the underlying law of the land in a different way than they do today. In this case, the King was called upon not so much to change the law as to shape or define its metes and bounds. The petition asked that the traditional privilege in favour of recalcitrant abjurers be reinstated. Manifesting the respect in which Edward II still held the church in the fourteenth century – and at the same time, attesting the enduring power of the church in medieval English society – the King honoured the church request to reaffirm the right of sanctuary. He also confirmed religious confession privilege which was not requested in the petition. But his sentence or judgement may not have been completely satisfactory to the church. That is because his exception allowing guards to stay in the church cemetery only if there was a real risk of escape provided obvious licence for those guards to stay outside the church but on church property and his confirmation of confession privilege came with a warning about clerical abuse.79

79 The likely substance and focus of the warning is discussed infra, pp 73-75.
As a symbol of enduring church power, the existence of churches as sanctuaries from the reach of the royal courts endured until Coke’s time. They were abolished during the reign of King James I in the early seventeenth century. Holdsworth records that earlier attempts to circumscribe continuing perceived abuse of sanctuaries during the reign of Henry VIII were unsuccessful and that some of the more powerful church sanctuaries continued in de facto operation until they were extinguished in practice, by the advent of meaningful police services in the early nineteenth century.

The purpose of this chapter again, however, is to identify the state of religious confession, and the privilege attaching to it, in pre-Reformation England. To enable a more objective and rational consideration of the historical evidence that supports the existence of a religious confession privilege before Henry VIII’s Reformation, the writer has thus proposed: first, that modern lawyers should not expect that historical proof of the existence of religious confessions will come in a recognisable modern form which presupposes a separation between church and state; and secondly, that the common law is and always has been more than the reports of decided cases, howsoever reported. It partakes of the social expectations of its time and this was especially true before there were any law reports at all.

Coke’s commentary on the Statute Articuli Cleri

Coke chose to comment on four phrases from Cap X of the Statute. As quoted above they are “Abjurant regnum”, “decapitantur”, “quin possint habere vitae

80 21 James 1.c.28 §7.
82 Ibid, p 307. See also Plucknett, op cit, p 431.
necessaria” and “latrones vel appellatores”. His comments upon the first and third of these phrases are largely explanatory of fourteenth century sanctuary practice and need not be considered further here. The full text of his two other comments are necessary if an accurate assessment of his precedential insight into religious confession privilege is to be made. He wrote:

Decapitantur. This was mistaken in the petition: for no man can be beheaded but for treason; and no man could abjure for treason, because the Coroner had no power to take any confession for treason, albeit the Coroner had a special commission from the King to doe it.

Latrones vel appelatores. This branch extendeth only to theves and approvers indited of felony, but extendeth not to high treasons: for if high treasons be discovered to the Confessor, he ought to discover it, for the danger that thereupon dependeth to the King and the whole Realme; therefore this branch declareth the common law, that the priviledge of confession extendeth onely to felonies: And Albeit, if a man indited of felony become an approver, he is sworne to discover all felonies and treasons, yet is hee not in degree of an approver in law, but onely of the offence whereof he is indited; and for the rest, it is for the benefit of the King, to move him to mercy: So as to this branch beginneth with theves, extendeth onely to approvers of theevery or felony, and not to appeales

83 The statute 21 Jac. Regis of 1623-1624 during the reign of King James I and passed shortly before Coke wrote his Second Part of the Institutes abolished sanctuary and abjuration, though Holdsworth notes that “certain ... sanctuaries existed till the eighteenth century ... [when] the arm of the law was strengthened by the establishment of an efficient police system” (Holdsworth, WS, A History of English Law, Boston, Little Brown and Co, 2nd ed, 1923, Vol 3, p 307; see also Plucknett, TFT, A Concise History of the Common Law, 5th ed, London, Butterworths, 1956, p 431), though Plucknett says effective policing was achieved in the early nineteenth century.

of treason; for by the common law, a man indited of high treason could not have
the benefit of Clergy (as it was holden in the Kings time, when this Act was
made) nor any Clergyman priviledge of confession to conceale high treason: and
so it was resolved in 7 Hen. 5. Whereupon Frier John Randolphe the Queene
Dowagers Confessor, accused her of treason, for compassing the death of the
King: And so it was resolved in the case of Henry Garnet, superieur of the
Jesuites in England, who would have shadowed his treason under the priviledge
of confession, although in deed he was not onely consenting, but abetting the
principal conspirators of the Powder Treason, as by the record of his attainder
appeareth: and albeit this Act extendeth to felonies onely, as hath been said, yet
the caveat given to Confessors is observable, ne erronice informant.85

The thrust of Coke’s commentary is not to prove that there was a religious confession
privilege in the common law at the time of writing in the early seventeenth century,
but that there was a treason exception to it. The existence of the underlying religious
confession privilege is for Coke, self-evident. The premises of Coke’s justification of
a treason exception to religious confession privilege are that: the public interest in the
King’s safety demands it; since treason was an exception to “benefit of clergy”,86 it is
also an exception to this other example of religious privilege; because treason was
involved, Friar John Randolph disclosed the Queen Dowager’s complicity in the
death of King Henry V, though he only knew of that from her confession; and though
Father Henry Garnet was convicted as one of the principal Gunpowder plotters, his
religious confession privilege defence would not have been accepted anyway since
the privilege does not apply in a treason case.

85 Idem.

86 “Benefit of clergy” is discussed infra, pp 61-66.
Coke relies upon the fact that treason was an established exception to the religious privilege known as “benefit of clergy” to justify a treason exception to religious confession privilege. He then cites two cases which he says confirm the principle that religious confession privilege did not apply in treason cases. Was treason an exception to “benefit of clergy”? In order to understand Coke’s statement that treason was an exception to the ecclesiastical privilege known as “benefit of clergy”, it is necessary to understand what this privilege was and how it worked.

“Benefit of clergy” and church jurisdictional claims

Though in its later history “benefit of clergy” became the privilege of the accused clerk, it began its life as a privilege of the church. Early records confirm that it was as significant a feature of French criminal law as it was in England. Though “the clerical privilege developed quite differently in the two countries” in later centuries, Gabel has established that the history of the privilege in France and the Frankish criminal procedure are “a valuable aid in forming opinions about the practice followed in Norman England”. Gabel suggests that there are two perspectives to be considered if one is to really understand the privilege – “that of the secular law and that of the Church”. She explains:

According to common law this privilege may be defined as the exemption of members of the clergy from the jurisdiction of the temporal courts in certain
criminal cases which normally would not have come within the competence of
the ecclesiastical courts ... From the ecclesiastical point of view ... the
privilege rested upon the principle that clergy should not be judged by laymen
but only by their own judges according to the ecclesiastical law.\textsuperscript{91}

For the church, “the benefit” was not an exemption or a privilege at all, but rather a
practice or a right claimed “at common law only because of the comprehensive\textsuperscript{92}
jurisdictional claims of that common law. The different perspective of the church and
state where benefit of clergy was concerned, accounts for the tension between the
secular and ecclesiastical jurisdictions. But despite the tension, “benefit of clergy”
endured and remained as a symbol of the different perspective of church and state in
the criminal law arena. During its “long and curious history”,\textsuperscript{93} benefit of clergy
changed from being “a special privilege of the clergy”\textsuperscript{94} into “a complicated series of
rules exempting certain persons from the death penalty incurred by those found guilty
of certain felonies”.\textsuperscript{95} Although those later “absurd and capricious”\textsuperscript{96} rules were
completely disconnected from the church, they were not abolished until 1827.\textsuperscript{97}

\textsuperscript{91} Idem.
\textsuperscript{92} Idem.
\textsuperscript{93} Holdsworth, op cit, Vol.3, p 294.
\textsuperscript{94} Idem.
\textsuperscript{95} Idem.
\textsuperscript{96} Ibid, p 302. Holdsworth also traces the see-sawing later statutory history of the rules as to who could
claim clergy and how they could claim it noting at various times; partial abolition, partial restoration,
mitigation of punishment, escape from punishment on first offence and declaration of various felonies to
be without benefit of clergy (ibid, pp 299-302).
\textsuperscript{97} 7, 8 George IV. c.28. Gabel traces the severance of connection “between the privilege and the
church” to the reign of Henry VII (1485-1509) and in particular to the statute 4 Henry VII c.13 (op cit,
pp123-125).
Thomas A'Becket's martyrdom (1170) was the high water mark of church jurisdictional claims, but through contemporary eyes it was a demarcation dispute between related political powers.\(^98\) It was a part of the larger Investiture struggle\(^99\) which Henry VIII resurrected to justify his separation from Rome in the sixteenth century.\(^100\) Pollock and Maitland's summarise the typical procedures before the thirteenth century ended:

A clerk is charged with murder; it is the sheriff's duty to arrest him. Probably his bishop will demand him. If so, he will be delivered up; but the bishop will become bound in a heavy sum, a hundred pounds, to produce him before the justices in eyre. The bishop can keep him in prison and very possibly will do so, for, should be escape, the hundred pounds will be forfeited. In the middle of the thirteenth century it is a matter of complaint among the clergy that owing to this procedure clerks may languish for five or six years in the episcopal gaol without being brought to trial. At last the justices come, and this clerk is brought before them ... And ... the words of the enrolment [say] ...

“And the said A.B. comes and says that he is a clerk and that he can not – or, that he will not – answer here. And the official of the bishop [the Ordinary] ...

\(^98\) For Berman, “the struggle of the papacy to wrest from emperor and kings the power to 'invest' bishops with the symbols of their authority” during the papacy of Gregory VII (1075-1083) was an outgrowth of feudal political ideas which had previously been unsystematised (Berman, HJ, Law and Revolution, Cambridge Massachusetts and London England, Harvard University Press, 1983, pp 85,86).

\(^99\) Berman traces the origins of the western legal tradition as a whole to the “investiture struggle” and the reforms promulgated by Pope Gregory VII (also known as the “Hildebrand Reforms” and the “Gregorian Reforms”). But he says that the term “investiture struggle” is something of an understatement. The transformation involved was much more revolutionary than that term implies and sought the complete “disengagement of the sacred and profane” spheres (Ibid, pp 87-88).

\(^100\) Discussed in chapter three, pp 104-112 (105, 109-110).
comes and demands him as a clerk – or, comes and craves the bishop’s court.  

Though this formality was diluted and the claim of the benefit in cases of treason was unlikely by the end of the thirteenth century, “benefit of clergy” was not completely abolished until the nineteenth century. In the meantime, ‘the benefit’ was institutionalised as a part of the secular criminal law system though it had lost any enduring meaning for the church. Holdsworth quotes Blackstone’s indiscriminate praise of all the laws and institutions of England favouring what “benefit of clergy” became after some statutory adjustment:

The wisdom of the English legislature has, in the course of a long and laborious process, extracted by a noble alchemy, rich medicines out of poisonous ingredients, and converted, by gradual mutations, what was at first

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101 Pollock and Maitland, op cit, Vol 1, pp 441-442.
103 7,8 George IV, c.28.
104 Holdsworth says that the meaning of benefit of clergy was “completely changed” during its “long and curious history”. “It ceased to be a special privilege of the clergy, and became ... a complicated series of rules exempting certain persons from the death penalty incurred by those found guilty of certain felonies”, although it was not “till the end of the sixteenth century that it began to lose its original character of a privilege of the clergy” (op cit, Vol 3, p 294).
105 Holdsworth attributes the change in character of benefit of clergy as a “special privilege of the clergy” to the “complicated series of rules exempting certain persons from the death penalty” which it became after the sixteenth century, “mainly to the action of the legislature; and a series of statutes of the two following centuries” (op cit, Vol 3, p 294). For example, “[a] statute of Henry VII had attempted to restrict its scope by drawing a distinction between those who were actually in orders and those who were not” (op cit, Vol 3, p 299, citing 4 Henry VII. c 14). More radical changes were made in Henry VIII’s reign to limit the privilege (op cit, Vol 3, p 299-300, citing the statutes 23 Henry VIII.c.I; 23 Henry VIII.c.II and 23 Henry VIII. c.3). “But the reaction against the severity of Henry VIII’s statutes, which produced the abolition of many of the new treasons and felonies created in his reign, produced also the partial restoration of the benefit of clergy” (op cit, Vol 3, p 300, citing I Edward VI. c.12). “There then follows in Holdsworth’s narrative a catalogue of extensive statutory amendments both extending and then restricting the privilege through to 1769 when “Blackstone ... says that at that date no less than 160 offences had been declared to be felonies without benefit of clergy” (op cit, Vol 3, pp 300-302).
an unreasonable exemption of popish ecclesiastics into a merciful mitigation of the general law with respect to capital punishment. 107

Gabel agrees with Blackstone and Holdsworth’s summary of the evolution of benefit of clergy but adds “that the privilege at all times served to temper the rigor of the common law in an age in which the death penalty was employed to an absurd degree. 108 Of its later development, she summarises:

[T]he privilege, after many mutilations, was preserved in English common law two-and-a-half centuries after it had ceased to have any connection with the church ... [perhaps] as a way around an inelastic harsh criminal code. 109

Pollock and Maitland find the seeds of this development in “the elementary rule that the church would never pronounce a judgement of blood”. 110 Pollock and Maitland’s close procedural account of a claim of “benefit of clergy” before the end of the thirteenth century demonstrates the jurisdictional contest between England’s temporal and ecclesiastical courts. But the history of “benefit of clergy” manifests that it was not simply a matter of which jurisdiction was the more powerful at a given time. For if it was simply a matter of jurisdictional power, the history of “benefit of clergy” would have been progressively marked by the narrowing of its scope and the development of exceptions at the same time as the secular courts gradually assumed

108 Gabel, op cit, p 126.
110 Pollock and Maitland, op cit, Vol 1, p 444.
the ecclesiastical jurisdiction. But the secular jurisdictions not only recognised this ‘clerical’ right to remove criminal charges into an ecclesiastical forum to avoid the rigours of the criminal penalties imposed by the secular jurisdiction. They nurtured and encouraged the longevity of the benefit by their broad and fictional interpretations of which defendants were clergy which enabled the privilege. That a religious privilege which constituted a significant part of the argument between Archbishop Thomas A’Becket and Henry II in the twelfth century, could endure as an entrenched feature of secular criminal law through into the early nineteenth century, is illustrative of a sense of seamlessness in the legal system as one great whole.

However, this understanding of “benefit of clergy” demonstrates more than mere seamlessness. It demonstrates that clerical privileges became common law rights. Was treason an exception to “benefit of clergy”, as Coke claimed?

**A treason exception to “benefit of clergy”?**

In medieval criminal law, there were three different levels of offences: misdemeanours, felonies and treasons. But there were many degrees of treasons— from those which affected the King’s forests, through those which affected his

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111 Holdsworth documents the erosion of the jurisdiction of the ecclesiastical courts from the conclusion of the investiture contest in England which he dates to 1106 (Holdsworth, op cit Vol 1, p 584) through to the beginning of the twentieth century when he says that the only remaining ecclesiastical jurisdiction “is a certain criminal or corrective jurisdiction over the clergy” (ibid p 614). Though the ecclesiastical jurisdictional claims “were at no time admitted by the state in their entirety ..., in the course of time most of these branches of jurisdiction have been appropriated by the state” (idem).

112 For example, Holdsworth observes statutory extensions allowing claims of benefit of clergy “[i]n 1547 to ‘bigami’ and in 1692 [to] women” though preserving the 1489 “distinction between those actually in orders and those not”. That 1489 distinction had differentiated between real clergy and those only allowed the benefit but “convicted of a clergyable offence”, by branding the latter. In 1576, “the court was given power to imprison such persons for ... one year” and “[i]n 1717 it was enacted that such persons...were to be transported for seven years instead of being branded” (Holdsworth, op cit, Vol 3, p 300).

coinage, to those which affected his person and were called high treasons to
distinguish them from the lesser treasons. Infidelity against one’s lord also amounted
to petty treason in the twelfth century, though by the thirteenth century it was unusual
to use the word treason in relation to personal crimes against anyone other than the
King. Pollock and Maitland state that misdemeanours never qualified for “benefit
of clergy” but expect that “in the thirteenth century a clerk charged with … one of the
worst forms of high treason, such as imagining the King's death or levying war
against him, would in vain have relied on the liberties of the church”. Holdsworth
agrees with both Coke and Pollock and Maitland that treason was excepted from the
scope of “benefit of clergy”, but says the treason exception was not settled until the
reign of Edward III. That was sixty years after the Statute Articuli Cleri was passed in
1315.

Did treason become an exception to other church privileges?

Does the logic transfer? Did treason become an exception to religious confession
privilege because it became an exception to “benefit of clergy”? Is Coke also correct
that the church privilege of abjuration (generally following sanctuary) was not
available when the charge was treason? Certainly as Pollock and Maitland say, “the

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114 Bellamy, JG, *The Law of Treason in England in the Late Middle Ages*, Cambridge University Press,

115 Pollock and Maitland, op cit, Vol 1, p 446.


117 To abjure was to flee the realm of England forever and thus escape its criminal jurisdiction. If
someone accused of crime escaped first to the sanctuary of the church, by "taking an oath to abjure
the kingdom of England" after confessing to the Coroner, the criminal could “proceed safely to a port
assigned to him” but never return without capital penalty. Though the institution of "sanctuary and
abjuration" was probably “not a product of Christianity”, it was administered by the church (Holdsworth,
liberties of the church\textsuperscript{118} may not have protected a clergyman personally charged with direct complicity in treason against the King (such as Coke charged against Garnet\textsuperscript{119}). It seems quite another matter to suggest that an innocent fourteenth century or fifteenth century priest who knew of treason only in confession would be coerced to disclose and found guilty of misprision\textsuperscript{120} of treason if the knowledge somehow came to light. Not only the practicalities of discovering the priest’s knowledge, but also the suggestion that judges would coerce priests to reveal their secrets when universal canon law forbade such disclosure\textsuperscript{121} exposes Coke’s theoretical deduction as a fiction. But perhaps the deduction was reasonable seventy to one hundred years after the English Reformation,\textsuperscript{122} if Coke’s other precedential assertions which support it, have merit.

In his \textit{Second Part of the Institutes}, Coke asserted that two cases supported his statement that treason had always been an exception to religious confession privilege. The first of those was \textit{Randolph’s case} (circa 1419). In what way was \textit{Randolph’s case} a precedent for Coke’s treason exception to religious confession privilege? Coke says Friar Randolph accused the Dowager Queen of treason

\textsuperscript{118} Pollock and Maitland, op cit, Vol 1, p 446.

\textsuperscript{119} \textit{Garnet’s case} discussed infra, pp 77-81. \textit{Garnet’s case} was the last case in which Coke functioned as the Attorney-General prosecutor.

\textsuperscript{120} Failing to report a crime to the authorities. See discussion infra in connection with \textit{Garnet’s case}, pp 77-81, and particularly notes 157 and 158.

\textsuperscript{121} Nolan, RS, “The Law of the Seal of Confession” (1913) 13 Catholic Encyclopedia, 649, 652. The universality of both the Catholic and Anglican canon law prohibitions against priests disclosing confessional secrets is discussed in detail in chapter three. However, Coke’s historical references are to a time when the only relevant canon law was Catholic and had forbidden such disclosure from the ninth century. The Fourth Lateran Council’s 1215 restatement of that canon law was still in force in the fourteenth century period upon which Coke was commenting.

\textsuperscript{122} \textit{Garnet’s case} in 1606 was argued seventy years after Henry VIII’s religious Reformation was all but complete and Coke’s Second Part of the Institutes is believed to have been published some time between 1630 and 1640, after Charles I initially banned publication. All the Institutes were first completed in 1628 (Hostettler, op cit, pp xiv, 160). See also note 1, supra.
against the current King (Henry V) – which suggests he had broken the seal of confession because he saw protection of the King’s life as a greater cause. Yet history records that Randolph was himself imprisoned as some sort of accomplice.\textsuperscript{123} Would Friar John Randolph have been protected from disclosure of Dowager Queen Joan’s confession (presumably that she was guilty of treason in “compassing”\textsuperscript{124} the death of the King Henry V) if the existence of a confession was suspected and was to be extracted from him? Or would withholding the confessional evidence in protection of the seal have seen the priest found guilty of misprision of treason, as is Coke’s hypothesis? There is no Year Book or other law report of the Randolph case available. However, Edward Hogan Jr has commented on Coke’s citation of the Randolph case in his commentary:

He referred to the trial of Friar John Randolph who was tried with Queen Dowager Joan, the widow of Henry IV, for conspiring to kill the King. History shows that Friar John admitted his share of the conspiracy, although this apparently had nothing to do directly with the fact that he was the Queen’s confessor. The record, meager as it is, establishes no breach of the privilege of the confessional.\textsuperscript{125}

\textsuperscript{123} The Brut or the Chronicles of England record that “Randolf” was “taken in yle of Gernesey” and imprisoned first at Chirbourne in Normandy, then transferred to “Maunte” and then to the Tower (The Brut or the Chronicles of England, edited from MS Rawl. B 171, Bodleian Library by Friedrich, WD, Ed. Brie, Part II, London, EETS, 1908, pp 422-423).

\textsuperscript{124} Coke, op cit, p 629.

\textsuperscript{125} Hogan, EA, Jr, “A Modern Problem on the Privilege of the Confessional” (1951) Loyola LR 1, 10-11. Other historical reports of the case suggest that “Queen Joan, second wife and widow of King Henry IV was arrested on 1 October 1419 as a result of an accusation by her confessor, John Randolf, a Franciscan” (Bellamy, JG, The Law of Treason in England in the later Middle Ages, Cambridge, England, University Press, 1970, p 126) on the basis that she had plotted to destroy King Henry V by sorcery and necromancy (Idem. See also Vickers, KH, Humphrey Duke of Gloucester: a biography, London, Archibald Constable & Co, 1907, pp 276-278). Other accounts still suggest that Randolph confessed his own complicity in the plot and that his personal confession of crime was what constituted the accusation against Queen Joan (Kittredge, GL, Witchcraft in the Old and New England, Cambridge, Mass., Harvard University Press, 1929, p 79; Vickers, op cit, p 278).
Though both the Dowager Queen and Randolph were imprisoned in 1419, neither was ever tried for the treason alleged. Queen Joan was restored by King Henry V two months prior to his death in 1422, and Randolph was murdered in prison in 1429 by another priest said to have been mad. Randolph’s case thus does not establish Coke’s treason exception to religious confession privilege.

Coke’s citation of Garnet’s case as authority for a treason exception to religious confession privilege, is somewhat circular. Since Garnet’s case was a jury decision and the verdict was guilty, Coke may be seen as citing his own prosecutorial arguments as precedent for the conclusion in his Second Part of the Institutes published more than twenty years later. But the jury decision had become a part of history. However, Coke’s commentary on the word “decapitantur” as it appeared in the Statute Articuli Cleri – that beheading was only allowed as punishment for treason; that one could not abjure for treason and that the reference to beheading, was thus a “mistake in the petition” which originated the statute – is inaccurate. Bellamy notes a number of cases of penalty mitigation (including mitigation from “drawing and hanging” and “drawing and quartering” to “beheading” and “abjuration” respectively) during the reign of Edward II in response to Edward’s

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126 Kittredge, op cit, p 80.
127 Kittredge, idem. See also The Brut or the Chronicles of England, op cit, pp 422-423.
128 Garnet’s case is discussed in detail infra, pp 77-81, where its contribution to the common law of religious confession privilege is weighed.
129 Coke, op cit, p 629.
130 Idem.
131 Bellamy, op cit, p 51.
132 Ibid, p 56, n3. In this case, Bellamy notes Sir John Maltrevor’s conviction by attaint for a treason following his flight to the Continent in 1429 (practical abjuration), from where “he endeavoured to win his
uncertain and arbitrary use of the charge of treason for political purposes.\textsuperscript{133}

Bellamy’s further insight that Edward II’s unpopular summary trial methods\textsuperscript{134} and his “tampering with the scope of treason”\textsuperscript{135} fell into disuse during Edward III’s reign,\textsuperscript{136} may explain Coke’s unfamiliarity with the variability of the criminal penalties for treason when the Statute Articuli Cleri was issued in 1315. Bellamy certainly confirms that statute’s assumption that abjuration was a penalty used in cases of treason during Edward II’s reign despite Coke’s denial of the fact.

But Coke needed to deny the availability of abjuration for treason, however transparent it may now appear, to prove his point that religious confession privilege, like the other religious privileges – “benefit of clergy” and “sanctuary and abjuration”, were only available in cases of felony, not treason.\textsuperscript{137} The reality is that the logic does not transfer. Treason was not an exception even to benefit of clergy until some time after 1315, and sanctuary and the right to abjure, were available for treason in 1315 to avoid the death penalty by beheading. Holdsworth’s additional observation – that the additional penalties of the forfeiture of one’s possessions and the legal way back into royal favour”. He cites the case as a fourteenth century case of practical penalty mitigation connected with abjuration (ibid, p 82).

\textsuperscript{133} Ibid, p 63.

\textsuperscript{134} Bellamy notes that King Edward II developed ‘the King’s record’ as a means of summary trial (ibid, pp 35-53) which deprived defendants of the right to ‘put themselves on the country’ (jury trial). The theory which lay behind the new trial mode was that “[t]he king’s own word or record that a fact was so, was the most perfect form of proof obtainable since it was incontrovertible” (ibid, p 35).

\textsuperscript{135} Ibid, p 63.

\textsuperscript{136} This “tampering with the scope of treason” (Bellamy, op cit, p 63) was answered by the Great Statute of Treasons in 1352 (25 Edward III) following a petition in the Commons (ibid, p 71).

\textsuperscript{137} Coke had asserted at Garnet’s trial “by the common law, howsoever ... [Garnet came to know of the Gunpowder Plot] (it being crimen laesae majestatis) he ought to have disclosed it” (Carswell, D, \textit{Trial of Guy Fawkes and Others}, Glasgow and Edinburgh, William Hodge and Company Limited, 1934, p 170; Garnet’s case (1606) 2 Howell’s State Trials 217, 246). Garnet’s case is discussed in detail infra, pp 77-81.
widowhood of one’s wife\textsuperscript{138} which were the further consequences of abjuration, were far too great to justify that sacrifice for lesser crimes which only amounted to felonies\textsuperscript{139} – also resonates with these conclusions which follow from Professor Bellamy’s research.

What does all this mean in this consideration of the existence of religious confession privilege in the early seventeenth century? First, that there was no doubt that religious confession privilege existed when Coke wrote his \textit{Second Part of the Institutes} (circa 1625). And secondly, that “Coke’s treason exception” as prosecutor in \textit{Garnet’s case}, had no legitimate foundation in the English common law of that day.

There may, however, have been other authority for the treason exception which Coke chose not to cite in his magnum opus on the common law. There are hints of that alternative authority in his use of the Latin “\textit{crimen laesae majestatis}” in Garnet’s prosecution, rather than the more familiar French phrase “\textit{lese-majesté}”,\textsuperscript{140} and in the then new Anglican canon law exception\textsuperscript{141} to the seal of confession.\textsuperscript{142} The Anglican canon law exception was only two to three years old at the time when \textit{Garnet’s case}...

\textsuperscript{138} Holdsworth, op cit, Vol 3, p 305.

\textsuperscript{139} Holdsworth cites Brooke, who doubts that sanctuary and abjuration were used for minor offences, and says “that it was confined to cases where the criminal was in jeopardy of his life; considering the serious consequences of abjuration it was probably mainly used in these cases” (Holdsworth, op cit, Vol 3, p 305).


\textsuperscript{141} The first canons of the Anglican Church were published in 1603/4 and are discussed in chapter three. Canon 113 deals with religious confession and includes an exception which has been considered ambiguous by some canon law commentators. Lynn Leeder has contributed that “treason would seem to be the only candidate” for the meaning of the exception to the new canon (\textit{Ecclesiastical Law Handbook}, London, Sweet & Maxwell, 1997, p 355).

\textsuperscript{142} Canon 113, \textit{Constitutions and canons ecclesiastical/treated upon by the Archbishops of Canterbury and York}, London, printed by Robert Barker and by the assigns of John Bull, 1640.
was tried.143 The French authority can be dated to the early fifteenth century.144 For from the fifteenth century, the canonists carried on an extensive debate as to whether priests were entitled to refuse to disclose knowledge they had gained in confession in the wake of “an ordinance of Louis XI, of December 22, 1477, commanding every citizen under pain of death to report any plot against the king or State of which he might have knowledge”.145 The French canonical conclusion, which was deplored by the more conservative canonists,146 was that treason was an exception to the seal of confession.

The only remaining question about Coke’s otherwise clear confirmation of a common law religious confession privilege in the early seventeenth century are the closing words of the 1315 Statute Articuli Cleri – “ne erronice informent”. Coke did not see the need to comment on these words as he had in relation to four other phrases in the part of the statute that is relevant to religious confession privilege. He simply repeated them. The relevant text of which they form part reads, “but the confessors must take care that they do not wrongfully inform these approvers”.147

Tiemann and Bush are uncertain about the existence of a religious confession privilege in Coke’s time, because they consider these closing ambiguous words

143 The canons were promulgated in 1603/1604. Garnet’s case was tried on 26 March 1606.
147 Translation courtesy of Dr Will Richardson of the Classics and Ancient History Department at the University of Auckland, New Zealand.
diluted the privilege and limited it only to “certain prisoners”\textsuperscript{148} – namely the thieves and approvers (informers) listed. It is submitted that Best’s view of the caution is more compelling. He wrote:

We may be permitted to doubt whether the caveat at the end was inserted to warn the confessor against disclosing the secrets of the penitent to others. The grammatical construction and context seem to show that it was to prevent him abusing the privilege of access to the criminal by conveying information to him from without.\textsuperscript{149}

Best noticed that the warning was generally interpreted as an affirmation, not only of religious confession privilege itself, but also of the clerical obligation to observe the seal imposed upon them by Canon 21 of the Fourth Lateran Council in 1215. Best doubted that either of those suggested purposes explained the warning. Instead Best opined, in view of the connection of the phrase to clerical communication with approvers (informers), that the King was more concerned that the clergy not abuse their access and provide prisoners with otherwise unknown information about crime in general. The essence of Best’s insight is that the King suspected the clergy of providing information about unsolved crime to prisoners so that those prisoners might then disclose that new information to the King as informers in better hope of receiving his mercy. It is submitted that Best’s view is the best explanation of the words “\textit{ne erronice informent}” and does not dilute either Edward II or Coke’s recognition of the accepted privilege.

\textsuperscript{148} Tiemann and Bush suggest that “the plain meaning of the Statute [Articuli Cleri is] ... that certain prisoners had the right to be confessed by a priest” and that “Lord Coke [in his commentary] is citing what he feels to be the common law at that time, as it would apply to all priests” (Tiemann, WH, and Bush, JC, \textit{The Right to Silence – Privileged Clergy Communications and the Law}, Nashville, Abingdon Press, 1983, pp 46-47).

What the context of Coke’s reference to religious confession privilege does confirm is that his point was not to affirm the existence of religious confession privilege. That confirmation is merely an aside which fact he treats as axiomatic. Because Coke did not think the “ne erronice informent” codicil to the Statute Articuli Cleri needed any explanation, it is not clear what he understood it to mean. The point he laboured was the treason exception and that is where he cited his authority. That focus is clearer still when it is remembered that his commentary upon the statute was provided as an example of the interrelationship of the common law with the church and its privileges. The treason exception to religious confession privilege was cited as an example of the common law’s successful assertion of its supremacy. What Coke was demonstrating was that even the established privileges of the church had been part trumped by a treason exception evolved at common law. He did not choose Randolph’s case or Garnet’s case to establish religious confession privilege except as a concession on the way to proving his premise. His premise was that the common law was so powerful that it had established a treason exception to the privileges of the church.

As has been explained above, his logic in explaining the historical context of the Statute Articuli Cleri in 1315 is not completely accurate because first, it was not correct for him to state that the ecclesiastical privilege known as ‘sanctuary and abjuration’ was not then available for treason150; and secondly, because even the treason exception to ‘benefit of clergy’ was not established until more than sixty years after the Statute Articuli Cleri was passed.151

150 Supra, pp 67-72.

Religious confession privilege in *Garnet’s case*.

The real question in defining the metes and bounds of religious confession privilege at common law at the beginning of the seventeenth century, thus comes down to the impact of *Garnet’s case* upon that common law. Coke’s concern in his *Second Part of the Institutes* more than twenty years later was to affirm that ‘his treason exception’ to religious confession privilege was established by historical and common law authority. It is noteworthy that the extensive report of *Garnet’s case* includes no mention at all of either the debatable treason exceptions to ‘benefit of clergy’ or ‘sanctuary and abjuration’ that he cites as authority in the *Second Part of the Institutes*, or to *Randolph’s case*, the other common law authority which he cites in that *Second Part of the Institutes*. While it is possible that he did not consider such evidence appropriate when he argued *Garnet’s case* before a jury, his prosecution of the case did include a great deal of other historical material of arguably less relevance. More likely it is that his defence of the treason exception to all church privileges in the *Second Part of the Institutes* was the result of twenty years further thought. Since King James was personally involved in academic debate with continental canonists after the *Garnet* decision to defend ‘Coke’s treason exception’ to religious confession privilege, it seems likely that Coke felt pressure to justify the exception from the common law. It is therefore not surprising that he endeavoured to do that exclusively from English common law materials.

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152 See note 178 infra and supporting text.
Garnet’s case

Despite Coke’s statement in his *Second Part of the Institutes* that Garnet’s case affirmed that treason was an exception to both ‘benefit of clergy’ and “priviledge of confession”, it is difficult to confirm that precedential finding from the facts of the case. However, “priviledge of confession” was certainly raised as a defence personally by the Jesuit Superior of England, Father Henry Garnet. Though the report of the case is extensive, it is not clear whether he was charged with treason, in what modern lawyers might call the first degree (direct involvement in development and prosecution of the crime), treason in the second degree (an accessory before or after the fact) or misprision of treason (knowing of a treason and not divulging it to the authorities). In practice it did not matter since all high treasons (treasons against the person of the King) and misprision of high treason, carried the death penalty and these close modern distinctions have no significance in the way the case was

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153 Garnet’s case (1606) 2 Howell’s State Trials 217.
154 Coke, op cit, p 629.
155 Idem.
156 Prisoners were not “allowed counsel at the trial itself ... until 1696 in cases of treason, [and] until 1836 in cases of felony” (Milsom, SFC, *Historical Foundations of the Common Law*, London, Butterworths, 1969, 360. Stone and Wells say that the year of this change occurred in 1695 but confirm that this change was not available to criminal defendants till near the beginning of the seventeenth century (Stone, J, *Evidence, Its History and Policies*, Revised by WAN Wells, Sydney, Butterworths, 1991, pp 34-35).
157 One modern legal dictionary defines “misprision” as “[a] word used to describe an offense which does not possess a specific name ... But more particularly and properly the term denotes either: (1) a contempt against the sovereign, the government, or the courts of justice, including not only contempts of court, properly so called, but also all forms of seditious or disloyal conduct and leze-majesty [sic]; (2) maladministration of public office; neglect or improper performance of official duty, including peculation of public funds; (3) neglect of light account made of crime, that is failure in the duty of a citizen to endeavor to prevent the commission of a crime, or ,having knowledge of its commission, to fail to reveal it to the proper authorities” (Black, HC, *Black’s Law Dictionary*, 6th ed, St Paul, Minnesota, West Publishing Co., 1990, p 1000). The dictionary goes on to indicate that “misprision of felony” connotes concealment “but without such previous concert with or subsequent assistance to the felon as would make the party concealing an accessory before or after the fact” (idem).
argued. Because it was a jury trial, the only precedent value the result carries is that Coke’s final prosecution as Attorney-General was successful. Henry Garnet was found guilty of a high treason and was beheaded in St Paul’s churchyard on 3 May 1606, five weeks after his trial on 26 March 1606.

Coke’s case for the prosecution connected disparate threads of circumstance to establish that Garnet not only knew of the plot, but that he had certainly encouraged and assisted it if he was not its primary author. His reasoning may be summarised down to four essential propositions. First, that it was a secret confederacy involving only “Catesby of the laity”. Secondly, that it was oath-bound for seriousness and

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158 Professor Bellamy traces how the offence of “misprision”, which first had reference to a mistake (Bellamy, JG, *The Law of Treason in England in the Later Middle Ages*, Cambridge University Press, 1970, p 216) “took on additional meanings as the years passed” (idem). Though he says that “it has been [an error] to hold misprision as almost the equivalent of treason” (idem), yet his findings that Tudor statutes and Sir Edward Coke so used the word, suggest to the writer that it is not a very large error. “For as early as 1415, to know of yet to conceal treason was treason” (ibid, p 222), which suggests that the words “misprision of treason” had become, by Tudor times, simply an adjectival way of describing a particular type of treason. The fact, too, that Coke devotes “a separate if slender chapter” (Bellamy, op cit, p 216) to “misprisions diverse and several”, yet does not mention Garnet’s case in that chapter as he does when discussing the Statute Articuli Cleri of 1315 (Second Part of the Institutes, p 629), suggests that either he considers that Garnet had been charged with treason proper, or that “misprision of treason” had indeed become a legal term of art to describe a species of treason, and that it no longer denoted a lesser version of the principle offence in the case of treason.

159 That is, the jury made the decision after hearing all the evidence. Only the jury could thus technically spell out the reasons why they decided Garnet was guilty of treason, but of course juries have never been required or even allowed to give reasons.

160 Coke was appointed Chief Justice of Common Pleas on 20 June 1606 and served till his dismissal in the autumn of 1613. He was appointed Chief Justice of King’s Bench on 25 October 1613 (which was a less lucrative post and considered a demotion) until he was again dismissed by the King on 14 November 1616 (Hostettler, op cit, pp 61, 79, 93).


162 Each of the trials of the Gunpowder plotters lasted only one day. The first took place on 27 January 1606 and Garnet’s on 26 March 1606. Those executed following the earlier trials were Sir Everard Digby, Robert Writer, John Grant, Thomas Bates, Thomas Winter, Ambrose Rookwood, Robert Keyes and Guy Fawkes (Lyon, H, and Block, H, *Edward Coke – Oracle of the Law*, Littleton Colorado, Fred B Rothman & Co, 1992, pp 158-159). Robert Catesby, Thomas Percy, John Wright and his brother had been killed in the pitched battle that attended the capture and arrest of the fleeing conspirators in Hobeach House on the Welsh border on 8 November 1605 (Pollen, JH, “The Gunpowder Plot”, 7 *Catholic Encyclopedia* (1913) 81, 82; Mockler, A, op cit, p 17).

163 Carswell, D, op cit, p 158; Garnet’s case (1606) 2 Howell’s State Trials 217, 237.
secr**esy**’s sake.\textsuperscript{164} Thirdly, that it was Jesuit blessed by their administration of the sacraments to all the conspirators.\textsuperscript{165} And fourthly, that it was further disguised by the Jesuit’s careful indoctrination of the conspirators in the art of equivocation.\textsuperscript{166}

The “privilege of confession” arose as an issue in the case because Garnet denied he was a principal conspirator in the case as Coke alleged.\textsuperscript{167} Garnet stated that he only knew about the issue because Greenwell\textsuperscript{168} (another Jesuit) had consulted him about the matter. This consultation, Garnet maintained, was itself protected by the privilege of confession.\textsuperscript{169} Garnet further defended that he had done what he reasonably could to dissuade the plotters without breaching the seal of confession. He also cited his loyalty to the English King and counsel against treason in other plots as proof of his good faith.\textsuperscript{170}

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\begin{itemize}
\item \textsuperscript{164} Carswell, D, op cit, p 147; \textit{Garnet’s case} (1606) 2 Howell’s State Trials 217, 229.
\item \textsuperscript{165} Idem.
\item \textsuperscript{166} Carswell, D, op cit, p 153-154; \textit{Garnet’s case} (1606) 2 Howell’s State Trials 217, 234-235.
\item \textsuperscript{167} Carswell, D, op cit, p 136; \textit{Garnet’s case} (1606) 2 Howell’s State Trials 217, 221.
\item \textsuperscript{168} The law reports in the writer’s possession (Cobett’s \textit{Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours from the earliest period to the present time}, London, Printed by TC Hansard, Published by R Bagshaw, Brydges Street Covent Garden, 1809 and herein cited as “Howell’s State Trials”; along with Donald Carswell’s edition of \textit{The Trial of Guy Fawkes and Others (The Gunpowder Plot)}, London, Butterworth & Co, 1934) both name this particular Jesuit priest as “Greenwell” and so the writer has used that name for him throughout. However, readers should note that other commentators variously name him as “Greenway” (Kurtscheid, B, \textit{A History of the Seal of Confession}, Authorized translation by the Rev FA Marks, Edited by Arthur Preuss, St Louis and London, B Herder Book Co, 1927; Lyon, H, and Block, H, \textit{Edward Coke – Oracle of the Law}, Littleton, Colorado, Fred B Rothman & Co, 1992; Pollen, JH, “Henry Garnet” (1913) 6 \textit{Catholic Encyclopaedia} 386 and “The Gunpowder Plot” (1913) 7 \textit{Catholic Encyclopaedia} 81) and “Greenaway” (Mockler, A, \textit{Lions Under the Throne}, London, Frederick Muller Ltd, 1983).
\item \textsuperscript{169} Other religious confessions were referenced at the trial. For example, the first five plotters’ confession to the Jesuit Gerard in May 1604 immediately after they had made their “collective oath of secrecy and constancy” (Carswell, D, op cit, p 147; \textit{Garnet’s case} (1606) 2 Howell’s State Trials 217, 229) and Garnet’s own overheard confession to his brother Jesuit Hall while both were incarcerated in the Tower (Pollen, JH, “The Gunpowder Plot”, 7 \textit{Catholic Encyclopaedia} (1913) 81, 84). But the “privilege of confession” was not raised as a defence to either of them.
\item \textsuperscript{170} Carswell, D, op cit, p 161-162; \textit{Garnet’s case} (1606) 2 Howell’s State Trials 217, 240-241.
\end{itemize}
Coke’s rebuttal of Garnet’s defence appears to have convinced the jury. Coke said Garnet’s conversation with Greenwell was not a sacramental confession because: it contemplated a future wrong which could not be repented of in advance; the confidante was not penitent; it was told him “not as a fault, but by way of consultation and advice”;\textsuperscript{171} and it was told on behalf of others, and not by the sinners themselves.\textsuperscript{172} Coke added that even if it were a confession, it was not privileged for two reasons. First, because “[Garnet] might and ought to have discovered the mischief, for preservation of the State, though he had concealed the persons”\textsuperscript{173} (the implication being that Garnet would not then have broken the Seal). And secondly, because “it [was] \textit{crimen laesae majestatis} ... by the common law”\textsuperscript{174} ... he ought to have disclosed it”.\textsuperscript{175}

Cross-examination and comment from two\textsuperscript{176} of the nine Commissioners present\textsuperscript{177} doubting that Garnet’s communication with Greenwell could ever have been a

\textsuperscript{171} Carswell, D, op cit, p 169; Garnet’s case (1606) 2 Howell’s State Trials 217, 246.

\textsuperscript{172} Carswell, D, op cit, p 169-170; Garnet’s case (1606) 2 Howell’s State Trials 217, 245-246.

\textsuperscript{173} Carswell, D, op cit, pp 169-170; Garnet’s case (1606) 2 Howell’s State Trials 217, 246.

\textsuperscript{174} The report provides no detail of what common law Coke was referring to. In light of the fulsome detail otherwise provided in what reads close to a verbatim report, it appears that the simple assertion stood on its own and was not contested.

\textsuperscript{175} Carswell, D, op cit, p 170. Garnet’s case (1606) 2 Howell’s State Trials 217, 246. Though Coke referred to “the common law” at the trial, the report does not reveal whether he cited any authority or whether any authority was discussed. Given the otherwise thorough fulness of the report, it seems unlikely that he did cite those authorities that he later referenced in his Second Part of the Institutes.

\textsuperscript{176} The Earls of Northampton and Salisbury.

\textsuperscript{177} The other seven Commissioners were Sir Leonard Holyday, Lord Mayor; the Earls of Nottingham, Suffolk and Worcester; the Lord Chief Justice of England, Sir John Popham; the Lord Chief Baron of the Exchequer; and Sir Christopher Yelverton, kt., one of His Majesty’s Justices of the King’s Bench (Carswell, D, op cit, p 131; Garnet’s case (1606) 2 Howell’s State Trials 217).
religious confession, must also have reinforced Coke’s prosecutorial rebuttal of Garnet’s religious confession privilege defence in the minds of the jurors.

Though these facts and this result in a jury case may not meet modern precedential standards in establishing a rule of law, they do prove that the “priviledge of confession” was not unknown to English law. If Garnet’s religious confession privilege defence had no substance whatever, Coke would surely have said so both in his prosecution of the case and in his later commentary. That King James himself subsequently entered into a correspondence with canon law authorities in Europe in an apparent effort to establish “Coke’s treason exception” to religious confession privilege as a matter of Catholic practice,\(^{178}\) is similarly probative of acceptance of the standing of “the priviledge of confession” more than 60 years after King Henry VIII’s Reformation was complete.

**Conclusion to chapter two**

Chapter two has demonstrated that there was practical recognition of religious confession privilege as late as the seventeenth century. Certainly the doctrine was not as defined as it is when expressed in modern statutes. However, it is clear that a priest would not be compelled to disclose the contents of any confession made to him in the course of his ministry, unless perhaps the facts confessed to him disclosed a high treason.

\(^{178}\) Kurtscheid has written that “James I ... (1607) wrote an apology of the oath of allegiance under the title *Triplici Nodo Triplex Cuneus, sive Apologia pro Iuramento Fidelitalis*, in which he attacked ... the doctrine of the Jesuits concerning the Seal. [Cardinal] Bellarmine answered under [a] pseudonym ... In reply, James republished his apology with an amplified preface and sent it to the various courts, which induced Bellarmine to write a reply in his own name” (Kurtscheid, B, *A History of the Seal of Confession*, Marks, PA, transl, St Louis and London, B Herder Book Co, 1927, p 157).
Chapter three will document the evolution of the “privileedge of confession” in canon law and will explain how and why it became embedded in the common law. In particular, King Henry VIII’s reception of all existing canon law as his ecclesiastical law of England will rebut Wigmore’s implication that “Papal ecclesiastical practices prior to Henry VIII”\(^\text{179}\) including the seal of confession had been abolished at the time of the English Reformation.

CHAPTER THREE

RECOMMENDATION PRIVILEGE AND PRIVILEGE IN CANON LAW

Introduction

Coke’s recognition of a religious confession privilege in the seventeenth century does not define its metes and bounds. He simply says that there is a religious confession privilege save in cases of treason, but the exception does not explain the privilege itself. Readers of his Second Part of the Institutes are expected to know what constitutes a privileged religious confession – which lack of definition is itself testimony to the joinder of church and state which was a theme of chapter two. While Garnet’s case suggests that there was a distinction even in the seventeenth century between regular and irregular confessions, it is doubtful that the case has common law precedential value since it was a jury trial and the prosecution’s untested assertions about regularity were swamped in the end by the circumstantial case that Garnet was guilty of treason in the first degree.

The purpose of chapter three is to explain what religious confession meant when Coke acknowledged its existence in the common law – and what it was about religious confession that was privileged. The influence of canonical recognition of the seal on the common law will then be discussed before various expressions of its continuing status as part of the fabric of the general law of England are weighed.
This chapter two and three historical part of the thesis concludes that recognition of religious confession privilege was so thoroughly respected as a common law principle in the seventeenth century that there is no record of its ever being contested except in Garnet’s case. And that case was only “indecisive”¹ in the sense that the existence of religious confession privilege itself was uncontested.

Origins of confession

While Roman Catholic apologists like to trace modern confessional practice to various biblical statements made by Christ himself,² there is fairly general consensus that the early Christian church that was developed after his death, practiced a form of public confession.³ While it is not clear exactly what form that confession took, the use of the Greek word “exomologesis”⁴ to describe it suggests that intending new converts would address the congregation and renounce their old sins in a public and generalised way. “Exomologesis” however, is only a reference to a form of public confession and it is not clear whether it was available only to new converts or to existing members with something to shrive; whether the confession had to be made in a public meeting or simply in front of representatives of the relevant congregation; whether it was a regular occurrence for example repeated weekly or monthly; whether it was preceded by private interview with clerical leaders; whether it was

¹ Wigmore’s use of the word “indecisive” to describe Garnet’s case does not acknowledge that the historical and canon law roots of the common law might have justified a more careful review (Evidence in Trials at Common Law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 869).

² For example “the keys of the kingdom” given Peter to bind and loose on earth and in heaven (Matthew 16:16-19).

³ McNeill, JT, A History of the Cure of Souls, New York, Evanston and London, Harper & Row, 1951, pp 90, 91. Note also that EF Latko says that “exomologesis ... has a variety of meanings, but ordinarily signifies an avowal of sin, made either to God or to man”, but “etymologically [it] denotes open declaration and implies public confession [and was employed] in the primitive Church ... for confession of sins and for the sacramental procedure involving austere discipline” (Latko, EF, “Auricular Confession” (1966) 4 New Catholic Encyclopedia 131). See also Meninger, K, Whatever became of sin?, New York, Hawthorn Books Inc, 1973, p 25.

⁴ Literally, exomologesis means “to confess in full” or “to make full acknowledgement” (http://monarch.gsu.edu/jcrampton/foucault/techterms.html last visited 8 July 2006).
accompanied by some public imposition of penitential restitution; or whether it was only used in connection with public as opposed to secret sins. It may be that all of these further questions were the later questions of a successful institution grown large and forced to grapple with issues of administrative consistency and efficiency. McNeill is confident that before the end of the second century it routinely took place in Sunday meetings and necessarily took place before the clergy when the sins were more serious, though it seems congregational publicity was all that was required since persecution often required that the ‘public’ meetings themselves took place in secret.\(^5\) This process was soon embellished, for Murray recounts an elaborate liturgy of St Ambrose in 383 AD which took days and saw all penitents, as Adam and Eve, symbolically expelled from the church on Ash Wednesday before being readmitted on Holy Thursday.\(^6\)

McNeill says that none of “the third century fathers authorized the repetition of the exomologesis”,\(^7\) but notes that the “considerable numbers who lapsed into ‘idolatry’ in persecution, and afterward insistently sought restitution”,\(^8\) probably explains the advent of confessional repetition. Meninger is probably cynical when he suggests that confession became private after Constantine to make the church more attractive to would-be converts\(^9\) but McNeill and Kurtscheid propose a more reasoned explanation. McNeill suggests that from “an early period a private interview normally preceded the public act”,\(^10\) and cites authority in Origen (died 253 AD) and Ambrose

\(^5\) McNeill, op cit, p 91.


\(^7\) McNeill, op cit, p 93.

\(^8\) Idem.

\(^9\) Meninger, op cit, p 26.

\(^10\) McNeill, op cit, p 94.
(died 397 AD) for private confession to a priest, but notes that reconciliation still required the further step of public confession.\textsuperscript{11} For Tertullian, writing shortly before 200 AD, public penance was still required for “secret grievous sins”,\textsuperscript{12} but in the Spanish Church before 400 AD, “only a confession to the bishop or to the presbytery”\textsuperscript{13} was required and the public aspect was reduced to a generalised acknowledgement of sin and a request for pardon and support from the congregation.\textsuperscript{14} While Kurtscheid apologetically suspects that even Tertullian’s public penance around 200 AD was generalised, the detail and penance having been prescribed in private,\textsuperscript{15} he is certain that St Augustine’s failure to mention public confession means “that since the close of the fourth century secret confession of secret transgressions was deemed sufficient”.\textsuperscript{16} While McNeill is not so convinced by this failure to mention public confession in St Augustine, since he “offers no evidence for the existence of private penance with absolution”\textsuperscript{17} either, he acknowledges “the African father[s] ... habitual ... use of a private interview to receive confessions”.\textsuperscript{18}

But though confession had become a private affair by the end of the fourth century, there was no canonical seal nor reference to an expectation of confidentiality in the priest. Formal approval of secret confession and a disapproval of public recitation of

\textsuperscript{11} Ibid, pp 94-95.
\textsuperscript{12} Kurtscheid, op cit, p 18.
\textsuperscript{13} Ibid, p 19.
\textsuperscript{14} Ibid, p 17.
\textsuperscript{15} Ibid, pp 16-18.
\textsuperscript{16} Ibid, pp 21, 37.
\textsuperscript{17} McNeill, op cit, p 96.
\textsuperscript{18} Idem.
sin at a papal level is variously attributed, but it is in Celtic custom in Ireland that the penitential discipline which led to the seal is sourced. Though Kurtscheid “finds no specific evidence in Church law of insistence upon secrecy before the middle of the ninth century”, “Ambrose in the fourth century had felt obligated to tell none but the Lord the nature of offenses revealed to him in private”. Kurtscheid says that “the rudiments of the Seal are recognizable” from this early date, since the church was endeavouring “to remove everything that might deter the faithful from confessing their sins” but it is the fact that public penance was never even introduced into Ireland that focuses his attention on that country as the source of the seal.

Murray says the idea that people can “go to a priest to get absolution ... any time they take it into their heads to sin” was an idea that had germinated in Spain though “[t]he Council of Toledo, AD 589 [had] thunder[ed] against this intolerable abuse”, considering it “disgusting” that “people [would use] a form of penance contrary to the canonical institutions”. For McNeill, that the Irish and Welsh Penitential Books which were copied by “English and Continental imitators, from the sixth to the sixteenth century” evidences a penitential discipline quite different to that which had

19 Ibid, pp 98-99. See also Kurtscheid, op cit, pp 51-64.
20 The Irish origins of the seal attached to confessional practice are discussed infra, pp 79-81.
22 Idem. See also ibid, pp 45-46.
23 Ibid, p 47.
24 Idem.
27 Ibid, p 159.
28 McNeill, op cit, p 113.
obtained in the Patristic Age.\footnote{Ibid, p 112. The Patristic Age is the age of Christ’s Apostles, and the Bishops who succeeded them, who governed the church in the early centuries after Christ was crucified.} “Instead of being public and unusual,\footnote{Idem. “Unusual” in the sense that confession to the congregation in the Patristic Age seems to have been a one-off event in the life of the penitent and the discipline imposed was unique to individuals. The Penitential Books gradually standardised discipline for similar offences.} confession and penance had become private, frequent and common to all”,\footnote{Ibid, p 115.} and the roots for these Irish origins lay “in the culture of the Celtic peoples”.\footnote{Ibid.} Murray says that

\[\text{when St Patrick landed in Ireland [in] AD 432, he seems never to have thought of introducing the classical penitential system [but rather] … his missionaries developed a new style by grafting ecclesial penance on to an old monastic custom whereby novices went to the old for spiritual advice and to confess their faults.}\footnote{Murray, op cit, p 160.}

In fact, the Irish even had “a word for penitence (aithrige or athirgi etc) … in old … tales scarcely affected by Christianity”.\footnote{McNeill, op cit, p 115.} The Celts in Wales and Gaul too had pre-Christian confessional traditions and some scholars have even “shown remarkable parallels between ancient Irish and ancient Indian practice”\footnote{Ibid, p 116.} where their spiritual directors, judges and wise men were involved, and the people “accepted the obligations they imposed”.\footnote{Idem.} For McNeill, “the private character of … Celtic penance”\footnote{Idem.} is manifest in its complete “disassociati[on] from church assemblies”\footnote{Idem.}
and there is no “public exposure” nor need as in the classical tradition for a “public act of reconciliation”. Accordingly, when the Greek Theodore of Tarsus became Archbishop of Canterbury, he found the Irish system so well established and accepted, even in England, that “he yielded to the Irish practice”. Kurtscheid suggests that this surrender was so as not to “render the conversion of Anglo-Saxons more difficult” which would have been the result of insisting on the “humiliating [classical] penance”. Murray says that it was the imprimatur of Theodore’s authority, who was well seasoned in the classical Roman and Greek penitential systems but who nonetheless adopted the Irish development, which enabled it to flourish and gradually spread through the whole church. In time, the process by which the Irish church developed their traditions into sacramental confession “came to be recognized as a stroke of genius”. Her useful summary of that development records four changes. First, “[a] transition from a communal, social, ecclesiastical celebration to a private ceremony”; secondly, “[a] transition from a statement in which all the people of god have an active role to one in which ordained priests are active”; thirdly, “[a] transition from a sacrament in which only serious sins are confessed to

38 Idem.
39 Idem.
40 Idem.
41 There is variation in the dates of Theodore’s archbishopric at Canterbury. Kurtscheid dates his penitential manual from which the information upon which all the commentators rely to 568 AD (Kurtscheid, op cit, p 65), whereas McNeill dates his term as Archbishop in England to 668-690 AD (McNeill, op cit, p 117). Murray also dates the commencement of his bishopric to 668 AD (Murray, op cit, p 160), which suggests there is a typographical error in the earlier work of Kurtscheid.
42 McNeill, op cit, p 116.
43 Kurtscheid, op cit, p 65.
44 Idem.
45 Murray, op cit, p 160.
one in which venal sins and imperfections are confessed”; and fourthly, “[a] transition from a sacrament rarely received, to a commonly frequented sacrament.”

The evolution of confession thus manifests the church’s desire to ameliorate the severity of its classical penitential regime as it grew internationally, both because such severity was difficult and time-consuming to administer, and because it was unattractive to would-be converts. All that remains to complete a tracing of the modern Catholic sacrament of confession and penance is to identify the origins of the seal itself and its penalties, for they have remained virtually unchanged since they were finally enshrined in the 21st canon of the 4th Lateran Council of 1215.

**Origins of the seal**

In his endeavour to prove the historical and doctrinal seamlessness of the Catholic practice with regard to the seal of confession, Kurtscheid finds it fairly thoroughly established in practice if not in canon law by Pope Leo I’s papal letter in 459 AD. In that letter, the Pope addressed “the bishops of Campania, Samnium and Picenum”, in whose diocese it had been “customary, when public penance was accepted, to read publicly in church, not only the names of the penitents ... but also the transgressions for which each one did penance”. Kurtscheid calls this letter “the first papal decretal safeguarding the secret of confession”. The Pope identified the

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47 McNeill, op cit, p 98.
48 Kurtscheid, op cit, pp 51-58, 83-84.
49 Ibid, p 51.
50 Idem.
custom of so reading secret transgressions in open assembly51 as an abuse that must “by all means cease”52 – that “the manifestation of conscience (secret sins) in secret confession to the priests fully suffices”.53

Kurtscheid does however recognise the existence of other commentary down to the ninth century, which drew an evolutionary distinction between secret or conscience sins and those public sins which came to be defined in church canon law as scandal.54 In the earlier days of this evolution, the nature of the sin was more indicative of whether a public penitential sanction should attach,55 but gradually, the question of whether the sin itself was publicly known – in which event the sinner would need to be excommunicated and readmitted to the church56 – became the factor most determinative of whether any public penance was required. Cases of clerical penance created particular problems if the seal was not inviolable, since the withdrawal of clerical office after secret confession of secret sins – a very public penance – was incongruous with the lay rule which required only secret penance for secret sins.57

However, in England, more than a century before the Fourth Lateran Council of 1215 put the inviolability of the seal beyond doubt anywhere in the church,58 the seal was

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51 Ibid, p 52.
52 Ibid, p 54.
53 Ibid, p 55.
54 Ibid, pp 57-76.
56 Ibid, p 70.
57 Ibid, pp 69-76.
58 McNeill, op cit, p 113.
already inviolable. For Lanfranc, whom William the Conqueror had appointed Archbishop of Canterbury in 1070, wrote “in his treatise De Celanda Confessione”

He sins against this sacrament [i.e., Penance] who in any manner whatever arouses public suspicion regarding what has been confessed to him, or causes penitents to be defamed.

Lanfranc is emphatic on the point for the duty of confidentiality remains even if the supposed penitent turns out to be a recidivist sinner and “persevere[s] in his guilt”. In these circumstances, Lanfranc holds that “the confessor should bear with, after the example of Christ, who bore with Judas to the end”. “He who reveals a confession commits a crime deserving of death”. Lanfranc’s successor as Archbishop of Canterbury, Anselm (1093-1109), was similarly firm about the inviolable secrecy of confessional secrets and held that confessions must be kept “absolutely secret, if confession is to serve its purpose” and unbar “the salutary road to penance ... against those who would rather conceal their transgressions until death than expose themselves to the suspicion of crime”. Though there were controversies in Europe in later centuries about internal church use of confessional information and whether confessional information might be used to warn a monarch of a plot, so long as the

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59 Lanfranc was Archbishop of Canterbury 1070-1089.
60 Kurtscheid, op cit, p 92.
61 Idem.
62 Ibid, p 93.
63 Ibid, pp 93-94.
64 Ibid, p 93.
65 Ibid, p 75.
66 Idem.
penitent was not revealed. Kurtscheid concludes that the position in England was well settled against any disclosure for any cause whatever by the end of the eleventh century.

The need for such strong pronouncements in favour of the inviolable seal of confession and against any disclosure whatever of the contents of a confession were essentially a response to abuse. Lanfranc’s concern, shared and expressed later by the renowned canonist Peter Abelard (1079-1142), was the need for discretion in choosing one’s confessor, since some “priests are light-minded and careless, and it is difficult for them to control their tongue”. The seal was imposed and finally canonised with penalty in the Fourth Lateran Council of 1215 because respect for the sacred confidence due the sacrament of confession had not proven sufficient to impress this obligation of secrecy upon all priests. Hence the 21st canon of the Fourth Lateran Council declared:

Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner: but if he should happen to need wiser counsel let him cautiously seek the same without any mention of person. For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office but that he shall be sent into the confinement of a monastery to do perpetual penance.

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68 Ibid, pp 94-95.
69 Ibid, p 95.
70 Ibid, p 96.
71 Nolan, RS, “The Seal of Confession” (1913) 13 Catholic Encyclopedia 649
For Kurtscheid, this canon “contains no essential innovation either concerning the
seal or the precept of annual confession”72 because “the direct violation of the seal
was looked upon as a crime”73 from the eighth century onwards. Though Nolan74
with Kurtscheid notes the “renew[al of this law] during the succeeding centuries by
numerous provincial councils and diocesan synods”,75 these ordinances merely
repeated and inculcated the Lateran canon which remained as the canon law of the
church in place down to and through Henry VIII’s Reformation.76 The seal of
confession, protecting as it did the Sacrament of Penance, was one of those papal
laws which was “meant to have the force of ‘binding statute law’ in a modern
sense”.77

But did these papal laws indeed have effect as “‘binding statute law’ in a modern
sense”,78 as Helmholz suggests was their intent? In the remainder of chapter three I
answer that question by tracing the canon law and church influence in three
chronological periods. First, in the pre-Norman period when canonical sources
suggest that the seal had become respected in English practice, I note the congruity
of the catholic canon law and such so-called secular law as English kings passed.

72 Kurtscheid, op cit, p 115.
73 Ibid, p 79.
74 Nolan, op cit, p 650.
75 Kurtscheid, op cit, p 127.
76 The practical effect of the seal of confession in Roman Catholic canon law has remained the same to
the present day, though the expression has been modernised. King Henry VIII’s retention of all of the
Roman Catholic canon law operative at the time of the separation from Rome, other than changes which
he personally approved, is discussed infra, pp 109-111.
1987, p 261.
78 Idem.
Secondly, in the two centuries which followed the Norman conquest, I show the growth of church power before it slowly declined ending in England with King Henry VIII’s Reformation. And thirdly, despite that decline, I explain that Henry VIII’s Reformational decision to retain intact all previous canon law including the canon law regarding the seal of confession, operated to preserve religious confession privilege.

**England’s Catholic history before the Norman conquest**

Plucknett observed that Roman Catholic influence in Britain began in Roman times as the church gradually took over the empire and the Roman Empire became the Holy Roman Empire.\(^{79}\) While that influence began with Agricola’s “systematic conquest of the island”\(^ {80}\) beginning in 43 AD, barbarian defence preoccupation at home diluted both Roman and Christian influence until the end of the sixth century under St Gregory the Great (590-604).\(^ {81}\)

Following the visit of the monk Augustine,\(^ {82}\) Pope Gregory’s emissary in 597,\(^ {83}\) the catholicisation of England continued in earnest. Hence by the reign of Edward the Elder (921-924), Nolan noted secular (as opposed to canon laws passed by the church) “laws concerning confession”:\(^ {84}\)

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\(^{79}\) Plucknett observes that despite Roman efforts to “incorporate with [the Hellenistic religion] ... the religions of Isis, Mithras, Christ and others ... as an official department [with] ... its priests as civil servants ... Christianity would not accept this inferior position” (*A Concise History of the Common Law*, 5\(^{th}\) ed, London, Butterworths, 1956, p 4). Accordingly, “slowly, but certainly, the Empire ruled from Rome was being replaced for many purposes by Christendom ruled by the papacy” (Ibid, p 5).

\(^{80}\) Plucknett, op cit, p 6.

\(^{81}\) Ibid, p 8.

\(^{82}\) Not to be confused with St Augustine who lived between 354 and 430 AD.


\(^{84}\) Nolan, op cit, p 649.
And if a man guilty of death (ie who has incurred the penalty of death) desires confession let it never be denied him.  

This injunction from Edward the Elder’s laws was repeated in the forty-fourth of the secular laws of King Canute (1017-1035), with the following preface:

This then is the secular law which by the counsel of my ‘Witan’ I will that it be observed all over England.

Ethelred’s laws (978-1016) declared:

And let every Christian man do as is needful for him: let him strictly keep his Christianity and accustom himself frequently to shrift (i.e., confess): and fearlessly declare his sins. [The parentheses are Nolan’s.]

Nolan concluded that this very close connection between the religion of the Anglo-Saxons and their laws, many of which were purely ordinances of religious observance enacted by the State [and] the repeated recognition of the supreme jurisdiction of the pope ... led conclusively to the opinion that the ecclesiastical law of the

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85 Idem.
86 Idem.
87 Idem.
secrecy of confession was recognized by the law of the land in Anglo-Saxon England.\footnote{Idem.}

Though Nolan is a little generous in his conclusion, since neither Edward the Elder, Ethelred nor Canute said anything about canonical secrecy, his identification of congruity between church and state in matters of law seems fair before the Norman Conquest. But is it fair to say that there was congruity between such secular laws as were passed after the Norman Conquest as there had been before 1066?

**England’s Catholic history after the Norman conquest**

Though Plucknett notes that William the Conqueror (1066-1081) was a “devout Christian”\footnote{Plucknett, TFT, *A Concise History of the Common Law*, 5th ed, London, Butterworths, 1956, p 11.} himself,

he yet insisted that the Church should keep the place which he assigned to it, and in fact he secured an effective control over its policy, notably in appointments to the higher dignities.\footnote{Idem.}

Plucknett further notes that William’s long quarrel with the church in the twenty years before the English expedition was settled with “the help of Lanfranc whom he afterwards appointed Archbishop of Canterbury”.\footnote{Idem. There were seven separate popes in power during this twenty year period beginning with Clement II (1046-1047) and ending with Alexander II (1061-1073) see http://www.newadvent.org/cathen/12272b.htm (last visited April 10, 2004). Lanfranc served as Archbishop of Canterbury between 1070 and 1089.} These disputes with the church were not an English specific issue and, in the wider European historical context, are
variously discussed as the “Investiture Contests”, the Hildebrand Reforms and the Gregorian Reforms.

There are a number of threads which trace the ebb and flow of the English King’s relationship with ‘The Church’. The question of whose was the right to appoint the highest clerical officeholders was one of those; another was what temporal roles the clergy could fulfil in the King’s realm; and another, perhaps the most famous of all, was how much jurisdiction the King’s courts could exercise over the clergy – and in the explicit context of this thesis, what were the privileges of the clergy before the King’s courts.

The writer has dated the investiture contests in England to at least William the Conqueror’s time, and has already explained that the history of “benefit of clergy” demonstrates the power of the church and thus the respect in which its privileges were held. The unlikelihood that the clergy would be coerced to disclose confessional secrets during a period when even secular judicial roles were held by clergy will be explained below. But William’s practical power to appoint his own choice even as Archbishop of Canterbury demonstrates that modern separation of church and state still lay in the future and that in eleventh century England, it was simply a question of who had what political power over church appointments. For the spirit of the Reformation which blended sixteenth century nationalism with changed

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92 Berman says the term “Investiture Struggle” is something of an understatement. The transformation involved was much more revolutionary than that term implies and sought the complete “disengagement of the sacred and profane” spheres (Berman, HJ, Law and Revolution, Cambridge Massachusetts and London England, Harvard University Press, 1983, pp 87-88).

93 These reforms are named after the monk, Hildebrand, who became Pope Gregory VII (Berman, op cit, p 87).

94 Supra, chapter two, pp 61-66.

95 Infra, pp 101-103.
concepts of church and state planted during the Investiture contests from the
eleventh to the thirteenth centuries was still hundreds of years in the future.
Plucknett has noted that before William had appointed the priest Lanfranc as
Archbishop of Canterbury, that same Lanfranc had helped William settle his
struggle with the church in Normandy before he crossed the channel. Though
William may have broken protocol when he made the appointment as Archbishop
instead of the Pope, the reality is that a political compromise had been reached which
reconciled the personalities (William and the Pope) and suggests that their
institutions were never separated in practice.

Although Harold Berman believes that the Investiture struggle was the revolutionary
watershed from which the entire separate church/state western legal tradition
flowed, he confirms that the contest was contemporarily fought as an internal
political struggle in which the upper hand see-sawed back and forth. William the
Conqueror not only “appointed the bishops in his domain and controlled them... he
declared that the King of England and Duke of Normandy had the power to determine
whether a pope should be acknowledged by the church in England and
Normandy”, and asserted a veto power over the promulgation of new canon law
and “ecclesiastical penalties imposed on his barons and officials”. While the
Conqueror’s son William Rufus (William II, 1081-1100) defied the efforts of Pope
Gregory VII (1073-1085) and his successors to assert papal authority over the

96 Plucknett, op cit, p 11.
97 Berman, op cit, pp 99-100.
98 Ibid, p 94.
100 Idem.
101 Idem.
English clergy, William Rufus’ brother, King Henry I (1100-1135), made “substantial compromises with respect to the appointment of clergy”\textsuperscript{102} in return for papal support for his claim of Normandy from his brother Robert. Indeed, “[t]he Concordat of Bec (Normandy) in 1107\textsuperscript{103} anticipated the Concordat of Worms of 1122\textsuperscript{104} which settled the so-called Investiture Contest in Europe when the Emperor transferred the right “to invest bishops and abbots”\textsuperscript{105} to the Pope though retaining “the right to be present at [their] elections.”\textsuperscript{106} However the European settlement was more of a settlement than the Concordat of Bec, since it followed Pope Gregory VII’s successful deposition of the Emperor Henry IV in 1080\textsuperscript{107} and the sporadic civil war which followed “between the papal and imperial parties” until Worms in 1122. In England, papal assertion of the “independence of the clergy from secular control”\textsuperscript{108} was not really complete until after Becket’s martyrdom in 1170.

The point for this thesis is that the power of the church grew stronger in England after the Norman Conquest and reached its high water mark after Becket’s martyrdom. That high water mark was amply demonstrated by the public penance that the English King Henry II (1154-1189) was obliged to do “by walking barefoot to Canterbury”\textsuperscript{109} – and by his submission in 1172 “to a papal legate on the heights of Avranches …[where] before its cathedral [he] publicly renounced those portions of

\textsuperscript{102} Idem.
\textsuperscript{103} Henry I ruled both Normandy and England, as had his brother (William Rufus) and his father (William the Conqueror) before him. Bec is in Normandy and was the place where he settled his controversy with the Papacy -- the Pope at the time of the Concord was Paschal II (1099-1118).
\textsuperscript{104} Berman, op cit, p 437.
\textsuperscript{105} Idem.
\textsuperscript{106} Idem.
\textsuperscript{107} Ibid, pp 87, 522.
\textsuperscript{108} Ibid, p 87.
\textsuperscript{109} Ibid, p 256.
[Henry II’s] Constitutions of Clarendon that were ‘offensive”110. In such an age it is unthinkable that any judge in any jurisdiction would have tried to force a priest to disclose a sealed and sacred confession, and certainly not soon after the 4th Lateran Council in 1215 had made that seal canonically binding upon the whole church.111 Though the power of the Church waned subsequently, its authority and the King’s willingness to pass ‘secular laws’ protecting and restating its privileges just as Edward the Elder, Ethelred and Canute had done in pre-Norman times, are demonstrable one hundred years later in 1315 when Edward II passed his Statute Articuli Cleri112 which was discussed in chapter two.113 That most of the judges who manned the royal courts were clerics until Pope Innocent IV (1243-1254) banned such service, also demonstrates the pervasive influence of the church in the secular realm.

Clerical service in the royal courts

Nolan quotes Pollock and Maitland extensively as he makes his point that it was highly unlikely that a secular judiciary, manned by ecclesiastics, would deny the inviolability of the confessional seal when the confession was a sacrament of their faith.

Again, let us remember that in some districts such as Durham and Chester, bishops exercised temporal jurisdiction. Even in the King’s Courts, as Lord Coke points out, oftentimes the judges were priests before Innocent IV

110 Idem.
111 The evolution of the confessional seal was explained supra, pp 90-95.
112 9 Edward II, st.1.
113 Chapter two, pp 53-61.
prohibited priests from acting as judges. Pollock and Maitland’s “History of the Laws of England” gives us a specimen date, that of 16 July 1195, on which there sat in the Court of King’s Bench an archbishop, three bishops and three archdeacons. The same book tells us that “it is by popish clergymen that our English common law is converted from a rude mass of customs into an articulate system, and when the ‘popish clergymen’ yielding at length to the pope’s commands no longer sit as the principal justices of the King’s court the golden age of the common law is over.”

Holdsworth suggests that the churchmen were reluctant to relinquish these secular seats, some being “more at home when ... hearing assizes as justiciarii domini regis than when they were sitting as judices ordinarii” and others were concerned that without their direct involvement in the secular courts, church influence and jurisdiction would be eroded – which is exactly what happened. But it is again the question of another paradigm to ask why Pope Innocent IV would direct this retreat. Eight centuries later, it seems easy to see that this retreat to ministerial duties diluted the influence and jurisdiction of the church, but even in the present no one has such twenty-twenty prescience. In his discussion of the later interplay between the royal writs of prohibition and ecclesiastical sanctions, Helmholz observed:

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114 Nolan, op cit, p 652. Berman confirms that “[i]n the twelfth and thirteenth centuries ... most of the men who served as officials and judges and counsellors of Kings and emperors were clerics who owed at least half of their allegiance to the pope” (op cit, p 147).


116 Holdsworth, idem. Holdsworth observes that as “the common law courts gradually ... began to be staffed by common lawyers who had made their career at the bar ... the professional jealousy of the common lawyers led them to restrict the jurisdiction of the ecclesiastical courts whenever it was possible to restrict it.”

117 See chapter two, note 45 and supporting text.
It may have seemed unwise to push royal claims too far. Community acceptance of the place of the ecclesiastical courts and generally shared agreement about the proper jurisdictional boundaries may have stood behind the procedural features which kept the writ from being determinative.\footnote{Helmholz, \textit{Canon Law and the Law of England}, London and Ronceverte, Hambledon Press, 1987, p. 76}

The same church influence that later slowed the march of the royal writ of prohibition in its assertion of royal judicial jurisdiction, was being asserted by Pope Innocent IV when he curtailed clerical service in the royal courts. The most likely reason for his direction of an end to such service seems to have been his wish to dilute the respect in which royal courts were held because of the authority those courts enjoyed when clerical personnel presided. Regardless of the reason why Pope Innocent IV directed that clergy should no longer sit as secular justices, that service underscores unavoidable respect for clerical practice in the royal courts.

What difference did the English Reformation make to the practical protection which canon law afforded to sealed religious confessions? That question will be answered in two parts. First, by consideration of the mechanical steps that Henry VIII took to reform and control the church. And secondly, by reviewing the status and content of the canon law of the Anglican Church that resulted, and its arguably even enhanced status as a part of the law of England.
Effect of the English Reformation on pre-existing Catholic canon law

As the sixteenth century opened throughout Europe, “centralised territorial states were taking the place of the previous loose ... feudal monarchies”. 119 Henry VIII and Cardinal Wolsey both wanted to control the clergy and reform the admitted corruption in the church – “particularly the abuses of the ecclesiastical courts [which] were exciting extreme unpopularity”. 120 Initially, Protestantism did not even feature in their minds as a method to achieve such reform. Indeed, if the Pope had agreed to Henry’s wish for a divorce, there would likely have been no break with Rome. But the unalterable Roman attitude towards divorce made a separation from the orthodox Western church inevitable. 121

Plucknett says that the English Reformation fitted the philosophical theme of the times and Henry VIII’s personal need for a divorce was merely a symptom of a universal questioning of “religion ... as the basis for civil government”. 122 Not only did scholarly re-examination of the Bible’s New Testament lead to a “denial of the validity of [the Catholic] theological development [of] ... custom”, but the whole “doctrinal basis of Catholicism was questioned”. 123 The people [were] brought into the equation as it [was] perceived “that Kings [do not] exist ... for the convenience of their subjects (as in the Middle Ages), [but] both King and people work ... together for the glory of

119 Holdsworth, op cit, Vol 1, p 588.
120 Idem.
123 Idem.
God".124 A whole new theory of state was emerging and as Berman has said, the church victory in the Investiture struggle centuries earlier had provided an unlikely conceptual basis upon which the church and the state could be separated.125 Indeed, the principle underlying Bernard of Clairvaux’s old justification for church influence in temporal matters – that the church wielded two swords, one spiritual and the other temporal126 – could be and, in England, was conceptually reversed so that the King and not the unpopular Pope, wielded both swords.

Thus even before the separation with Rome was an accomplished fact, the preambles to Henry VIII’s statutes began to manifest his growing assertion of authority over church matters. He began by legislating against abuses within the church, but when he could not get his divorce, he began chopping away at the authority of Rome in domestic ecclesiastical matters. Holdsworth notes that these changed “relations between Church and State – the theory of Royal Supremacy”127 – were the result of Henry VIII’s collaborative work with “the Reformation Parliament which sat from 1529-1536”.128

The first Acts of this Parliament, carried on in spite of the opposition of the clergy, were directed against certain abuses in the church and its courts [21

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124 Ibid, pp 41-42.

125 Berman says that it was the Papal Revolution which began the process of “disembed[d]ing law]...from the social matrix of which it was part” (op cit, p 50).

126 Though this idea undoubtedly had its roots in St Augustine’s (345-430AD) largely theological concept of the two cities, one earthly and the other heavenly, with “the true Christian” (Berman, op cit, p 110) living in both, Brian Tierney sources the political development of a separation to Pope Gregory VII in his March 1075 Dictatus Papae (No 26), “which contained the first explicit claim that a Pope could depose an emperor” (Tierney, B, The Crisis of Church and State 1050-1300, Prentice-Hall Inc, Englewood Cliffs, NJ, 1964, p 46), though the “two swords” phrase was coined only later by Bernard of Clairvaux (1090-1153) (Tierney, op cit, p 88).

127 Holdsworth, op cit, Vol 1, p 588.

Henry VIII, c.5 dealt with Probate; 21 Henry VIII, c.6 dealt with Mortuaries and 21 Henry VIII, c.13 dealt with Pluralities]; and the clergy were compelled in 1531 to recognize the Royal Supremacy ‘so far as the law of Christ allows’. In 1532 it was so clear, from the unsatisfactory progress of the divorce, that there would be legislation aimed more directly at Rome, that Warham, the Archbishop of Canterbury, drew up a formal protest against all statutes to be passed in the ensuing session, which should prejudice the ecclesiastical or papal power. Parliament passed an Act against the payment of Annates [23 Henry VIII, c.20]; but the Act was respectful to ‘our Holy Father the Pope’, who was still allowed to charge certain fees for the consecration of bishops; and the King was given a discretion as to its enforcement.\textsuperscript{129}

The Statute of Appeals,\textsuperscript{130} which cut off appeals to Rome, followed in 1533. Later statutes of Henry’s reign further amplified and defined the supremacy which he claimed.\textsuperscript{131} The Act of Supremacy (1534)\textsuperscript{132} recognised the King as the head of the Church of England;\textsuperscript{133} “Annates and all other payments to Rome were cut off”\textsuperscript{134} by the statute 25 Henry VIII, c.20 (1534); the Act for the Submission of the Clergy (1535)\textsuperscript{135} forbade the enactment of new church canon law “except in convocations

\textsuperscript{129} Idem.
\textsuperscript{130} 24 Henry VIII, c.12.
\textsuperscript{131} Holdsworth, op cit, Vol 1, p 591.
\textsuperscript{132} 26 Henry VIII, c.1.
\textsuperscript{133} Holdsworth, op cit, Vol 1, p 591.
\textsuperscript{134} Ibid, p 592.
\textsuperscript{135} 25 Henry VIII, c.19.
summoned by the King’s writ,” and the Act of Six Articles (1539) reaffirmed Roman Catholic doctrine as the doctrine of the by now separate Church of England.

On one historical view, Henry VIII, was doing nothing that had not been done by English Kings before him. William the Conqueror had appointed his own Archbishop of Canterbury and Henry II had asserted royal or secular jurisdiction over criminous clerks. But Henry VIII was doing more than resurrect the spirit of the old investiture contest. Holdsworth says that Henry VIII “[m]anufacture[d] history upon an unprecedented scale” as he postulated temporal supremacy over the church. His genius was “the Tudor genius for creating a modern institution with a medieval form” at a time when his agenda resonated with the nationalism of the age. Marius says that “[t]he Act in Restraint of Appeals constituted a revolution” because it cleared the way “for an Archbishop of Canterbury with the proper credentials to declare the marriage between Catherine and Henry null and void and to leave the

136 Holdsworth, op cit, Vol 1, p 592.
137 31 Henry VIII, c.14.
138 Berman, op cit, p 437; Plucknett, op cit, p 11.
139 “Benefit of clergy” was discussed supra in chapter two, pp 61-66. It was Archbishop Thomas A’Becket’s resistance to Henry II’s ‘Constitutions of Clarendon’ (1164) and in particular Henry’s assertion of royal jurisdiction over clergy accused of crime, that lead to the Archbishop’s murder by the King’s knights in 1170. The Constitutions of Clarendon asserted secular authority in what was considered ecclesiastical jurisdiction in a number of other ways including: that all disputes about church offices were to be decided in the King’s court (article 1); that clergy could not depart the kingdom without the King’s permission (article 4); specifying procedural safeguards for laymen fronting ecclesiastical courts (article 6); that the King’s officers and tenants-in-chief could not be excommunicated without his permission (article 7); that appeals lay from the Archbishop’s court to the King’s court (article 8); dictating royal jurisdiction in the decision of what land belonged to the church (article 9); that the election of bishops and other beneficed clergy was to occur in the King’s chapel – though this was merely a restatement of the 1107 Concordat at Bec (article 12); royal jurisdiction over “pleas of debt under pledge of faith” (article 15) and the prerequisite consent of the lord to the priesthood ordination of the sons of villeins who were born on his land (article 16) – see Berman, op cit, pp 256-257.
140 Holdsworth, op cit, Vol 1, p 591.
141 Idem.
mournful queen no appeal to higher earthly authority”.143 And that is, of course, exactly what Henry VIII’s newly nominated Archbishop of Canterbury, Thomas Cranmer, did as soon as “the official papal documents certifying Rome’s approval of [his] ... elevation arrived in England”.144

Baker says that the 1533 Statute of Appeals145 “severed [the Church of England] from Rome [from January 1534] and appeals to the pope were forbidden”,146 and though Marius maintains that Henry VIII would still have accepted the pope’s jurisdiction if he had thereafter ruled in favour of the divorce, he agrees with Baker that in practice “the act ended the papal jurisdiction in England”.147 Both Marius and Holdsworth find the Act’s preamble revelatory of Henry VIII’s new theory of church and state. For Marius, “[t]he ecclesiastical theory behind the act was that the church was inspired in the whole body by the Holy Spirit and that the pope was unnecessary to the unity of Catholic doctrine”.148 For Holdsworth, the newness of the theory was at its starkest when compared with Bracton, who had written in the thirteenth century:

Among men there are differences in status because some men are pre-eminent and preferred and rule over others. Our lord the Pope, for instance, is pre-eminent in matters spiritual which relate to the priesthood, and under him are archbishops, bishops and other inferior prelates. Also in matters temporal there are emperors, Kings and rulers in matters relating to the

143 Idem.
144 Idem.
145 24 Henry VIII, c 12.
147 Marius, op cit, p 432.
148 Idem.
Kingdom, and under them dukes, counts, barons magnates or vavassors, and Knights.\footnote{Holdsworth, op cit, Vol 1, p 590.}

The preamble to the 1533 Statute of Appeals\footnote{24 Henry VIII, c 12.} which Holdsworth says manifests Henry VIII’s personal sketching,\footnote{Holdsworth, op cit, Vol 1, p 589.} in contrast joins the temporal and spiritual jurisdictions under the King:

\begin{quote}
By divers sundry old authentic histories and chronicles, it is manifestly declared and expressed that this realm of England is an empire ... governed by one supreme head and King ... with plenary whole and entire power ... without restraint or provocation to any foreign princes or potentates of the world. The body spiritual ... (now being usually called the English Church) which ... is sufficient and meet of itself, without the intermeddling of an exterior person ... to declare and determine all such doubts and to administer all such offices and duties as to their rooms doth appertain ... the King his most noble progenitors and the nobility and commons of this said realm ... made sundry ... laws ... for the entire and sure conservation of the prerogatives, liberties and pre-eminences of the said imperial crown of this realm, and of the jurisdictions Spiritual and Temporal of the same, to keep it from the annoyance as well of the see of Rome as from the authority of other foreign potentates.\footnote{24 Henry VIII, c 12, preamble.}
\end{quote}
However, Henry VIII did not establish this new theory of church and state all by himself. The “lawyers, theologians and ecclesiastical historians soon began to amplify and illustrate this historical argument ... to prove that it rested upon a solid basis of historic truth”. Lawyers and ecclesiastics “have had and still have professional interest in maintaining this thesis” to keep their statutes, cases and canon law intact. Indeed, Holdsworth maintains that it was not until Maitland in the nineteenth century, a dissenter as he said, from both the English and Roman churches, that “the historical worthlessness of Henry’s theory was demonstrated”.

Henry VIII’s later statutes “amplified and defined the supremacy which [Henry VIII] claimed”, the Act of Supremacy being the most obvious example. Plucknett’s summary of Henry VIII’s revolutionary statutes is:

In one statute [Parliament] declared that the supreme head of the Church was not the Pope, but Henry; in another it confiscated enormous quantities of property which had been held by the Church for centuries undisputed; in another even so sacred a thing as Christian doctrine was restated by

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153 Holdsworth, op cit, Vol 1, p 591.
154 Idem.
155 Idem.
156 Holdsworth, idem. He calls Maitland “the greatest historian of this century” and says that Maitland “was both a consummate lawyer and a dissenter from the Anglican as well as from other churches.”
157 Holdsworth, idem. Berman in contrast, implies that Henry VIII’s ‘new theory of church and state’ had very strong historical antecedents since the Holy Roman Emperor held political supremacy at least in Europe, before Pope Gregory VII’s ‘revolution’ in the eleventh century (see discussion of England’s Catholic history after the Norman conquest, supra, pp 97-101).
158 Idem.
159 26 Henry VIII, c.1.
160 Idem.
Parliament in the *Statute of Six Articles*; soon it was to establish a prayer-book to replace the age-old formularies hitherto in use.¹⁶¹

Again, the lack of significant or sufficiently powerful opposition manifested the nationalism of this age. Such was Henry VIII’s capture of public sentiment that “the bishops and archbishops took out commissions from him to exercise their ordinary powers and authorities”.¹⁶² But it was not only nationalism that empowered Henry VIII. He yoked clerical self-interest to patriotism when he presented the English church with a status quo autonomy. In the *Act for Submission of Clergy*,¹⁶³ he affirmed that there would be “no new canons ... except in convocation summoned by the King’s writ”,¹⁶⁴ but he made no changes to the canon law as the English church knew and practised it. Even the *Act of Six Articles*¹⁶⁵ “reaffirmed most of the leading doctrines of the Roman Catholic Church; and the existing organisation of the ecclesiastical courts was maintained”,¹⁶⁶ including the canon law surrounding the seal of confession. For though the *Act for Submission of Clergy*¹⁶⁷ anticipated the creation of a committee of thirty-two to review existing canon law, and even though Elizabeth I’s Archbishop Cranmer and Peter Martyr completed the revision,¹⁶⁸ “it never obtained legislative sanction”¹⁶⁹ – and no change was made to the canon law surrounding religious confession until the first year of the reign of James I.¹⁷⁰

¹⁶¹ Plucknett, op cit, p 43.
¹⁶² Holdsworth, op cit, Vol 1, p 592.
¹⁶³ 25 Henry VIII, c 19.
¹⁶⁴ Holdsworth, op cit, Vol 1, p 592.
¹⁶⁵ 31 Henry VIII, c 14.
¹⁶⁶ Holdsworth, op cit, Vol 1, p 593.
¹⁶⁷ 25 Henry VIII, c 19.
¹⁶⁸ Holdsworth, op cit, Vol 1, p 594.
¹⁶⁹ Idem.
Though there is difference between the historians who maintain Henry VIII simply resurrected the spirit of the Investiture struggle and those who say that he effected a completely new theory of church and state, Henry VIII did not change the doctrine, canon law or practice which surrounded Roman Catholic religious confession with seal. Though Church power had certainly ebbed from its high water mark after Thomas A'Becket's martyrdom in the twelfth century, and though Protestant ideas denying the need for regular sacramental confession began to seep across the Channel from Europe before the first Anglican canons were promulgated, there was no suggestion that priests were free to disclose confessional communications and secrecy was retained when those canons did come forth.

The seal of confession in Anglican canon law

The purpose of this section is to briefly set out the Anglican canon law relevant to religious confession in 1603/1604 and to confirm that almost alone in the total body of that law, the canon regarding the secrecy of confession has remained intact ever since. The significance of this consistent canon law position on religious confession will then be placed in the evolving secular legal context to identify the respect due this canon in English courts since James I took the English throne in 1603.

The proviso to the 113th canon of the Anglican Church enacted in 1603/1604 relevant to this consideration of religious confession privilege reads:

170 Elizabeth I died and James I succeeded to the throne on 24 March 1603. The original canons of the Anglican Church are variously described by the commentators as having been issued in 1603 and 1604.
Provided alwayes, that if any man confesse his secret and hidden sinnes to
the Minister for the unburthening of his conscience, and to receive spirituall
consolation and ease of minde from him, We doe not any way bind the sayd
Minister by this our Constitution, but doe straightly charge and admonish him,
that he do not at any time reveale and make knowen to any person
whatsoever, any crime or offence so committed to his trust & secrecie (except
they bee such crimes as by the Lawes of this Realme, his own life may be
called into question for concealing the same) under paine of irregularitie.\textsuperscript{171}

It is clear that this canon represents a dilution of the standard of secrecy imposed by
the 21\textsuperscript{st} canon of the Fourth Lateran Council\textsuperscript{172} and technically operative even in the
Anglican Church until these new 1603/1604 canons were promulgated.

\textbf{Effect of new conditional seal wording}

The most striking thing about the change to the Roman Catholic canon concerning
the seal of confession in the first Anglican canon is the words – “we doe not any way
bind the sayd Minister by this our Constitution” and the parenthesised exception –
“except they bee such crimes as by the Lawes of this Realme, his own life may be
called into question”. They represent a clear retreat from the unconditional
requirement operative from 1215 – 1603 under the 21\textsuperscript{st} canon of the Fourth Lateran
Council. Just what these two conditions mean in practice, has never been
authoritatively determined by Anglican canonical authorities.

\textsuperscript{171} Constitutions and canons ecclesiasticall/treated upon by the Archbishops of Canterbury and York,
London, printed by Robert Barker and by the assigns of John Bull, 1640.

\textsuperscript{172} The text of the 21\textsuperscript{st} canon promulgated by the Fourth Lateran Council in 1215 is set out in full supra,
p 93.
Norman Doe’s view is that this “law of the Church of England merely recommends that a minister should not disclose information received in the exercise of the ministry of absolution”, but his interpretation of the canon may be regarded as the liberal view premised upon the belief that confession itself fell into disuse after Henry VIII’s Reformation. Bursell is more conservative in his observation that “auricular confession was specifically enjoined in the Edwardian prayer books of both 1549 and 1552, each of which received the sanction of Parliament”. And though the Anglican canon law authority Blunt recognised disuse of confession compared to the mandatory annual Roman Catholic practice after the Reformation, he observed that it was “distinct[ly] recogni[sed] ... in the Prayer Book [1549], the canons of 1603, and the Homilies [and] ... has been continuously in use by wise, orthodox, and holy Anglican clergy and laity [ever since] and there is no law whatever against it”.

Though Doe says the 1938 Doctrine Commission interpreted the “not any way bynd” words to mean “that the ‘rule’ binds only in conscience”, the Commission in fact, and rather more largely, said:

The confession is heard under the ‘seal’ of absolute secrecy. This rule is necessary in order that freedom of confession may be secured. It is essential

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to the due discharge of the confessor’s office that this rule should be held to
be so binding on the priest’s conscience that he cannot consider himself
released therefrom by the authority of the civil or other power.\(^{178}\)

Leeder contributes that although the meaning of the “exception” words in the proviso
have likewise never been clearly spelled out, “[t]reason would seem to be the only
candidate”.\(^{179}\)

**Non-compulsory Protestant confession**

The debate noted above as to whether and how Anglican confessional practice
changed after the English Reformation is licensed by the conditional nature of the
proviso’s language. Gone is any indication that confession is an obligatory annual
sacramental observance incumbent upon every member of the body of Christ, and
instead there is demonstrably Protestant language intoning that the purpose of
confession is the unburdening of conscience. Luther’s primary attack on Roman
Catholic confessional practice had denied the need for obligatory priestly intervention
between sinner and God. Hence he and other Protestants came to downgrade
confession’s sacramental character, though without diluting the priestly obligation of
secrecy when confessions were heard.\(^{180}\) Clearly the doctrines of Protestantism
made their influence felt in England after Henry VIII’s break with Rome saw him
embrace some in self-justification.\(^{181}\) Holdsworth says that “the church was given a

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\(^{178}\) Quoted by Doe (op cit) from *Doctrine of the Church of England*, London, 1938, p 192.


\(^{180}\) See for example Marius, R, op cit, p 271.

\(^{181}\) Marius, R, op cit, pp 385-394, noting Henry VIII “consort[ing] with even the most unsavory heretics if
they offered him support” (ibid, p 394).
more definitely Protestant character” in Elizabethan times as she sought to accommodate popular doctrines from Europe.

However, even though the Catholic formality was certainly diluted from Anglican confessional practice after the Reformation, its traditional secrecy was not mitigated at all and arguably attracted the imprimatur of more formal legal sanction. Bursell’s observation above that Parliament had at least obliquely endorsed confession and its canonical secrecy when it “enjoined [it] in Edwardian prayer books” is not an assertion he leaves to stand on its own. He notes England-specific canon law and parliamentary approval with “royal assent and licence” of the practice on several occasions down to 1662. He cites the following eight authorities. First, the 21st canon of the Fourth Lateran Council (1215) with inviolable seal has been reiterated by synodal statutes subsequent from Salisbury, Durham, Winchester, Worcester, Chichester, Ely, Wells, London, Exeter and Canterbury, leaving beyond doubt “that the seal of the confessional was a duty imposed by the pre-Reformation canon law of England”. Secondly, section 7 of Henry VIII’s Act for the Submission of Clergy in 1533 provided that all existing canon and synodal law was preserved until the King confirmed any proposed changes, unless such law was “contrary or repugnant to the laws, statutes and customs of the realm, or to the damage or hurt of the King’s

182 Holdsworth, op cit, Vol 1, p 594.
184 Supra, p 114 and see note 175.
186 Ibid, p 88.
187 Ibid, p 84.
188 25 Henry VIII, c 19.
prerogative royal”.\textsuperscript{189} Thirdly, the 1539 \textit{Act for Abolishing Diversity of Opinions in certain Articles concerning Christian religion} confirmed with the King’s express consent “[t]hat auricular Confession is expedient and necessary to be retained and confirmed, and used and frequented in the Church of God”.\textsuperscript{190} Fourthly, “[a]lthough [that] statute was repealed in 1547,\textsuperscript{191} auricular confession was specifically enjoined in the Edwardian prayer books ... each of which received the sanction of Parliament”.\textsuperscript{192} Fifthly, the proviso to the 113\textsuperscript{th} 1603/1604 canon received “royal assent and licence”\textsuperscript{193} as part of the new canonical package before same was promulgated “demonstrating] once again that the seal of confessional was not regarded at that time as “contrariant or repugnant to’ either the royal prerogative, the common law or the statute law”.\textsuperscript{194} Sixthly, that proviso has never been altered, though a proposal which would have strengthened it further and removed the “treason” exception in 1969 lapsed in favour of the status quo.\textsuperscript{195} Seventhly, the 1662 Book of Common Prayer which was given statutory force by the \textit{Act of Uniformity} in 1662 after Cromwell’s Commonwealth, reiterated the appropriate practice of auricular confession.\textsuperscript{196} And finally, “the ecclesiastical law is part of the

\textsuperscript{189} Bursell, op cit, pp 86-87.

\textsuperscript{190} 31 Henry VIII, c 14, ss 1, 2 & 3 as quoted by Bursell, op cit, p 87.

\textsuperscript{191} Bursell, op cit, p 87 citing 1 Edw VI c 12, s 2.

\textsuperscript{192} Bursell, idem, citing the 2\textsuperscript{nd} edition of Phillimore’s \textit{Ecclesiastical Law} (pp 541-542) and the statutes 2 & 3 Edw VI c 1 and 5 & 6 Edw VI c 1 giving parliamentary sanction to these prayer books. Though Bursell says the second of these statutes endorsing the prayer books was repealed by Edward’s successor Queen Mary (1 Mar. sess 2 c 2), he notes it was revived under Elizabeth (1 Eliz I c 2) and has not since been repealed.

\textsuperscript{193} Ibid, p 88.

\textsuperscript{194} Idem, citing the actual old English words of the \textit{Act for Submission of Clergy} (25 Henry VIII, c.19).

\textsuperscript{195} Ibid, p 95. The text of the original 113\textsuperscript{th} canon of the Church of England promulgated in 1603/4 has never been altered. The most recent proposal that it be amended was considered in 1969 but was not advanced and the original form of the canon’s language thus remains to the present day.

\textsuperscript{196} Ibid, pp 99, 105.
general law of the land and a secular court is as much under a duty to enforce it as
an ecclesiastical court".197

This final point is the point which must be tested.

What authority does canon law have in post-Reformation secular courts?

Bursell cites only seventeenth century authority for his eighth proposition above198
and does recognise but disagrees with Nokes’ opposing view that “it is doubtful
whether a clergyman in the twentieth century is ... likely to be censured by an
ecclesiastical court for [breach of confessional secrecy] ... in the absence of any
modern precedent of ecclesiastical discipline for [such] ... breach”.199 Blackstone200
and Holdsworth201 have cited more recent authority for the same proposition – but
what does it mean? Is Bursell’s conclusion that “[b]oth [ecclesiastical and secular]
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”202 accurate?
What about non-Anglican clergy? Or is Nokes correct that a twentieth century
secular court is no more likely to enforce ecclesiastical discipline against an Anglican
priest than that same court would be to censure a layman for sexual immorality? 203

197 Ibid, p 108.
201 Holdsworth, op cit, Vol 8, pp 402-420, citing variously Taylor’s case (1676) 1 Vent. 293; 86 ER 789; R
v Woolston (1729) 2 Str 834; 93 ER 881; Briggs v Hartley (1849) 19 LJ Ch 416-417; Shore v Wilson
(1842) 9 Cl. and Fin., pp 524-525; 8 ER 450 and MacKonochie v Lord Penzance (1881) 6 AC 424, 446.
203 Nokes, op cit, p 101.
Norman Doe is doubtful of Bursell’s conclusion “that a cleric would be in grave danger of censure [even] by the ecclesiastical courts in the event of violating the seal”.204 Professor Elliott205 (also in the Ecclesiastical Law Journal) and Lynne Leeder are both of the view “that the general attitude of English law”206 and “the weight of opinion”207 are sufficiently against the confessional privilege that it would not stand against an actual judicial inquiry.208 But the three scholars, and others,209 all concede that the matter has never been decided.210 Bursell was, however, making finer points than most of the other commentators, who limited themselves to generalisations about the state of religious confession privilege at common law – a question which is the detailed subject of this thesis in chapters four and five infra. Bursell’s finer point was that the clergy of the Anglican Church are under “a duty in certain circumstances ... to hear a confession”211 and a concomitant and substantive duty not to disclose such communications under the 1603 canons.212 He adds that

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205 Emeritus Professor of Law from the University of Newcastle upon Tyne.  
208 In his letter to Gladstone about religious confession privilege, former Chief Justice Lord Coleridge (1880-1894), who expressed his personal belief in the existence of an enduring religious confession privilege at common law after the Reformation though it “had never been decided”, also doubted that “the English Judges” would have upheld it in 1865 (Coleridge, EH, Life and Correspondence of John Duke Lord Coleridge Lord Chief Justice of England, London, William Heinemann, 1904, Vol 2, p 365).  
209 For example, McNicol, SB, Law of Privilege, Australia, Law Book Co, 1992, p 324, where she writes, “At common law it is generally accepted that there is no privilege in existence which would protect communications between cleric and communicant ... [t]here is, however, a paucity of judicial authority to support the claim”.  
210 Bursell says simply that such cases as have raised the question of the admissibility of sealed confessions, have been “inconclusive” (Bursell, op cit, p 109).  
211 Bursell, op cit, p 104.  
212 Ibid, p 105.
that obligation was reaffirmed in both 1959 and 1969, when the 1603 canon
upholding the confessional seal was preserved intact.\footnote{Ibid, p 95.} While Bursell\footnote{Ibid, pp 101-4.} agrees with
doctrine or practice of the Anglican Church, they agree with him that voluntary
confession is still acceptable and practised and that the obligation of secrecy
remains. All that is in issue between them is whether even ecclesiastical courts will
protect the priest in his obligation of secrecy in the late twentieth and early twenty-
first centuries. Bursell as Chancellor of the Diocese of Durham and both a Judge and
Queen’s Counsel when he wrote in 1991 says they will. Doe (lecturer in law at the
University College of Wales at Cardiff in 1996) and Nokes (appointed Professor of
Law at the University of London after he wrote his Law Quarterly Review article in
1950) doubt they would. In the context of this thesis’ quest for the law in the secular
courts, that question is moot. But Bursell consequentially opines:

\begin{quote}
The clergyman’s claim [of privilege from compulsion to disclose a confession]
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 prosecuted and censured for sexual
immorality [despite Nokes’ doubt of any such possibility], there is grave
danger that he will be proceeded against for breaching the seal of the
confessional. No doubt a situation in which a clergyman was compelled to
answer would be considered both by the diocesan bishop in exercising his
\end{quote}
discretion and by the Chancellor when considering sentence; 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. Thus no breach should be compelled by a secular court and the absence of any modern precedent such as Nokes suggests is irrelevant.\textsuperscript{217}

It seems to this writer that even in England where the Anglican Church remains the established church of the state, a contemporary secular court would leave an underlying issue of clerical indiscipline to the ecclesiastical jurisdiction, however strongly a conservative church advocate might point up the technicality that secular courts retain theoretical ecclesiastical jurisdiction. However, Bursell's recitation of modern English statutory recognition of judicial discretion “to exclude evidence ... whether by preventing questions from being put or otherwise”\textsuperscript{218} is of much greater practical significance in the hands of even a secular judge, since it provides an opportunity to remove friction between church and state at what McNicol has observed is a potential flashpoint.\textsuperscript{219} As will be seen in chapter five, the writer believes that this 1984 English statutory recognition of a judicial discretion to exclude evidence represents the codification of a common law privilege which had grown up and been recognised to favour confidential religious communications generally, rather than only the narrower class of religious confessions.

While Bursell's analysis of the position of a Roman Catholic priest is less clear\textsuperscript{220} than the position of the Anglican clergy who have the backdrop of “a legal duty imposed by

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\textsuperscript{217} Bursell, op cit, pp 107-8.
\textsuperscript{218} Section 82(3) of the \textit{Police and Criminal Evidence Act, 1984} as cited in Bursell, op cit, p 109.
\textsuperscript{220} Bursell, op cit, p 108.
\end{flushright}
substantive law,” it is likely even in England where a formal Human Rights Act incorporating “a number of the articles of the European Convention on Human Rights into United Kingdom law” was passed in 1998, that the secular courts would exercise their 1984 discretion to exclude evidence even-handedly regardless of what faith a clergyman represented.

That no such cases have come before the courts in England in recent memory bears out a practical point made often in commentary. Bursell observes:

It is not surprising 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.

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221 Idem.


223 Note however, that in the European Union which includes England, the provisions of the European Convention on Human Rights and Fundamental Freedoms (4 Nov 1950, 213 U.N.T.S. 221) which bind all member states do not mean that all religions or religious observance need be treated in a completely even-handed way since many of the member states have established churches (see Evans, C, Freedom of Religion under the European Convention on Human Rights, Oxford, Oxford University Press, 2001, pp 19-22). Note also that the interpretation of instruments guaranteeing freedom of religious practice in Australia which has no established church and where the Commonwealth is constitutionally prevented from passing laws which would interfere with freedom of religious practice, is discussed in chapter seven.

224 Bursell, op cit, p 89.
McNicol observes more simply that most clergy would rather go to gaol than break their sacred vow about confidentiality.\(^{225}\) The reasons underlying these observations are likely to ensure that religious confessions remain confidential in practice. Indeed, anecdotal evidence from the United States confirms that even in jurisdictions where the clerical reporting of child abuse has been legislatively mandated,\(^{226}\) there has not been a significant increase in court cases about clerical privilege, though whether that is because priests do not report anyway, or because child abusers do not confess, is, and is likely to remain, unclear.

Richard Nolan’s conclusion quoted on pages 96-97 supra – that there was such a “close connection” between the so-called spiritual and temporal domains of government in Anglo-Saxon England that there can be no doubt that religious confession was privileged from disclosure by the “law of the land”\(^{227}\) has been seen to be a fair statement of the legal standing of religious confession privilege before the Reformation. But what of his doubt that such privilege survived the official Catholic persecution that followed the English Reformation?\(^{228}\) When his logic (though not his doubt) in favour of the survival of religious confession privilege after the Reformation, is weighed with Bursell’s ‘Anglican view’ just discussed, and Nokes’ more objective doubt of respect for religious confession privilege in English ‘secular’ courts in the 1950s,\(^{229}\) is religious confession privilege any more supportable in a common law world which has become markedly less religious but more egalitarian?

\(^{225}\) McNicol, op cit, pp 329-330, 336.


\(^{227}\) Nolan, RS, “The Seal of Confession” (1913) 13 Catholic Encyclopedia 649.

\(^{228}\) Ibid, p 653.

The answer is that Nolan’s conclusion about the pre-Reformation standing of religious confession privilege agrees with what Bursell has said in favour of Anglican religious confession privilege after the English Reformation. For since: no statute has been passed which expressly revokes religious confession privilege; Anglican canon law still enshrines the secrecy of such confessions as are made to the clergy; the Church of England remains the State Church of England by force of law; the English courts are still jurisdictionally obliged to apply the ecclesiastical law when it applies in cases coming before them; custom still respects established religious practice when it is practiced; and there is still no formally decided and authoritative case rebutting the privilege directly once and for all – English courts remain technically obliged to respect ecclesiastical law as a part of the law of the land.

Historical debate about secular legal respect for canon law

There has, however, been some doubt of the view that canon law was always respected in English courts. That view states that English courts never felt themselves obliged to cite or follow foreign authority. And that view resonates both

231 Ibid, p 652.
232 Compare similar arguments that Nolan makes in favour of Roman Catholic confession when the Roman Catholic Church was the State Church of England (ibid, p 650).
233 Bursell, op cit, pp 107-108 as quoted supra, pp 120-121.
234 Ibid, pp 650, 651.
235 Compare Nolan’s argument that “there is not a single reported case, textbook or commentary, during the whole pre-Reformation period which contains any suggestion that the laws of evidence did not respect the seal of confession” (ibid, p 652).
with King Henry VIII’s seeming capture of nationalistic sentiment when he severed
the church from Rome and Coke’s obvious reluctance to cite foreign authority for his
treason exception to religious confession privilege.

Bishop Stubbs’ doubt of canon law authority in even English ecclesiastical courts
before the eighteenth century is noted by both Holdsworth and Helmholz from the
Report of the Commissioners into the Constitution and Working of the Ecclesiastical
Courts in 1883.236 Those Commissioners “held ... that, even before the Restoration,
the English Church Courts were free to pursue a path independent of foreign, and
particularly papal direction”.237 Stubbs’ view implies that Nolan’s conclusion of a very
close connection between the spiritual and temporal domains even in Anglo-Saxon
England is too strong. For Stubbs says such a view draws respect for the canon law
not only into English ecclesiastical law, but further into the temporal common law as
well. But Maitland, Holdsworth and Helmholz have all effectively rebutted the Stubbs’
opinion and implicitly approved the Nolan logic. Holdsworth says that Maitland
proved that “the supremacy of the Pope and the binding force of the canon law were
fully recognized [in England]”238 in his book on Roman Canon Law in the Church of
England.239 In his more recent review of the Stubbs-Maitland controversy,240
Helmholz concedes for Stubbs that “[n]ot all papal decretals241 were meant to have

236 Quoted by both Holdsworth (op cit, Vol 1, p 582) and Helmholz (Helmholz, RH, Canon Law and the
“The History of the Canon Law in England” in Selected Essays in Anglo-American Legal History, Vol 1,
New York, The Lawbook Exchange Ltd, 1992 (originally published in Boston by Little Brown and
Company in 1907) pp 248, 263.

237 Helmholz, op cit, p 260.

238 Holdsworth, op cit, Vol 1, p 582.

239 Maitland, P, “Church, State and Decretals”, in Roman Canon Law in the Church of England, Methuen

240 Helmholz, op cit, pp 260-261.

241 Papal decretals were “[p]apal decisions defining principles of canon law” (Helmholz, op cit, p 249).
the force of ‘binding statute law’ in a modern sense”. 242 However, he agrees with Maitland that the more important “papal law[s] ... were in fact regarded as binding statute law in England”, 243 but says that the whole debate was the anachronistic result of reading too much legal positivism into a Middle Ages context where “[l]ocal custom ... played a much greater role in the legal practice of the ecclesiastical courts than modern statute law would allow”. 244

Accordingly, Nolan’s expectation that England’s secular courts and hence the common law were unlikely to deny a religious confession privilege when the confession was an essential sacrament of the national church, 245 appears well grounded. It also concords with Professor Nokes’ 246 statement that:

There is no doubt that the Roman canon law insisted on the duty of the priest not to divulge the secrets of confession, and that, while the Church here was still in communion with Rome, English provincial councils, clerics and canonists reiterated that duty 247

though Nokes does not enter into the controversial Stubbs-Maitland question as to whether that respect for canon law flowed through the ecclesiastical law and into the common law.

243 Idem.
244 Idem.
245 Nolan, op cit, p 652.
246 Emeritus Professor of Law at the University of London, though not when he wrote the article cited in note 229.
247 Nokes, op cit, p 94.
Conclusion to chapter three

Sir Edward Coke confirmed except in cases of treason, that religious confessions were privileged from disclosure in English courts in the seventeenth century. The canon law and practice of the English church was so entrenched in English custom that it became a part of the common law as that common law evolved. Since religious confession was a sacrament of the established church at least until the first Anglican canons were promulgated in 1603/1604, there can be no doubt that recipients of religious confessions were privileged from any obligation to disclose them – to anyone. Even in Garnet’s case in 1606, when Catholic persecution was raging after the discovery of the Gunpowder Plot, Coke as Attorney-General and prosecutor, and the Earls of Salisbury and Northampton must be interpreted as recognising that privilege attached to sacramental religious confessions. Coke subsequently reaffirmed that view when he published his Second Part of the Institutes more than twenty years later. Though there was no discrete body of evidence law in existence before it evolved following the advent of defence representation in criminal trials, the ancient “privilege of confession” was deeply imbedded in the common law – and unlike its sister privilege, ‘benefit of clergy’, has never been statutorily abrogated.

The thesis will now review the evolution of the common law regarding religious confession privilege since Garnet’s case and the publication of Coke’s Second Part of the Institutes.
CHAPTER FOUR

RELIGIOUS CONFESSION PRIVILEGE
AT COMMON LAW FROM
THE SEVENTEENTH TO
THE TWENTIETH CENTURY

Introduction

Sir Edward Coke’s recognition of religious confession privilege at common law with a treason exception\(^1\) has never been cited in a reported English case. Though the common law evolved markedly in the almost two centuries that elapsed before the first evidence law texts began appearing, it is also surprising that WM Best\(^2\) was the first to cite Coke’s *Second Part of the Institutes* in his treatment of religious confession privilege in 1860 – more than two hundred and thirty years later. While the rigour and accuracy of Coke’s scholarship has been criticised since, and while the law of evidence became a specialty in those intervening years, it is still surprising that neither his last case as Attorney-General in so celebrated a matter as the prosecution of the last alleged Gunpowder plotter,\(^3\) nor his *Second Part of the Institutes* warranted such mention. Was religious privilege abolished by statute in the meantime? If there were no cases, was

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3 Garnet’s case (1606) 2 Howell’s State Trials 217.
there some prerogative edict which directed the extinction of this ‘aberration’ imported into the common law from the old canon law? There is no obvious explanation for the silence – and yet there was a significant volume of judicial comment before the twentieth century dawned.

The purpose of this chapter is to review the cases in detail to determine why the early text writers were so fixed in their belief that there was no privilege that ever protected a member of the clergy from evidential compulsion. I start chapter four with a summary of the general evolution of the law of evidence and explain that religious confession privilege existed long before other any other evidential privilege was born. Evidence law and the privileges that were developed to protect some witnesses from being compelled, are identified as the product of a newly independent judiciary regulating the evidence that the jury should properly hear. Religious confession privilege is identified as having predated any of that though it may have provided some conceptual support for the new ideas. The need to categorise the cases about evidential privileges in text books primarily designed as handbooks for barristers, is identified as the reason why religious confession privilege and legal professional privilege were treated together and why religious confession privilege was treated as an afterthought, a qualification and even a mere sub-category. Then I analyse the cases themselves. First, I discuss the legal professional privilege cases which are cited in connection with religious confession privilege. Secondly, I identify why cases about irregular confessions are not really relevant to deciding whether there was a religious confession privilege or not. Thirdly, I consider whether there have been any clear religious confession privilege cases and conclude that the very few that there are, do not advance an understanding of religious confession privilege very much. Finally, I discuss the variety of extra-judicial comment and response about religious confession privilege which resulted from the much
publicised case of *R v Constance Kent*\(^4\) in 1865 but note once again that no authoritative conclusion emerged. Chapter four concludes with a restatement of the opening observation that since there has been no statute to abolish religious confession privilege, and since the cases do not justify that firm conclusion, then religious confession privilege survives at least in theory.

**Religious confession privilege existed before there was a discrete law of evidence**

In connection with religious confession privilege, in 1876, Sir James Stephen wrote that “the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries.”\(^5\) Stone and Wells affirm that though “the rules of evidence relation to documents ... are of immemorial antiquity ... the rules relating to oral testimony ... are little older than the seventeenth century”.\(^6\)

I have demonstrated in chapters two and three that there was a practical religious confession privilege functioning in England until at least the beginning of the seventeenth century, despite doubt or denials in legal commentary. Since the law relating to religious confession privilege is a part of the law of evidence, and since in practice it is not a documentary privilege, the law relating to religious confession privilege is older than most if not all of the rest of law relating to oral evidence. This insight is important when it is recognised that the other privileges and immunities which form part of what Sir James

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\(^4\) Unreported because Constance Kent ultimately pleaded guilty to the murder with which she was charged.


Stephen called “the modern law of evidence” evolved as a part of that new and discrete body of law. Stone and Wells explain the relative modernity of the law of oral evidence with proof from the evolution of the criminal trial. They observe that it was not necessary to regulate oral testimony when trials were a procedure to ascertain the will of God. However, when the jury was transformed into an institution that was required “to give its verdict only on evidence of witnesses duly sworn in the case”, it became necessary to standardise the quality of what jurors heard. Similarly, before the English Revolution of the seventeenth century established the supremacy of Parliament, judicial dependence “on the goodwill of the Crown”, particularly in cases of treason, acted as a restraint on the development of “rules for preventing prejudice”, such as the hearsay and similar fact evidence rules. The absence of defence counsel for accused persons till 1695 in cases of treason, until the late eighteenth century in cases of felony and universally in 1837, was another contributor to the late development of evidentiary rules intended to prevent prejudice.

Stone and Wells tie the development of “the rule exempting attorneys from the duty to disclose communications made to them in professional confidence” and “the rule that no witness will be compelled to answer questions, if the answer may tend to render him

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7 Stephen, op cit, p 172.
8 Stone and Wells, op cit, p 23.
9 Idem.
10 Ibid, p 34.
12 Stone and Wells, op cit, p 35. Note, however, that Milson dates the availability of defence counsel in cases of felony to 1836 (Milsom, op cit, p 360).
13 Stone and Wells, op cit, p 33.
liable to criminal prosecution”¹⁴ to the appearance of the idea that “witnesses might be compelled to appear”.¹⁵ Since it was quickly apparent that the Crown’s power to compel witnesses might become an “instrument of tyranny”, and since particularly after the English Revolution, parliament and the judiciary were acutely conscious of the need to control tyranny, legal professional privilege¹⁶ and self-incrimination privilege were originated as policy exceptions to the practice of witness compulsion.¹⁷

Though the cases that have developed legal professional privilege in particular numerically dwarf those reported in connection with religious confession privilege, it is clear that the two privileges have completely discrete origins. For when “the modern law of evidence”¹⁸ began to appear in the seventeenth century, the privileges of the church were established and still respected. Though the Catholic Father, Henry Garnet, had relied on religious confession privilege in vain in 1606 during the furore which followed the Gunpowder Plot,¹⁹ canon law sanctions were still recognised and enforceable by

¹⁴ Idem.

¹⁵ Ibid, p 32. Stone and Wells explain that witness compulsion was a consequence of the perception of trials as a rational “search to discover truth from those who knew” (idem). The same Crown self-interest that had promoted “the jury mode of trial” (ibid, p 30) as preferable to older ecclesiastical modes of trial “established the idea that witnesses might be compelled to appear” (idem). Though the transition from the Jury as an Inquest of Neighbours (in the thirteenth century) into what Stone and Wells call the Judicial Jury was complete by the end of the fifteenth century (ibid, pp 16-23 (20)), there was further development between 1500 and 1700 before the jury was transformed completely into the modern body that decides case on the basis of evidence “put before them by witnesses called by the parties” (ibid, p 32).

¹⁶ Though Baron Alderson analogised from legal professional privilege to religious confession privilege to justify the privilege he extended to the confession Griffin made to the workhouse chaplain in R v Griffin (1853) 6 Cox Cr Cas 219, it is possible that legal professional privilege originated in an analogy from the privilege extended to priests, since they intercede between sinner and God. However, the author can find no trace of this idea in any of the authorities on the evolution of legal professional privilege.

¹⁷ Note, however, that Wigmore says that legal professional privilege was already “unquestioned” during the reign of Elizabeth 1 (Wigmore, Evidence in Trials at Common Law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 542).

¹⁸ Stephen, op cit, p 172.

¹⁹ Supra, chapter two, pp 77-81.
secular authorities, judges could still be excommunicated if they offended the church, and “benefit of clergy” was still an integral part of criminal law practice. Indeed, since the ecclesiastical law, including the new Church of England canon law, was respected as a part of the law of the land, it is hardly surprising that religious confessions to the king’s clergy were not the subject of testimonial compulsion. It did not matter that no case had raised the subject of religious confession privilege for adjudication. This privilege of the clergy was still a contextual given. Why then, was religious confession privilege inaccurately represented in the early evidence texts that began appearing in the early nineteenth century? The answer lies in the orientation and analyses of the early evidence text writers.

The practical purpose of early evidence texts as handbooks for barristers

For Stone and Wells, “[t]he principal pioneering books on evidence in our modern sense were Peake on Evidence, 1801, Phillips on Evidence, 1814, and Starkie on Evidence, [20] Holdsworth observes that even after the Restoration, “[c]hurch and king act[ed] together to make their own standards of political and theological orthodoxy the conditions precedent for full citizenship” (Holdsworth, WS, A History of English Law, 2nd ed, Boston, Little Brown and Co, 1923, Vol 6, p 197). He then traces the Acts of Parliament which were passed to persecute non-conformists into such orthodoxy (ibid, pp 197-198). Helmholz notes that “the day [when] the ecclesiastical courts would obediently follow all the dictates of royal court rules still lay in the future” in 1600 – and that despite jurisdictional contests between ecclesiastical and secular courts, the two jurisdictions cooperated far more often than they struggled (Helmholz, RH, Canon Law and the Law of England, London and Ronceverte, The Hambledon Press, 1987, pp 4-5).


[23] See supra, chapter three, pp 117-121. This idea endured in English common law well into the nineteenth century. Thus Holdsworth is able to quote Lord Blackburn in 1881 stating that “[t]he ecclesiastical law of England is not a foreign law. It is part of the general law of England – of the common law – in that wider sense which embraces all the ancient and approved customs of England which form law … that law administered in the courts ecclesiastical, that law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm, and form … the king’s ecclesiastical law” (Holdsworth, op cit, Vol 1, p 595, quoting Lord Blackburn from MacKonochie v Penzance (1881) 6 AC 424, 446).

1824”. The reporting of decisions at first instance commencing at the end of the eighteenth century (particularly the *Nisi Prius* reports of Peake, Espinasse and Campbell) and the advent of the textbooks analysing and criticising the rules there expressed into a “coherent, purposive system” was the ‘spring-tide’ of our law of evidence. Most telling given chapter one’s insight that Peake and Starkie had profound influence on Park J who referenced them as he gave judgement in *R v Gilham*, is Stone and Wells’ summary of the influence of the text writers:

To contemporaries like Peake and Phillips, whose reports and textbook played the major roles in the development, it must have seemed that at last the system was receiving its final form in detail as well as in principle. Indeed broadly speaking, they were right. The authorities we cite today for the basic rules and their exceptions usually date between the years 1800 and 1850.

The text writers were barristers and reporters recording a knowledge of the law of evidence as they had lived and practiced it. Often they called their books digests thus signaling their intent to systematically reduce, classify and summarise the relevant law – and they were very popular. *Roscoe’s Nisi Prius*, for example, passed through eighteen

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25 Stone and Wells, op cit, p 36. These texts were all referenced as being principal sources of the flawed interpretation of *R v Sparkes* discussed in chapter one, pp 16-19, 22-24. Note too that Stone and Wells misspell the name of Phillipps.

26 Idem, quoting Wigmore.

27 Idem.

28 Idem, attributing the term ‘spring-tide’ to Wigmore.

29 Ibid, pp 36-37.
editions in the course of eighty years.\textsuperscript{30} The proliferation of the publications and the number of editions, demonstrates the popularity of the product and their degree of legal market penetration.\textsuperscript{31} Necessarily they dealt most carefully with developing law and religious confession privilege was not a developing area of the law. Perhaps because the clergy kept their confidences or because for a long time it was simply unthinkable to compel a priest to testify about confessional information,\textsuperscript{32} there was no need to modify the statements about religious confession privilege in the earliest texts. Religious confession privilege cases simply did not come before the courts, and if confessional issues were raised analogically, the obiter dicta comments which followed were categorised in the texts under related headings which seemed logical although generalised. New cases which referred to religious confession privilege for some reason, were simply added to the footnotes without careful analysis. The texts for the most part did not deal with history; they dealt with day to day legal practice and they were produced as aids for practitioners keen to master the generalised rules of the courts in which they would earn their bread. But they also came to have profound precedential influence.

Stone and Wells' conclusion on the development of the law of evidence, is that despite reform “to remedy particular evils in existing law”,\textsuperscript{33} the law of evidence alone among “all

\textsuperscript{30} The first edition was published in 1827 (Roscoe, H, \textit{A Digest of the Law of Evidence}, London, Joseph Butterworth and Son, 1827) and the eighteenth in 1907 (Powell, M, ed, \textit{Roscoe's Nisi Prius}, 18\textsuperscript{th} ed, London, Stevens and Sweet and Maxwell, 1907).

\textsuperscript{31} See the writer's summary of some of the texts in chapter one, pp 16-18.


\textsuperscript{33} Ibid, p 37.
the great bodies of traditional rules which made up the common law in the nineteenth century ... is the one which has been the least changed by a century of legislation”. As noted in chapter one, the only sure way to learn what the law of religious confession privilege is, is to go back to the original cases where religious confession privilege is concerned and decide whether Peake, Phillipps and Starkie correctly analysed the cases to arrive at their ‘no religious confession privilege’ conclusion since so many later judges and commentators have taken their summary at face value. The error wrought by Peake’s report of *R v Sparkes* despite Lord Kenyon CJ’s doubt of it in *Du Barré v Livette* has already been noted. This chapter will now review the cases cited in connection with religious confession privilege to determine whether the treatment they received in commentary and subsequent cases was fair and rational. Before I proceed with that analysis, it is necessary to restate why so much of that analysis arises in cases about legal professional privilege.

### Categories in evidence law texts

The methodical academic treatment of legal subject matter has always required categories. In the law of evidence, ‘privilege’ is a natural subdivision of the case law. Legal professional privilege is by far the largest evidentiary privilege if case volume is the yardstick. It is also the privilege that arises most often in legal practice and the privilege most conceptually familiar to all law practitioners. That familiarity is certainly part of the reason why there are and always have been so many cases about it. Consequently, in every evidence law text, such treatment as there is of religious confession privilege,

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34 Idem.

35 Unreported but referred to in *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96.

36 *Du Barré v Livette* (1791) 1 Peake 108: 170 ER 96.

37 Chapter one, pp 15-19.
follows treatment of legal professional privilege. There are other privileges which are also dwarfed by textual treatment of legal professional privilege, but they are not so easily analogous. For in religions that practice confession, the priest like the lawyer, stands between an individual and a higher power. Such an analogical comparison does not exist in the case of the privilege which protects communications between a husband and wife during marriage; the privilege that protects judges and juries from being compelled to disclose material learned while they were acting judicially; the privilege which protects state secrets and those who become privy to them or the privilege which protects matters of which decency forbids disclosure. But the comparison has always disfavoured proper consideration of religious confession privilege. For it became simple in such analysis, to group the clergy with other professionals who did not enjoy an evidential privilege and repeat the one sentence denial in a treatment of legal professional privilege considered more current, important and relevant and that often filled several pages with nuanced detail.

So it was that in the first edition of Peake’s *Compendium of the Law of Evidence*, he excluded religious confession privilege as follows:

This rule of professional secrecy extends only to the case of facts stated to a legal practitioner, for the purpose of enabling him to conduct a cause; and therefore a confession to a clergyman or priest, for the purpose of easing a culprit’s conscience, the statement of a man to his private friend, or of a patient to his physician, are not within the protection of the law. We should certainly think

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the friend, or the physician, who voluntarily violated the confidence reposed in
him, acted dishonourably; but he cannot withhold the fact, if called upon in a
Court of Justice.\(^{40}\)

The statement had not changed in the fifth edition in 1822\(^{41}\) and while Phillipps was
faithful to the steadfast omission of clergy from the list of unfortunately unprivileged
professionals in Wilson v Rastall\(^{42}\) in his first and second editions in 1814\(^{43}\) and 1815,\(^{44}\)
Starkie’s first edition in 1824 states:

The law will not permit any one to withhold from the information of the jury any
communication which is important as evidence, however secret and confidential
the nature of that communication may have been, although it may have been
made to a physician or a surgeon, or even to a divine, in the course of
discharging his professional duties; for it has ever been held, that a minister is

\(^{40}\) Ibid, p 128, citing R v Sparkes as reported in Peake’s cases and the Duchess of Kingston’s case (20 State Trials 612).

\(^{41}\) London, J & WT Clarke, 1822, p 175.

\(^{42}\) Wilson v Rastall (1792) 4 TR 753; 100 ER 1283. Kenyon CJ and Buller J sat together in this case. Unless they were avoiding public disagreement, it is odd that they did not mention the clergy at all in their obiter statements in this case. For Buller J had apparently decided against religious confession privilege in R v Sparkes (c 1790 unreported but referred to in Du Barré v Livette (1791) 1 Peake 108: 170 ER 96) while Kenyon CJ had disagreed with Buller J’s approach when he had referenced the Sparkes decision obiter in Du Barré v Livette.


\(^{44}\) Phillipps, SM, A Treatise on the Law of Evidence, London, J Butterworth, 1815, p 104, though in this second edition reference, Phillipps cites R v Sparkes (where Buller J denied protection to an irregular religious confession) as his footnoted authority rather than Du Barré v Livette where Kenyon CJ had doubted the wisdom of the finding. In his first edition, a year earlier, Phillipps appears to have preferred Kenyon CJ’s statement as his authority since R v Sparkes is not mentioned in the footnotes. Phillipps may well have concluded during the year between his first and second editions, that since Buller J’s decision was ratio decidendi, it was more authoritative than Kenyon CJ’s later obiter statement notwithstanding the latter’s seniority as Chief Justice.
bound to disclose that which has been revealed to him as a matter of religious
confession.45

Three years later when the first edition of Roscoe’s Digest was released, the summary
had been compressed to:

Counsel, solicitors, and attorneys are the only persons who cannot be compelled
to reveal communications made to them in confidence, R v Duchess of Kingston
20 How.St. Tr. 612, therefore physicians, surgeons and divines are bound to
disclose such communications. Ibid.46

From 1827 onwards, with rare exceptions,47 the commentators were steadfast in their
denial that religious confession privilege existed at common law. But the brief quotations
provided show the category habit at work. In the first from Peake, legal professional
privilege is a professional secrecy privilege. Peake confines it to lawyers by trivialising
the priest’s role to that of easing a culprit’s guilty conscience. Such is not the work of a
professional entitled to an evidential privilege. Starkie has generalised one degree
further. He says that no one can avoid giving relevant evidence to a court, unless there
is an established common law privilege providing an exemption. But he does not
consider that there may be a separate exemption in favour of clergy that originates from
a different genesis than the exemption established in favour of legal professionals. In

45 Starkie, T, A Practical Treatise of the Law of Evidence and Digest of Proofs in Criminal Proceedings,

Butterworth and Son, 1827, p 72.

47 Taylor references some of the arguments made in favour of extending professional privilege to clergymen
but concludes none the less that they are compellable (Taylor, JP, A Treatise on the Law of Evidence,
London, A Maxwell & Son, 1848, Vol 1, pp 618-620). Best is altogether more doubtful about the standard
denials of religious confession privilege and demonstrates with summaries that he has read the relevant
one sense, Roscoe’s summary is simply lazy. In another sense, it is simply the best of
the three examples of a risk that inheres in that inductive reasoning which is a feature of
common law development. That is, that in inductively reasoning from the specific case
to the general principle, one is apt to over-generalise if one begins with an inadequate
sampling of facts or cases. That, of course, is not to say that inductive reasoning is
fatally flawed as a logical system. Rather, it simply underscores the absolute essentiality
of reading each and every case available and considering all the material in detail before
one starts to write a text book.

What then do the cases say? In the light of this explanation of why there are so many
legal professional privilege cases tied up in the common law that does exist relevant to
religious confession privilege, I begin this treatment by examining the statements about
religious confession privilege in cases that are really about legal professional privilege, in
three categories:

(a) Legal professional privilege cases that contain an obiter statement
against the existence of religious confession privilege,

(b) Legal professional privilege cases that contain obiter statements that
doubt denials of religious confession privilege, and

(c) Legal professional privilege cases that are cited in evidence texts about
religious confession privilege but which do not even mention religious
confession privilege.
Religious confession privilege in cases about legal professional privilege

By simple definition, the statements about religious confession privilege in cases about legal professional privilege can only be obiter dicta. Accordingly, where there are decided cases about religious confession privilege, the statements about religious confession privilege in those cases will be more authoritative since such statements will be the kernel of the decision making in the case. As will be seen, there is a dearth of such ratio decidendi statements in recorded English common law history. For that reason, it is the opinion of Sir James Stephen in 1876 and Peter Winckworth in 1952 that the existence and nature of religious confession privilege has never been decided in English common law.\(^{48}\) And even Dean Wigmore, who opines that there are at least two ratio decidendi cases that have been decided against the existence of religious confession privilege, does not identify them in his long footnoted list. This uncharacteristic absence of exactness makes it difficult to work out which cases he considered did decide against religious confession privilege. For while all the cases listed in Wigmore’s footnotes are considered in the analysis that follows, it remains unclear which cases Wigmore considered were decided against the existence of religious confession privilege. The writer therefore finds the Stephen/Winckworth view more accurate. Thus the obiter dicta statements in cases about legal professional privilege must be considered more carefully than would be necessary if there were better common law material available for analysis.

\(^{48}\) See note 24 supra.
Legal professional privilege cases that contain an obiter statement against the existence of religious confession privilege

In a 1693 decision called simply Anon, Holt CJ would not compel an attorney named Saunders to provide evidence about an allegedly corrupt deed of indenture he had drawn between a sheriff and his under sheriff “though [the attorney] was not a counselor”. It is evident that the Chief Justice felt pressed to explain why not and his explanation was that even a scrivener had been found not compellable in relation to advice he had given as “counsel” in conveyancing matters. However, it is the qualification that he placed upon this “counsel” principle that has seen this report cited as authority against the existence of religious confession privilege. “[F]or” he added, “he is a counsel to a man, with whom he will advise; if he be instructed and educated in such a way of practice, otherwise of a gentleman, parson, &c”.

Holt CJ’s point seems to have been that if a scrivener was educated so as to give legal advice and gave legal advice, then he was not compellable as a witness in relation to the matter advised upon. But it is there where the analysis gets difficult. Did the Chief Justice mean then to say only the legally educated could give legal advice and thus not be compellable as witnesses in related matters; did he mean to say that since gentlemen, parsons and others were not legally educated they were not exempt from being compelled as witnesses on the basis that they were legal advisors; or did he mean to say that parsons could never claim an exemption from being compelled as a witness on any basis whatever? The better interpretation of this thin report seems to be that only a legally educated person who had given legal advice in relation to a matter under

49 Anon (1693) Skin 404; 90 ER 179-180.

50 Idem.

51 Idem.
consideration by a court, could be exempt from compulsion as witnesses in that court on
the basis of legal professional privilege. There is no sound basis for the extraction of the
‘no religious confession privilege at common law’ principle from this report. Such citation
of the case is misleading.

There is more justification for the citation of Greenlaw v King,52 Russell v Jackson,53
Anderson v Bank54 and Wheeler v LeMarchant55 as authority for the ‘no religious
confession privilege at common law’ principle, for they all include intentional judicial
statements intended to deny that there is a religious confession privilege at common law.
In Greenlaw v King, the new rector of St Mary’s in Woolwich sought to have an annuity
the late Bishop56 had assigned to his son, Mr King, set aside on grounds that two Acts of
Parliament established the annuity on a trust connected with the construction of a new
rectory house. In his effort to have the annuity set aside, Greenlaw sought to adduce
evidence of correspondence between the Bishop and his solicitor, as well as the opinion
of counsel given in the matter, which documents answered the Bishop’s concern about
the validity of the annuity.57

52 Greenlaw v King (1838) 1 Beav. 137; 48 ER 890.
53 Russell v Jackson (1851) 9 Hare 387; 68 ER 558.
54 Anderson v Bank of British Columbia (1876) 2 Ch D 644.
55 Wheeler v LeMarchant (1881) 17 Ch D 675.
56 As in Randolph’s case, cited by Coke in his Second Part of the Institutes as authority for the proposition
that there is a treason exception to religious confession privilege, it is fair to wonder whether one reason why
Greenlaw v King is cited in connection with religious confession privilege is because a member of the clergy
was mentioned in the same case where a confession or a privilege was considered. In chapter three it was
noted that Randolph, a priest, confessed his complicity in the crime of treason. Sir Edward Coke used the
fact that he was also Dowager Queen Joan’s confessor to bolster the appearance of authority for his treason
exception to religious confession privilege. In Greenlaw v King, it may have seemed to some commentators
that the denial of any privilege by which a member of the clergy might have benefited, lent authority to the
idea that there is no religious confession privilege.
57 Greenlaw v King (1838) 1 Beav. 137, 143; 48 ER 890, 893.
King countered with the argument that since these documents came into being because of the Bishop’s concern about litigation such as might flow if the annuity was invalid, they could not be produced in any court.\textsuperscript{58} The court, however, found the documents admissible because the privilege of a solicitor and his client “are not co-extensive”\textsuperscript{59} and as executor or personal representative, the Defendant King was not the beneficiary of the privilege to which his late father, the Bishop, would have been entitled in this suit.\textsuperscript{60} Lord Langdale also referenced the relationship of friendship that had existed between the late Bishop and his solicitor and it was in generalising further to point out that mere confidences were not privileged from disclosure in a court of law, he made an obiter dicta statement which included reference to religious confession privilege. He said:

\begin{quote}
[T]hey are communications which have taken place between the Defendant and [his father’s solicitor], not in his character of solicitor; and it cannot be said that a mere friend is a person so confidential that a communication with him is privileged: the cases of privilege are confined to solicitors and their clients; and stewards, parents, medical attendants, clergymen and persons in the most closely confidential relation are bound to disclose communications made to them.\textsuperscript{61}
\end{quote}

In \textit{Russell v Jackson}\textsuperscript{62} Sir GJ Turner, the Vice-Chancellor, explained that the existence of legal professional privilege is not premised in “the confidence reposed by the client in

\begin{itemize}
\item \textsuperscript{58} \textit{Greenlaw v King} (1838) 1 Beav. 137, 143-144; 48 ER 890, 893-894.
\item \textsuperscript{59} \textit{Greenlaw v King} (1838) 1 Beav. 137, 144; 48 ER 890, 894.
\item \textsuperscript{60} \textit{Greenlaw v King} (1838) 1 Beav. 137, 145; 48 ER 890, 894.
\item \textsuperscript{61} Idem.
\item \textsuperscript{62} \textit{Russell v Jackson} (1851) 9 Hare 387; 68 ER 558.
\end{itemize}
the solicitor" but rather “on a regard to the interests of justice ... and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence ... [for] if the privilege did not exist at all, everyone would be thrown upon his own legal resources [and,] deprived of all professional assistance, a man would not venture to ... tell his counsellor half his case". If it were otherwise, in this Vice-Chancellor’s opinion, a privilege would lie “in other cases in which at least equal confidence is reposed: in the cases for instance, of the medical man and the patient, and of the clergyman and the prisoner”.

The facts in both *Anderson v Bank* and *Wheeler v LeMarchant*, have been set out in detail in chapter one. In *Anderson v Bank* the English Court of Appeal denied that legal professional privilege extended to protect information an overseas bank prepared for its client after litigation had commenced. In *Wheeler v LeMarchant*, the same court denied that legal professional privilege protected written exchanges between a solicitor and his client’s surveyor before the dispute arose. In *Anderson v Bank*, Sir George Jessel MR quoted Lord Cottenham’s judgement in *Reid v Langlois* which denied that legal professional privilege extended to cover communications with a third party, even though those communications resulted in the production of documents in litigation. The object of legal professional privilege for Lord Cottenham was “to protect the party who wishes

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63 Idem.
64 Idem.
65 Idem.
66 *Anderson v Bank of British Columbia* (1876) 2 Ch D 644.
67 *Wheeler v LeMarchant* (1881) 17 Ch D 675.
68 *Reid v Langlois* (1849) 1 Mac & G 627; 41 ER 1408.
to take the advice of professional men". Sir George Jessel MR then denied the existence of both doctor-patient privilege and the religious confession privilege which is recognised “in foreign countries where the Roman Catholic faith prevails” because “[w]hen Lord Cottenham says “professional men” he means members of the legal profession and nothing else”. In Wheeler v LeMarchant, Sir George Jessel MR essentially repeated his Anderson v Bank obiter statement against the existence of religious confession privilege, but without the citation of Lord Cottenham's authority and his doubtful explanation of what Lord Cottenham meant.

While it remains doubtful that Chief Justice Holt in 1693 intended by his obiter dicta comments in his Anon decision to say anything at all about religious confession privilege, it is clear that Lord Langdale in Greenlaw v King, Sir GJ Turner, the Vice-Chancellor in Russell v Jackson and Sir George Jessel MR in both Anderson v Bank and Wheeler v LeMarchant intended to deny the existence of religious confession privilege. So elementary was that denial, that only Sir George Jessel MR referred to authority, but his quotation from Lord Cottenham really meant little more than res ipsa loquitur. But as my historical analysis in chapters two and three has demonstrated, the thing does not speak for itself. To properly assess the authority of these influential obiter dicta statements against the existence of religious confession privilege, they must be weighed against the opposing views of equally influential judicial minds who were equally sure that the privilege did exist.

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69 As quoted by Sir George Jessel MR in Anderson v Bank of British Columbia (1876) LR 2 ChD 644, 650.
70 Anderson v Bank of British Columbia (1876) LR 2 ChD 644, 650-651.
71 Idem.
Legal professional privilege cases that contain obiter statements that doubt denials of religious confession privilege

Neither Lord Kenyon CJ in 1792, nor Chief Justice Best in 1828 agreed that legal professional privilege was the only privilege against evidential compulsion known to English law, and both disagreed with brother judges in recorded judgements promptly after views disavowing religious confession privilege were brought to their attention.

Lord Kenyon’s doubt that religious confession evidence had been properly compelled the previous year, was discussed in chapter one as a part of the writer’s discussion of the error in *R v Sparkes.*72 In *Du Barré v Livette,*73 Lord Kenyon was asked to compel the interpreter who assisted defence counsel in a case of jewellery theft, to disclose conversations between one of the accused, Livette, and his lawyer. Counsel for Du Barré used an analogy to press his case by suggesting that since Justice Buller had decided the previous year that a Catholic prisoner’s confession to a Protestant clergyman was compellable74, the interpreter should be compelled here. Lord Kenyon found that the interpreter was as protected by legal professional privilege as Livette’s lawyer himself since the attorney could not fulfill his proper function without the involvement of the interpreter.75 However, rather than letting the analogy pass, he said that he would have paused before he admitted the evidence Justice Buller had admitted in *R v Sparkes.*76 While the language was temperate, even understated, the message was clear. The Chief Justice did not think that even an irregular religious confession should have been admitted as evidence, but he did not say why.

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72 Unreported but referred to in *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 86.

73 *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96.

74 *Du Barré v Livette* (1791) 1 Peake 108, 109; 170 ER 96, 97.

75 Idem.

76 *Du Barré v Livette* (1791) 1 Peake 108, 110; 170 ER 96, 97.
Chief Justice Best was more forthright when he learned that his decision to prevent a clergyman giving evidence in *R v Radford*\(^{77}\) in 1823 had been disapproved by the banc of judges who decided that Gilham’s evidence was not illegally induced in 1828. For six weeks after the decision in *R v Gilham*\(^ {78}\) was handed down, he took the opportunity to respond in *Broad v Pitt*,\(^ {79}\) another case about legal professional privilege.

The facts of *Broad v Pitt* are not reported. However, despite the brief report, it is clear that the case concerned the question of whether legal professional privilege applied to a conversation between Pitt and his attorney when Pitt “executed a deed which the latter had prepared for him as his professional adviser”.\(^ {80}\) Chief Justice Best decided that legal professional privilege only applied in cases where communications flowed from a person’s need for legal advice “for the purpose of defending himself or of commencing an action”,\(^ {81}\) but not, as here, where the advisor was only “consulted about a deed”.\(^ {82}\) He then commented about religious confession privilege as follows:

> I think this confidence in the case of attornies is a great anomaly in the law. The privilege does not apply to clergymen, since the decision the other day, in the case of Gilham (Carr. Suppl. 61). I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to

\(^{77}\) Unreported, but referred to in *R v Gilham* (1828) 1 Moody 186; 168 ER 1235.

\(^{78}\) *R v Gilham* (1828) 1 Moody 186; 168 ER 1235.

\(^{79}\) *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528.

\(^{80}\) Idem.

\(^{81}\) *Broad v Pitt* (1828) 3 Carr & P 518, 519; 172 ER 528, 529.

\(^{82}\) Idem.
disclose them, I shall receive them in evidence. There is also no privilege of this description in the case of a medical man.83

While the report suggests that Chief Justice Best believed that the decision in R v Gilham had extinguished religious confession privilege, the Chief Justice’s opinion is unclear since he still says that he would not compel a clergyman to give evidence in his court. It may be that the Chief Justice considered some part of what he believed was pre-existing common law protection for clerical confidentiality had been extinguished by the R v Gilham obiter. Or perhaps he was just annoyed that his course in R v Radford had been disapproved. He certainly did not believe the decision in R v Gilham had extinguished his discretion to exclude religious confession evidence. He is not the only judge to have believed he had such discretion. I consider the cases which arguably recognise a broader and discretionary religious “communications” privilege in detail in chapter five.

What is evident is that Chief Justice Best was not present in banc when the Gilham decision was taken and that he had not read the report. For if he had read the report or been present in banc, he could have further distinguished Park J’s obiter comments about religious confession privilege since that case really only decided that spiritual inducements could not invalidate an otherwise voluntary confession of crime. Though Park J had opined against religious confession privilege when discussing Best CJ’s decision in R v Radford, he had done so on the basis of Peake and Starkies’ flawed commentary on the decisions in R v Sparkes and Du Barré v Livette.

83 Broad v Pitt (1828) 3 Carr & P 518, 519; 172 ER 528-529.
Best C.J.’s tenacity, despite the evident criticism of his brethren, is the more remarkable since he maintained his opinion anyway – and offered legal justification for continued practical recognition of religious confession privilege by suggesting that perhaps it was subject to waiver by priest (R v Radford) or penitent (Best C.J.’s apparent understanding of the facts in R v Gilham). Indeed, given Park’s summary of the Radford facts – that Chief Justice Best had actually forbidden the priest from giving evidence in that case when he was willing to do so – Best C.J. effectively said that the only change made by the Gilham obiter to his understanding of the underlying common law, was that judges must allow willing clergymen to testify, implying that judges should still exclude evidence of religious confessions in cases where priests declined to testify willingly.

In addition to the cases about legal professional privilege cited in commentary which do include obiter dicta comments for and against the existence of religious confession privilege, there are legal professional privilege cases cited which say nothing about religious confession privilege at all. The only reason why they seem to have been so mentioned, is because they feature strong statements denying that there is any evidential privilege at all except for members of the legal profession.

**Legal professional privilege cases that are cited in evidence texts about religious confession privilege but which do not even mention religious confession privilege**

That these cases carry little weight against religious confession privilege despite citation for that purpose in commentary is also exposed by the observation that their generalised denials have been used to deny the existence of other evidential privileges including

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84 Though the report in R v Gilham cites only the opinion of Park J against Best’s decision to exclude the clergymen’s evidence in R v Radford, since Park’s brethren concurred with him in the result in banc, Best appears to have felt that they all concurred in Park’s opinion against his Radford decision.
those that protect state secrets and the privilege against self-incrimination. Perhaps again, the commentators included references to these cases because the analogy between priests and lawyers seems more natural since both intercede between individuals and a higher power.\footnote{See earlier comparison supra, p 137.}

\textit{Vaillant v Dodemead}\footnote{\textit{Vaillant v Dodemead} (1743) 2 Atk 54; 26 ER 715.} was a 1743 case decided by the Lord Chancellor. Dodemead had produced his clerk in court, a Mr Bristow, to provide evidence about “a collusive assignment made by the defendant Dodemead of a lease to one Lascelles, a prisoner in the Fleet, in order to avoid paying a ground rent to the plaintiff”.\footnote{Idem.} Mr Bristow demurred from answering questions in cross-examination on the basis “that he knew nothing of the matters inquired of, except what came to his knowledge as the defendant’s clerk in court, or agent”.\footnote{Idem.} In overruling his demurrer, the Lord Chancellor said that “no persons are privileged from being examined in such cases, but persons of the profession, as counsel, solicitor, or attorney, for an agent may only be a steward, or servant”.\footnote{Idem.} He also said that because Bristow had consented to being examined in chief, he had waived any right even a counsel or attorney might have had to demur on grounds of legal professional privilege.

\textit{Wilson v Rastall}\footnote{\textit{Wilson v Rastall} (1792) LTR 753; 100 ER 1283; (1775-1802) All ER 597.} is possibly more significant than \textit{Vaillant v Dodemead} on two counts. First, it was decided the year after Lord Kenyon CJ had disapproved of Buller J’s
decision to admit evidence of an irregular religious confession in *R v Sparkes*,\(^9^1\) and secondly, because the current Chief Justice of the New South Wales Supreme Court, cited it as authority for his proposition that there is no religious confession privilege except by statute.\(^9^2\)

An attorney named Mr B Handley, by convoluted circumstances, had come into possession of letters apparently material to a bribery case following an election “for the borough of Newark upon Trent”.\(^9^3\) The attorney claimed that he was entitled to refuse to produce the letters or answer questions about them, since he had been consulted in a professional capacity by the owner, though he had never acted as the owner’s attorney. Before Baron Thomson in the first instance criminal trial, it was held that the attorney “was not bound”\(^9^4\) to produce the letters. Lord Kenyon and Mr Justice Buller did not agree. Lord Kenyon said:

> The evidence of B. Handley was rejected on account of a confidence supposed to have been reposed in him by the defendant, for the witness said that the letters were delivered to him in consequence of the defendant’s consulting him professionally ... It expressly appears from [Mr B. Handley’s] ... own evidence that he was not, nor could be, employed as an attorney. I have always understood that the privilege of a client only extends to the case of an attorney

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\(^9^1\) Unreported but referred to in *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 86. Note that Lord Kenyon CJ and Buller J sat together in *Wilson v Rastall*.

\(^9^2\) *R v Young* (1999) 46 NSWLR 681, 699, para 88, per Spigelman, CJ, though note it is possible to read his citation of *Wilson v Rastall* as authority only for the first proposition (“The common law refused to afford privilege to exceptional sensitive confidential relationships”) and not for the statement after which it was cited (“No such privilege was recognised until statutory modification”).

\(^9^3\) *Wilson v Rastall* (1792) LTR 753; 100 ER 1283; (1775-1802) All ER 597.

\(^9^4\) *Wilson v Rastall* (1775-1802) All ER 597, 598.
for him ... In order to show that the privilege extends beyond the case of an attorney and client, a hard case has been pressed on our feelings of confidence reposed in a friend ... I ... think that this privilege is only allowed in the case of attorney and client.95

Mr Justice Buller was more direct:

The privilege is confined to the cases of counsel, solicitor and attorney. In order to raise the privilege ... it must be proved that the information was communicated to the witness in one of those characters ... as B. Handley was neither the attorney of W. Handley nor of the defendant, I am of the opinion that he was improperly prevented from producing the letters in question.96

It is noteworthy that Lord Kenyon did not reiterate or justify his extension of legal professional privilege to the lawyer’s interpreter the previous year in *Du Barré v Livette*. Both Judges decided *Wilson v Rastall* on its distinct facts and resisted the invitations of counsel to extend or generalise that specific privilege into a wider privilege benefitting confidentiality simpliciter. Commentative assertions that *Wilson v Rastall* represents further proof that religious confession privilege had been extinguished by the turn of the nineteenth century97 may thus be discounted.

95 *Wilson v Rastall* (1775-1802) All ER 597, 599.

96 *Wilson v Rastall* (1775-1802) All ER 597,600.

In *Falmouth v Moss*, the Earl of Falmouth sought to extend legal professional privilege to exclude evidence that might have been given by his steward, a sometimes conveyancer, but who was admitted not to be an attorney. This case may be similarly dismissed as not impacting on religious confession privilege.

The inductive generalisation of broad principles from cases about legal professional privilege has contributed to the mistaken belief that religious confession privilege has been extinguished from the common law by a line of authoritative cases. But it is not the only analytical error that has contributed to that mistaken belief. A correct understanding of religious confession privilege has also been confused by cases which involve irregular confessions. The entire history of the development of the law relating to legal professional privilege has been the story of refining the scope of that privilege and denying it was available to people outside the legal profession. Judges are of course, uniquely qualified to decide whether a legal professional privilege claimant is a legal practitioner. They are also eminently qualified to decide whether a particular communication has the hallmarks of a legally privileged communication. But the adjudication of whether an individual is a qualified clergyman and whether a confession is regular according to the tenets of a particular faith, is beyond the competence of most judges – and there is a very strong body of common law authority that states that secular courts have no business adjudicating matters that have ecclesiastical content. Yet until the New South Wales religious confession privilege statute passed into law in 1989 suggested that the member of the clergy claiming religious confession privilege is the proper adjudicator of whether what was heard was a confession or not, that possibility never appeared in commentary. While there are a number of cases where Judges have

98 *Falmouth v Moss* (1822) 11 Price 455; 147 ER 530.

99 *Falmouth v Moss* (1822) 11 Price 455, 457; 147 ER 530, 532.
perceived the difficulty, no common law text has ever explored whether such perplexity has been a valid factor in denial of the privilege. The next section of this chapter therefore considers various examples of confessional irregularity to determine whether the decisions in these cases can be said to have extinguished religious confession privilege at common law.

**Irregular confessions**

Garnet’s case, decided in 1606, was the last prosecution flowing from the Gunpowder Plot of 1605. The facts are set out in chapter three, as is the illogic of using Garnet’s case as authority for the proposition that there was no religious confession privilege after the English Reformation. For if there was no religious confession privilege at common law, why such considerable effort to deny that Garnet’s communication was a religious confession? It would have been altogether simpler to have dismissed Garnet’s argument that his communications with Greenwell and possibly Catesby were privileged out of hand since no such privilege was known to English common law. But Coke and two of the nine Commissioners who sat to guide the jury on the case, went to great lengths to disabuse the jury of the notion that Garnet’s religious confession defence had any substance.

Because Buller J did not make an issue of the irregularity of the confession in *R v Sparkes*, that irregularity does not underscore recognition of religious confession privilege at common law as does the legal argument in Garnet’s case. Indeed, though the irregularity of confession point was not lost on counsel who sought to use the

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100 As discussed in chapter two, pp 58-60, 65-76, this same reasoning makes Coke’s stretching to find a treason exception to religious confession privilege in English common law an argument which proves the existence of the underlying privilege.
decision as a precedent narrowing a claim of legal professional privilege in *Du Barré v Livette* argued before Lord Kenyon CJ the following year, Mr Justice Buller had apparently dismissed both the religious confession privilege and irregularity arguments summarily since no such privilege was known to English common law. Because the case is not reported, we have no knowledge of the basis upon which Buller J dismissed the religious confession argument. We do not know, for example, if Coke’s *Second Part of the Institutes* was cited or the argument about the privilege from the report in Garnet’s case. But it does seem that something was made of the irregularity of the confession since that is the way the argument was presented to Lord Kenyon in *Du Barré v Livette*. Though the decision in *R v Sparkes* may be one of the authoritative decisions against the existence of religious confession privilege that Wigmore says that he cited in his footnotes, questions remain. Since a Catholic priest of that day would probably deny that the alleged confession was a confession at all since it was made to a Protestant clergyman, did this unreported decision of Buller J authoritatively confirm once and for all that there was no religious confession privilege? Was authority cited? If so, did Buller J consider and then distinguish or dismiss that authority? Or did he simply wave his hand and say that the argument was irrelevant either on the basis that this was not a confession at all, or because there was no religious confession privilege at common law? It may be that the evidence text writer WM Best took a better approach when he suggested that the decision in *R v Sparkes* was more of a commentary on the rampant anti-Catholic prejudice endemic in England in 1790, than it was upon the existence of religious confession privilege at common law. WM Best certainly thought it academically

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101 Wigmore, JH, *Evidence in Trials at Common Law*, revised by John T McNaughton, Boston, Little Brown and Company, 1961, Vol 8, pp 867-870 – though the text does not spell out which of the authorities listed (including *R v Sparkes*) are his “at least two decisive rulings ... which deny ... the existence of a [religious confession] privilege”.

reasonable to set the decisions in both *R v Sparkes* and *Butler v Moore*\(^\text{103}\) to one side and not count them as authorities against the existence of religious confession privilege on the basis that they were tainted by prejudice.\(^\text{104}\) There is also the point of distinction asserted later by Best CJ in his obiter comments in *Broad v Pitt*, that the Protestant clergyman in *R v Sparkes* had evidently testified willingly and had therefore waived any privilege that otherwise obtained.\(^\text{105}\) Whatever the correct analysis may be if these remaining questions could be answered, it is not reasonable to induce the finding that religious confession privilege was extinguished from common law by the argument or the results in *Garnet’s case* or *R v Sparkes*.

The decision in *R v Gilham* was set out in detail in chapter one\(^\text{106}\) and has been referred to earlier in this chapter.\(^\text{107}\) Though various commentaries cite it as authority against the existence of religious confession privilege at common law,\(^\text{108}\) I have shown that it actually decided that confessions induced by spiritual promises were admissible. It is only an ‘irregular confession’ case in the sense that though the confessions concerned may have been made for spiritual purpose, no one asserted they were religious confessions and it is hard to see how they could have been since none was made to a member of the

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\(^{103}\) *Butler v Moore* (1804-1806) 2 Sch & Lef 249. This case is discussed in more detail infra, pp 167-168, and also in chapter six, pp 238, 240.

\(^{104}\) Best, WM, op cit, pp 459-460.

\(^{105}\) See discussion supra, pp 148-150.

\(^{106}\) Chapter one, pp 19-21.

\(^{107}\) Supra, pp 134, 148-150.


For it does not appear from the report that anyone had to be compelled to give evidence against either their will or their religious scruples.

Nor does the report of the decision in *R v Wild* advance the case for or against the existence of religious confession privilege at common law. William Wild was a thirteen-year-old boy accused of murdering a three-year-old girl named Elizabeth Smith. As in *R v Gilham*, the death sentence had been passed upon the prisoner, but the execution was respited so that “the opinion of the Judges [could be taken] upon the admissibility of certain confessional evidence, which counsel for the prosecution thought it necessary to adduce”.

None of the persons who received confessional evidence from the boy held any clerical status whatever, though the record repeats the fact that they were not constables either.

In particular, one William Clark had questioned the boy, having required first that he should kneel down and tell the truth in the presence of the Almighty. After this admonition, the boy had responded that “he pushed one [girl] in with one foot, and the other with the other, but not purposely” – though his formal pre-cautioned statement had said that both girls had fallen into the pit when he had stumbled against Martha who was being held by the waist by Bessy. Though the banc of judges found the evidence given by William Clark “strictly admissible, they much disapproved of the mode in which

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109 *R v Gilham* also counts as an irregular confession case since various commentaries assert that it is a religious confession privilege case even though the confessions involved were not asserted to be regular religious confessions by any measure.

110 *R v Wild* (1835) 1 Moody 452; 168 ER 1341.

111 Idem.

112 *R v Wild* (1835) 1 Moody 452, 453-454; 168 ER 1341.

113 *R v Wild* (1835) 1 Moody 452, 454; 168 ER 1342.

114 *R v Wild* (1835) 1 Moody 452, 454-455; 168 ER 1342.
it was obtained", but they commuted the death sentence and the boy was transported for life. It is doubtful that there was anything irregular about this confession, though it was not even asserted that it was privileged as a religious confession and the case was referred to higher authority as *R v Gilham* had been, simply because there was doubt whether the confession had been properly obtained. While one can feel some compassion for a thirteen-year-old boy who was first sentenced to death and then ‘mercifully’ transported instead because he had accidentally pushed a girl who could not swim into the water, it is doubtful that the case should have been cited in connection with any form of evidentiary privilege.

*In re Keller*\(^{117}\) and *Normanshaw v Normanshaw*\(^{118}\) are included here as cases about irregular confession because though cited in connection with religious confession privilege, they are really cases about whether religious confession privilege should extend to protect confidential communications with clergy, since the member of the clergy in both cases asserted religious confidentiality as a reason why he should not be compelled to give evidence. *Normanshaw v Normanshaw* in particular is also discussed in some detail in chapter five in connection with an arguable religious ‘communications’ privilege at common law because of several equivocal statements Jeune P is reported to have made about discretion. But the case still demonstrates how even when there was

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115 *R v Wild* (1835) 1 Moody 452, 455; 168 ER 1342.
116 Idem.
117 *In re Keller* (1887) L.R. Ir. 158.
118 *Normanshaw v Normanshaw* (1893) 69 LTR 468.
no religious confession at all, such cases were nonetheless cited in the commentaries as authority against the existence of religious confession privilege.\textsuperscript{119}

The Reverend Mr Keller had been questioned in the Irish Court of Bankruptcy in connection with the bankruptcy of one Patrick O’Brien, and declined to answer a question about his whereabouts “on the 16\textsuperscript{th} of November last?\textsuperscript{120} When he was asked the reason why he declined to answer that question, he explained that he could not answer it because doing so “would tend to compel me to disclose secrets that I cannot in honour disclose, or in duty to my sacred profession”.\textsuperscript{121} When pressed, the Reverend Mr Keller carefully explained further that an answer to the question “would tend to elicit disclosure of a conversation ... with the bankrupt, or other persons – disclosures of which I may have become cognizant simply and solely because of my being a priest”.\textsuperscript{122} When Judge Boyd suggested that he did not believe this question concerned his clerical duties, the Reverend Mr Keller answered:

\begin{quote}
Your Lordship, of course, is the proper interpreter of the law in this Court; but I beg respectfully to say that your Lordship cannot be expected to understand the nature of the obligations of a Catholic priest, or the laws of Catholic discipline, or the laws or usages of Catholic discipline that would bind him to consider as a sacred trust the confidence reposed in him by his parishioners, or by his Catholic
\end{quote}

\textsuperscript{119} For example, Phipson in his 5\textsuperscript{th} edition (\textit{Law of Evidence}, 5\textsuperscript{th} ed, London, Stevens and Haynes, 1911, Vol 2, p 188) and the editors of the 13\textsuperscript{th} edition of his work in 1982 (Buzzard JH, May R and Howard MN, \textit{Phipson on Evidence}, 13\textsuperscript{th} ed, London, Sweet & Maxwell, 1982, para 15-09) so treat the decision in \textit{Normanshaw v Normanshaw}.

\textsuperscript{120} \textit{In re Keller} (1887) L.R. Ir. 158, 159.

\textsuperscript{121} \textit{In re Keller} (1887) L.R. Ir. 158, 160.

\textsuperscript{122} Idem.
people. I beg to repeat that my knowledge of my duty and my conscience must be my own guide in reference to any answers I make in that respect.123

In the absence of any argument evident from the record about the existence of either religious confession privilege or religious communications privilege, Judge Boyd exercised “power to commit for contempt witnesses refusing to answer a legal question”.124

The matter came before the Irish Court of Queen’s Bench as an application made on behalf of the priest for a writ of habeas corpus directed to the Governor of the prison where he had been held for six weeks since Judge Boyd’s committal order.125 It further came before the Court of Appeal eight days later as an appeal from an order in Queen’s Bench that had refused the application for habeas corpus. The reported legal argument focused upon questions not relevant to religious confession privilege127 and ultimately the Queen’s Bench order denying the application for habeas corpus was reversed 4:1 and Father Keller was released from prison.

123 Idem.
124 Idem.
125 In re Keller (1887) L.R. Ir. 158, 162.
126 The original examination of the Reverend Mr Keller in the Court of Bankruptcy was heard on 19 March 1887, on which date he was committed for contempt. The application made for habeas corpus on his behalf was heard in the Irish Court of Queen’s Bench on 4 and 5 May 1887, and the appeal on 13, 19, 20 and 21 May 1887.
127 The legal issues upon which the Court of Appeal focused were: firstly, whether the matter was a criminal matter, in which event the Court of Appeal could not hear the appeal at all under the provisions of the Irish Judicature Act, and second, whether the Irish Court of Bankruptcy was an Inferior or Superior Court. If Inferior, it was argued that it had no power to commit for contempt in the first place; if Superior, then it had power to commit and the Court of Appeal allegedly had power only to examine the committal warrant itself for regularity.
The various decisions in *In re Keller* do not really advance our understanding of the law with regard to religious confession privilege. Perhaps Nokes’ suggestion that it demonstrates judicial reluctance to punish the moral convictions of a priest\(^{128}\) is the most that can be said of the decision. That view certainly resonates with McNicol’s observation that the state is wise to try and avoid conflict at the church/state intersection.\(^{129}\)

In *Normanshaw v Normanshaw*, the Reverend Wm. Richardson Linton, vicar of Shirley, at first objected to deposing to details of a conversation he had had with the respondent wife in a divorce petition on grounds of adultery. Though Jeune P said that each case of confidential communications was to be treated on its own merits, he saw no reason in this case why the witness should not speak about the relevant conversation. When the clergyman did disclose the details of the conversation that had taken place, it was clear there had been no confession but rather they had discussed whether the respondent should go to the penitentiary or not. Whether disclosure of that conversation was decisive in the jury’s finding that the adultery was proven is not stated. Once again, the failure in the commentary to analyse the facts and decision has seen the report of this case generalised as an authority against the existence of religious confession privilege.\(^{130}\) That is clearly not correct.

While *R v Hay*\(^{131}\) is not a case about irregular confession, it is appropriately discussed here because it appears to demonstrate more judicial reluctance to confront the privilege

\(^{128}\) Nokes, GD, “Professional Privilege” (1950) 66 *LQR* 88, 97.


\(^{130}\) See note 119 supra.

\(^{131}\) *R v Hay* (1860) 2 *F & F* 4; 175 ER 933.
head on despite the apparent availability of relevant and probative evidence. It has been cited by commentators both as authority for\textsuperscript{132} and authority against\textsuperscript{133} the existence of a religious confession privilege.

Hay was accused of robbing a prosecutor, Daniel Kennedy, of a silver watch. The watch had been recovered from the Reverend John Kelly, a Catholic priest\textsuperscript{134} who was called to give evidence as to the identity of the person from whom he had received it. Father Kelly at first declined to make the court oath, but reconsidered and took the oath after Justice Hill explained that it was his duty “as a loyal subject”\textsuperscript{135} to do so, especially since he had the right to object and have his objection sustained, if his answer might incriminate himself.

It appears that Father Kelly might have objected to answer questions related to the circumstances of the confession on the grounds that his answers might incriminate him under canon law. But it is not clear whether Hill J was suggesting he make such an objection, or indeed telling him that a self incrimination objection was not available because the risk of becoming subject to canon law penalties was not recognised as a species of incrimination in English secular courts. It is more likely that Hill J’s reference to the possibility of self-incrimination, was a reference to the possibility that Father Kelly may himself have committed a crime in stealing the watch or in receiving stolen property.

\textsuperscript{132} McWilliams, PK, Canadian Criminal Evidence, 2\textsuperscript{nd} ed, Aurora Ontario, Canada Law Book Limited, 1984, p 923.

\textsuperscript{133} For example, Hageman, JF, Privileged Communications, Princeton New Jersey, Honeyman & Co, 1889, p 127. It seems that \textit{R v Hay} may be one of the two cases that Wigmore considered was decisive against the existence of religious confession privilege (Wigmore, JH, Evidence in Trials at Common Law, revised by John T McNaughton, Boston, Little Brown and Company, 1961, Vol 8, pp 867-870).

\textsuperscript{134} Though it is unusual to refer to a Catholic priest with the title “Reverend”, that is done several times in this report.

\textsuperscript{135} \textit{R v Hay} (1860) 2 F & F 4, 6; 175 ER 933, 934.
In any event, when the prosecutor asked the central question – “from whom did you receive the watch?”136 – Father Kelly answered, “I received it in connexion with the confessional”.137 It is at this point that the different interpretations of the meaning of the case as a precedent in the commentaries is identified. Hill J intervened:

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?138

When Father Kelly explained that he could not answer that question without suspension for life under the laws of the Church as well as offending what he regarded as “the natural laws”,139 Hill J repeated his explanation that Father Kelly was only required to depose to facts and that no confessional material was required from him.140 When Father Kelly repeated his refusal to answer, he was adjudged guilty of contempt and taken into custody, and other witnesses were called,141 though the report does not reveal Hay’s fate.

Though some commentators maintain that *R v Hay* is a precedent that denies the existence of a religious confession privilege since the clear result of Hill J’s adjudication

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136 Idem.
137 Idem.
138 *R v Hay* (1860) 2 F & F 4, 6-7; 175 ER 933, 934-935.
139 *R v Hay* (1860) 2 F & F 4, 7; 175 ER 933, 935.
140 *R v Hay* (1860) 2 F & F 4, 9; 175 ER 933, 936.
141 *R v Hay* (1860) 2 F & F 4, 10; 175 ER 933, 936.
was to deny Father Kelly’s understanding of his own canon law obligations, it is also true to state the contrary, since the Judge was at pains to point out that the question required no breach of the confessional seal.

What does the decision in *R v Hay* say about religious confession privilege? Finlason, who reported it, clearly did not feel that Hill J had properly or adequately dealt with the common law of religious confession privilege – indeed, his footnotes pointing to the “correct” result amount to an essay longer than the report itself, setting out the pre-existing canon and common law upon which the case might have been decided. Hageman appears to have thought Hill J’s practical decision in *R v Hay* decisive of the point in “both England ... and the United States ... that priests are not privileged”. However, Phipson and Nokes did not consider that the recorded facts underlying the decision really raised the privilege and so left the general question untouched. It is submitted that those views are fairer than an assertion that the case represents a clear decision against the privilege, as seems the intent of Wigmore’s commentary.

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142 See note 133.

143 See note 132.


148 Wigmore, JH, *Evidence in Trials at Common Law*, revised by John T McNaughton, Boston, Little Brown and Company, 1961, Vol 8, pp 867-870 – though the text does not spell out which of the authorities listed (including *R v Hay*) are his “at least two decisive rulings ... which deny ... the existence of a [religious confession] privilege”.

Lord Chief Justice Coleridge’s anecdotal observation that Hill J, the judge in *R v Hay*, was a strong Ulster Protestant, is not helpful either. Though a more sympathetic judge such as Lord Kenyon CJ in *Du Barré v Livette*, Best CJ in *Broad v Pitt* or Baron Alderson in *R v Griffin* might have prevented the prosecutor from pressing a reluctant clergyman for an answer to this question, it is reasonable to observe that Hill J felt he was left with little choice but to hold Father Kelly in contempt. The report does not suggest any authority in favour of religious confession privilege was argued nor was any self-incrimination objection made, yet Father Kelly steadfastly refused to depose to facts which did not themselves disclose any spoken confessional secret. However, Hill J’s use of a legal interpretation of what constituted a religious confession to rebut Father Kelly’s insistence that he could not depose the required fact without breaching canonical laws, echoes Coke’s theological debate with Father Henry Garnet about the definition of a religious confession in 1606. That same debate recurred at first instance in *In re Keller* twenty-seven years after Hill J decided *R v Hay* and appears as one conceptual reason why the New South Wales religious confession privilege statute in 1989, sought to take the definition of what constitutes a religious confession away from the judiciary. A cynic might take the view that the interpretive possibilities thus available to a judge, enable whatever decision the judge wants to take. For a narrow interpretation of even the broadest statute, particularly where a definition of religious confession is provided, will enable a judge to admit almost any otherwise relevant evidence. But if a judge wishes to respect even a very informal ecclesiastical confidentiality practice in a jurisdiction without

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150 *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96.

151 *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528.

152 *R v Griffin* (1853) 6 Cox Cr Cas 219. This case is discussed infra, pp 169-170.
a religious confession privilege statute, there is a line of authority that allows the exclusion of religious communications that are merely confidential. 153

Were there any clear cases?

There were four cases between the seventeenth and the twentieth centuries that are said to have involved religious confessions, but they do not send a clear signal. The reasons for that uncertainty vest in the fact that one was English, one was Irish, and two were American, and to the extent that they do represent authority where religious confession privilege is concerned, they were evenly split in deciding for and against it. But there are other even more specific reasons why they are not compelling either way.

Butler v Moore154 was the earliest in 1801. It was the Irish case which WM Best suggested was best set to one side because it was possibly tainted by anti-Catholic prejudice. A Catholic priest had been called to give evidence on whether Lord Dunboye had returned to the Catholic faith before his death in which event his will would have been invalid. Sir Michael Smith, the Master of the Irish Rolls overruled the priest’s demurrer and held him in contempt of court when he would not answer related questions.155 Although the law report does not detail this process, various authorities confirm that interrogatories were administered by the late Lord’s sister to a priest said to

153 That line of authority is the subject of chapter five’s treatment of a religious communications privilege at common law.

154 Butler v Moore (1804-1806) 2 Sch & Lef 249

155 This interpretation of the case is from MacNally (The Rules of Evidence, London, J Butterworth; Dublin, J Cooke, 1802, pp 253-255). The Schoales and Lefroy report of the case (Butler v Moore (1804-1806) 2 Sch & Lef 249, 254-255) does not report the interchange between the priest and Master of Irish Rolls, recording only that the Lord Chancellor considered that even though a certificate had been produced from the Vicar-General of the diocese of Killaloe of the Church of Ireland confirming that James Butler had renounced “the errors and corruptions of the Church of Rome” that nonetheless “evidence might be given to shew that James was in fact a Papist”.
have attended him shortly before his death.\textsuperscript{156} When the priest refused to answer “on the ground that his knowledge (if any) arose from a confidential communication made to him in the exercise of his clerical functions ... he was adjudged guilty of contempt of court and was imprisoned”.\textsuperscript{157} Since the case did not concern a religious confession but possibly a confidential religious communication, it does not represent authority against religious confession privilege at common law, though it has been so represented.\textsuperscript{158}

The two American cases followed. Though United States constitutional law was a large factor in both decisions, they both purported to apply existing English common law. In the first, \textit{The People v Phillips},\textsuperscript{159} Mayor Clinton was thorough in his analysis, but scathing in his criticism. He dismissed the \textit{Butler v Moore} decision on account of its manifest anti-Catholic bias, and said Justice Buller’s hurried, unresearched, and just plain wrong decision in \textit{R v Sparkes} had, in any event, been “virtually overturned by Lord Kenyon, who certainly censure[d] it with as much explicitness as one Judge can impeach the decision of his colleague, without departing from judicial decorum”.\textsuperscript{160} Not surprisingly, Mayor Clinton confirmed that Phillips’ Catholic confession could not be compelled from his priest, primarily on the ground that such compulsion would deny his freedom of religious practice which was protected under the federal United States First Amendment. But in \textit{The People v Smith}\textsuperscript{161} decided four years later, a confession to a

\footnotesize{
\begin{itemize}
\item\textsuperscript{156} For example, \url{http://en.wikipedia.org/wiki/Butler_v._Moore} (last visited 22 July 2006).
\item\textsuperscript{157} Idem.
\item\textsuperscript{158} For example in MacNally, L, \textit{The Rules of Evidence}, London, J Butterworth; Dublin, J Cooke, 1802, pp 253-255.
\item\textsuperscript{159} \textit{The People v Phillips}, as reported in “Privileged Communications to Clergymen”, \textit{The Catholic Lawyer} 1 (1955) 198.
\item\textsuperscript{160} Ibid, p 204.
\item\textsuperscript{161} \textit{The People v Smith}, (2 City Hall Recorder (Rogers) 77 (Richmond County Court 1817) as reported in “Privileged Communications to Clergymen”, \textit{The Catholic Lawyer} 1 (1955) 198, 209.
\end{itemize}
}
Protestant clergyman was held compellable. Commentary affirms the latter result was a contributing factor in the advent of New York’s religious confession privilege statute eleven years later in 1828. While Mayor Clinton’s interpretation of then applicable English common law is interesting, it has not been cited in any relevant English case ever since.

Which brings us to *R v Griffin* decided by Baron Alderson in 1853. Baron Alderson had an interest in the history of religious confession privilege. That was manifest in obiter dicta remarks he made in *Attorney-General v Briant* about Crown informant privilege in 1846 where he dismissed *R v Gilham* as wrongly decided after counsel had cited it for comparative purposes. Though he did not say so in *R v Griffin*, his comment in *Attorney-General v Briant* makes it clear he was aware of the 1315 Statute Articuli Cleri and probably also of Coke’s commentary upon it in his *Second Part of the Institutes*.

In *R v Griffin*, a workhouse chaplain “was called to prove certain conversations he had had with [the prisoner] with reference to the [alleged injuries she had inflicted on her infant child]”. Baron Alderson’s full judgement reads:

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162 Reese, S, “Confidential Communications to Clergy” (1963) 24 Ohio St LJ 55, 57.
163 *R v Griffin* (1853) 6 Cox Cr Cas 219.
164 Baron Alderson is most famous for his judgement in *Hadley v Baxendale* (1854) 9 Exch 341 about damages in contract law.
165 *Attorney-General v Briant* (1846) 15 LJ Exch 265; (1846) 15 M & W 169; 153 ER 808. Baron Alderson’s question and comment to counsel about religious confession privilege *in arguendo*, is only reported in the LJ Exch report (*Attorney-General v Briant* (1846) 15 LJ Exch 265, 271).
166 *R v Griffin* (1853) 6 Cox Cr Cas 219.
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.  

Though Baron Alderson’s statement was made in a case about a religious confession, and though he effectively refused to compel the evidence, he framed the relevant principle so as to broaden the protection provided beyond a narrow religious confession, to encompass any confidential religious communication. But then he qualified the principle by stating bluntly that he was not to be taken as laying down an “absolute rule” – but that certainly in the case before him, it was not appropriate that the evidence be given. Further consideration of the principle in *R v Griffin* is thus left to chapter five, where the nature and scope of a discretionary religious communications privilege is discussed. While it seems likely that a religious confession would meet Baron Alderson’s test for non-compellable confidential religious communications, since a religious confession seeks spiritual response and assistance, the principle is insufficiently developed to provide much comfort for the clergy in practice.

167 Idem.
All that remains to conclude this chapter about the common law treatment of religious confession privilege between the seventeenth and twentieth centuries, is to discuss the various extra-judicial comments that followed the case of *R v Constance Kent* in 1865.

**Extra-judicial commentary on *R v Constance Kent***

The case itself has little precedential consequence since Constance Kent eventually pleaded guilty to a charge of murder committed five years previously, though not before criminal trial processes had commenced. However, her Anglican clergyman’s assertion “that he must withhold any further information [other than was necessarily involved in his helping her ‘give herself up to justice’] on the ground that it had been received under the seal of ‘sacramental confession’” excited considerable interest outside the court.

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170 Idem.

171 There is some debate as to exactly what set off the public debate. For though Nolan says that the debate arose because the clergyman asserted religious confession privilege, Phipson (*Of the Law of Evidence by the late WM Best*, London, Sweet & Maxwell, 1911) says the debate arose because the magistrates in the case had declined to press the clergyman “who had voluntarily tendered himself as a witness on an application to commit the prisoner for murder” (op cit, p 565). Since Coleridge LCJ’s (infra, pp 163-164) who acted as barrister for Constance Kent before he was appointed to the bench, expected a religious privilege contest before Willes J before the defendant decided to plead guilty, Nolan’s view appears to be correct.
Nolan reports that questions were asked in both Houses of Parliament about the privilege, though the public indignation seems to have been largely focused on the enduring ecclesiastical issue of whether “sacramental confession” was known in the Church of England. In the House of Lords, Lord Westbury (the Lord Chancellor), Lord Chelmsford (a previous Lord Chancellor), and Lord Westmeath (who had raised the question), all opined strongly against the privilege. Lord Chelmsford stated:

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 he had known in confession. He is compelled to answer such a question, and the law of England does not extend the privilege of refusing to answer to Roman Catholic clergymen in dealing with a person of their own persuasion.

Lord Chelmsford concurred in this view, and Lord Westmeath reported two recent cases which he considered demonstrated that there was no religious confession

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172 Nolan, op cit, p 658.

173 The ecclesiastical distinction here is between the mere obligation of secrecy undoubtedly imposed by the 113th canon of the Church of England and the Roman Catholic doctrinal position which insists that the sacrament of penance or confession is one of the seven inviolable sacraments of the true Christian religion. The underlying canon law debate was discussed supra in chapter three, pp 113-115, 118-120.

174 Nolan, op cit, p 658.


176 The first was in Scotland, which had seen a Catholic priest imprisoned for contempt when he refused to give evidence and was forced to serve his sentence without remission when “the Home Secretary, Sir George Grey [had denied a request for remission made on his behalf and advised that such a remission] ... would be giving a sanction to the assumption of a privilege by ministers of every denomination which he was advised they could not claim” (Nolan, op cit, p 658). The Scottish case is not cited and the writer has been unable to trace any other reference to it. The second case, R v Hay, discussed supra (pp 162-166) had seen Father Kelly imprisoned for contempt when he refused to answer a factual question which did not touch confession.
privilege. However, the public debate escalated when the “Bishop of Exeter”\textsuperscript{177} strongly protested “Lord Westbury’s statement in the House of Lords”\textsuperscript{178} in a letter which argued that the canon law on the subject had been accepted without gainsaying or opposition from any temporal court, [and] that it had been confirmed by the Book of Common Prayer in the service for the visitation of the sick, and thus sanctioned by the Act of Uniformity.\textsuperscript{179}

Lord Westbury had evidently incurred the Bishop’s ire with his suggestion that the obligation of confidentiality imposed upon a clergyman by the 113\textsuperscript{th} canon of 1603 did not apply in the face of a legal compulsion – and in any event that “at the time [1865] ... the public was not in a temper to bear [what he regarded as] an ... alteration of the rule compelling the disclosure of such evidence.”\textsuperscript{180} Phipson\textsuperscript{181} rebuts Lord Westbury’s view from Edward Badeley’s “very learned pamphlet ... in favour of the seal of the confessional”\textsuperscript{182} which “quickly followed”\textsuperscript{183} the debate in the House of Lords:

\begin{quote}
[so] far as members of the Church of England are concerned [the inviolable secrecy of their confessions is not] ... weakened by the undoubted fact that the general practice and ministerial solicitation of auricular confession is
\end{quote}

\textsuperscript{177} Nolan, op cit, p 658.
\textsuperscript{178} Idem.
\textsuperscript{179} Idem.
\textsuperscript{180} Idem.
\textsuperscript{182} Ibid, p 566.
\textsuperscript{183} Idem.
discountenanced by the Church of England however much that Church may encourage it in particular cases”. 184

Badeley had also stated:

It is beyond all question that neither the proceedings of the 16th nor those of the 17th century (including therefore the whole period of the Reformation) made any change whatever in the sacred and inviolable character of this religious Rite. They certainly did not render unlawful the general use of private penitential confession, and it is perfectly clear that both by parliament and Convocation the continuation of it in certain cases was directly encouraged. 185

Badeley continued that it would take “better arguments ... to show that the privilege of secrecy ... attached [to the Anglican canon law of confession] ... was lost at the Reformation”. 186 While Badeley said that the “right of Catholics at the present day to have their professions respected in courts of justice rests upon a different ground”, 187 it clearly originated in both common and ecclesiastical law. The alleged loss of privileged Catholic confession “because the religion itself was proscribed”, 188 has “happily” 189 been corrected:

184 Ibid, pp 566, 567
186 Badeley, op cit, p 32.
187 Idem.
188 Idem.
189 Idem.
the religion is restored, not indeed as the religion of the State, but as one sanctioned and protected by law. The Catholic therefore is reinstated in his right to the perfect enjoyment of all the ordinances of his creed, and of those privileges which are necessary to the performance of every one of his religious duties. If he is not, he has not that benefit which the legislature intended to give him.¹⁹⁰

Forty-six years later, Phipson’s concludes that the seal of confession is inviolable at law both because the penitent enjoys a privilege, and because the clerical witness would be exposed to ecclesiastical penalties if he breached the seal.¹⁹¹ He continued:

It is submitted that either of these is sufficient in any court, and constitutes in a petty sessional court a ‘just excuse’ for refusal of the witness to answer, within the meaning of sect. 16 of the Indictable Offences Act, 1848, and sect. 7 of the Summary Jurisdiction Act, 1848 ... The 113th canon of 1603 ... appears to suffice in the case of the Anglican clergy, and the pre-Reformation canons to a similar effect in the case of the Roman Catholic clergy.¹⁹²

Tiemann and Bush¹⁹³ add light to the commentary with their citation of a letter about religious confession privilege in 1890 from Coleridge LCJ (who had defended Constance

¹⁹⁰ Idem. Badeley’s reference to the legislative restoration of the Catholic religion to a position of sanction and protection is an implicit reference to that then well-known and contemporary series of enactments which relaxed the law against non-conformist religion generally, and Roman Catholicism in particular, specifically The Roman Catholic Relief Acts of 1791 (31 Geo. 3, c 32) and 1829 (10 Geo. 4, c 7).

¹⁹¹ Phipson, SLC, Of the Law of Evidence by the late WM Best, London, Sweet & Maxwell, 1911, p 567.

¹⁹² Idem.

Kent when he practised as a barrister) to Gladstone, later Prime Minister of England.\textsuperscript{194}

Stating first of all that he regarded the judge in the case, Sir James Willes, as the “greatest and largest lawyer [he] ever knew”,\textsuperscript{195} ahead of Jessel,\textsuperscript{196} Cairns,\textsuperscript{197} and Campbell,\textsuperscript{198} Coleridge LCJ said Willes J had decided to uphold any objection Coleridge should make to Karslake’s (the prosecutor) efforts to lead the Reverend Wagner’s confessional evidence – but did not need to, both because of the guilty plea, and because the prosecutor was too much the gentleman barrister to raise the suggestion that such evidence might be led.\textsuperscript{199}  Coleridge LCJ further wrote that Willes J had reported to him personally that he had weighed all the judicial authorities on the subject and “had satisfied himself that there was a legal privilege in a priest to withhold what passed in confession”.\textsuperscript{200}  Coleridge LCJ’s personal conclusion that “while Barristers and Judges are gentlemen the question can never arise”\textsuperscript{201} do add his authority to effect that

\begin{enumerate}
\item The highest judicial office held by Sir George Jessel was Master of the Rolls in the English Court of Appeal, where he served from 1873 till his death in 1883 (Simpson, AWB (ed), \textit{Biographical Dictionary of the Common Law}, London, Butterworths, 1984, p 281).
\item Lord Cairns served twice as Chancellor, the first time for ten months in 1868, and the second time for six years commencing in 1874.  He also served as a member of the Court of Appeal in Chancery for a brief period in 1867 (Simpson, AWB (ed), \textit{Biographical Dictionary of the Common Law}, London, Butterworths, 1984, p 98).
\item Lord Campbell served as Lord Chief Justice from 1850 to 1859 and then as Lord Chancellor from 1859 till his death at the age of 81 in 1861 (Simpson, AWB (ed), \textit{Biographical Dictionary of the Common Law}, London, Butterworths, 1984, p 101).
\item Tiemann and Bush, op cit, p 118
\item Idem.
\item Ibid, p 119.
\end{enumerate}
there should be a privilege, though he was not certain if “English Judges would have upheld ‘Willes’ law’”.202

Do these extra-judicial comments prompted by the public debate surrounding R v Constance Kent clarify the law where religious confession privilege is concerned? Probably not, since there is no record that the learned Lords involved ever responded to the reasoned legal and ecclesiastical arguments which their strong initial statements drew from the public. Their certainty is also balanced by the equally non-precedential view expressed by Coleridge LCJ with his second hand additions from Willes J, who was reputedly prepared and ready to hear the legal argument. The concurring opinions of Finlason (in 1860203), Badeley (in 1865) and Phipson (in 1911) that no statute has ever removed the privilege, also remain uncontested.

Conclusion to chapter four

The reported cases that have mentioned religious confession privilege since Garnet’s case204 in 1606, have not added to our understanding of that privilege at all. Save perhaps for Baron Alderson’s analogy with legal professional privilege which justified his exercise of discretion in preventing compulsion of the workhouse chaplain’s evidence in R v Griffin,205 there has been nothing other than unsubstantiated denials that there is or ever was any such privilege. Even Butler v Moore,206 an Irish case in 1801, which is said

202 Idem.
203 R v Hay (1860) 2 Foster & Finlason 4; 175 ER 933. Finlason’s footnote to the report providing his opinion on the continuing viability of the sacramental seal even in the Anglican church, is longer than the report of the case.
204 Garnet’s case (1606) 2 Howell’s State Trials 217.
205 R v Griffin (1853) 6 Cox Cr Cas 219.
206 Butler v Moore (1804-1806) 2 Sch & Lef 249.
to have decided against the existence of religious confession privilege, but which did not overtly treat a religious confession, has been discredited on grounds of the religious prejudice that is apparent in its premise that a Catholic will was not valid. Since there is no suggestion of statutory abolition either, then the inevitable conclusion of this chapter must be that religious confession privilege survived at least till the twentieth century began.
CHAPTER FIVE

RELIGIOUS COMMUNICATIONS PRIVILEGE AT COMMON LAW

Introduction

Building upon the proposition that the historical, canonical and common law materials confirm that religious confession privilege has never been extinguished, in this chapter I set out the case for the additional proposition that the common law also recognises a broader privilege for confidential religious communications to be applied by judges on a discretionary basis. That broader discretionary privilege may be seen as a line of judicial recognition that there is a social interest in protecting such communications even though the issue rarely arises in a courtroom – and even though many text books deny the existence of even a narrower religious confession privilege. Though many jurisdictions have turned to statutory codification to provide the legal certainty required by modern

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clerical and legal practice, it is suggested here that both a religious confession privilege and a confidential religious communications privilege may be identified in the existing common law materials.

Elementary religious communications privilege in cases already discussed

It has already been observed that Judges have used various tools to avoid a frontal debate about the existence of a religious confession privilege. For example, even immediately after the English Reformation when the existence of religious confession privilege must have seemed less questionable, both Coke as prosecutor and two of the Commissioners who judicially presided over Garnet's jury trial, effectively sidelined

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2 “[T]he tendency of the law must always be to narrow the field of uncertainty” (Holmes, OW, Jr, The Common Law, Howe M De W, editor, Cambridge Massachusetts, Harvard University Press, 1963, p 101. However, Holmes also notes “that the law is always approaching, and never reaching consistency” (op cit, p 32).

3 Judicial avoidance of religious confession privilege was discussed briefly in chapter four, pp 160-163, in connection with In re Keller and R v Hay. Professor Elliott has observed that such avoidance in fact represents the exercise of a discretion. He wrote:

A discretion, in the strict sense of the word, is involved where a judge, having found that a rule covers the case before him, nevertheless decides it is not to be followed in the case. In a looser sense of the word, ‘discretion’ is also used where the judge is required to follow a rule if he finds that it applied (and is not able to disapply it), but where he is given considerable freedom in deciding whether it applies at all. Whether it applies or not depends on the judge weighing various factors against each other and how much weight he gives each factor and how he makes his mind up is largely for him (Elliott, DW, “An Evidential Privilege for Priest-Penitent Communications” [1993-1995] 3 Ecclesiastical Law Journal, 272, 274).

4 Garnet’s case (1606) 2 Howell’s State Trials 217.
Garnet’s religious confession privilege defence by defining the issue out of jury consideration. Hill J’s finding of contempt against Father Kelly because he refused to disclose not confessional material but a peripheral “fact”,5 may be seen as another example of a judge avoiding confrontation even though the reporter6 sought to expose the sophistry he perceived in Hill J’s distinction. Both of these cases are examples of a species of judicial discretion at practical work7 – but in a manner that does not conduce to certainty in the law.

Kenyon LCJ and Best CJ more directly manifest their belief in the existence of judicial discretion at this state/church flashpoint,8 though they did not labour the point because the cases before them concerned legal professional privilege and did not require elaboration of an unrelated privilege or discretion. For example, in Du Barré v Livette,9 Kenyon LCJ said simply that he would “pause”10 before admitting the confessional evidence Buller J had allowed the previous year in R v Sparkes.11 What Kenyon LCJ meant by “pause” is not spelled out, but while he did not confirm an absolute immunity for confessional material, he did indicate the need to exercise some discretion when weighing the public interests which compete when it is sought to adduce confidential religious material at trial. Indeed, on his limited knowledge of the Sparkes facts as counsel had submitted them in Du Barré v Livette, it is difficult to escape the conclusion

5 R v Hay (1860) 2 Foster & Finlason 4, 7.
6 WF Finlason, Barrister, Middle Temple.
7 See note 3.
9 Du Barré v Livette (1791) 1 Peake 108; 170 ER 96.
10 Du Barré v Livette (1791) 1 Peake 108, 110; 170 ER 96, 97.
11 R v Sparkes (1790), but referred to in Du Barré v Livette (1791) 1 Peake 108; 170 ER 96.
that Kenyon LCJ would have excluded that confessional evidence, even though the confession in that case was theologically irregular.

Best CJ was apparently peremptory in his refusal to admit confessional evidence in *R v Radford*,¹² as were the magistrates in *R v Constance Kent*¹³ and Ridley J in *Ruthven v De Bour*.¹⁴ Best CJ would not even allow the clergyman to speak of the issue and when he understood in 1828 that his course in *Radford* had been disapproved en banc in *Gilham*,¹⁵ he found a distinction to justify the exercise of the discretion he had exercised in *Radford*.¹⁶ Thus in *Broad v Pitt*,¹⁷ he confirmed the existence of a judicial discretion whether or not to allow the adduction of confessional evidence by reading *Gilham* as allowing a clergyman the right to waive his religious confession privilege – though neither his understanding of *Gilham’s* ratio, nor his distinction to restate the privilege, were necessary if he had read the *Gilham* report closely.

The discretionary point is much less veiled in *R v Griffin*,¹⁸ where Alderson B made it clear that he had a discretion and that he was exercising it to exclude the workhouse chaplain’s evidence in that case. Though *R v Griffin* may not represent a strong ratio

¹² *R v Radford* (1823) unreported but referred to in *R v Gilham* (1828) 1 Moody 186; 168 ER 1235.


¹⁵ See discussion in chapter four, pp 148-150.

¹⁶ Idem.

¹⁷ *Broad v Pitt* (1829) 3 Carr & P 518; 172 ER 528.

¹⁸ *R v Griffin* (1853) 6 Cox Cr Cas 219.
decision confirming a defined and inviolable religious confession privilege, it is certainly a ratio decidendi affirmation of the existence of judicial discretion to exclude evidence of confidential clerical communications, since it is not clear that “these conversations”\textsuperscript{19} were confessional in character. Further, there can be no other interpretation of Alderson B’s qualification – “I do not lay this down as a general rule”\textsuperscript{20} – than that he was marking his decision as an exercise of judicial discretion that could be similarly exercised by other judges in future.

However, there are other more recent cases which reaffirm Alderson B’s endorsement of such a discretion in cases involving confidential religious communications, though his authority is not cited in any of them, possibly because the judges in the later cases considered that the existence of such discretion was a self-evident principle. For example, Cockburn CJ in \textit{R v Castro}\textsuperscript{21} two years before Sir George Jessel MR’s first statement against the privilege\textsuperscript{22} stated “that if a priest refused to disclose the subject matter of a confession, he would not be compelled to speak.”\textsuperscript{23} While the facts of the case do not amplify the meaning of the statement\textsuperscript{24} – and this statement was not even included in the Queen’s Bench report – the language of judicial discretion is

\textsuperscript{19} Idem.
\textsuperscript{20} Idem.
\textsuperscript{21} \textit{R v Castro} (1873) 9 QB 219, 350.
\textsuperscript{22} \textit{Anderson v Bank of British Columbia} (1876) LR 2 Ch D 644.
\textsuperscript{23} As quoted by Wigmore from the Chief Justice report of the case, since the quotation was not reported at Queen’s Bench – \textit{R v Castro} (1874) (\textit{Tichbourne case}) 2 Charge of Chief Justice 648 (Wigmore, JH, \textit{Evidence in Trials at Common Law}, revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 870).
\textsuperscript{24} The case concerned an allegedly fraudulent claim to a baronetcy and did not raise a question of religious confession privilege in any direct way.
unmistakable and recalls Best’s affirmation that “[he], for one [would] never compel a clergyman to disclose communications made to him by a prisoner.”

In *Normanshaw v Normanshaw*, the existence of judicial discretion was dealt with in more detail. It will be remembered that this divorce case has been cited as authority against the existence of any religious confession privilege at common law. The vicar of Shirley had been called to provide details of his conversation with the respondent wife following her husband’s divorce petition on the ground of adultery, “but [the clergyman] objected to speak on the subject”. The jury found the adultery proven. Both Heydon and Bursell doubt that the case represents authority against the common law existence of religious confession privilege because it was clear before Jeune P insisted on an answer, that no sacramental confession had been involved. The clergyman nonetheless objected to giving evidence because “he had consulted friends on the subject, and they had all advised him not to divulge a private conversation with a parishioner.” Despite this explanation from the clergyman, Jeune P said that he must

25 *Broad v Pitt* (1828) 3 Carr & P 518, 519; 172 ER 528-529.

26 *Normanshaw v Normanshaw* (1893) 69 LTR 468 was discussed briefly supra in chapter four, pp 148, 151.

27 For example, McNicol cites it as a scarce authority against a privilege “arising out of the priest-penitent relationship” at common law alongside *Wheeler v LeMarchant (Law of Privilege, Australia, Butterworths, 1992, p 324)*. Similar statements are made by Robilliard (”Religion, Conscience and Law” (1981) 32 *Northern Ireland Legal Quarterly* 358,359) and by the editor of The Law Times (”Sacerdotal Privilege in English Law” 221 LT 268). Stone and Wells also endorses this interpretation when they cite *Normanshaw v Normanshaw* as authority for the proposition that privilege does not extend to “sacramental confessions” (*Evidence, Its History and Policies*, Sydney, Butterworths, 1991, p 586).

28 *Normanshaw v Normanshaw* (1893) 69 LTR 468, 469.

29 Idem.


31 Bursell RDH, “The Seal of the Confessional” (1990) 7 *Ecclesiastical LJ* 84, 94.

32 *Normanshaw v Normanshaw* (1893) 69 LTR 468, 469.
answer the questions, though there does not appear to have been any legal argument on the religious confession point. The report provides only a summary of the judge’s comments, but is helpful nonetheless. Following the clergyman’s objection,

The President said that each case of confidential communication should be dealt with on its own merits, but, in the present instance, he saw no reason why the witness should not speak as to his conversation with the respondent.

The report does not disclose whether a voir dire was conducted to assist Jeune P, in this determination, though since the clergyman was apparently unrepresented, it may be that the possibility of such a procedure was not even raised. The brief report thus leaves the impression that the witness was marginally hostile and the question of the admissibility of the clergyman’s evidence was discussed between judge and witness in open court. When he summed up,

The President ... observed that it was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law. It was a principle of our jurisprudence that justice should prevail, and no unrecognised privilege could be allowed to stand in the way of it.

33 Idem.

34 Normanshaw v Normanshaw (1893) 69 LTR 468, 469.

35 Sir FH Jeune was serving as president of the Probate, Administration and Divorce Court at the time of this trial. In the absence of a voir dire, it is difficult to imagine how any judge could know enough of the reasons for a minister’s decision to withhold a confidence, to exercise his alleged discretion requiring it adduced as evidence or not. It is doubtful that such material would have been heard before the jury if there was a moot question hanging on the validity of its admissibility.

36 Normanshaw v Normanshaw (1893) 69 LTR 468, 469.
Though the report denies the existence of any evidential privilege connected with religious confidentiality,37 Jeune P’s earlier observation that “each case of confidential communications should be dealt with on its own merits” suggests that he still believed a discretion to exclude the clergyman’s evidence was available to him. But it is not accurate to extract more from Jeune P’s comments than to point up the fact that he believed he had a discretion to exclude confidences as evidence in some undefined circumstances. For when the Reverend Linton did disclose what had passed between him and the respondent, it seemed that there had not been a confession at all. Rather, “there was a proposition that the respondent should go to a penitentiary, and, as he understood, she at first consented, but subsequently declined to do so.”38

While the reported conversation between this respondent and the clergyman may bear the implication that the respondent had committed some offence, else why would she have willingly consented to go to a penitentiary at all, there is no suggestion that she confessed a sin to this clergyman for any spiritual purpose, unless the clergyman was being precious in what he did eventually reveal to the court.39 Though any confession in issue was arguably non-sacramental,40 it seems that the clergyman sought only to

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37 The absence of any indication of careful research and consideration of whether there was a religious confession privilege at common law in Normanshaw v Normanshaw is another example of a patterned judicial belief that it did not exist. Since it is not clear from the report whether Jeune P referred to any authority, his statement that the privilege did not exist, exists as a bald unsupported misstatement of fact.

38 Normanshaw v Normanshaw (1893) 69 LTR 468, 469.

39 Note that both McNicol and the President of the Australian Law Reform Commission in 1987 have cited “clear evidence” (McNicol, op cit, p 336) that “the clergy ... will invariably assert the primacy of the spiritual as against the temporal ... [so that ] a law [requiring disclosure of confidential communications] will be totally unenforceable” (A.L.R.C., Report No. 38 (1987), para. 212, p 120). It is thus possible that the clergyman was not entirely candid in what he disclosed to the court.

40 WP Finlason makes a case to effect that confession is a sacrament in the Church of England in his commentary/report of Hill J’s decision in R v Hay (1860) 2 Foster & Finlason 4, 8; 175 ER 933, 935. Some of the ecclesiastical commentators (supra, chapter three, pp 113-114) deny that there exists a sacrament of confession in the Anglican Church. For example, Norman Doe says that “[t]he English Reformation led to the abandonment of obligatory private auricular confession, required under the pre-Reformation Roman canon law, as the norm” and that “[w]hilst churches commonly agree on the nature of the rite as effecting
protect a confidential religious communication with one who had sought his counsel and
solace when in matrimonial difficulty – and the Judge did not feel that confidentiality was
compelling enough to require it to be protected. Jeune P’s language allows the inference
that a confidential religious communication with more ‘merit’ may have seen him
exercise a discretion to exclude it as evidence. Whether a religious confession or a
sacramental religious confession would have crossed Jeune P’s ‘merit’ threshold for
exercise of discretion against admissibility as evidence on public interest grounds or
otherwise, is likewise unclear. It is also possible that Jeune P considered that he had a
discretion to exclude the conversation in Normanshaw on the different ground that it was
a without prejudice communication focused on reconciling this couple because of the
public interest in saving their marriage. As will be seen below, fifty years later Denning J
(as he then was\textsuperscript{41}) believed that such a discretionary privilege existed in McTaggart v
McTaggart,\textsuperscript{42} a case where he also made a passing obiter dicta comment about religious
confidences.

Twentieth century cases in England, Ireland and Canada since Jeune P decided
Normanshaw have further explored his notion that “each case of confidential
communication should be dealt with on its own merits”\textsuperscript{43} and have not always considered
as he did in Normanshaw that the “interest of justice”\textsuperscript{44} was “prevalent”.\textsuperscript{45}

\textsuperscript{41} Alfred Thompson Denning was appointed to the House of Lords in 1957 “[b]ut ... welcomed his transfer
back to the Court of Appeal as Master of the Rolls five years later because, in a three-judge court, he
needed only one ally to get a majority” (http://www.guardian.co.uk/obituaries/story/0,,313455,00.html
(last visited 11 July 2006).

\textsuperscript{42} McTaggart v McTaggart [1949] Probate 94, discussed infra p 188. See also note 189.

\textsuperscript{43} Normanshaw v Normanshaw (1893) 69 LJ 468, 449.

\textsuperscript{44} Idem.
Religious communications privilege dicta in twentieth century cases

In McTaggart v McTaggart, the wife appealed because a “without prejudice” discussion in the presence of a probation officer endeavouring to reconcile the couple had been allowed as evidence by the Commissioner hearing competing petitions for divorce from both spouses. The appeal in days of ‘fault divorce’ appears premised on the wife’s dissatisfaction with the Commissioner’s acceptance of the husband’s version of the facts, which the disputed evidence favoured. Denning J made comment bearing upon religious communications privilege. He said:

The rule as to “without prejudice” communications applies with especial force to negotiations for reconciliation ... 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 ... [however] The law favours reconciliation and the court will not normally take upon itself a course which would be so prejudicial to its success. If a probation officer should be compelled to give evidence ... it would mean that he would not be told the truth, or ... the whole truth ... In this case, however, neither party claimed the privilege and must, therefore, be taken to have waived it.46

This was not Lord Denning’s only statement about confidentiality in a case which did not involve a member of the clergy. As Master of the Rolls in 1963, Lord Denning enlarged

45 Idem.
46 McTaggart v McTaggart [1949] Probate 94, 97-98.
his thinking on the issue of professional confidences and again made references to confidential communications with the clergy. *Attorney-General v Mulholland and Foster*47 was an appeal by two journalists from a High Court finding of contempt because of their persistent unwillingness to answer relevant questions asked by a tribunal “set up to inquire into breaches of security in connection with spying offences”48 under the *Official Secrets Act*. The questions which Mulholland and Foster had declined to answer concerned the sources of their information and they defended themselves by saying that “a journalist has a privilege by law entitling him to refuse to give his sources of information ... justifi[ed by] the pursuit of truth ... in the public interest”.49 Lord Denning said:

> It seems to me that the journalists put the matter much too high. 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 his 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, a necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests – to weigh on the one hand the respect due to confidence in the

47 *Attorney-General v Mulholland and Foster* [1963] 2 QB 477.

48 Idem, the quotation is from the headnote.

49 *Attorney-General v Mulholland and Foster* [1963] 2 QB 477, 489.
profession and on the other hand the ultimate interest of the community in justice being done.\textsuperscript{50}

While Lord Denning, like Jeune P before him in \textit{Normanshaw}, denied the existence of any class privilege benefiting the clergy, like Jeune P he also said that a judge would respect the confidences of the clergyman as well as those of the medical man and the banker. That Lord Denning intended to identify the existence of judicial discretion in such cases is demonstrated by his response to counsel submissions made in relation to professional confidences in \textit{D v NSPCC}.\textsuperscript{51} For in the English Court of Appeal’s hearing of that case, Lord Denning clarified what he meant. He said:

where information is given in confidence to a clergyman, a medical man or a banker, the court will respect that confidence. It will not compel it to be disclosed, save in the last resort when it is relevant, proper, and indeed necessary in the course of justice.\textsuperscript{52}

Even though all of the Law Lords disapproved of the generality with which Lord Denning had expressed the respect that courts would pay to confidences,\textsuperscript{53} they concurred with

\textsuperscript{50} Attorney-General \textit{v Mulholland and Foster} [1963] 2 QB 477, 489-490.

\textsuperscript{51} \textit{D v NSPCC} [1978] AC 171. The House of Lord’s decision which affirmed Lord Denning’s minority decision in the Court of Appeal in this case is discussed in detail infra, pp 192-206.

\textsuperscript{52} \textit{D v NSPCC} [1978] AC 171, 191.

\textsuperscript{53} Lord Diplock said he felt “this House would be unwise to base its decision in the instant case upon a proposition so much broader than is necessary to resolve the case in issue … A cautious judge expresses a proposition of law in terms that are wide enough to cover the issue in the case under consideration; the fact that they are not also wide enough to cover an issue that may arise in some subsequent case does not make his judgement an authority against any wider proposition” (\textit{D v NSPCC} [1978] AC 171, 220). Lord Hailsham said “Lord Denning MR in his dissenting judgement … seeks to found the immunity upon this pledge. I do not think that confidentiality by itself gives any ground for immunity” (\textit{D v NSPCC} [1978] AC 171, 230). After discussing Lord Denning’s opinion “in the instant case” and the view expressed by the English Law Reform Committee in their Sixteenth Report, Lord Simon said, “I do not think that the confidentiality of the communication provides in itself a satisfactory basis for testing whether the relevant
his dissenting Court of Appeal judgement in the result by finding that the public interest in protecting the confidence in *D v NSPCC* justified the exclusion of the evidence in dispute. But Lord Edmund-Davies went further and set out in detail the circumstances in which a court had a discretion to exclude confidential communications as evidence.\(^\text{54}\)

Those principles are discussed below. Despite the nuanced differences in the reasons provided in the four separate judgements provided by the House of Lords\(^\text{55}\), they did agree that the public interest in protecting some confidences, did justify the exclusion of such confidential communications as evidence. It is also noteworthy once again, that because neither religious confession privilege nor any species of religious communications privilege was an issue in *McTaggart, Mulholland and Foster* or *D v NSPCC*, there was neither argument nor citation of any case on that subject in any of the judgements. However, even without discussion of the unique public interest factors that arise in a case involving religious confessions or confidences, even the careful approach of the House of Lords in *D v NSPCC* signals scope for some exercise of judicial judgement where confidentiality is weighed against public interest. This view resonates with the opinion of a line of English judges in cases that did have reason to consider religious confidences.\(^\text{56}\)

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\(^{54}\) *D v NSPCC* [1978] AC 171, 243, 244. Note too that Spigelman CJ said that Lord Edmund-Davies’ “expansive remarks” in *D v NSPCC*, “have not been adopted” where “public interest immunity” is concerned (*R v Young* (1999) 46 NSWLR 681, 694) though the view of Spigelman CJ itself is questionable (see infra, pp 193-194). *R v Young* is discussed in detail in chapter seven.

\(^{55}\) Lord Kilbrandon concurred entirely with Lord Hailsham and adopted his judgement.

\(^{56}\) That line begins with Chief Justice Kenyon’s judgement in *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96; is continued by Chief Justice Best in *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528; expressed as ratio by Baron Alderson in *R v Griffin* (1853) 6 Cox Cr Cas 219, and implicitly concurred with by Jeune P in *Normanshaw v Normanshaw* (1893) 69 LTR 468, Ridley J in *Ruthven v De Bour* (1901) 45 Sol J 272, and the Chief Baron in *Tannion v Synnott* (1903) 37 Ir. L.T. 275. Gavan Duffy J in *Cook v Carroll* [1945] Ir. Rep 515 was much more explicit in his affirmation of a confidential religious communications principle in Ireland.
The final pure\textsuperscript{57} common law word upon judicial discretion to exclude confidential communications – and in particular, how such discretion is to be weighed and exercised by the Judge – is provided by the House of Lords in 1978 and particularly in Lord Edmund-Davies’ judgement in \textit{D v NSPCC}.

\textbf{\textit{D v National Society for the Prevention of Cruelty to Children}}

In this case, a mother, aggrieved by the NSPCC’s investigation of a complaint “about the treatment of her 14-month-old”\textsuperscript{58} daughter, “brought an action against the society for damages for personal injuries alleged to have resulted from the society’s negligence in failing properly to investigate the complaint”\textsuperscript{59}. Denying the negligence, the NSPCC made an application “for an order that there be no discovery ... of any documents which revealed or might reveal the identity of the complainant on the grounds ... that the proper performance by the society of its duties required that the absolute confidentiality of information given in confidence should be preserved ... in the public interest”\textsuperscript{60} to prevent its sources of information drying up. At first instance, the Master ordered the relevant documents disclosed. On appeal, that order was reversed and then reinstated by a

\textsuperscript{57} “Pure” in the sense that in the absence of any religious confession privilege statute, the English cases do not mix issues of statutory or constitutional interpretation in their considerations.

\textsuperscript{58} \textit{D v NSPCC} [1978] \textit{AC} 171. The quote is from the headnote.

\textsuperscript{59} Idem.

\textsuperscript{60} Idem.
majority in the Court of Appeal (Lord Denning dissenting) before it was finally overturned by a unanimous decision in the House of Lords.

Though the NSPCC did not assert that the confidential communication which they had received was privileged under any established head of privilege, the Society’s claim that their informers were entitled to public interest immunity on the same principles as applied in favour of police informants, extracted many statements about ‘privilege’ from both the Court of Appeal and House of Lords before public interest immunity was finally affirmed in favour of the NSPCC. Those close comparisons and particularly the observation that the categories of public interest immunity are never closed, indicate that there is an increasing degree of conflation of public interest immunity and privilege, particularly since the High Court of Australia has also recently described legal professional privilege as “an important common law immunity”, a “fundamental right”,

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61 The consensus of Lord Scarman and Sir John Pennycuick against Lord Denning in the Court of Appeal allowing the mother’s discovery of the evidence, was that the only public interest that could legitimately prevent disclosure was a State interest (ibid, pp 197, 201). Though the House of Lords noted that they agreed with Lord Denning in the result in the case, they did not accept his generalised proposition that “the courts should not allow confidences to be lightly broken” (ibid, p 220, see note 53 supra. Lord Denning however seems to have seen himself as merely elaborating the principle he had outlined in Attorney-General v Mulholland and Foster in 1963 when he had said “the court will respect ... confidence [and] ... will not compel it to be disclosed, save in the last resort when it is relevant, proper, and indeed necessary for the course of justice” (ibid, p 191).

62 For example per Lord Denning (D v NSPCC [1978] AC 171, 192-193); per Scarman LJ though he denied that priests could invoke the public interest to protect their confidences (ibid, pp 198-199) and per Sir John Pennycuick (ibid, pp 200-203).

63 For example, Lord Diplock said that “public interest” as a ground for withholding disclosure of documents or information was but another term for what had ... been called ‘Crown privilege” (ibid, p 220); Lord Hailsham of St. Marylebone observed in a conflationary way, “[t]hese questions are all manageable if the categories of privilege from disclosure and public interest are considered to be limited” before doubting a “rigid distinction ... between privilege and public interest”, and finding that the categories of public interest immunity are not closed (ibid, pp 225-227, 230) and Lord Simon of Glaisdale analagised between the existence of legal professional privilege demanded by virtue of the public interest in the administration of justice and the public interest that demanded that the informant’s evidence be protected from disclosure in this case (ibid, pp 231-233).

64 Per Lord Hailsham of St. Marylebone, ibid, p 230. See also Lord Simon, ibid, pp 236, 241.

65 Daniels Corporation v ACCC (2002) 192 ALR 561, 563-564 para 11 per Gleson CJ, Gaudron, Gummow and Hayne JJ.
a “common law right” and even perhaps as a “fundamental human right”. While public interest immunity and privilege are distinct concepts and have discrete historical origins, the reasoning in *D v NSPCC* manifests that future consideration of a broad discretionary confidential religious communications privilege will certainly include consideration of the competing public interest factors that are an established part of judicial decision making in public interest immunity cases.

Concerning topical allegations of child abuse as it does, not only does the decision in *D v NSPCC* provide insight into authoritative English judicial attitudes about confidential relationships, it also practically signalled the House of Lords’ commitment to the public interest in protecting children. In this 1970s case, however, the public interest which outweighed the mother’s interest in knowing the evidence against her and the identity of her accuser, was the public interest in protecting the confidentiality promised to the NSPCC’s informants. However, that public interest was justified by analogous comparison to the established privilege that protected police informants rather than on the express ground that such confidentiality was necessary to protect mechanisms established by the legislature to protect children from abuse. In the twenty-first century, it is doubtful that the public interest would protect an alleged paedophile’s confidence in

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66 Ibid, p 49, para. 44, per McHugh J.
67 Ibid, p 65, para. 132, per Callinan J.
68 Ibid, p 56, paras 85-86, per Kirby J.
69 See chapter seven, infra, pp 290-297.
70 For example. Lord Hailsham spoke of Crown’s concern as parens patriae for the welfare of children and the need to protect them from “maltreatment by adults” (*D v NSPCC* [1978] 171, 228). Lord Simon referred to the Crown’s parens patriae jurisdiction and a line of statutes aimed at protecting children and said “all this attests beyond question a public interest in the protection of children from neglect of ill-usage” (ibid, p 240).
his priest absent the existence of a statutory religious confession privilege or recognition of the existence of that same privilege at common law. One suspects that in such a case, the public interest in child protection would trump the public interest in protecting a confidential religious communication with a member of the clergy. The Lords’ analogical use of police informant privilege to found a public interest immunity for NSPCC informants, also points up the fact that it may be easier for the crown to make a public interest immunity claim than for the defence in a criminal case. For the identification of the NSPCC as a quasi-statutory body\textsuperscript{72} provided a connection which enabled the Lords to draw on public interest immunity authority to narrow the pure confidentiality rationale upon which Lord Denning had relied to protect the informant in the Court of Appeal.

Though it seems unsatisfactory to suggest that the exercise of judicial discretion to exclude evidence might turn on whether it was asserted by the crown or the defence, defensive assertions of public interest immunity made on behalf of private individuals will not have the same convincing power as those made on behalf of state prosecuting agencies.

For Lord Diplock in \textit{D v NSPCC}, it was “the general public interest that in the administration of justice truth will out”\textsuperscript{73} that trumped the mother’s interest in knowing all the evidence. For him, only the “rule of law” that enabled a defendant in a criminal trial to have “disclosure of the identity of the informer … to show that the defendant was

\textsuperscript{72} Lord Hailsham made this point most explicity when he said that since the NSPCC was the only body that could bring case proceedings, it had “[t]o that extent … been charges with the performance of public responsibility by the Home Secretary under the direct authority of an Act of Parliament” (\textit{D v NSPCC} [1978] AC 171, 228-229). Lord Diplock’s identification of the NSPCC as carrying out public functions was set out in the first full page of his judgement (ibid, pp 215-216). Lord Simon said that the NSPCC had been statutorily recognised and had succeeded to part of the Crown’s historic role as parens patriae to children (ibid, p 240).

\textsuperscript{73} Ibid, p 218.
innocent of the offence”\textsuperscript{74} would have trumped the NSPCC informant’s immunity. But
the mother in \textit{D v NSPCC} was not charged with a criminal offence and accordingly the
public interest immunity claimed for the informant was justified by analogy to police
informant privilege. As will be seen in chapter seven, it was the fact that the party
seeking disclosure of the confidence in \textit{R v Young}\textsuperscript{75} was the defendant in a criminal case
seeking to defend himself by testing the credibility of his accuser, that saw the public
interest justification for sexual assault communications privilege fail in that case. Lord
Simon also implied that the informant’s privilege in \textit{D v NSPCC} would have failed if it
was challenged by the defendant in a criminal case. However, he said the reason why
the public interest immunity claim would fail in such a case, was because “[t]he public
interest that no innocent man should be convicted of crime is so powerful that it
outweighs the general public interest that sources of police information should not be
divulged”,\textsuperscript{76} not simply because it had become a “rule of law”\textsuperscript{77} as Lord Diplock had
suggested. Though such ‘rules of law’ may have originated because of the
countervailing public interests that first justified them, it is noteworthy from the High
Court of Australia’s confirmation of the status of legal professional privilege in \textit{Daniels v ACCC},\textsuperscript{78} that judges do not feel a large need to so justify them once they have been
characterised as ‘common law rights’ or even as ‘fundamental human rights’.\textsuperscript{79}

\begin{notes}
\item[74] Idem.
\item[75] \textit{R v Young} (1999) 46 NSWLR 681.
\item[76] Ibid, pp 232-233.
\item[77] See note 73 and 74 and supporting text.
\item[78] \textit{Daniels Corporation v ACCC} (2002) 192 ALR 561; (2002) 77 ALJR 40. This case is discussed in detail in chapter seven.
\item[79] See note 65-68 and supporting text.
\end{notes}
For both Lord Hailsham and Lord Simon, the primary justification which allowed the informant’s privilege in *D v NSPCC* was not the analogy to police informant privilege, but rather the fact that the categories of public interest immunity were not closed. Lord Simon, however, said that the judge was not only entitled to rule on the admissibility of evidence “as a matter of law and practice”, but that a judge could also effectively exclude evidence by what he called the “exercise … [of] considerable moral authority on the course of a trial”, as for example by suggesting that counsel not press a particular question “in the circumstances”. Though Lord Simon said that this approach meant that it was law and not discretion that was “in command”, there remains a sense in which it is judicial discretion that achieves the exclusion of such evidence. For if the judge concerned decided instead to say nothing disapproving of counsel’s line of questioning, the exercise of ‘moral authority’ would not see counsel drop the line of otherwise relevant questioning. Though such an approach does not advertise itself as the exercise of judicial discretion, it clearly operates to avoid the necessity of formal precedential rulings on evidence admissibility in criminal cases. Indeed, both Baron Alderson’s success in having the prosecutor drop the line of questioning which would have required disclosure of the workhouse chaplain’s evidence in *R v Griffin*, and Lord Coleridge’s observation that Karslake, the prosecutor in *R v Constance Kent* was too much the gentleman barrister to press similar questions, are clear examples of the

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80 *D v NSPCC* [1978] AC 171, 239.
81 Idem.
82 Idem.
83 Idem.
84 *R v Griffin* (1853) 6 Cox Cr Cas 219.
judicial approach at which Lord Simon was pointing. But it is hard to see that the result was achieved other than as an exercise of a species of judicial discretion.

After the other three judgements in *D v NSPCC* are analysed, it is apparent that Lord Edmund-Davies tried to synthesise a framework that might guide judges called upon to exercise discretion in cases involving both confidentiality and public interest in the future.86 And though Chief Justice Spigelman in the NSW Court of Appeal has suggested that what he called Lord Edmund-Davies’ expansive remarks have not been adopted,87 collectively the judgements in *D v NSPCC* remain the last word on public interest immunity in the British common law world to the present day. For example, Geoghegan J delivering judgement for the Irish Supreme Court in final appeal in December 2005 in *Howlin v The Hon. Mr Justice Morris*88 referred to the Tribunal’s “endorse[ment of] a view I had taken as a judge in the High Court … [when] I had adopted the view of the House of Lords in *D v NSPCC* [1978] AC 171 and in particular the views expressed in the speech of Lord Edmund-Davies”.89 It is also noteworthy that various members of the High Court of Australia cited *D v NSPCC* with approval in *Baker v Campbell* in 198390 as did various members of the House of Lords in *Ashworth Security Hospital v MGN Limited* in 2002.91 Though indeed most of the references to the decision in *D v NSPCC* have not been specific to the judgement of Lord Edmund-Davies,

86 While Lord Simon did not characterise his extensive summary of the development of the law surrounding privilege and public interest immunity as an endeavour to provide such an analytical framework, he observed that there had “been three attempts to impose a comprehensive and coherent pattern on this branch of the law” and he confided that he had “great sympathy with that object” (*D v NSPCC* [1978] AC 237).


he was only one of four of the five judges in the case who confirmed that the categories of public interest immunity were not closed.92

Before Lord Edmund-Davies commenced his effort to provide “a comprehensive and coherent pattern on this branch of the law”,93 he signalled that intention with his observation that the law could only “be altered … by a decision of this House, in a suitable case raising the issue, or by the legislature”.94 Though his judgement would undoubtedly have exerted more authority in the development of the law with regard to public interest immunity if his was the only judgement delivered by the House of Lords in D v NSPCC, it will be observed that his remarks say very little more than the other judgements in the case. After quoting the same Lord Denning’s comments in Attorney-General v Mulholland and Foster95 that I have quoted above,96 Lord Edmund-Davies disposed of plaintiff counsel’s argument that it was “no longer right to say ‘that the only profession … which is given a privilege from disclosing information to a court of law is the legal profession’”,97 with citations to Phipson, Cross and Halsbury to effect that “the[se]...
writers [were] unanimous that only in the case of lawyers and their clients [was] the court ... empowered to protect a confidential communication with privilege. Though he noted paragraph 51 of the Sir Rupert Cross Chaired English Criminal Law Revision Committee’s Eleventh Report on Evidence in 1972 which proposed “that a judge is entitled to direct a doctor not to disclose information regarding his patient’s health”, he rejected that proposition as being contrary to law. He then stated that there was no judicial discretion to direct evidence not be given simply because the parties to the communication were in a confidential relationship. If the evidence concerned was both relevant and necessary “for the attainment of justice in the particular case” even a doctor or a priest must be compelled to provide such evidence if “the advocate persists in seeking disclosure” despite the efforts to the judge to dissuade the advocate from that course. But he continued and spelled out where and how a judge might exercise his discretion to find evidence protected on grounds of public interest immunity. He said:

(ii) But where (i) a confidential relationship exists (other than that of lawyer and client) and (ii) disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a

“it was no longer right to say that the only profession which is given a privilege from disclosing ... is the legal profession”. That bald proposition was clearly taking Lord Denning’s dissenting generalisations about confidentiality in Mulholland and Foster (criticised by Lord Diplock in the House of Lords as “much broader than necessary” (D v NSPCC [1978] AC 171, 220)) – further than even Lord Denning seems to have intended.

98 Idem.
99 Idem.
100 Lords Hailsham (ibid, p 227) and Simon (ibid, p 237) also noted the Criminal Law Revision Committee’s 1967 report, but doubted the NSPCC submission that the judiciary has so wide a discretion as to permit a witness to refuse to disclose evidence, as was suggested.
102 Idem.
refusal to disclose relevant evidence provided it considers that, on balance, the public interest would be better served by excluding such evidence.

(iii) In conducting the necessary balancing operation between competing aspects of public interest, the presence (or absence) of involvement of the central government in the matter of disclosure is not conclusive either way though in practice it may affect the cogency of the argument against disclosure ...

(iv) The sole touchstone is the public interest, and not whether the party from whom disclosure is sought was acting under a “duty” – as opposed to merely exercising “powers”. A party who acted under some duty may find it easier to establish that public interest was involved than one merely exercising powers ...

(v) The mere fact that relevant information was communicated in confidence does not necessarily mean that it need not be disclosed. But where the subject matter is clearly of public interest, the additional fact ... that to break the seal of confidentiality would endanger that interest will in most (if not all) cases probably lead to the conclusion that disclosure should be withheld ...

(vi) The disclosure of all evidence relevant to the trial of an issue being at all times a matter of considerable public interest, the question to be determined is whether it is clearly demonstrated that in the particular case
the public interest would nevertheless be better served by excluding evidence despite its relevance. If, on balance, the matter is left in doubt, disclosure should be ordered.\(^\text{103}\)

The congruence of Lord Edmund-Davies’ opinion with that of his brethren can be seen woven through the entire statement. Not only did he restrict its application to civil trials in an effort to accord with Lord Diplock’s principle that the decision in this case not be broadened further that “is necessary to resolve the issue between these parties”,\(^\text{104}\) he concurred with all of his brethren against Lord Denning’s statements in the Court of Appeal below that confidentiality alone does not invoke public interest immunity. He also acknowledged Lord Simon’s observation that a judge can exercise considerable moral influence on the course of a trial by dissuading counsel from persisting in certain lines of questioning,\(^\text{105}\) he confirmed that the involvement of government in the issue is not the only touchstone of public interest\(^\text{106}\); and he confirmed the need to weigh the competing public interests that arise.

However, even if it is accepted that Lord Edmund-Davies’ six points outlining the metes and bounds of a judicial discretion to exclude evidence in civil trials do capture the spirit of the judgements of his brethren, they are not particularly helpful in elucidating when such discretion might be exercised to protect a confidential religious communication. For

\(^\text{103}\) D v NSPCC [1978] AC 171, 245-246.

\(^\text{104}\) Ibid, p 220.

\(^\text{105}\) Ibid, p 239 per Lord Simon.

\(^\text{106}\) This principle may be seen in Lord Diplock’s judgement since he invoked an analogy to police informant privilege even though the NSPCC was a voluntary society (ibid, pp 215-219). It is also evident in the principle expressed by both Lord Hailsham and Lord Simon that the categories of public interest immunity are not closed (ibid, pp 225-230 per Lord Hailsham and pp 236-241).
while the decision confirms that NSPCC informants in England will likely be privileged from disclosure when competing public interests are judicially weighed,¹⁰⁷ one senses that the countervailing public interest in a court’s having all the evidence will not be easy to displace. That Lord Edmund-Davies confined his six principles to civil cases¹⁰⁸ is particularly problematic when one considers religious confidences since even the rare case reports that do exist suggest that such confidentiality is most likely to challenged in criminal cases. Valid concern may also be raised about the practical utility of the Edmund-Davies principles since they do not suggest what kinds of public interest and therefore what kinds of confidence are likely to attract court sympathy for an immunity argument in the future. This absence of guidance may be part of the learned Lord’s concession to Lord Diplock’s direction that the decision in D v NSPCC not be broadened beyond the facts of the case.¹⁰⁹ But if that is so, then the decision confirms little more than that some form of judicial discretion exists in public interest immunity cases, but that so far only informants of the English National Society for the Prevention of Cruelty to Children have qualified for its exercise.

While D v NSPCC thus provides limited analogical guidance, it is not surprising that the House of Lords were unwilling to suggest categories where public interest immunity might arise in the future. Though Lord Edmund-Davies had stated his view that the

¹⁰⁷ However, it must be noted that even different cases involving the NSPCC will raise different competing public interests, so that the precedential value of the decision does not extend very far beyond its own precise facts.

¹⁰⁸ Ibid, p 245. It would appear that this concession was a recognition of Lord Simon’s caution against creating principles in the law of evidence without careful consideration of the different circumstances that arise in criminal cases. Lord Simon said “[e]ven though the rules of criminal evidence may differ in some respects from civil, any wide judicial discretion to admit or reject evidence should, I think, at least be tested against what would be acceptable in a criminal trial (ibid, p 239).

¹⁰⁹ D v NSPCC [1978] AC 171, 220. Lord Simon also made comments about the need for judicial circumspection in cases involving considerations of public policy (ibid, p 240).
House of Lords did have the practical power to settle the law in this area,\textsuperscript{110} he conceded that unlike the legislature, the nation’s highest court required a suitable case to provide that opportunity. Even though the doctrine of precedent provides the House of Lords with a species of law making power, that power is not co-extensive with the law making power constitutionally vested in parliament. For under the strict doctrine of precedent, obiter dicta statements alone cannot bind the future. The House of Lords would require an actual case raising doctor/patient privilege or religious confession privilege before they could make statements about the public interests that would justify the recognition of public immunity in such cases. \textit{D v NSPCC} was not such a case but the Lords did what they could with the material thus made available to settle the law in the area. They certainly rebutted Lord Denning’s idea that the existence of confidentiality alone provided the judge with discretionary power to exclude otherwise relevant evidence. Public interest factors would also have to weighed before any exercise of discretion was justified.

Perhaps if the facts of \textit{D v NSPCC} had set constitutional values like freedom of speech or conscience against some thin government assertion of confidentiality outside facts in wartime or following a recent terrorist attack, some further analogical help might have been forthcoming. But in nations without recorded and entrenched Human Rights legislation, there is a risk that even the constitutional values potentially raised in such cases, may be chilled or buried by the passion of a passing tide of public opinion. In the context of this thesis, the final problem with Lord Edmund-Davies principles is once again, his unquestioning acceptance of the assertions of Phipson, Cross and Halsbury that there is no privilege from disclosing information to a court of law outside the legal

\textsuperscript{110} Ibid, p 245.
profession. For as this thesis has already demonstrated, that commentary is not accurate where religious confession privilege is concerned.

Though Spigelman CJ in NSW has indicated that what he called Lord Edmund-Davies’ “expansive remarks” in *D v NSPCC* have not been adopted where “public interest immunity” is concerned, Lord Hailsham’s observation that “the categories of public interest immunity” are no more closed than those of negligence, has struck a chord around the British Commonwealth. Writing as a law teacher at the Faculty of Law in the University of British Columbia, Beverley McLachlin as she then was referenced Wigmore’s “principle” approach in preference to a more conservative “category” approach to determine “the question of privileged communications”. She

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111 *D v NSPCC* [1978] AC 171, 244.
112 *R v Young* (1999) 46 NSWLR 681, 694. In the context of *D v NSPCC*, it is difficult to characterise Sir Edmund-Davies’ remarks as “expansive”, since he did not accept submissions of counsel for the complainant that the larger remarks of Lord Denning (in the Court of Appeal) should apply, and was rather narrower on discretion than even his brother Lord Hailsham in his concurring judgement in the same case.
113 *D v NSPCC* [1978] AC 171. See also notes 54 and 87 and the text supporting note 87.
114 *R v Young* (1999) 46 NSWLR 681, 694. Again see note 87 and the supporting text which suggests that Chief Justice Spigelman’s dismissive comments about Lord Edmund-Davies’ principles do not fairly recognise the degree to which those principles did capture the sentiments of his brethren who were unanimous in the result, or the acceptance those remarks have achieved in subsequent judicial consideration.
115 Idem.
118 McLachlin CJ was appointed to the Supreme Court of Canada on 30 March 1989 and was appointed Chief Justice of Canada on 7 January 2000 (http://www.scc-csc.gc.ca/about-courts/judges/McLachlin/index_e.asp) (last visited 28 July 2003).
119 McLachlin, B, op cit, p 269.
120 Ibid, p 268.
121 Idem.
cited Turner J’s (as he then was\textsuperscript{122}) approach to the issue in the NZ Supreme Court (as it then was\textsuperscript{123}) in \textit{Bell v University of Auckland}.\textsuperscript{124} “Referring to confidential communications between a university and its employee, he stated”:\textsuperscript{125}

\begin{quote}
I cannot but think that this situation is one which, if the existing rules of privilege do not protect the documents from discovery, an addition should be made to the categories of documents regarded as privileged. The famous dictum of Lord Macmillan in \textit{Donoghue v Stevenson} [1932] AC 562, 619; [1932] All ER Rep 1, 30, that “the categories of negligence are never closed” may serve as inspiration for a similar remark as to the categories of privilege.\textsuperscript{126}
\end{quote}

Though Lord Hailsham in \textit{D v NSPCC}\textsuperscript{127} may have been familiar with this statement of Turner J in New Zealand, it is remarkable that two senior British Commonwealth judges within a decade of one another should choose the same generous analogy to express what they felt the common law on privilege and public interest immunity was or should be. The Canadian courts have developed this jurisprudence much further and McLachlin J, before her appointment as Chief Justice of Canada, has been a significant contributor in that development along the lines that she spelled out in her 1977 article.

\begin{footnotes}
\item[122] “Alexander Turner (1901-1993) was a judge of the NZ Court of Appeal from 1962 to 1973 and during his last eighteen months served as President” (http://www.waikato.ac.nz/law/wlr/1993/article4-spiller.html), (last visited 28 July 2003).
\item[123] The New Zealand Supreme Court was established in 1841 and was renamed the New Zealand High Court in 1980 (http://www.courts.govt.nz/courts/high_court.html), (last visited 28 July 2003). A new New Zealand Supreme Court, replacing the Privy Council as New Zealand’s highest court, was established by the Supreme Court Act 2003 to commence hearing cases from 1 July 2004.
\item[124] \textit{Bell v University of Auckland} [1969] NZLR 1029.
\item[125] McLachlin, B, op cit, p 269.
\item[126] \textit{Bell v University of Auckland} [1969] NZLR 1029, 1036.
\item[127] \textit{D v NSPCC} [1978] AC 171.
\end{footnotes}
Religious communications privilege in twentieth century Canadian cases

Before the advent of the Canadian Charter of Rights and Freedoms\textsuperscript{128} and the Supreme Court’s decision in \textit{Slavutych v Baker},\textsuperscript{129} the Canadian common law with respect to religious confessions and religious communications more generally, was indistinguishable from the common law of England. However, the Supreme Court of Canada’s invocation of Dean Henry Wigmore’s “four fundamental conditions necessary to the establishment of a privilege against the disclosure of communications”,\textsuperscript{130} though not “carved in stone”\textsuperscript{131} has been sufficiently affirmed in subsequent decisions of that court\textsuperscript{132} to have made those principles part of the unique fabric of Canadian law.

The particular relevance of the Canadian authorities in an Australian context, is the use made of constitutional materials\textsuperscript{133} and Wigmore’s four canons to develop a discretionary religious communications privilege which resonates with the less developed thread of

\textsuperscript{128} The Canadian Charter of Rights and Freedoms came into force as Schedule B to the \textit{Canada Act 1982 (UK)} Clause 11 on 17 April 1982. In Canada it is known as the \textit{Constitution Act 1982}.

\textsuperscript{129} \textit{Slavutych v Baker} [1976] 1 SCR 254; (1975) 55 DLR (3d) 224

\textsuperscript{130} Ibid, p 228. The Wigmore principles are: 1. The communications must originate in a confidence that they will not be disclosed. 2. The element of confidentiality must be essential to the full maintenance of a satisfactory maintenance of the relation between the parties. 3. The relation must be one which in the opinion of the community ought to be sedulously fostered. 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation (italics original) (Wigmore JH, \textit{Evidence in Trials at Common Law}, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 527).

\textsuperscript{131} \textit{R v Gruenke} (1991) 3 SCR 263, 290.

\textsuperscript{132} For example, the four Wigmore canons have been used as a tool to determine the availability of a confidentiality privilege in \textit{Reference Re Legislative Privilege} (1978) 39 CCC (2d) 226; \textit{R v Big M Drug Mart Ltd} [1985] 1 SCR 295; \textit{Re Church of Scientology and the Queen} (No 6) (1987) 31 CCC (3d) 349 (Ontario Court of Appeal) and \textit{R v Gruenke} [1991] 3 SCR 263.

\textsuperscript{133} The possible application of the Canadian jurisprudence in Australia in light of both the resonance in Canadian and Australian multicultural values and the similarity in protection afforded religious freedom under the Canadian Charter and section 116 of the Australian Constitution, are considered in chapter seven.
authority in favour of discretionary public interest immunity in English common law authority traced supra. Though Spigelman CJ did not feel that the New South Wales Court of Criminal Appeal could similarly adopt the Wigmore canons in a case about the emerging sexual assault communications privilege, the Canadian reasoning is likely to be highly persuasive if a confidential religious communications privilege case were to confront an Australian appellate court.

In Slavutych v Baker, Associate Professor Yar Slavutych of the Slavonic Languages Department of the Faculty of Arts of the University of Alberta had been “invite[d] to give a confidential assessment of a colleague … [to] determin[e] … whether the latter should be granted tenure”. When the university later used that communication “as a basis for a charge of misconduct justifying [Slavutych’s] … dismissal”, even though it had been made in good faith, Slavutych challenged his dismissal before the Appellate Division of the Supreme Court of Alberta and lost on grounds of public policy notwithstanding that court’s review of the Wigmore canons. But in the Supreme Court of Canada, Spence J, giving the judgement of the whole court, affirmed that Wigmore’s canons were not only appropriately reviewed to determine whether Slavutych was entitled to an evidential privilege in connection with his confidential communication with

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134 R v Young (1999) 46 NSWLR 681, 698, para 84. Note that while Spigelman CJ did not consider it was open to an intermediate Court of Appeal in Australia to adopt “the approach … propounded by Wigmore and adopted in Canada”, despite the fact that Beazley JA found that approach attractive (R v Young (1999) 46 NSWLR 681, 715-716), Lord Simon cited Wigmore’s canons of privilege with approval in D v NSPCC ([1978] AC 171, 237).


137 Ibid, p 224.

138 Idem.

139 Ibid, p 228.
the university, but that in fact all four canons were satisfied in Slavutych’s case. Since
the university’s board of arbitrators which approved the university president’s
recommendation of dismissal had made no finding of bad faith at first instance and
indeed had recommended “some lesser penalty” to the university, the equitable
principle “that a person who had obtained information in confidence is not allowed to use
it as a springboard for activities detrimental to the person who made the confidential
communication” applied, and the award was quashed completely without need for
arbitral reconsideration where its decision of dismissal was concerned.

In *Re Church of Scientology and the Queen (No 6)*, in rejecting Osler J’s ruling in the
Supreme Court of Ontario that the Wigmore principles “recognized and adopted for
some purposes by the Supreme Court of Canada in *Slavutych v Baker* ... are not
embraced by the [priest-and-penitent] privilege”, the Ontario Court of Appeal
reaffirmed its acceptance of both the Wigmore canons and the parallel constitutional
protection afforded by the new Charter of Rights and Freedoms with these words:

> We agree with the Crown that ... there is no recognized class privilege accorded
to the priest-and-penitent relationship ... We cannot agree, however, that it is too
late to expand the modern law of privilege. In the light of the constitutional

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140 Ibid, p 229.
141 Ibid, p 231.
was in turn adopting the statement of Roxburgh J in *Terrapin Ltd v Builder’s Supply Co (Hayes) Ltd et al*
143 Ibid, p 233.
144 *Re Church of Scientology and the Queen (No 6)* (1987) 31 CCC (3d) 349.
145 Ibid, p 536.
protection given by the Charter and having regard to the expansion of the law of privilege under the general principles enunciated by Dean Wigmore and accepted by the Supreme Court of Canada in Slavutych v Baker, ... we are satisfied that our courts will be encouraged to recognize the propriety of a priest-and-penitent privilege, if not as a class, at least on a case-by-case basis.146

While these statements rank only as obiter dicta, since the appeals against the issue of the search warrants in issue were all dismissed, this statement signals a clear direction in Canadian judicial thought,147 since reaffirmed and developed by the Supreme Court in R v Gruenke148 which is regarded as the leading case not only on religious communications privilege, but on privilege generally.

R v Gruenke

Adele Gruenke had unsuccessfully appealed her first degree murder conviction to the Manitoba Court of Appeal. When unsuccessful, she obtained leave to further appeal to the Supreme Court of Canada on the basis that either her communications with two

146 Ibid, p 541.

147 In an unreported Supreme Court of Ontario case (filed in Ontario Judgements Quicklaw Database as R v Medina [1988] OJ No 2348), Campbell J observed that despite the Ontario Court of Appeal finding in the Scientology case (following Jessel MR’s obiter observations against the privilege in Wheeler v LeMarchant (1881) 17 ChD 675, 681) that “[t]here ... was at common law, no privilege in communications to clergyman” (R v Medina [1988] OJ No 2348 p 4 quoting the Scientology case at p 537)), “that was ... not the universal position [as] [s]ome judgements seem to recognize a priest-penitent or clergy and parishioner privilege in, or at least a discretion to exclude, communications made for purposes of spiritual guidance and comfort” (R v Medina, idem). Campbell J then went on in Medina to find that it was “open to the accused to resist the admission into evidence against him of [a] ... statement to his clergyman on the ground of religious privilege” (R v Medina, p 5) on a “case-by-case basis” (idem) applying “the general principles set out in Wigmore” (idem). Though he found Medina had not made out such a case since the fundamental reason for his communication on the street with a pastor was to solicit his help in fleeing the city and the country to avoid a murder charge, he did believe that a religious privilege did exist on a case-by-case basis, applying the general Wigmore principles.

pastors in the Victorious Faith Centre were “protected by common law privilege, or alternatively, were protected confidential communications, and therefore inadmissible, under the common law and s 2(a) of the Canadian Charter of Rights and Freedoms”.  

Though the Full Supreme Court of nine judges concurred in their decision that the appeal should be dismissed, they divided over the reasons for that dismissal and their reasoning is enlightening in an Australian context since similar considerations arise in this country. Lamer CJ delivered the judgement of the seven judges who affirmed the existence of a religious communications privilege on a case-by-case basis.  

L’Heureux-Dubé J delivered the alternative view that maintained there was a religious communications class privilege in Canada but that, nonetheless, it did not protect Gruenke’s communications with her pastors in this case because these communications “did not originate in the confidence that they would not be disclosed”. The Supreme Court’s recitation of the facts accepted that Ms Gruenke had already decided “to turn herself into the police and ‘take the blame’”, and that her communications with her pastors were more “accurately described ... as being made to relieve Ms Gruenke’s emotional stress than for a religious or spiritual purpose”.  

The Court’s division essentially boiled down to the question of whether the Supreme Court should recognise a new class or category of privilege in favour of confidential religious communications, or whether the admissibility of evidence in cases of confidential religious communications should be resolved on some discretionary ‘case-
by-case’ basis. Lamer CJ provided the judgement of the majority which set out the
approach which Canadian courts should take to determine whether they should exercise
a discretion to protect any confidential communication from disclosure. Because the
case concerns a confidential religious communication and because it has also become
the leading case concerning the admissibility of confidences as evidence in Canadian
courts, the reasoning is set out in some detail.

Lamer CJ’s judgement confirming what was called a ‘case-by-case privilege’, first dealt
with the arguments that been presented by counsel for Gruenke to prove the existence
of a religious communications privilege at common law. He agreed that while “English
and Canadian courts have not, as a matter of practice, compelled members of the clergy
to disclose confidential religious communications, this does not answer the question of
whether there is a legal common law privilege for religious communications”.155 Lamer
CJ also rejected the odd suggestion from counsel for Gruenke that “the existence of a
limited statutory religious privilege in [Quebec and Newfoundland] indicate[d] ... that a
common law privilege exists”.156 Logically, Lamer CJ observed that “[i]f anything ... [such
need for statute] indicate[d] that the common law did not protect religious
communications”.157

Lamer CJ then turned to the reasons which could justify a confidential religious
communications privilege and considered that “the question of whether a prima facie

155 Ibid, pp 287-288 per Lamer CJ. Note that the facts of the Gruenke case did not allow the Canadian
Supreme Court to consider closely the existence of a narrower religious confession class privilege at
common law, since it was not suggested at any of the trials (first instance in Manitoba, appeal in Manitoba,
or final appeal to the Supreme Court) that the communication which had taken place was a religious
confession.

156 Ibid, p 288.

157 Ibid, p 288. This view that the need for the creation of a statutory privilege may have proved the non-
existence of religious confession privilege at common law is further discussed in chapter six, pp 242-246.
privilege exists for religious communications is essentially one of policy”.158 In his view, unless compelling policy reasons such as underlie “the class privilege for solicitor-client communications”159 could be shown, “there [was] ... no basis for departing from the fundamental ‘first principle’ that all relevant evidence is admissible until proven otherwise”.160 Proponents of a religious communications privilege could not call in aid the policy reason which was accepted as underlying “prima facie protection for solicitor-client communications”.161 That privilege was justified by the fact that those communications were essential “to the effective operation of the legal system ... [since s]uch communications are inextricably linked with the very system which desires the disclosure of the communication”.162

But, ‘the effective operation of the legal system’ was not the only policy reason that could justify a privilege. Though confidential religious communications were “not inextricably linked with the justice system in the way that solicitor-client communications surely are”163 the social importance of confidential religious communications was implicit in the value placed upon freedom of religion in s.2(a) of the Canadian Charter of Rights and Freedoms. However, it was not necessary that “a prima facie privilege [be recognized] to give full effect to the Charter guarantee”.164 Since “[t]he extent (if any) to which disclosure of communications will infringe on an individual’s freedom of religion will

158 Idem. Note that though the House of Lords’ decision in D v NSPCC was not referred to anywhere in the Supreme Court of Canada’s decision in R v Gruenke, public policy is recognised as the primary guide in identifying new evidentiary privileges or immunities in both decisions.

159 Idem.

160 Idem.

161 Ibid, p 289 per Lamer CJ.

162 Idem.

163 Idem.

164 Idem.
depend on the particular circumstances involved”¹⁶⁵ principled consideration, “on a case-by-case basis, having regard to the Wigmore criteria ... [was consistent with] the approach taken by this Court in Slavutych v Baker¹⁶⁶ and the Ontario Court of Appeal in Re Church of Scientology and the Queen (No 6). He continued and explained that while “the Wigmore criteria are [not] ... ‘carved in stone’, they provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court”.¹⁶⁷ Such judicial use of the Wigmore criteria did not “preclude the [future] identification of a new class [privilege] on a principled basis”,¹⁶⁸ but the recognition of a new religious communications class privilege was not necessary since case-by-case consideration would allow Canadian courts to weigh the freedom of religion considerations arising under the Charter.¹⁶⁹

Lamer CJ said that use of “the general term ‘religious communications’ [was preferable] ... [to] the more traditional term ‘priest-penitent communication’ ”¹⁷⁰ because it recognised the need for the accommodation of a wide variety of beliefs and accordingly, the non-denominational approach sensitively desirable in Canada’s multi-cultural jurisdiction.¹⁷¹ “The fact that the communications were not made to an ordained priest or minister or that they did not constitute a formal confession will not bar the possibility of

¹⁶⁵ Idem.
¹⁶⁶ Idem.
¹⁶⁷ Ibid, p 290 per Lamer CJ.
¹⁶⁸ Idem.
¹⁶⁹ Idem.
¹⁷⁰ Ibid, p 291 per Lamer CJ.
¹⁷¹ Idem.
the communications being excluded”.

Lamer CJ summed up with the observation that because “Ms Gruenke’s communications to Pastor Thiessen and Ms Frovich did not originate in a confidence that they would not be disclosed ... the communications in question [did] not satisfy the first Wigmore criterion and their admission into evidence [did] not infringe Ms Gruenke’s freedom of religion”.

In essence, the Supreme Court of Canada recognised that confidential religious communications may be privileged from compulsory disclosure in court out of respect to that nation’s multicultural values, which are enshrined in the 1982 Charter of Rights and Freedoms. Such privilege will not protect every religious communication and indeed did not protect the communications in the Gruenke case. Against the constitutional law backdrop provided by the Charter, Canadian judges are at liberty to weigh competing policy considerations that arise on the facts in individual cases. It is possible to identify a measure of congruence between this Canadian approach and that set out in the House of Lords judgements in *D v NSPCC*. For in both decisions, there is a recognition that public interest or policy considerations should dictate the exclusion of some confidences not protected by the existing privilege or immunity categories acknowledged in the text books. But there is a marked reluctance to recognise new classes or categories of privilege when appropriate exercise of discretion can meet the purpose. But not all the judges in the Supreme Court of Canada agreed.

L’Heureux-Dubé and Gonthier JJ worried that the Supreme Court’s failure to recognise confidential religious communications as a category would have “a chilling effect on the

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172 Idem.
173 Ibid, p 292 per Lamer CJ.
spiritual relationship”\textsuperscript{174} in Canadian society. This failure unnecessarily focused “on the palpable need for evidence in the individual case and … neglect[ed] more intangible and long-term interests”.\textsuperscript{175} The minority judgement found several public interest factors beyond the Charter protection of freedom of religion\textsuperscript{176} that justified recognition of confidential religious communications as a distinct class of privilege. This included “Society’s Interest in Promoting Religious Communications”,\textsuperscript{177} “Privacy Interests”\textsuperscript{178} and the fact that “[c]ompelling disclosure … may arguably bring disrepute to the system of justice”.\textsuperscript{179} While they did not believe “that every communication between pastor and penitent will be protected”,\textsuperscript{180} L’Heureux-Dubé and Gonthier JJ considered it desirable to recognise religious confession privilege as a “class” privilege to avoid the danger of social prejudice where recognition of religious communications privilege was characterised as a mere discretion.

However, the majority view of the court directed that assertions of privilege for any form of confidential religious communications should be assessed in accordance with the Wigmore principles\textsuperscript{181} in the future. The individual judge should weigh society’s interest in the confidentiality against the normal requirement that the court should hear all the evidence. While the existence of a narrower religious confession privilege may still

\begin{footnotesize}
\footnote{174} Ibid, p 311.
\footnote{175} Idem.
\footnote{176} Ibid, pp 300-302.
\footnote{177} Ibid, pp 297-300.
\footnote{178} Ibid, pp 302-303.
\footnote{179} Ibid, p 304.
\footnote{180} Ibid, p 312.
\footnote{181} The Wigmore principles are set out in full in note 130.
\end{footnotesize}
seem moot in Canada\(^{182}\) absent a decision considering a formal sacramental confession, it is unlikely the need for such a category will appear in future since judicial discretion is likely to be exercised in favour of the most formal confessions. Though the English reasoning in \(D v \text{NSPCC}\) is different in a case that did not involve a religious communication, both English and Canadian courts have now stated that judicial discretion is the appropriate way to assess the complex public interests that arise when it is asserted that confidences should trump the court’s need for all the evidence. Irish jurisprudence, however, has concluded that a class privilege favouring religious communications was necessary to protect the public interests involved.

Religious communications privilege in twentieth century Irish cases

Though the existence of any privilege, discretionary or otherwise, was discountenanced very early in Ireland,\(^{183}\) the view of the evidence scholar WM Best that such dismissive treatment may have reflected judicial religious prejudice seems to have eventually prevailed.\(^{184}\) For though the judges in \(\text{In re Keller}\)\(^{185}\) seemed to go to great lengths to avoid both the religious confession privilege and religious communications privilege issue in that case, both privileges may be said to have survived that episode and to have been confirmed, most memorably by Gavan Duffy J in \(Cook v Carroll\).\(^{186}\)

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\(^{182}\) Again, note Lamer CJ’s statement that the principled case-by-case approach to such assertions of privilege, did not “preclude the identification of a new class on a principled basis” in the future (ibid, p 290). See also note 168 and supporting text.

\(^{183}\) Butler v Moore (1804-1806) 2 Sch & Lef 249. Discussed supra in chapter four, pp 167-168, and in chapter six, pp 238, 240.


\(^{185}\) In re Keller (1887) 22 LR Ir. 158, discussed in chapter four, pp 159-162.

In an action for damages for seduction brought by the girl’s mother against the alleged seducer, the Reverend WJ Behan, who was parish priest to both parties, was called to give evidence of a discussion that took place at a meeting between the three of them as he endeavoured either to “induce[e] ... the girl to withdraw a false charge, or [to] persuade[e] ... the man to make amends for the wrong done to her”.\(^{187}\) In the Circuit Court, the priest was fined £10 for contempt as a result of his refusal to give evidence and “the plaintiff’s action was dismissed”.\(^{188}\) On appeal, the priest again refused to give evidence, with the following statement:

> I respectfully decline to give evidence. I cannot conscientiously do so, because any information I have, was given to me as a 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.\(^{189}\)

Father Behan’s demurrer raises the issue of a religious communications privilege rather than a narrower religious confession privilege. Both parties waived privilege at the


\(^{188}\) *Cook v Carroll* [1945] Ir. Rep. 515.

\(^{189}\) *Cook v Carroll* [1945] Ir. Rep. 515, 516. Note that Gavan Duffy J need not have decided the case by confirming the existence of a religious communications privilege in Ireland. He could have decided, as Denning J did four years later in *McTaggart v McTaggart* [1949] Probate 94, that these communications were protected as without prejudice communications which were protected because of society’s interest in preserving marriage. Such a course was identified and approved by the House of Lords in *D v NSPCC* [1978] AC 171 (per Lord Hailsham, pp 226-227; per Lord Simon pp 236-237, and per Lord Kilbrandon who concurred with Lord Hailsham).
trial, so that the priest’s continuing assertion of a personal privilege stood uncomplicated and on its own. As the Supreme Court of Canada would later do in *R v Gruenke*, Gavan Duffy J reviewed the historical evidence for the existence of a religious communications privilege. He concluded “that the seal of confession was respected in the courts of England before the Reformation”, but that “the attitude of pre-Reformation courts towards any wider claim [of privilege] by a priest is probably unascertainable today”. He observed that “rare decisions upholding the sacerdotal [confession] privilege to the full extent may be found up to eighty years ago, but they are not now regarded as law, because the preponderance of judicial opinion in England has denied any privilege whatever to the priest for confidences made either inside or outside the confessional”, either overlooking or brushing the old common law aside. He did not attribute significant weight to the dicta against religious confession privilege in *Wheeler v LeMarchant* and considered on balance, in the unique religious context in Ireland, that a religious communications privilege must be recognised in practice. Specifically he noted that though in “an action on a building contract”, Sir George Jessel MR did opine against any religious communications or confessional privilege, 

190 Idem.

191 Contrast these facts with those, for example, in *Normanshaw v Normanshaw* (1893) 69 LTR 468, where Jeune P apparently convinced the clergyman to testify (supra, pp 173-176) and in *Tannian v Synnott* (1903) 37 Ir. L.T. 275 (infra, pp 211-212) where the Roman Catholic priest made no objection to the request for his testimony. Thus in the present case, the absence of clerical waiver of any privilege, obliged the judge to decide on the matter of privilege raised as an issue of law rather than on grounds of simple pragmatism. While there have been other judges who have asserted a privilege for a clerical witness when it may not have been asserted for them (eg Best CJ in *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528) and possibly Alderson B in *R v Griffin* (1853) 6 Cox Cr Cas 219), here Gavan Duffy J was faced with the pure legal question of whether the priest owned any privilege, since neither of the parties had any objection to the adduction of the evidence he could give.


193 Idem.

194 Idem.

195 Idem.

196 Idem.
“there has long been a feeling that the community is better served by passing over awkward clerical incidents than by advertising a discreditable rule of law”. 197 He continued that “the utter futility of trying to invade the secrecy of the confessional” 198 in Ireland had seen the Irish courts give “clear indications ... that a priest in the witness box could not be asked to break the seal”. 199 “[T]hough there are some reasons common to the cases for the sacerdotal and for the legal privileges”, 200 the fact that “the priest is not hired” means that “a parishioner’s waiver of privilege should not ... destroy the priest’s right to keep his secret”. 201 He then concluded his review of the common law with the strong statement that “it would be intolerable that the common law, as expounded after the Reformation in a Protestant land, should be taken to bind a nation which persistently repudiated the Reformation as heresy”, 202 since that common law resulted from “the regrettable preconceptions of English Judges”. 203

After thus disposing of English common law’s denials of any religious privilege, Gavan Duffy J proceeded to appreciate the wisdom of Wigmore’s four fundamental conditions precedent to the establishment of a privileged communication. 204 He found that protecting “the priest against having to testify [was] ... only a half measure of justice, if

197 Idem.


199 Idem.

200 Cook v Carroll [1945] Ir. Rep. 515, 519. This statement seems to be an allusion to Baron Alderson’s analogy between legal professional privilege and religious confession privilege in R v Griffin (1853) Cox Cr Cas 219 which was discussed in chapter four, supra, pp 169-170.

201 Idem.

202 Idem.


204 Cook v Carroll [1945] Ir. Rep. 515, 521. The four Wigmore canons are quoted above at note 130.
[the two adverse parties could] ... blurt out the conversation” and ruled that “no conversation whatever of the secret conversation [was] ... allowable, without the express permission of the parish priest”. “[T]he emergence of the national Constitution of Ireland which “affirm[ed] the indefeasible right of the Irish people to develop its life in accordance with its own genius and traditions” was a “complete and conclusive answer to the objection” that Gavan Duffy J had not found a certain “judicial precedent in favour of the parish priest”. “[T]he parish priest of Ballybunion [had thus] committed no contempt of the High Court on Circuit”.

As the Supreme Court of Canada has since done, Gavan Duffy J also drew authority for his decision to recognise a confidential religious communications privilege from constitutional precedent which was particular to his own jurisdiction. Though the majority in Gruenke chose to apply the Wigmore canons to affirm a discretionary or ‘case-by-case’ privilege, Gavan Duffy J’s strong statements affirm a broad confidential communications privilege rather than a narrow religious confession privilege in Ireland since the communication which he held privileged on the facts before him did not represent a sacramental confession. It is also worthy of note that Gavan Duffy J’s interpretive approach represents a more accurate application of the Wigmore canons than was adopted by the Supreme Court of Canada. For Wigmore favoured the creation

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205 Ibid, p 524.
206 Idem.
207 Ibid, p 523.
208 Ibid, p 519.
209 Ibid, p 523.
210 Idem. Sir George Jessel MR’s dictum in Wheeler v LeMarchant (1881) 17 Ch D 675, is treated by Gavan Duffy J as an example of a case in which “the old common law has been overlooked or brushed aside” (ibid, p 517) and is not followed on that basis.
211 Ibid, p 525.
of a class privilege for religious confessions, though it is unclear whether he saw that class privilege as extending beyond formal religious confessions to confidential religious communications generally.\(^\text{212}\)

While the earlier sketchy solicitor’s journal report in *Tannian v Synnott*\(^\text{213}\) does not reveal any consideration of “the Wigmore principles”, it does reaffirm early Irish commitment to a discretionary religious communications privilege to be invoked in favour of a priest’s refusal to admit the evidence in contest. Heard before Palles CB, the reference to religious communications privilege was incidental in a civil case involving a claim of damages for slander. It is also unusual since the Roman Catholic priest involved was willingly involved as a plaintiff witness to provide evidence of a “conversation [that] had taken place in the street ... and not in confession”,\(^\text{214}\) though it was acknowledged that the defendant had spoken to the priest in his professional capacity. The Lord Chief Baron is reported to have “stated that he would not ask the witness to depose to anything connected, directly or indirectly, with confession, or in reference to his advice as to whether a man had committed a crime ... [but] that the present occasion was not complicated by such matters ... [so that] he allowed the evidence to be given in spite of any objection on behalf of the defendant.”\(^\text{215}\) It is fair to observe in the light of Gavan Duffy J’s later elaboration of a larger privilege, that the *Tannian v Synnott* facts might now see this priest’s evidence excluded, even though there was certainly room to admit it as falling outside any class of religious privilege at all.

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\(^\text{213}\) *Tannian v Synnott* (1903) Ir. LT 275.

\(^\text{214}\) Idem.

\(^\text{215}\) Idem.
Discretion in commentary

Though this summary of the evolution of judicial discretion benefitting confidential religious communications in England, Ireland and Canada is fairly consistent, the commentators who have recognised argument in favour of such judicial discretion, have not interpreted the authority as being well established or clear. After citing Best CJ in Broad v Pitt, Mc Nicol has written:

There appears to be wide support among commentators for the view that judges have the scope to discourage attempts to force disclosure. At this stage, however, there does not appear to be any clear authority in Australia to support the existence of a special residual discretion not to insist on evidence being given.216

Bursell has written of the position in England:

The present state of the law as to judicial discretion (both in civil and criminal cases) is unclear but s 82(3) of the Police and Criminal Evidence Act, 1984 apparently recognises the existence of such an exclusionary discretion.217

But Professor Elliott218 doubts that s 82(3) of the Police and Criminal Evidence Act 1984 recognises the judicial discretion identified by Judge Bursell and instead says that

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218 Emeritus Professor of Law at the University of Newcastle-upon-Tyne, England.
provision was “overtaken and overlapped”219 (though not repealed) “by a new more
general discretion introduced by s 78(1)”220 Professor Elliott summarised his view with
the statement that “it is quite unlikely that a judge is able to protect a reluctant witness by
discretion”,221 and that “it would be surprising if the judges ever used [the discretion in
s 78] to rule out a priest's evidence of a confession.”222 Professor Elliott’s view is
surprising since all the cases he reviewed have been discussed above and provide
some authority for the exercise of judicial discretion in religious confession privilege
cases – without any statutory endorsement as arguably allowed by the two sections of
the English Police and Evidence Act 1984 cited. The better view of the authorities must
be that the common law provides scope for the exercise of judicial discretion to privilege
even religious communications (and not just formal religious confessions) where the
public interest can be invoked to justify the exercise of such discretion. This
notwithstanding the fact that neither English nor Canadian authority has recognised a
‘class’ privilege for either religious confessions or confidential religious communications.

This chapter has demonstrated that a long line of common law authority dating back at
least to 1791,223 if not to 1606,224 provides ample scope for the recognition at common
law of both a religious confession privilege and also a broader religious communications
privilege. When twentieth century authority in Ireland, England and particularly Canada

272, 277.

220 Idem.

221 Ibid, p 274. Though Lord Simon in D v NSPCC similarly said that law rather than discretion must control
the course of a trial, he also recognised that a judge could exercise considerable moral authority on the
course of a trial as for example by suggesting that counsel abandon a certain line of questioning (D v

222 Ibid, p 278.

223 Du Barré v Livette (1791) 1 Peake 108; 170 ER 96.

224 Garnet’s case (1606) 2 Howell’s State Trials 217.
is overlaid upon that older common law base, it is difficult to ignore the existence of a judicial discretion such as has the power to exclude evidence of confidential religious communications. Whether such discretion will ever be used, and if used, whether it will outweigh other public interest considerations which will be factored against it, is another matter. But the common law certainly confirms the existence of such discretion.

**Conclusion to chapter five**

Chapters four and five of the thesis have explained the development of the common law on religious confession privilege since *Garnet’s case* and the publication of Coke’s *Second Part of the Institutes* in the early seventeenth century. Recognising that the existence of a religious confession privilege has never been solemnly decided\(^\text{225}\) in an English court, the thesis has reviewed other judicial treatment that has confused it with confessions obtained under duress; misinterpretations of obiter statements in cases about legal professional privilege and cases that really only dealt with general confessions somehow involving clergy – and has confirmed that ‘never solemnly decided’ assessment. But the thesis has also suggested that the reluctance of a number of senior English judges to compel the disclosure of confidential religious communications in their courtrooms must mean something. When those many expressions of reluctance are considered together, a thread of emerging discretion can be identified. That thread suggests that members of the clergy may be privileged from providing evidence obtained in confidential religious communications if a countervailing public interest in protecting such confidence exists. In Canada and Ireland, local constitutional instruments have justified a more complete elaboration of the metes and bounds of religious communications privilege. Thus in Canada, a ‘case-by-case’

confidential religious communications privilege has clearly existed since *R v Gruenke* in 1991, and in Ireland, since *Cook v Carroll* in 1945, there has existed a ‘class’ privilege which prevents any confidential religious communication at all being lead as evidence in court without the consent of the priest involved having first been obtained. This conclusion will now be tested against the various theories which have been advanced to suggest that though religious confession privilege existed before the English Reformation, it was extinguished before the modern law of evidence was established.
CHAPTER SIX

THEORIES ABOUT THE EXTINCTION OF RELIGIOUS CONFESSION PRIVILEGE

Introduction

The purpose of this chapter is to examine the theories for extinction of religious confession privilege that exist to determine whether they have any validity despite the tentative conclusion advanced from the materials considered to date in the thesis. There are five principal arguments that religious confession privilege was extinguished before the commencement of the twentieth century. They are first, that religious confession privilege was extinguished either at or by the English Reformation or by the Restoration. Secondly, that the English social system and the law it produced was so set against Roman Catholicism from the time of the English Reformation until the end of the nineteenth century reform era that religious confession privilege “must” have been extinguished during that period. Thirdly, the fact that any legislature has felt the need to pass a religious confession privilege statute proves religious confession privilege did not exist at all, or has been extinguished. Fourthly, that in Anglo-American jurisdictions without an established state church, the absence of parliamentary legislative authority for a canonical confession privilege, has extinguished the existence of any common law religious confession privilege. And finally, that Sir George Jessel MR’s dicta against
religious confession privilege in *Anderson v Bank of British Columbia*¹ and *Wheeler v LeMarchant*² were so authoritative or so captured the spirit of public policy where religious confession privilege was concerned that they extinguished any residue of the privilege that may endured in English common law in the late nineteenth century.

After reviewing each of these theories separately, the chapter will conclude that religious confession privilege has not been extinguished at common law.

**Religious confession privilege extinguished by the Reformation or the Restoration?**

Wigmore appears to be the primary authority for the theory that religious confession privilege was extinguished either by the English Reformation or by the Restoration. He wrote, as will be remembered³:

> It is perhaps open to argument whether a privilege for confessions to priests was recognized in common law courts during the period before the Restoration ... But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a privilege.⁴

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¹ *Anderson v Bank of British Columbia* (1876) 2 Ch D 644.

² *Wheeler v LeMarchant* (1881) 17 Ch D 675.

³ This quotation was cited previously in the Introduction to the thesis, p 1.

⁴ Wigmore, JH, McNaughton revision, op cit, Vol 8, p 869.
Various editions of Wigmore's work\textsuperscript{5} have been cited by other commentators for his proposition that religious confession privilege did not survive the Stuart Restoration. For example, Vincent C Allred has written:

\begin{quote}
The above are all the reported English cases on the subject. They are conflicting and even where the privilege is squarely denied there are indications of mental disquietude on the part of the judge. Professor Wigmore sums up as follows: [after which follows the Wigmore quote above and then the Allred conclusion] ... but the privilege cannot be said to have been recognized as a rule of the common law in England.\textsuperscript{6}
\end{quote}

Michael James Callahan references only Wigmore’s “unequivocal assertion ... that the privilege was unknown at common law”,\textsuperscript{7} and though Jacob Yellin discusses the cases Wigmore cites, he only uses the quotations that Wigmore used in his footnotes without any apparent reconsideration of the facts of those cases.\textsuperscript{8} Sister Simone Campbell does not cite Wigmore for her proposition that “[a]s state interests became dominant, the

\begin{itemize}
\item \textsuperscript{5} 1\textsuperscript{st} edition 1904; 2\textsuperscript{nd} edition 1923; 3\textsuperscript{rd} edition 1940; McNaughton Revision in 1961, with a most recent 1999 supplement current as at the time of this writing.
\item \textsuperscript{6} Allred, VC, “The Confessor in Court” (1953) 13 The Jurist 2, 7.
\item \textsuperscript{7} Callahan, MC, “Historical Inquiry into Priest-Penitent Privilege” (1976) 26 The Jurist 328, 329.
\item \textsuperscript{8} Yellin, J, “The History and Current Status of the Clergy-Penitent Privilege” (1983) 23 Santa Clara LR 95, 101. Medina uses an identical phrase – “virtually unanimous opinion” – (the writer suspects this means Wigmore) that the privilege ceased to exist after the Reformation (Yellin, idem, citing Medina, JH, “Evidence: ‘Is there a time to keep silence?’ – The priest-penitent privilege in Oklahoma” (1974) 27 Oklahoma LR 256). Valentine A Toth, however, cites Peake’s 1801 “A Compendium of the Law of Evidence” as authority for her statement that “it was clearly denied that such privilege ever existed ... in the 18\textsuperscript{th} and early in the 19\textsuperscript{th} century” (“The Clergyman: his privileges and liabilities” (1960) 9 Clev-Mar LR 323, 330). Peake’s interpretation stemming primarily from his report of \textit{R v Sparkes} ((1790) unreported) was discussed and dismissed in chapter one, pp 16-19.
\end{itemize}
[religious confession] privilege was abandoned by the courts,
but she does cite another Allred article to the same effect as that quoted above.

Edward A Hogan apparently gave the subject of the extinction of the privilege some independent thought. He considered that since Blackstone’s “only reference to privilege in the law of evidence [was] given to that arising out of the relationship of attorney and client” citing Wilson v Rastall, religious confession privilege had been extinguished by the time Blackstone’s commentaries were published in 1783. Though it is unclear whether Anonymous in 1693 was one of the “two decisive rulings” Wigmore found against religious confession privilege after the Restoration, since he leaves no other indication for his choice of the Restoration as the time of the demise, it appears that Anonymous represented confirmation to Wigmore that religious confession privilege had been extinguished by the end of the seventeenth century.

Perhaps because of the lack of an obvious reason for Wigmore’s choice of ‘the Restoration’ as the date by which religious confession privilege had been extinguished

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9 Campbell, S, “Catholic sisters, irregularly ordained women and the clergy-penitent privilege” (1976) 9 UC Davis LR 523, 525.


11 Hogan, EA, Jr, “A modern problem on the privilege of the confessional” (1951) 6 Loyola LR 1.

12 Hogan, op cit, p 12.

13 Wilson v Rastall (1792) LTR 753; 100 ER 1283.


15 Anonymous (1693) Skin 404; 90 ER 179.

16 Wigmore, McNaughton revision, op cit, Vol 8, p 869.
from the common law, Tiemann and Bush,\textsuperscript{17} have gone to some trouble to understand the assertion and to try and explain it. After a brief survey of the English common law before the Reformation\textsuperscript{18} which they affirm that the United States inherited, they note that the Anglican Church moved from compulsory confession to voluntary confession. Though the “absolute injunctions to secrecy”\textsuperscript{19} in Roman Catholic canon law were removed from the 1603 Anglican canons, Tiemann and Bush state that the seal of confession was still inviolable, except in cases of treason (they accept Coke’s exception\textsuperscript{20}) “whether ... made to a Roman Catholic priest or to an Anglican one.”\textsuperscript{21} They then ponder the reasons that can be advanced to explain how “[t]he privileges of the confessional were withdrawn from the English clergy sometime during the seventeenth century”\textsuperscript{22} as Wigmore stated. They speculate that it was because of “the banning of the prayer book of the Church of England”,\textsuperscript{23} but they confirm that “[n]o writer seems clear about the exact time the privilege was withdrawn, nor why”\textsuperscript{24} and that there is an absence of any clear and compelling evidence that lawyers would normally cite to prove a change in an established common law rule. They note with Hogan above, guided by Wigmore again, that Blackstone’s “monumental work on the common law about the time

\begin{footnotes}
\footnotetext[18]{Ibid, pp 39-48.}
\footnotetext[19]{Ibid, p 53.}
\footnotetext[20]{For detailed discussion of Coke’s treason exception to religious confession privilege, see the discussion in chapter two, pp 66-74.}
\footnotetext[21]{Tiemann and Bush, op cit, p 52.}
\footnotetext[22]{Ibid, p 53.}
\footnotetext[24]{Idem.}
\end{footnotes}
of the American Revolution, ignores completely the privilege of the confessional”, but suggest that this omission proves nothing since “[n]o writer seems clear about the exact time the privilege was withdrawn, nor why.” They think it most likely that “the withdrawal occurred in January, 1645, with the abolition by Parliament of the Anglican Prayer Book”, since the replacement “Directory for Worship ... produced by the Westminster Assembly contained no provisions for private confession and absolution”, since “[t]he Puritans had little patience with former Anglican ordinances”. But they point out that this reasoning cannot have been Wigmore’s, since he does not suggest the privilege was ended until after Charles II’s return. They then conjecture that Wigmore’s unstated reasoning may have been that when King Charles II was restored, he enacted “severe repressive measures ... against the Puritan ministry”. In such context “[t]he withdrawal of the seal would have been one more act of persecution, aimed at preventing the Puritan pastors from holding back secrets before royal tribunals”. But Tiemann and Bush also find this reasoning unconvincing since “the Puritans did not practice confession as such”. Though they do not say that they end their search stumped or mystified as to why so respected an evidence law authority as Wigmore should leave his conclusion essentially unjustified, they concede that result when they abandon his post-

26 Idem.
27 Idem, however they do not answer the obvious question of where religious confession privilege then stood once the Prayer Book was reinstated, as it was (Bursell, RDH, “The seal of the confessional” (1990), Ecclesiastical LJ 1 (7) (1990) 84, p 89).
28 Ibid, p 53.
29 Idem.
30 Idem.
31 Idem.
32 Ibid, pp 53-54.
Charles II Restoration date for "[t]he withdrawal of the seal"\textsuperscript{33} and return to their own thought that it must have happened during “Cromwell’s toleration”.\textsuperscript{34}

Wright and Graham\textsuperscript{35} were more direct in their doubt of Wigmore’s conclusion when they wrote that “[c]ourts and writers regularly assert that there was no penitent’s privilege at common law. The authority cited in support of this proposition is seldom impressive, usually consisting of one or two judicial opinions or a citation to Wigmore.”\textsuperscript{36} After their own review of the historical common law, Wright and Graham conclude that Wigmore’s “statements of the impact of the authorities he cites”\textsuperscript{37} against a religious confession privilege after the Restoration are “exaggerated”.\textsuperscript{38}

Though the existence of a religious confession privilege at English common law may never have been “solemnly decided”,\textsuperscript{39} it is not correct to see Holt CJ’s passing reference to a person not being entitled to legal professional privilege in 1693\textsuperscript{40} as extinguishing religious confession privilege which had been a part of English custom for

\begin{itemize}
\item \textsuperscript{33} Ibid, p 53.
\item \textsuperscript{34} Ibid, p 54.
\item \textsuperscript{36} Wright and Graham, op cit, Vol 26, p 29.
\item \textsuperscript{37} Ibid, p 41.
\item \textsuperscript{38} Idem.
\item \textsuperscript{40} Anonymous (1693) Skin 404; 90 ER 179.
\end{itemize}
centuries. Though the Commissioners in *Garnet’s case*\(^41\) may not have allowed Garnet’s attempted religious confession privilege defence, their denial that he had received a confession and Coke’s belief that such an argument of religious confession privilege would have been defeated by “the treason exception”, confirm that the privilege outlasted the Reformation by more than sixty years. The Wigmore conclusion that religious confession privilege did not survive the seventeenth century is also discountenanced by the marked reluctance of many judges to compel priests to testify into the eighteenth and nineteenth centuries. It is also appropriately observed that the line of authority in favour of a discretionary confidential religious communications privilege at common law discussed in chapter five, was well established by the time Wigmore wrote his first edition – and his own four canons\(^42\) have enlightened that line of development subsequently.\(^43\)

Before I pass to the argument that anti-Catholic prejudice extinguished religious confession privilege from English common law, one further historical theory as to why religious confession privilege did not survive the eighteenth century is appropriately discussed here since it too has been attributed to Wigmore. That theory is that in the seventeenth century, the philosophical rationale for all privileges underwent a marked changed such that any enduring privilege was thereafter necessarily premised in public interest rather than in a duty to keep confidences. The logic behind this theory was set out by Wilson J in the High Court of Australia in 1983 when that court was asked to

\(^41\) *Garnet’s case* (1606) 2 Howell’s State Trials 217.

\(^42\) Wigmore, JH, McNaughton revision, op cit, Vol 8, p 527. They are set out in full in chapter five, note 130.

\(^43\) Gavan Duffy J in Ireland in *Cook v Carroll* [1945] Ir. Rep. 515, found Wigmore’s canons helpful in recognising a religious communications class privilege in Ireland and the Supreme Court of Canada found them similarly useful in establishing a discretionary ‘case-by-case’ privilege in Canada in *R v Gruenke* (1991) 3 SCR 263.
consider whether documents kept by a solicitor in his office were appropriately seized by Australian Federal Police Officers executing a search warrant. He said:

But confidentiality alone cannot supply the reason for ... [legal professional] privilege. Originally it may have done so, in common with the protection which the law at that time afforded to other confidential relationships. In the sixteenth and seventeenth centuries the privilege was based in the duty of the solicitor to respect professional confidences. It was a matter of honour and consequently the privilege belonged to him rather than to the client: Wigmore on Evidence, McNaughton rev. (1961) vol. 8, par. 2290. However, in the eighteenth century the law moved decisively away from this approach, with the Duchess of Kingston’s Case (1776) 20 State Tr 355 providing the turning point. The public interest, not merely the protection of confidentiality, became the reason for the rule. Thereafter, the only profession to have the privilege of non-disclosure was the legal profession. The historical evolution of the privilege is described by Lord Simon of Glaisdale in D v National Society for the Prevention of Cruelty to Children (1978) AC 171, at pp 237 – 239.44

Though the Duchess of Kingston’s case has certainly been quoted as authority for Wilson J’s proposition in the text writers,45 a judgement against any evidential privilege for a medical practitioner with no mention of religious confession privilege or its discrete history, cannot extinguish religious confession privilege from the common law. It is noteworthy that neither Wilson J nor Lord Simon cited any other authority for the

44 Baker v Campbell (1983) 153 CLR 52, 94.

45 See discussion in chapter one, pp 18-19.
proposition that legal professional privilege is the only evidential privilege that survived the eighteenth century.

Did anti-Catholic prejudice extinguish religious confession privilege?

Sir James Stephen QC\textsuperscript{46} surfaced this theory in the 1876 original edition of his *Digest of Evidence*.\textsuperscript{47} Though I have cited part of the following quote previously to identify when the law of evidence evolved\textsuperscript{48}, it also provides a clear indication of the influence that anti-Catholic prejudice had upon the development of law during the same period. He wrote:

I think the modern law of Evidence is not so old as the Reformation, but has grown up by the practice of the courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favour of auricular confessions to Roman Catholic priests were not likely to be made. 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 stated so as not to include them.\textsuperscript{49}

\begin{footnotesize}
\begin{enumerate}
\item Sir James Stephen served as a Criminal Court Judge from 1879 to 1891 and was made a Baronet in 1891 http://www.infoplease.com/ce6/people/AO846659.html, (last visited 30 July 2003).
\item The language in all subsequent editions, including the 12th in 1948, is unchanged.
\item See chapter four, p 130.
\end{enumerate}
\end{footnotesize}
Despite the fact that he was a Roman Catholic apologist, Richard Nolan thought that the privilege which undoubtedly existed at the time of the Reformation, was probably extinguished during the Catholic persecution which followed for centuries, though he points to no authoritative date or event which signalled its demise.\(^{50}\) Wright and Graham contribute:

By the time Catholics in England had regained their civil rights and could claim the privilege, English law had already set its face against all privileges other than attorney-client privilege.\(^{51}\)

However, they qualify that apparent support for the idea that religious persecution contributed to the supposed extinction of the privilege with their acknowledgement that the clerics of the established Church ... were not interested in embarrassing the courts with divisive demands for a privilege when they could count on the religious sympathies of the judges to protect their secrets without the existence of a formal privilege.\(^{52}\)

Such veiled reference to the evolution of a discretionary religious communications privilege\(^{53}\) is hardly conclusive that religious confession privilege had been extinguished.

\(^{50}\) Nolan, RS, "The law of the seal of confession" (1913) 13 Catholic Encyclopedia 649, 653.


\(^{52}\) Idem.

\(^{53}\) Discussed in chapter five, supra.
But there is considerably more opinion that points up the unworthiness of the notion that pure historic prejudice in the absence of any formal legal decision, can extinguish a privilege. That such opinion pre-dates twentieth century acceptance of non-discrimination norms is the more impressive. Best⁵⁴ was the first who so wrote and he responded to the idea that Sir Michael Smith, the Irish Master of the Rolls, had extinguished religious confession privilege by his 1801 decision in Butler v Moore,⁵⁵ as follows:

How far that form of religious belief being disfavoured by the law at the period, affected those decisions, it is not easy to say, but [it] leave[s] the general question untouched. [italics original].⁵⁶

Badeley’s contemporary pamphlet⁵⁷ which responded to the public debate surrounding the case of Constance Kent noted in chapter four,⁵⁸ also referenced the effect that anti-Catholic prejudice had had upon the development of the common law concerning religious confession privilege. But he considered that error to have been corrected by parliamentary legislation passed between 1791 and the time of his writing in 1865.⁵⁹ He concludes:

⁵⁴ Best, WM, A Treatise on the Principles of Evidence, London, S Sweet, 1849. See also brief reference to this opinion of Best in chapter four at note 104 and in the supporting text.
⁵⁵ Butler v Moore (1804-1806) 2 Sch & Lef 249.
⁵⁶ Best, WM, op cit, pp 459-460.
⁵⁸ Chapter four, pp 171-175.
⁵⁹ Chapter four, note 190.
The religion is restored, not indeed as the religion of the State, but as one
sanctioned and protected by law. The Catholic therefore is reinstated in his right
to the perfect enjoyment of all the ordinances of his creed, and of those privileges
which are necessary to the performance of every one of his religious duties. If he
is not, he has not that benefit which the legislature intended to give him.\(^{60}\)

Though Badeley says that the “right of Catholics at the present day to have their
confessions respected in courts of justice rests upon a different ground [than for
Anglicans],”\(^{61}\) he says that even the Catholic privilege has a clear origin in both common
and ecclesiastical law.

Finlason’s apologetic report of Hill J’s decision in *R v Hay*\(^{62}\) disagrees with Badeley’s
non-sacramental interpretation of Anglican confession, but concludes that both religions
still benefit by an unrevoked privilege with unequivocal common law origins. For
Badeley in 1865, the Anglican privilege is even stronger than the common law privilege
which favours confessional privilege generally, because the practices of the state
established church (including secret confession) have force as general law.

Mayor Clinton’s decision in *The People v Phillips*\(^{63}\) expresses a very critical view of the
English common law still applicable in North America in the early nineteenth century.

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\(^{60}\) Badeley, op cit, p 32. Badeley’s reference to the legislative restoration of the Catholic religion to a position
of sanction and protection is an implicit reference to that then well-known and contemporary series of
enactments which relaxed the law against non-conformist religions generally, and Roman Catholicism in
particular. See specifically *The Roman Catholic Relief Acts of 1791* (31 Geo. 3, c 32) and 1829 (10 Geo. 4,
c 7).

\(^{61}\) Badeley, op cit, p 32.

\(^{62}\) *R v Hay* (1860) 2 Foster & Finlason 4; 175 ER 933.

\(^{63}\) *The People v Phillips* (1813) NY Ct. Gen. Sess., reprinted in “Privileged Communications to Clergymen”,
*The Catholic Lawyer* 1 (1955) 198.
Though he ultimately decided the case on constitutional grounds inapplicable in the English context, his reasoning is informative, particularly since it concurs in the conclusion to which Badeley and Finlason both came fifty years later. He began with reference to the decision in *Butler v Moore*\(^{64}\) in Ireland:

> With those who have turned their attention to the history of Ireland, the decisions of Irish courts, respecting Roman Catholics, can have little or no weight.

That unfortunate country has been divided into two great parties, the oppressors and the oppressed. The Catholic has been disenfranchised of his civil rights, deprived of his inheritance, and excluded from the common rights of man; statute has been passed upon statute, and adjudication piled upon adjudication in prejudice of his religious freedom. The benign spirit of toleration, and the maxims of enlightened policy, have recently ameliorated his condition, and will undoubtedly, in process of time, place him on the same footing with his Protestant brethren; but until he stands upon the broad pedestal of equal rights, emancipated from the most unjust thraldom, we cannot but look with a jealous eye upon all decisions which fetter or rivet his chains.\(^{65}\)

Since the decision of Buller J in *R v Sparkes*\(^{66}\) had been cited to him as an authority against the existence of religious confession privilege, and since Mayor Clinton had set his mind to affirm the existence of such privilege he dispatched Buller J’s reasoning

\(^{64}\) *Butler v Moore* (1804-1806) 2 Sch & Lef 249.

\(^{65}\) *The People v Phillips* (1813), as reported in *The Catholic Lawyer* 1 (1955) 198, 205-206.

\(^{66}\) *R v Sparkes* (1790), unreported but referred to in *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96.
without any hesitation at all. He observed that there was no official report of the case and such anecdotal evidence as was available about its finding came from the interested counsel of one of the parties in the matter. He said that the reasoning was unconvincing because it was the hurried decision of a single judge on circuit without research opportunity and he said that “[i]t [was] virtually overturned by Lord Kenyon, who certainly censure[d] it with as much explicitness as one Judge can impeach the decision of his colleague, without departing from judicial decorum.” And for good measure he added that it was just plain wrong on moral grounds. But speaking from an American context where he saw religious confession as part of that freedom of religious practice which was protected by the First Amendment to the Constitution, he also distinguished Buller J’s decision from that which confronted him in Phillips with the observation that the Protestant clergyman who received the confession in Sparkes was not “exposed to ecclesiastical degradation and universal obloquy” if he revealed the relevant confidential communication.

Though Mayor Clinton’s language is harsh and intemperate and has no precedential authority in the British Commonwealth, it is prescient of twentieth century opinion in the English common law world enlightened since by international human rights instruments and constitutional principle. Mayor Clinton’s sentiments also resonate with the more circumspect comments made by Gavan Duffy J in Ireland in 1945 in the light of the Irish

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67 The People v Phillips, as reported in “Privileged Communications to Clergymen”, The Catholic Lawyer 1 (1955) 198, 204.
68 Idem.
69 Idem.
70 Idem.
71 Idem.
Constitution.\textsuperscript{72} It is memorable that Gavan Duffy J also observed that “it would be intolerable that the common law, as expounded after the Reformation in a Protestant land, should be taken to bind a nation which persistently repudiated the Reformation as heresy”,\textsuperscript{73} since that common law resulted from “the regrettable preconceptions of English Judges”.\textsuperscript{74}

Since even that anti-Catholic prejudice which did find its way into common law has been expunged by statute and discredited by objective doubt, it is inaccurate to state that religious confession privilege in English common law was extinguished by more than two hundred years of official persecution of the Roman Catholic faith.

\textbf{Does the advent of statutory religious confession privilege prove that it had been extinguished at common law?}

This argument was most memorably expressed by Lamer CJ in \textit{R v Gruenke}\textsuperscript{75} when he gave the majority judgement of that court in 1991.\textsuperscript{76} He said that he could not “agree with the appellant that the existence of a limited statutory religious privilege in some jurisdictions indicates that a common law privilege exists. If anything, the fact that there is a statutory privilege in some jurisdictions indicates that the common law did not protect religious communications – thus necessitating the statutory protection.”\textsuperscript{77} It is not clear from the rest of the judgement, what arguments counsel for the appellant put to the court.

\begin{itemize}
\item \textsuperscript{72} \textit{Cook v Carroll} [1945] Ir. Rep. 515.
\item \textsuperscript{73} \textit{Cook v Carroll} [1945] Ir. Rep. 515, 519.
\item \textsuperscript{74} \textit{Cook v Carroll} [1945] Ir. Rep. 515, 520.
\item \textsuperscript{75} \textit{R v Gruenke} [1991] 3 SCR 263.
\item \textsuperscript{76} Discussed supra in chapter five, pp 210-217.
\item \textsuperscript{77} \textit{R v Gruenke} [1991] 3 SCR 263, 288.
\end{itemize}
In support of the submission that the existence of a limited statutory religious privilege in some jurisdictions indicated the existence of a common law privilege. Given that Adele Gruenke’s communication was not a formal religious confession, it is unlikely that her counsel sought to establish the existence of a narrow religious confession privilege in the extant common law, so that the Supreme Court of Canada did not have to consider that.

In a practical sense, the same question must be said to have faced every Parliament that has enacted a statutory religious confession privilege – including all fifty United States,\textsuperscript{78} the two Canadian jurisdictions acknowledged by Lamer CJ in \textit{R v Gruenke}, Victoria,\textsuperscript{79} Tasmania,\textsuperscript{80} the Northern Territory,\textsuperscript{81} New South Wales,\textsuperscript{82} and the Commonwealth of Australia\textsuperscript{83} and New Zealand.\textsuperscript{84} The history of the origins of those statutes and their subsequent development manifest a variety of moving causes. Those include in New York State in 1828, an apparent egalitarian concern in the then fledgling republican democracy, to spell out that First Amendment Freedom of Religion included religious confession privilege as a matter of practice,\textsuperscript{85} in New South Wales in 1989, equivocal

\textsuperscript{78} But not the US federal jurisdiction where a common law religious confession privilege has been found to exist (\textit{Mullen v US} (1959) 263 F 2d 275). See also chapter five, note 1, for details of the statutes applicable in US State jurisdictions.

\textsuperscript{79} The \textit{Evidence Act 1958}, s 28(1) (No 6246 of 1958). The first Victorian religious confession privilege was enacted in 1890 (\textit{Evidence Act 1890}) (54 Vict No 1088 c 55).

\textsuperscript{80} The \textit{Evidence Act 1910}, s 96 (1 George V, No 20) was the first Tasmanian provision though it was superseded in 2001 when Tasmania adopted the Uniform Commonwealth \textit{Evidence Act} (76/2001).

\textsuperscript{81} The \textit{Evidence Ordinances 1939}, s 12(1).

\textsuperscript{82} The first religious confession privilege provision in statute in New South Wales was the \textit{Evidence (Religious Confessions) Amendment Act 1989} which inserted section 10(6) into the New South Wales \textit{Evidence Act 1898}. That provision was superseded by the \textit{Evidence Act 1995}, s 127 (No 25 of 1995).

\textsuperscript{83} The \textit{Evidence Act 1995}, s 127.

\textsuperscript{84} The \textit{Evidence Amendment Act 1980}, s 31. The first New Zealand religious confession privilege was enacted in the \textit{Evidence Further Amendment Act 1885}, s 7 (49 Vict No 15).

\textsuperscript{85} Rev. Stat. of N.Y. (1828), Pt. 3. c.7, tit. 3 §72, though note that the federal constitution was not binding upon the states until perhaps 1940 (see chapter seven, note 202). Note also that Reese traces the Delaware (1961) statute to a similar dissatisfaction with the treatment of religious confessions at common
desires both to correct the misapprehension of the judge in \( R \text{ v} \ Young^{86} \) that there was no common law religious confession privilege and a desire to create one if it did not exist,\(^87\) and in many United States jurisdictions, legislative efforts to order seemingly incoherent judicial applications of both common law and statutory privileges in the face of voluminous academic suggestions toward improvement.\(^88\)

Such a variety of moving causes for legislation manifest the diverse influences which press upon modern legislatures. Nor does legislative treatment in antiquity lead to the conclusion that there was no common law privilege. As was explained in chapter two, statutes were used by the King as a judge to answer petitions and clarify the common

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\(^{86}\) An unreported case which was celebrated in the NSW Press because Father Mark McGuigan a Catholic priest in Lithgow, refused to tell whether or not he had heard a confession from Pamela Young, who was charged with murdering her husband on New Years Eve in 1988. The Daily Mirror reported that Ken Horler QC had opined that the Priest should be charged with contempt but that Attorney-General John Dowd had stepped in to prevent such a charge being laid (Daily Mirror (NSW) 18 August 1988). This case is a different case than \( R \text{ v} \ Young \) (1999) 46 NSWLR 681 cited elsewhere in this thesis and which dealt with that defendant’s challenge to sexual assault communications privilege asserted by various counsellors to the complainant in a rape case.

\(^{87}\) \( R \text{ v} \ Young \) was only reported in Sydney newspapers (Daily Mirror (NSW) 17 August 1988; The Sydney Morning Herald, 3 April 1989). The reasoning of the NSW legislature is revealed in the Hansard debates that followed those newspaper reports and resulted in the passage of the \( \text{Evidence Amendment (Religious Confessions) Act} \) of 1989 (Parliamentary Debates (NSW) Legislative Council, 21 November 1989, pp 12829-12835).

law. The Statute Articuli Cleri in 1315, which Sir Edward Coke cited in his Second Part of the Institutes as an authority for common law religious confession privilege with a treason exception, was “an attempt to delimit accurately the sphere of the lay and spiritual jurisdictions” as the King responded to petitions against alleged clerical abuse. While modern legislative treatment of a subject can still modify the pre-existent common law, many statutes have been passed in many jurisdictions to codify the common law in a simple, coherent and orderly way. Hence, though it was reasonable for Lamer CJ in Gruenke to rebut the applicant’s assertion that the existence of a religious confession privilege statute proved the existence of such a privilege in common law by pointing out the familiar modern legislative use of statutes to overrule judicial lawmaking, neither view of the relationship of common law and statute is complete even in the twenty-first century. In fact, the question of whether there was or is a common law religious confession privilege, or a confidential religious communications privilege, stands independent of any statute on the subject unless the statute was passed to expressly abrogate or extinguish such privilege.

It has been one purpose of this thesis to address the question peripherally debated by Lamer CJ and counsel for the appellant in R v Gruenke – “whether there is a legal common law privilege for religious communications”. Lamer CJ’s summary was that

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89 Supra, chapter two, pp 53-58.
90 9 Edward II. St. 1.
94 Ibid, p 287.
the “conflicting interpretations of pre-Reformation history” urged by the parties to that appeal had been “inconclusive”, even though he was inclined to accept that neither the English nor the Canadian courts had been inclined to compel “members of the clergy to disclose confidential religious communications ... as a matter of practice”. In the end, the Supreme Court of Canada saw the issue as a matter of policy and decided the matter by finding a “case-by-case” discretionary judicial discretion to be exercised as the weighed factual considerations arising dictated.

Since neither the Manitoba nor Canadian legislatures have moved to overrule, abrogate or codify the Supreme Court of Canada’s decision in *R v Gruenke*, it can be stated that there is common law affirming a species of confidential religious communications privilege in that country. This even though *Gruenke* may be interpreted to affirm rather more narrowly a judicial discretion to exclude evidence on grounds of public policy on a case-by-case basis. It is thus not accurate to say that the advent of a religious confession privilege in statute law proves either that such a privilege did not exist at common law or that the statute was necessary to redeem it.

**Does the ‘non-establishment’ of a State Church extinguish common law religious confession privilege?**

The simple answer to this question in Australia is that when the Commonwealth was established in 1901, the foundational decision not to establish any state church as had always existed in England, did not simultaneously extinguish freedom of religious

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95 Idem.
96 Idem.
97 Ibid, p 288.
practice. For the same constitutional provision which forbade the establishment of a state church also affirmed “free exercise of any religion”. The Constitution reads:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

There has been no Australian case that addresses the question of whether the practice of religious confession or confidential communication for religious purposes is an example of free religious exercise protected by this constitutional provision. However, it has been stated that a law that was expressly directed at proscribing an otherwise lawful religious practice, would breach this constitutional provision. It is also evident from even the limited Australian jurisprudence on section 116, that the purpose of legislation which has the effect of proscribing a religious practice will be a valid consideration when courts decide if a law (or even an administrative decision) breaches the constitutional prohibition against Commonwealth interference in the free exercise of religion.

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98 The Australian Constitution, 1901, section 116.
99 Idem.
100 Per Pincus J in Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs (1986) 11 FCR 543, 577-578, though note that his decision was overturned by the Full Federal Court on appeal who considered that the Minister had not intended to prohibit the free exercise of the practice of Islam when he had deported an Imam.
101 Note that it was an administrative decision that was in contest in in Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs (1986) 11 FCR 543 and in the appeal (Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association (1987) 17 FCR 373).
102 In Adelaide Company of Jehovah’s Witnesses Incorporated v Commonwealth (1943) 67 CLR 116 Latham CJ considered the statement that “civil government … can deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion” (p 124), and decided that is was open to the court “to determine whether a particular law is an undue infringement of religious freedom” (p 131) though he and Starke J decided that section 116 did not protect action subversive of social order (per Latham CJ at p 122 and per Starke J at p 155). Latham CJ also said that the use of the word “for”
Perhaps the advent of a federal religious confession privilege statute in Australia in 1995\textsuperscript{103} will serve to bulwark religious confession privilege in the future, since any statutory measure to abolish religious confession privilege after such express recognition, would face a stronger constitutional challenge than would be possible if religious confession privilege was deemed ambiguous at common law. It is also unclear whether a statute passed to privilege religious confession is an unconstitutional establishment of religion,\textsuperscript{104} though that seems unlikely since on the few occasions when the High Court has considered the meaning of the establishment clause, it has indicated that the clause only means that the Commonwealth cannot legislate to create a state church in Australia.\textsuperscript{105}

Though the Australian constitutional provision does not state that religious confession privilege is an example of protected religious exercise, and though there is no reported Australian judicial decision on point, the Supreme Court of Canada addressed a similar in section 116 “shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character” (at para 10). More recently in Kruger v Commonwealth (1997) 190 CLR 1, the High Court variously affirmed that “[t]he purpose of the law may be taken into account in determining whether it infringes the free exercise clause” (Moens GA & Trone J, Lumb and Moens’ The Constitution of the Commonwealth of Australia, 6\textsuperscript{th} ed, Butterworths, Australia 2001, para 803, p 376) though Gaudron J made the even stronger suggestion that “[t]he purpose of the law is the sole criterion of validity” (Moens and Trone, idem).

\textsuperscript{103} Commonwealth Evidence Act 1995, s 127.

\textsuperscript{104} Note that this argument by Jane E Mayes in the United States, has not gained any apparent traction (“Striking down the clergy-communicant privilege statutes: let free exercise of religion govern” (1986) 62 Indiana LJ 397).

\textsuperscript{105} See for example the judgements of Barwick CJ and Gibbs J in Attorney-General (Vic) : Ex rel Black v Commonwealth (1981) 146 CLR 559. Note also as explained by Moens and Trone “that the proclamation under the Marriage Act 1961 of religious denominations as recognised for celebrating marriage was not an ‘establishment’ of religion, especially having regard to the Commonwealth’s power over marriage” though an exercise of such Commonwealth power in favour of one particular denomination would likely offend the constitution (Moens GA & Trone J, Lumb and Moens’ The Constitution of the Commonwealth of Australia, 6\textsuperscript{th} ed, Butterworths, Australia 2001, para 799, p 373 discussing Nelson v Fish (1990) 21 FCR 430 per French J at p 434).
issue in \textit{Gruenke}.\textsuperscript{106} Counsel for the appellant had suggested that “the value of freedom of religion, embodied in s 2(a) [of the Canadian Charter of Rights and Freedoms] ... must necessarily be recognized in the form of a prima facie [confidential religious communications] privilege in order to give full effect to the Charter guarantee”.\textsuperscript{107} But Lamer CJ stated that:

\begin{quote}
The extent (if any) to which disclosure of communications will infringe on an individual’s freedom of religion, will depend on the particular circumstances involved, for example: the nature of the communication, the purpose for which it was made, the manner in which it was made, and the parties to the communication.\textsuperscript{108}
\end{quote}

However, Lamer CJ also adopted the following words of an earlier Supreme Court of Canada decision:

\begin{quote}
A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter.\textsuperscript{109}
\end{quote}

\textsuperscript{106} \textit{R v Gruenke} [1991] 3 SCR 263.

\textsuperscript{107} \textit{R v Gruenke} [1991] 3 SCR 263, 289.

\textsuperscript{108} Idem.

\textsuperscript{109} \textit{R v Big M Drug Mart} [1985] 1 SCR 295, 336.
He then observed “that the case-by-case analysis”\(^{110}\) of confidential religious communications called for under the Charter, “must begin with a ‘non-denominational’ approach”,\(^{111}\) with the informality of some confessional practices not operating as a bar to the exclusion of some confidential communications as evidence.\(^{112}\) Lamer CJ had earlier quoted the Ontario Court of Appeal in the *Church of Scientology No 6 case*,\(^{113}\) which had observed

> that the fundamental freedom of conscience and religion now enshrined in s 2(a) of the Charter embraces not only the freedom of religious thought and belief but also “the right to manifest religious belief by worship and practice or by teaching and dissemination”. This protection will no doubt strengthen the argument in favour of recognition of a priest-and-penitent privilege.\(^{114}\)

The Supreme Court of Canada’s statement that “a truly free society [is] one which can accommodate a wide variety of beliefs”\(^{115}\) is a characterisation of democratic religious tolerance that resonates with Australian constitutional values. That the court made this statement without relying upon section 15 of the Charter strongly suggests that a common law evidential privilege for confidential religious communications need not be inconsistent with secular state neutrality towards religion anywhere in the Anglo-American common law world. But could any residue of common law religious confession privilege extant in England and inherited by Australia before federation have been


\(^{111}\) Idem.

\(^{112}\) Idem.

\(^{113}\) *Re Church of Scientology and the Queen* (no 6) (1987), 31 CCC (3d) 449.


\(^{115}\) *R v Big M Drug Mart* [1985] 1 SCR 295, 336.
extinguished before the guarantee of free exercise of religion was enshrined in the Constitution?

A series of lectures given by Keith Mason in October 1989\textsuperscript{116} explained that there has always been separation between church and state in Australia despite the familiar pronouncements in the inherited common law that “the Christian religion is part of the law of the land”.\textsuperscript{117} However, though he explained why the idea that Australia had “an inherently Christian legal system”\textsuperscript{118} was essentially a “myth”,\textsuperscript{119} he confirmed in his fourth lecture that Australia did originally inherit England’s “establishment”\textsuperscript{120} of the Church of England.\textsuperscript{121} In the early colonial years, that establishment saw the church function “as an adjunct to the military establishment”,\textsuperscript{122} among other reasons “to ... keep alive amongst the bulk of the people such a sense of religion as will make them temperate and orderly, and domestic and contented”.\textsuperscript{123} But that establishment was gradually diluted by “the large numbers of non-Anglicans in the early colony”,\textsuperscript{124} many of whom “ministered more effectively to the convicts” and who “railed against the privileges of the Anglicans”.\textsuperscript{125} The dilution of establishment need not be traced in full, but began

\begin{flushleft}
\textsuperscript{116} Mason, K, Constancy and Change, Sydney, Federation Press, 1990. At the time he gave these lectures, Keith Mason was the New South Wales Solicitor-General. As of this writing (2006), he is President of the New South Wales Court of Appeal.

\textsuperscript{117} Mason, K, op cit, p 4, citing Williams’ case (1797) How St Tr 654 at 703 per Kenyon CJ.

\textsuperscript{118} Mason, K, op cit, chapter one, pp 1-30.

\textsuperscript{119} Idem.

\textsuperscript{120} Ibid, pp 93-101.

\textsuperscript{121} Idem. However, Mason notes that “[t]he Presbyterians were on firm ground when they reminded those in power that there were not one, but two established churches in Britain” (ibid, p 101).

\textsuperscript{122} Ibid, p 102.

\textsuperscript{123} Ibid, p 97, quoting William Wilberforce.

\textsuperscript{124} Ibid, p 101.

\textsuperscript{125} Idem.
\end{flushleft}
with the provision of state subsidies in connection with the church buildings of other denominations,\textsuperscript{126} and the provision of stipends for their ministers.\textsuperscript{127} It seems that the dilution of religious establishment in Australia was almost complete when judicial doubt was expressed about the validity of letters patent issued by the state to bishops\textsuperscript{128} and state aid for public worship was terminated in 1863,\textsuperscript{129} as was “all financial aid to Churches and Church schools by the latter part of the 19\textsuperscript{th} century”.\textsuperscript{130} But in answer to the question of whether any residual common law religious confession privilege inherited from England was extinguished during the period when establishment was diluted, it is noteworthy that there was no statute passed to specifically or impliedly abrogate religious confession privilege.

Ultimately, it was the debates surrounding the creation of an Australian Federal Constitution and the decision to adopt the American constitutional language to express the Australian separation of church and state\textsuperscript{131} that finalised the severance of church and state in Australia. While Australia’s greater secularism\textsuperscript{132} may explain the absence of the profound debates about the practical meaning of ‘the establishment clause’ that

\footnotesize
\textsuperscript{126} Ibid, p 103.
\textsuperscript{127} Idem.
\textsuperscript{128} Idem.
\textsuperscript{129} Idem.
\textsuperscript{130} Idem.
\textsuperscript{131} Ibid, pp 103-105.
\textsuperscript{132} “Religion in American Life: The 2004 Political Landscape”, Pew Research Center for the People & the Press, Survey Reports, \texttt{http://people-press.org/reports/print.php3?Page1D=757} (last visited 17 November 2003), where in 2003 87\% of Americans are said not to doubt the existence of God, versus 81\% in the late 1980s (inter alia) – statistics which are in marked contrast with the 1996 Australian census where 73.7\% of the population claimed a religious faith, more than 16\% expressly disclaimed such, and the balance either did not state or gave an unintelligible answer to the census question (1996 Census of Population and Housing, ABS Catalogue No. 20150, p 43).
has contributed volumes to American jurisprudence, so that Mason could comparatively call section 116 “something of a dead letter”, Australia’s commitment to a version of democracy that increasingly respects multicultural values suggests that Canadian Charter jurisprudence will be more indicative of Australia’s future direction when it comes to adjudicating freedom of religion. It is also relevant that Canada’s highest court has articulated a contemporary basis for the recognition of religious values including the secrecy of religious confidences at common law. Though the American states have all passed religious confession privilege statutes to ensure similar tolerance, the United States federal jurisdiction still recognises religious confession privilege at common law without the need for a statute in confirmation. This suggests that Major Clinton’s common law finding in 1813 of an English common law religious confession privilege bulwarked by constitutional freedom of religion might have endured without statutes had state legislatures not responded with legislation when

133 The writer has been unable to find a significant body of scholarship about the meaning and practical effects of s 116 of the Australian Constitution, whereas several new articles every week on the US First Amendment are brought to his attention by LSRN on the internet.

134 Mason, K, op cit, p 118.

135 Ibid, p 105.

136 For example, the majority decision in R v Gruenke [1991] 3 SCR 263 noted that while the “freedom of religion embodied in s. 2(a)” of the Charter did not necessitate the recognition of a prima facie class religious communications privilege (ibid, p 289), “both s. 2(a) and s. 27 [required] … that the case-by-case analysis must begin with a ‘non-denominational’ approach” (ibid, p 291).


139 Mullen v US (1959) 263 F.2d 275.

140 The People v Phillips, Court of Sessions, New York (1813), reported in Allred, VC, “Privileged Communications to Clergymen” (1955) 1 The Catholic Lawyer 198.

141 Idem.

142 The first religious privilege statute in the world (Revised Statutes of N.Y. (1828), Pt. 3. c.7.tit.3 §72) is said to have been a response to the decision in The People v Smith, 2 City Hall Recorder (Rogers) 77 (Richmond County Court 1817) (also reported in Allred, VC, op cit, p 209) because the privilege allowed to a
judges in search of all the evidence devalued the public interest in religious confidence
and doubted the existence of religious confession privilege at common law.

In any event, the High Court of Australia has repeatedly reaffirmed that clear statutory
words are necessary to extinguish a common law privilege,\(^\text{143}\) and particularly a privilege
that may have achieved status as a substantive common law, or even a human right.\(^\text{144}\)
That jurisprudence will be discussed in chapter seven.

The dicta of Sir George Jessel MR

What then of the argument that Sir George Jessel MR and others have merely
sociologically adapted the common law of England to “[t]he felt necessities of the time”
where religious confession privilege is concerned?\(^\text{145}\) Holmes was perhaps the most
memorable advocate of that interpretive theory when he wrote that “[i]t is revolting to
have no better reason for a rule of law than that it was so laid down in the time of Henry
VI.”\(^\text{146}\) He has also written:

\[\text{Catholic priest in }\text{Phillips (see note 140) was denied a Protestant minister in }\text{Smith (see Reese, S, “Confidential Communications to Clergy” (1963) 24 Ohio St LJ 55, 57). The Delaware Statute in 1961 is said to have been a response to a judicial denial of common law religious confession privilege (Reese, S, “Confidential Communications to Clergy” (1963) 24 Ohio St LJ 55) and Hansard reports in New South Wales confirm the statute in 1989 was a response to a well-publicised denial of religious confession privilege in }\text{R v Young (Daily Mirror (NSW) 17 August 1988; The Sydney Morning Herald, 3 April 1989 – as discussed in McNicol, SB, Law of Privilege, Australia, Law Book Co, 1992, p 330). The timing of the first New Zealand and Victorian religious confession privilege statutes (1885 and 1890 respectively) suggest that they may have been a response to Sir George Jessel MR’s obiter comments in }\text{Wheeler v LeMarchant (1881) 17 Ch D 675, though the writer has not found any evidence to confirm this connection.}\]

\(^\text{143}\) See, for example, Daniels Corporation v ACCC (2002) 192 ALR 561, paras 11, 43 and 132, confirming the decision in Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49.

\(^\text{144}\) Ibid, pp 583-584, paras 85-86, per Kirby J.


The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.\textsuperscript{147}

and that

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy.\textsuperscript{148}

While these words published by Holmes in the United States in 1881 read like an ample defence of Sir George Jessel MR’s \textit{Wheeler v LeMarchant}\textsuperscript{149} judgement across the Atlantic that same year, it must be observed that they tell only half the story. For while Sir George Jessel MR, a Jew,\textsuperscript{150} and Hill J in 1860 and a strong Ulster Protestant\textsuperscript{151} may

\begin{footnotes}
\item[148] Ibid, p 32.
\item[149] \textit{Wheeler v LeMarchant} (1881) 17 Ch D 675.
\item[150] The son of a Jewish diamond merchant, Sir George Jessel MR was never admitted to the peerage (Simpson, AWB, ed, \textit{Biographical Dictionary of the Common Law}, London, Butterworth, 1984, p 280). See also Nokes, GD, “Professional Privilege” (1950) 66 \textit{LQR} 88, 98 where he observes both that “no one would have suspected Sir George Jessel of a keen Christian bias” and that the uncertainty about the existence of
\end{footnotes}
have felt they captured majoritarian community sentiment when they made decisions which marginalised the Catholic religious practice of their day, there were many other judges who were and had been much more tolerantly inclined. And among those in favour of this tolerant privilege, Cockburn CJ in *R v Castro* (1874),\(^{152}\) Baron Alderson in *R v Griffin* (1853),\(^{153}\) Best CJ (later Lord Wynford) in *R v Radford* (1823)\(^ {154}\) and *Broad v Pitt* (1828),\(^ {155}\) Kenyon LCJ in *Du Barré v Livette* (1791),\(^ {156}\) and Coleridge LCJ writing to Gladstone in 1890,\(^ {157}\) rank very prominently indeed.

While any attempt to weigh or balance the differing judicial views on whether there was a religious confession privilege in the nineteenth century can only be an arbitrary exercise the commentators have preferred the views of Sir George Jessel MR apparently

religious confession privilege may have been the result of “a conflict of a different nature – a conflict between those unconscious prejudices of which the Bench can never be free”.


\(^{152}\) *R v Castro* (1874) 2 Charge of Chief Justice 648, where Chief Justice Cockburn indicated that if a priest refused to disclose confessional material he would not be compelled to speak.

\(^{153}\) *R v Griffin* (1853) 6 Cox Cr Cas 219, where Baron Alderson said that conversations between the accused and the workhouse chaplain “ought not to be given in evidence”. This arguably ratio decidendi decision was discussed in detail in chapter four, pp 169-170.

\(^{154}\) Unreported but referred to in *R v Gilham* (1828) 1 Moody 186; 168 ER 1235 where Chief Justice Best as he then was, prevented a clergyman apparently willing to testify, from giving evidence about a confession in his court. *R v Radford* was discussed in chapter four, pp 148-150, and mentioned again in chapter five, p 182.

\(^{155}\) *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528, where Chief Justice Best distinguished the decision supposedly against his *R v Radford* decision in *R v Gilham* with the observation that a priest may disclose confessional material if he chose, but that he would personally never compel such disclosure. The decision in *Broad v Pitt* was discussed in detail in chapter four, pp 148-150, and again in chapter five, p 182.

\(^{156}\) *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96, where Lord Kenyon said that he would have paused before he admitted the evidence allowed by his brother Justice Buller in *R v Sparkes*. These cases were discussed supra in chapter one, pp 14-16, and chapter four, p 147, and mentioned in chapter five, pp 181-182.

because they were more thoroughly articulated. But how convincing was and is his logic? Though the integrity of his belief that there neither was nor ever had been a religious confession privilege cannot be doubted, did his view authoritatively decide what the law was for the future regardless of the past? The answer to this question lies in part at least in the common law doctrine of precedent which has been succinctly expressed as follows:

Rationes decidendi of higher courts are binding on lower courts by virtue of the common law doctrine of precedent ... Where the reasons for a court’s decision are contained in multiple judgments, it may be that no clear ratio decidendi can be discerned. In such a case, lower courts are only bound to apply the outcome of the case when faced with a fact situation not reasonably distinguishable from the case and not the reasoning of any of the judges who constituted the majority.\textsuperscript{158}

Of obiter dictum, the same authors have written that “[j]udicial observations that do not form part of the reasoning of a case ... are not binding on lower courts nor subsequently on the court that makes them.”\textsuperscript{159} That this principle is elementary, ought not blind us to its application where the doctrine of religious confession privilege is concerned. Though Sir George Jessel MR’s dicta may have more precedential weight than those of the arguably lesser judges\textsuperscript{160} who had opined more casually in the opposite direction, yet the


\textsuperscript{159} Ibid, p 312.

\textsuperscript{160} The Chancery Act 1851, 14 & 15 Vict, Chap 83, set up two Lord Justices with the Master of the Rolls as the Court of Appeal in Chancery, to try and solve the bottlenecks which resulted when “appeals from subordinate equity judges were more than one Chancellor could despatch” (Plucknett, TFT, A Concise History of the Common Law, 5\textsuperscript{th} ed, Boston, Little Brown, 1956, p 210. See also Baker, JH, An Introduction to English Legal History, London, Butterworths, 1970, p 48). It is difficult to approximate the authority of
learned Master of the Rolls’ dicta remains as dicta and still manifests the following unresolved flaws. First, it cites no convincing authority.  
Secondly, his reasoning treats all evidentiary privilege as having a common genealogical origin when historically that is manifestly not the case.  
Thirdly, there is a conspicuous disregard of that religious tolerance which was born in the late eighteenth century, was legislated by various Acts of Parliament, and which was noticed by various other members of the judiciary.  
Though it is true that Sir George Jessel MR may have given expression to what his judicial colleagues had said in parliament in 1865 when they responded to press reports of the exclusion as evidence of Constance Kent’s confession to her clergyman at a depositions hearing, yet they were responding only to press reports and equally learned extra judicial opinion took the contrary view.

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judicial officers before and after the Judicature Acts since the Court of Appeal was a new creation. However it is clear that the rules of hierarchical precedent were more precise afterwards because the hierarchy of the courts themselves were more clearly defined. The ‘Judicature Acts’ are those two acts more fully named the Supreme Court of Judicature Act 1873 (36 & 37 Vic c 66) and the Supreme Court of Judicature Act 1875 (38 & 39 Vic c 77).

161 See chapter one, pp 25-35, and chapter four, pp 145-146.

162 For example, see chapter four, pp 136-140.


164 Supra, notes 152 - 157 and supporting text.

165 Discussed in detail in chapter four, pp 171-177. The case of R v Constance Kent (1865) was not reported because the defendant ultimately pled guilty to the murder charged but the case occasioned significant debate in the House of Lords and was the apparent stimulus behind the publication of Badeley’s pamphlet referenced supra, chapter four, pp 173-175 and in this chapter, pp 238-240.

166 Coleridge LCJ (1880-1894) had acted as counsel for Constance Kent and in his letter to Gladstone about religious confession privilege, expressed his personal belief in the existence of an enduring religious confession privilege at common law after the Reformation though it “had never been decided” and that Willes J would have upheld it, though he doubted that “the English Judges” would have upheld it in 1865 (Coleridge, EH, Life and Correspondence of John Duke Lord Coleridge Lord Chief Justice of England, London, William Heinemann, 1904, Vol 2, p 365).
But there are other arguments which suggest that reliance upon only Sir George Jessel MR’s obiter authority against religious confession privilege is questionable. Holmes’ suggestion that the “felt necessities of the time” and “the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed”, is a two-edged sword where the development of the common law relating to religious confession privilege is concerned. For though Sir George Jessel MR may well have nutshelled the conservative judicial opinion of his time, yet the common law has continued to develop and has accepted more fulsome notions of religious tolerance particularly where “free exercise of any religion” is entrenched in modern constitutional instruments. Indeed, the advent of the first religious confession privilege statutes in the British Commonwealth beginning very soon after the Jessel dicta may be sociologically interpreted as a reaction against Sir George Jessel MR’s conservatism.

The 1964 arguments of J Noel Lyon also militate against a favourable sociological interpretation of Sir George Jessel MR’s dicta. He observed that “[i]t is said by authoritative writers that statements made by a penitent to his priest during confession are not privileged at common law”, but questioned “whether any common law court

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166 The New Zealand Evidence Further Amendment Act 1885 (49 Vict. No. 15) c 7 was passed four years after Wheeler v LeMarchant was decided and the Victorian Evidence Act 1890 (54 Vict. No. 1088 c 55 five years later. The first religious privilege statute in the United States was passed in New York in 1828 (Revised Statutes of N.Y. (1828), Pt. 3. c.7.tit.3 §72), eleven years after The People v Smith, 2 City Hall Recorder (Rogers) 77 (Richmond County Court 1817) had denied a common law religious confession privilege affirmed four years earlier in The People v Phillips, Court of Session, New York (1813). Both of these early New York cases are reprinted in full in Vincent Allred’s article, “Privileged Communications to Clergymen” (1955) 1 The Catholic Lawyer 198.

167 Australian Constitution, section 116.

168 “Privileged Communications – Penitent and Priest” [1964-65] 7 Crim LQ 327. J Noel Lyon was then an Assistant Professor of Law at the University of British Columbia.

170 Idem.
ha[d] ever considered the best reason for granting such a privilege”. For Lyon, the admission into evidence of “confessions made to a priest would be so similar to admitting confessions made under duress to police that the idea should be expressly condemned by the common law.” He went on to observe that commentative characterisation of religious confession privilege as “a claim to protection for a confidential relationship” by analogy to legal professional privilege, misses the point of [legal professional privilege] ... which is not designed to please the legal profession, nor merely to benefit the client. It is rather a recognition of the fact that in a constitutional democracy under the rule of law, lawyers perform the central role in the process of projecting law into the daily life of the community. When legal process replaces self-help, the lawyer and his client must become one with respect to information which is necessary to bringing the client’s affairs within that legal process ... [and] to compel disclosure of information obtained for the purpose of properly bringing the client’s affairs under the law would be tantamount to compelling the client to give evidence against himself.

Lyon however says that the absence of any analogous or blanket privilege for other confidential professional relationships does not dispose of the priest-penitent question.

171 Idem.
172 Idem. Lyon’s analogy is reminiscent of the analogy to legal professional privilege used by Baron Alderson when he ruled against the admission of a confession to the workhouse chaplain in R v Griffin (1853) 6 Cox Cr Cas 219.
173 Idem.
175 Ibid, p 328.
If it did, he asks “[i]n dealing with a suspect who is a devout Catholic, why should the police bother bringing him in and working him over with questions? Just let him go to his priest and then subpoena the priest as a witness.” It is then that Lyon makes the point (which reiterates McNicol’s notice of state recoil at the church/state intersection) that the reason “this does not happen ... [is] because our society has sufficient built-in restraints [which mean] that any police force or prosecutor’s office that went that far would be courting disaster.” Lyon concludes that even though “common law judges may never be called upon to make this natural extension of the admissibility of confessions” because “[o]ther restraints ... keep the issue from arising in court”, the “legal writers should stop stating categorically that no [religious confession] privilege exists at all.”

It is also noteworthy that although Stone and Wells accepted Wigmore’s proposition that “practically all the decisive English authority is against” religious confession privilege, they preferred to cite *Normanshaw v Normanshaw* as their authority for that proposition rather than Sir George Jessel MR’s dictum in *Wheeler v LeMarchant*, which they set out in full very shortly before their reiteration of the Wigmore conclusion. That

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176 Idem.


178 Lyon, op cit, p 328.


180 Idem.

181 Idem.

182 Stone, J, *Evidence, Its History and Policies*, Revised by WAN Wells, Sydney, Butterworths, 1991, p 586. It will be remembered that Wigmore’s original statement was that “since the Restoration, and for almost two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a [religious confession] privilege” (Wigmore JH, *Evidence in Trials at Common Law*, Revised by John T McNaughton, 1981, Vol 8, p 869).

183 *Normanshaw v Normanshaw* (1893) 69 LT 468.
Normanshaw v Normanshaw is a doubtful authority for the non-existence of a religious confession privilege in modern common law, has already been demonstrated in chapters four and five.\(^\text{184}\)

**Conclusion to chapter six**

None of the theories canvassed in this chapter prove that religious confession privilege has been extinguished from the common law. A thorough legal analysis of all the historical evidence that can be mustered in support of the idea that religious confession privilege was extinguished from English common law sometime after the Reformation and before the end of the eighteenth century, leaves the argument wanting. There is nothing conclusive. If there was a privilege before the Reformation as this thesis demonstrates, then it survived the Reformation and has not been abrogated by statute or canon law passed since. Whether the historical ‘privilege’ existed as an immunity or a privilege, it arguably endures as a fundamental right because it is a necessary corollary of any meaningful free exercise of religion. Whether it does so exist and whether it can now only be extinguished by clear words or necessary implication in statute\(^\text{185}\) is a matter which will be discussed in chapter seven.

That religious confession privilege survived the Reformation is also compelling in disposing of the theory that the creation of Australia as a new nation without an established church, extinguished religious confession privilege. For even if the new nation’s constitution did not guarantee free exercise of any religion, Australia’s common law inheritance included religious confession privilege. It is also revolting to suggest that

\(^{184}\) Chapter four, pp 159-160, 162; chapter five, pp 184-187.

\(^{185}\) Daniels Corporation v ACCC (2002) 192 ALR 561, paras 11, 43 and 132.
pure religious prejudice could have extinguished the privilege without statutory
confirmation – a fact which enlightened and objective commentary in the nineteenth
century\textsuperscript{186} pointed up.

This leaves only the argument that religious confession privilege had clearly gone since
multiple legislatures have perceived a need to pass statutes to establish it. This chapter
has suggested that no two religious confession privilege statutes have ever had an
identical raison d’etre. While certainly some laws are passed to abrogate and completely
rewrite the common law, others seek to simplify by codification and other statutes still,
merely make adjustments at the edges. In any event, in context it is doubtful that Lamer
CJ in \textit{R v Gruenke}\textsuperscript{187} was seriously proposing the view that there was no religious
confession privilege at common law because some legislatures have passed laws to put
its existence beyond doubt. Rather, it is more likely that he was simply disagreeing with
Gruenke’s counsel’s strong contrary submission that statutory confirmation of religious
confession privilege proved that it did exist at common law.

Chapter seven will now discuss religious confession privilege in contemporary Australia.

the 1827 edition published by Hunt and Clarke, London), Volume IV, pp 586-592. See also Best, WM, \textit{A

\textsuperscript{187} \textit{R v Gruenke} (1991) 3 SCR 263, 288.
CHAPTER SEVEN

RELIGIOUS CONFESSION PRIVILEGE
AT COMMON LAW IN AUSTRALIA

Introduction

This thesis has identified what the common law is so far as religious confession privilege is concerned, without significant reference to case law in Australia. There are two reasons for that. Firstly, there is very little recorded judicial comment in Australia that treats the issue at all; and second, the advent of statutory religious confession privilege in Victoria, Tasmania, the Northern Territory, New South Wales and the Commonwealth has meant that courts in those jurisdictions have not needed to review the common law, since their statutory privileges were passed into law.

It is beyond the scope of this thesis to ascertain the “other” possible reasons for the dearth of religious confession privilege cases in Australia, though it is noted that those reasons certainly include the careful wish of the various arms of the state to avoid unnecessary conflict with the church¹ and the sacrosanctity with which Australian clergy

¹ McNicol, SB, Law of Privilege, Australia, The Law Book Co, 1992, p 330, where Suzanne McNicol recognises the New South Wales Police Minister’s statement accompanying the introduction of the Bill to create a statutory privilege in New South Wales in 1989, where he said the statutory privilege would realise “[t]he Government’s ... concern to minimise the possible areas of conflict” between church and state (Parliamentary Debates (N.S.W.), Legislative Council, 21 November 1989, p 12,805, per The Hon EP Pickering).
generally have treated confidences reposed in them.\textsuperscript{2} There have, however, been obiter dicta comments in three significant cases which bear upon the privilege which provide some insight into how an Australian court without a religious confession privilege statute, might treat a claim of religious confession privilege.

While Crisp J made reference to the existence of the privilege at common law in the Tasmanian Supreme Court in a case that concerned Tasmania’s statutory religious confession privilege,\textsuperscript{3} the references to religious confession privilege by Sir Owen Dixon J in \textit{McGuinness v Attorney-General (Vic)}\textsuperscript{4} in 1940; by three\textsuperscript{5} of the seven members of the High Court in \textit{Baker v Campbell}\textsuperscript{6} in 1983 and by Spigelman CJ in the New South Wales Court of Criminal Appeal in 1999\textsuperscript{7} are more likely predictive. However, the unanimous High Court decision in \textit{Daniels Corporation v ACCC}\textsuperscript{8} in 2002 affirming legal professional privilege as an important common law immunity\textsuperscript{9} which could not be

\textsuperscript{2} The Australian Law Reform Commission took notice of this apparent reason for a dearth of such cases when it said that “a law which enables a court to require members of the clergy to give evidence of confidential communications will be universally disobeyed by the clergy … It will be a law which will be totally unenforceable. Attempts to enforce it will simply result in incarceration of the clergy and thereby generate unnecessary friction between Church and State” (ALRC, Report No 38 (1987), Vol 1, para 212, p 120).

\textsuperscript{3} \textit{R v Lynch} [1954] Tas SR 47, where Crisp J said:

\begin{quote}
At common law I have no doubt [religious confession privilege] was confined to a ritual confession made according to the discipline of the particular faith in so far as a privilege existed at all. I do not wish to be taken as deciding that nothing other than a ritual confession is covered by the section. It may be that in our statute we have gone further … but here the confession was not made for any spiritual purpose.
\end{quote}

\textsuperscript{4} \textit{McGuinness v Attorney-General (Vic)} (1940) 63 CLR 73.

\textsuperscript{5} Gibbs CJ, Mason and Dawson JJ.

\textsuperscript{6} \textit{Baker v Campbell} (1983) 153 CLR 52.

\textsuperscript{7} \textit{R v Young} (1999) 46 NSWLR 681.

\textsuperscript{8} \textit{Daniels Corporation v ACCC} (2002) 192 ALR 561.

\textsuperscript{9} Ibid, paragraphs 11 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ), 44 (per McHugh J), 85 (per Kirby J) and 132 (per Callinan J).
abrogated without clear words or a necessary implication to that effect,\(^\text{10}\) includes reasoning both relevant and predictive of likely contemporary Australian judicial opinion were religious confession privilege to arise for decision in the nation’s highest court. This chapter will also review in detail, three ideas seeded by current judicial opinion, that seem likely to have significant influence on the argument that the High Court would have to consider in such a case. Those three ideas are firstly, that the High Court of Australia will consider international human rights obligations which Australia has assumed by virtue of its ratification of various human rights instruments including several which affirm freedom of religious belief and practice. Second, that the implication encouraged by Daniels that the familiar distinction between ‘immunity’ and ‘privilege’ is no longer hard and fast and that ‘immunity logic’ is therefore transferable into privilege contexts particularly where there are constitutional issues at stake. And finally, the notion that a consistent and preponderant message from evidence statutes in some Australian jurisdictions will exercise ‘gravitational pull’ on the common law in jurisdictions without similar statutory provisions – this despite the misinformed view that the High Court’s decision in *Esso Australia Resources v Federal Commissioner of Taxation*\(^\text{11}\) abolished that doctrine as it had begun to flourish in *Akins v Abigroup Ltd*\(^\text{12}\) and *Adelaide Steamship Co. Pty Ltd v Spalvins*.\(^\text{13}\)

Chapter seven concludes by suggesting that the High Court of Australia would likely affirm the existence of a discretionary religious communications privilege were an

\(^{10}\) Ibid, paragraphs 11 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ), 43 (per McHugh J), 88 (per Kirby J) and 132 (per Callinan J).

\(^{11}\) *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

\(^{12}\) *Akins v Abigroup Ltd* (1998) 43 NSWLR 539.

\(^{13}\) *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360.
appropriate case to raise the matter. But I also observe that lower and even intermediate level courts in Australian jurisdictions without religious confession privilege statutes remain unlikely to recognise either a religious confession privilege or a religious communications privilege at common law until the High Court has decreed upon the subject.

\textit{McGuinness v Attorney-General (Vic)}^{14}

In this 1940 case, a newspaper editor sought to justify his refusal to answer questions put to him by a Royal Commissioner. In rejecting his claim, Dixon J said:

\begin{quote}
The law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between a necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and State secrets, and by statute, physician and patient and priest and penitent, an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box. Claims
\end{quote}

\footnote{\textit{McGuinness v Attorney-General (Vic)} (1940) 63 CLR 73.}
have been made from time to time for the protection of confidences to trustees, agents, bankers, and clerks, amongst others, and they have all been rejected.\(^\text{15}\)

Dixon J’s observations about religious confession privilege are a little curious. Certainly the demands of his decision about a journalist’s claim to privilege merited no more attention to religious confession privilege than was given, but he raises more questions about religious confession privilege than he answers. For example, was he denying the existence of religious confession privilege in a jurisdiction without a religious confession privilege statute? Was he aware that some Australian jurisdictions had not then passed religious confession privilege statutes?\(^\text{16}\) Or was he suggesting that the public interest factors which might have been argued to justify a religious confession privilege at common law were not “paramount” enough – and hence the advent of statutes in the area? It is also possible that Dixon J foresaw the modern notion that statutes can influence common law development in other jurisdictions by their “gravitational pull”.\(^\text{17}\)

Though unlikely, it is possible that Dixon J was presciently inferring that the recognition of religious confession privilege in three Australian jurisdictions at that time enabled the common law recognition of religious confession privilege in those jurisdictions which had not passed statutes to expressly recognise it in the interests of one seamless common law in Australia. It is more likely that he was simply confirming that religious confession privilege did not exist in Australia except as a creation of statute, since his reference to the rejection of claims for “protection of confidences to trustees, agents, bankers and

\(^{15}\) Ibid, pp 102-103.

\(^{16}\) Only statutes in Victoria (Evidence Act 1890, c 55 – 54 Vict. No. 1088), Tasmania (Evidence Act 1910, s 96 – 1 George V. No. 20), and the Northern Territory (Evidence Ordinances 1939, section 12(1)) existed at the time the judgement was handed down.

\(^{17}\) The quoted words are original to Mason, P, in Akins v Abigroup Ltd (1998) 43 NSWLR 539, 547-548. Both Beazley JA and James J reference the concept in their judgements in R v Young (1999) 46 NSWLR 681, respectively at p 719 para 205 and p 743 para 326.
clerks amongst others18 reads like a quotation from English commentaries in his era, which normally included clergy in the “unprotected” list.19 There is also a question as to whether he was referencing religious confession privilege or a broader confidential religious communications privilege, as was almost contemporaneously recognised in Ireland20 – even though all of the Australian statutes treating such privilege at all still reference “confessions” as their subject matter.

While it is doubtful that this obiter statement would provide a contemporary Australian court with much assistance if it were required to decide a religious confession privilege case, it is fair to infer that it would encourage a narrow interpretation of even statutory privileges. Both Spigelman CJ and Beazley JA quoted and interpreted this same passage21 on their way to different decisions about the extent of the statutory sexual assault communications privilege claimed in R v Young in 1999.22 And when the High Court was asked in Baker v Campbell23 to decide whether legal professional privilege protected documents from seizure by police executing a search warrant, only Gibbs CJ referred to McGuinness and then only as authority for his proposition that “the public interest in discovering truth prevails over the private duty to respect confidence.”24 But with his two brethren who did reference religious confession privilege in Baker v

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18 McGuinness v Attorney-General (Vic) (1940) 63 CLR 73, 103.

19 For example, Stephen’s Digest of the Law of Evidence, which was printed in 12 editions between 1876 and 1948; Phipson’s Law of Evidence, published in 13 editions between 1892 and 1982, and of course Wigmore on Evidence, the third edition of which was published in 1940, the year when Sir Owen Dixon J made his decision in McGuinness v Attorney-General (Vic).

20 Cook v Carroll [1945] Ir. Rep. 515, per Gavan Duffy J.


Campbell, Gibbs CJ did signal that the view of the High Court was ‘developing’ where claims of privilege or immunity were asserted.

**Baker v Campbell**

Decided before the abolition of the sole purpose test as the required premise for a sustainable claim of legal professional privilege, the High Court split 4-3 in upholding the claim of privilege against the police search warrant. And of the three judges who did reference religious confession privilege in passing, only Dawson J sided with the majority in the result. Gibbs CJ said that the reason privilege did not extend to communications between priest and penitent at common law was because religious confession privilege was not “fundamental to the administration of justice” as was legal professional privilege. He did however state that this justification of legal professional privilege had its roots in public interest and it was the “higher public interest in the suppression of crime” which justified his recommended abrogation of legal professional privilege in this case. Dawson J similarly said that the reason there was no religious confession

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26 The so-called ‘sole purpose test’ was replaced by the ‘dominant purpose test’ by the High Court’s decision in *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49. Since this decision, for a claim of legal professional privilege to apply to documents, it has been necessary to demonstrate that the dominant purpose for which the document was created was to enable the seeking or giving of legal advice. The previous ‘sole purpose test’ had been laid down in *Grant v Downs*, see note 27.

27 It was held in *Grant v Downs* (1976) 135 CLR 674 “that legal professional privilege is confined to documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or use in legal proceedings” (*Baker v Campbell* (1983) 153 CLR 52, 60 per Gibbs CJ).

28 The split was really 5-2 since Brennan J said that documents in the solicitor’s office that were “merely expressions of legal opinion” and “documents brought into existence solely for use in litigation that is pending, intended or reasonably apprehended” were privileged and should not be produced (*Baker v Campbell* (1983) 153 CLR 52, 110).


privilege was because unlike legal professional privilege, religious confession privilege was not “part of the functioning of the law itself”.31

Mason J wished to confine legal professional privilege to “communications in aid of litigation and communications made for the purpose of giving and obtaining legal advice”32 to avoid an “evaluation of the competing considerations which lurk beneath the surface”33 of legal professional privilege. But he doubted that communications for giving and obtaining legal advice had any better justification than could be advanced in favour of “communications for advice between client and accountant or marriage counselor … with litigation in view”34 or “doctor-patient and priest-penitent communications”.35 Indeed, he said “[t]he need for preservation of doctor-patient and priest-penitent confidentiality seems to be as strong as the need for preservation of lawyer-client confidentiality in the area of advice”.36

That the law relating to privilege generally was in a state of flux when Baker v Campbell was decided, is also manifest by how two of the judges analogised from legal professional privilege to self-incrimination privilege. Mason J said that self-incrimination privilege rested on a “more enduring foundation”37 than legal professional privilege.

31 Baker v Campbell (1983) 153 CLR 52, 128. Note that these statements resonate with one of the reasons why Lamer CJ would not concede a class privilege to confidential religious communications in R v Gruenke (1991) 3 SCR 263, 289).


33 Idem.

34 Idem.

35 Idem.

36 Idem.

Dawson J said further that self-incrimination privilege was “too fundamental a bulwark of liberty to be categorized simply as a rule of evidence”,38 that legal professional privilege “stems from a right which is no less fundamental”39 and that the two rights were conceptually connected.40 What does this Baker v Campbell obiter discussion of religious confession privilege contribute to understanding how a case involving a confidential religious communication might be decided today? It confirms once again that the discrete origins and continued existence of religious confession privilege are not well understood, but it also confirms that legal professional privilege and self-incrimination privilege are improperly treated as mere rules of evidence when their historical origins are understood and taken into account. Those privileges can be said to exist as common law rights so firmly entrenched as Stephen, Mason and Murphy JJ said of legal professional privilege in Grant v Downs that they are “not to be exorcised by judicial decision”.41 The question is, will a proper understanding of the historical origins of religious confession privilege lead to the same conclusion? Namely that religious confession privilege is also a common law right and not a mere rule of evidence.

The narrow interpretation of new state legislation creating a sexual assault communications privilege,42 by the New South Wales Court of Appeal decision in R v Young43 followed by further state legislation in the wake of the decision,44 demonstrates

39 Idem.
40 Idem.
41 Grant v Downs (1976) 135 CLR 674, 685.
42 Division 1B of Pt 3.10 of the New South Wales Evidence Act 1995 was inserted in the Act by the Evidence Amendment (Confidential Communications) Act 1997 (No 122) and commenced on 1 January 1998 (R v Young (1999) 46 NSWLR 681, p 726, para 244, per James J).
that the law relating to privilege was still in a state of flux when that decision was handed down sixteen years after *Baker v Campbell*. That *R v Young* was decided the same year that the High Court replaced the ‘sole purpose test’ with the ‘dominant purpose test’ in *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia*\(^{45}\) simply underscores the fact. And though further New South Wales legislation about sexual assault communications in the wake of the majority decision has reduced the precedential value of *R v Young* as a guide to understanding statutory sexual assault communications privilege in New South Wales, the reasoning on privilege generally remains instructive.

**R v Young**\(^{46}\)

Spigelman CJ led the 4-1 majority in holding that a statute amending the New South Wales *Evidence Act* the previous year\(^{47}\) was not specific enough to deny Young’s access to the records of the various counsellors who had attended his accuser in a sexual assault case. Beazley JA dissented. However, none of the three other majority judges\(^{48}\) wholly adopted the reasoning of Spigelman CJ. After acknowledging “because the truth can cost too much”,\(^{49}\) that “the common law recognises a specific list of

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\(^{44}\) *R v Young* was reversed by the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* (NSW) which inserted a new Part 13 into the *Criminal Procedure Act 1986* (NSW).

\(^{45}\) *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49. The nature of the two tests is briefly referenced supra at notes 26 and 27.

\(^{46}\) *R v Young* (1999) 46 NSWLR 681.

\(^{47}\) See note 44.

\(^{48}\) Abadee, Barr and James JJ.

\(^{49}\) *R v Young* (1999) 46 NSWLR 681, 696, para 74, per Spigelman CJ, alluding to Knight Bruce V-C in *Pearse v Pearse* (1846) De G & Son 12 at 28-29; 63 ER 950 at 957.
privileges [against disclosure, which] list has been modified by statute", 50 to include "clergy-communicant privilege", 51 Spigelman CJ noted that each category “reflect[ed] a different form of public policy ... with its own distinct incidents”. 52 He then considered the Supreme Court of Canada’s approach to the recognition of new categories of evidentiary privilege (including a brief consideration of the Wigmore criteria in Gruenke’s case 53), but concluded “that the approach to determining these matters, propounded by Wigmore and adopted in Canada, is not open to an intermediate court of appeal in Australia”. 54

He then cited the full quote from Dixon J in McGuinness v Attorney-General (Vic) 55 cited above, and observed:

The common law refused to afford privilege to exceptional sensitive confidential relationships. To many people, even in this secular age, and to the overwhelming majority of people in times past, there was no more intimate or personal communication than that which occurred with a priest. No such privilege was recognised until statutory modification: see Wilson v Rastall (1792) 4 TR 753 at 759-760; 100 ER 1263 at 1206-1287; Normanshaw v Normanshaw and Measham (1893) 69 LT 468; McNicol, Chapter 5. 56

50 R v Young (1999) 46 NSWLR 681, 697, para 76.
51 Ibid, para 77.
52 Idem.
54 R v Young (1999) 46 NSWLR 681, 698, para 84.
55 McGuinness v Attorney-General (Vic) (1940) 63 CLR 73.
He concluded “that, by a process of induction, Dixon J stated the common law rule ... [which though not] replicated in the other judgements in *McGuinness* ... does represent, in my opinion, the common law rule in Australia ... [and again a]n intermediate appellate court should be slow to develop a new category of privilege”.57

While Beazley JA quoted the same statement from Dixon J in *McGuinness*58 and other sources to acknowledge that confidentiality simpliciter did not give rise to an evidentiary privilege, she cited extensive authority for her proposition that evidential immunity might be extended after balancing competing interests.59 She concluded with Lord Hailsham in *D v NSPCC*60 that “[t]he categories of public interest are not closed and must alter from time to time whether by restriction or extension as social conditions and social legislation develop”.61 She noted McLachlin J’s case-by-case approach in *M v Ryan*,62 which required “a balancing [of competing public interests] to determine whether the particular documents should be disclosed”63 and expressed her opinion that balanced public interest in New South Wales, the “gravitational pull”64 of statute law in other Australian

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58 Ibid, p 708, para 144.
61 *R v Young* (1999) 46 NSWLR 681, 711, para 163, quoting Lord Hailsham in *D v NSPCC*.
63 *R v Young* (1999) 46 NSWLR 681, 716, para 188.
jurisdictions and the need to ensure there was “one [consistent] common law for
Australia”, justified the extension of “immunity ... to the class of documents the subject
of the present claim”.

For Spigelman CJ, there was no common law religious confession privilege. However,
his reference to McNicol fails to acknowledge her statement that “there is a paucity of
authority” for this conclusion, and the authorities he chose for that statement of the law
do not establish the attributed point. For both of the cases he cited contain only obiter
statements; the first in a legal professional privilege case, and the second in a non-
confessional religious communications case where the observations of Jeune P can be
interpreted to support the existence of a discretionary religious communications
privilege. Nonetheless, it might be submitted that other reasoning in Spigelman CJ’s
judgement provides room for modern recognition of religious confession privilege in the
public interest. For even though he rejected the case-by-case discretionary Canadian
approach, he said that “[t]he recognition of a new category of privilege ... was

69 R v Young (1999) 46 NSWLR 681, 699, para 88 referring to Wilson v Rastall (1792) 4 TR 753; (1792) LTR
753; 100 ER 1283; (1775-1802) All ER 597, discussed supra in chapter four, pp 151-153, where it was noted
that the citation of this case as authority for the proposition that there was no religious confession privilege in
English common law by the turn of the eighteenth century is unsound since religious confession privilege is
not even mentioned obiter in the decision.
70 Idem, referring to Normanshaw v Normanshaw (1893) 69 LTR 468, discussed supra in chapter four, pp
159-160, 162, and chapter five, pp 184-187.
71 Supra, chapter five, p 187.
72 Spigelman CJ noted the evolution of this approach (beginning with Slavutych v Baker (1975) DLR (3d)
224 at 228; R v Gruenke [1991] 3 SCR 263 at 286, and in relation to sexual assault counselling privilege, in
M v Ryan (1997) 143 DCR (4th) 1) in his judgement in R v Young at pages 697-698. It is noteworthy that
while Lamer CJ in Gruenke did indeed say that the application of the Wigmore criteria was not "carved in
stone", as Spigelman CJ pointed out (R v Young, p 698, para 81) the case-by-case discretionary approach
appropriate [when it reflects] so widely held an opinion, that the court’s reasoning can be described in terms of ‘recognition’ rather than ‘creation’.”

Beazley JA did not treat religious confession privilege at all save in her quotation from Dixon J in *McGuinness*. She distinguished his reasoning with modern authority from various jurisdictions, noted the favoured discretionary case-by-case approach in Canada, but nonetheless preferred the creation of a new class of immunity in *R v Young* for reasons of pure countervailing public interest. As noted at the commencement of this consideration of *R v Young*, the three other majority judges chose not to wholly ally themselves with the reasoning of Spigelman CJ. Abadee and Barr JJ together and more simply, rested their joint decision on the simple insight that it was for parliament, not the court, to make “such a significant change in the rights of accused persons”, and that in confining the new immunity for sexual assault counsellors to evidence adduced at trial, the legislature had affirmatively left an accused

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75 *R v Young* (1999) 46 NSWLR 681, 708-716. See note 59 for a list of all her authorities.

76 Ibid, pp 715-716.

77 Ibid, p 721, para 215. Note also that L’Heureux-Dubé J, who provided the minority judgement in *R v Gruenke* [1991] 3 SCR 263, 295-316), for herself and Gonthier J, also preferred the “class or category” approach to the creation of evidential privileges and immunities in the common law, in the interests both of certainty and long-term civil liberty.

78 Abadee and Barr JJ provided a joint judgement concurring in the result with the separate majority judgements of Spigelman CJ and James J.

person’s pre-trial investigation rights intact. James J rested his decision primarily on the appropriate method of statutory interpretation, eschewing the ambulatory methods that had been urged on him by counsel for the respondent and those other interested state parties involved to ensure that the legislation hit its target. He decided then that recognising “a new category of public interest immunity [in this case]” would unnecessarily complicate the law, since several different “balancing process[es]” could be required to determine the treatment of evidence depending on whether

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80 Ibid, p 723, para 229.

81 James J accepted that Freeman J’s (the first instance judge who interpreted the legislation to deny Young’s access to the notes of the various sexual assault counsellors who had attended on his accuser) indirect, derivative or analogical reading of the statute was available on the basis of decisions then available in Telstra Corporation Ltd v Australia’s Media Holdings [No 1] (1997) 41 NSWLR 277; Adelaide Steamship Co Ltd v Spalvins (1998) 81 FCR 360 and Akins v Abigroup Ltd (1998) 43 NSWLR 539. However, the Full Federal Court in Esso Australia Resources Ltd v Commissioner of Taxation (Cth) (1998) 53 FCR 311 and the High Court in BT Australasia Pty Ltd v State of New South Wales (High Court of Australia, 3 December 1998, judgement reserved) had since effectively decided that it was wrong to read a statute derivatively if that derivative reading would modify the underlying common law (per James J, pp 724-730, paras 260 and 261). Ultimately, no decision was issued by the High Court in the BT Australasia case because the matter was settled (R v Young per James J at p 730, para 261). In the Esso Australasia Resources case, the High Court reversed the Federal Court and held, overruling Grant v Downs (1976) 135 CLR 674, that the dominant purpose test, and not the sole purpose test, would henceforward be the common law test for claiming legal professional privilege settling an “issue that ha[d] divided the courts for some years”(R v Young per Spigelman CJ at p 692, para 47). The High Court also effectively affirmed the view of the majority of the NSW Court of Criminal Appeal in R v Young that the statutory phrase “adduced in evidence” did not abrogate an accused person’s common law right to pretrial discovery. The Esso case is discussed in more detail infra (pp 302-307) in relation to the so-called ‘gravitational pull’ of statutes on common law development.

82 Spigelman CJ used the word “ambulatory” in his judgement in R v Young (para 15 and 32) to describe an approach to the process of judicial interpretation, but he did not believe it justified “the additional words proposed in the present case” (ibid, para 16) as, in his opinion, they went beyond the clear intention of Parliament in the words actually used.

83 The appellant’s interpretation of the statute eventually upheld by the New South Wales Court of Criminal Appeal was opposed not only by the Crown, but by separate legal teams from the office of the New South Wales Attorney-General and the New England Area Health Service (ibid, paras 4 and 119).

84 This description of the proper judicial approach to statutory interpretation attributed to Lord Diplock was quoted by James J (p 734, para 288) who was himself quoting McHugh JA (as he then was) in Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404, 421-424.


86 Idem.
s 126H(3), s 126J, s 130 or even the common law applied to the adduction of evidence or pre-trial processes. In any event, Parliament could intervene to clarify if it was not satisfied with the court’s decision.

Despite the three different majority judgements, the court’s view that a defendant’s common law rights were not abrogated without clear statutory language was clear enough. But if Spigelman CJ had not felt the need to expand his remarks so as to rebut Beazley J’s dissent, it is doubtful that the religious confession privilege discussion would have arisen. Though all of this obiter opinion from a court which Spigelman CJ characterised as an intermediate court of appeal is persuasive, it is not the last Australian judicial word relevant to the subject of common law privileges, including arguably religious confession privilege. That last word comes inductively from the High Court’s reasoning in Daniel’s Corporation v ACCC. As that judgement is now reviewed, it is useful to keep in mind the joint insight of Abadee and Barr JJ in R v Young, who found the most compelling reason not to allow a liberal interpretation of the sexual assault communications privilege statute in that case, was because such interpretation would extinguish the established defence right of an accused person to test all the evidence presented against him/her.

87 Idem.
88 Ibid, p 749, para 352. Spigelman CJ also anticipated further parliamentary legislative involvement if it did not approve of the Court of Appeal’s decision (ibid, p 696, para 70, and p 702, para 105).
89 Ibid, p 695, para 68, where he said he had added to his initial written decision after reading “the judgement of Beazley JA”.
90 Ibid, p 698, para 84, and p 700, para 91.
Daniels Corporation v ACCC

In Daniels, the Australian Competition and Consumer Commission had denied that Daniels Corporation could rely on the legal professional privilege claimed in respect of documents the Commission required to be produced. The Full Federal Court agreed with the Commission, but the High Court unanimously reversed the Federal Court finding that legal professional privilege was not just a rule of evidence, nor even simply a rule of substantive law. It was an important and fundamental common law immunity which embodies a substantive legal and human right that “is not limited to judicial or quasi-judicial proceedings”. All of the judges traced these ideas with approval back to earlier High Court of Australia decisions in Baker v Campbell in 1983 and Attorney-General (NT) v Maurice in 1986. Nor did the fact that Daniels was a corporate person rather than a human being eliminate its right to legal professional privilege. Though the concurring judgements of Gleeson CJ, Gaudron, Gummow and Hayne JJ seemed to “assume without deciding” that Daniels Corporation was entitled to the benefit of legal professional privilege, for Kirby J this “fundamental civil right belong[ed] ... also to artificial persons such as corporations”. Nor did the ACCC’s argument that section

92 Daniels Corporation v ACCC (2002) 192 ALR 561, 564 (para 10 per Gleeson CJ, Gaudron, Gummow and Hayne JJ) and 583 (para 85 per Kirby J).
93 Ibid, pp 564-565, para 11, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
94 Ibid.
95 Ibid, pp 573-574, para 44, per McHugh J; p 583, para 85, per Kirby J.
96 Ibid, pp 583-584, para 86, per Kirby J.
97 Ibid, p 583, para 85, per Kirby J.
99 Attorney-General (NT) v Maurice (1986) 161 CLR 475.
101 Ibid, pp 582-588, para 103.
155 of the *Trade Practices Act 1974* (Cth) was otiose if it did not abrogate legal professional privilege, make any headway with the court. For McHugh J, the fact that only a small percentage of documents claimed under the section would be protected by the privilege\textsuperscript{102} meant that section 155 still had meaning and practical effect if legal professional privilege were held unaffected by its operation.

How much of the High Court's defence of legal professional privilege as a fundamental common law and human right could Australians expect to see logically transferred to similarly defend either religious confession privilege or confidential religious communications privilege? Indeed, could either of these alleged privileges be correctly characterised as either a common law or a human right? The language used in the joint judgement of Gleeson CJ, Gaudron, Gummow and Hayne JJ when stating their version of the historical and foundational status of legal professional privilege is a good starting point for analysis. They wrote:

> It is now settled that legal professional privilege is a rule of substantive law ...
> Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings ... [it enables] resist[ance to] the giving of information or the production of documents in accordance with [other] investigatory procedures.\textsuperscript{103}

\textsuperscript{102} Ibid, p 574, para 45.

\textsuperscript{103} Ibid, pp 564-565, paras 9-10.
Is it similarly true to say either that ‘it is well settled that religious confession privilege is a rule of substantive law’? Is it more than a ‘mere rule of evidence’ if it is even accepted to be that? Such is doubtful. If it were true that ‘it is well settled’ that religious confession privilege is a ‘substantive rule of law’ or a well recognised ‘rule of evidence’, this thesis would not have been written. Since it is not well settled that religious confession privilege is even a rule of evidence, is it likely that the High Court of Australia will invoke this same reasoning in its defence when a religious confession privilege does eventually come before it? Will this thesis’ analysis or the arguable fact that religious confession privilege is believed to exist by the general populace\textsuperscript{104} make any difference? While the answer to this last question is sociologically beyond the scope of this thesis, the High Court’s use of the phrase ‘well settled’ raises precedential issues which are appropriately discussed here.

If by ‘well settled’, the High Court means that there have been enough cases affirming legal professional privilege to place its existence beyond doubt, then religious confession privilege does not meet the standard.\textsuperscript{105} If the test is or can be that suggested by

\textsuperscript{104} Though not clearly representative of the views of the ‘general populace’, in the Legislative Council of NSW, the Hon Franca Arena found it “strange that ... legislation should be necessary” to protect the immunity of religious confessions in a court of law (Parliamentary Debates, Legislative Council, 21 November 1989, p 12806). The Hon BH Vaughan said later the same day that he “was particularly attracted to the statement made by the Hon Franca Arena when she said it came as a great surprise to her that it ought even be necessary to legislate for the protection of a clergyman in the circumstances I have set out” (ibid, p 12830) and the Hon FJ Nile “question[ed] the necessity to introduce the legislation into the House” (idem) but nonetheless supported it. The recent (September 2003) introduction of the Children’s Protection (Mandatory Reporting) Bill into the South Australian Parliament proposing to reduce the religious confession privilege in child abuse cases, manifests some understanding in that state that the privilege exists at common law, even though it has never been confirmed there by statute.

\textsuperscript{105} The following is a simple summary of the obiter (no ratio available) for and against religious confession privilege:

Against: (i) Anonymous (1693) Skinner 404; 90 ER 179 per Holt LCJ; (ii) R v Sparkes (c 1790) per Buller J, unreported but referred to in Du Barré v Livette (1791) 1 Peake 108; 170 ER 96; (iii) R v Gilham (1828) 1 Moody Cr Cas 186; 168 ER 1235 per Park J; (iv) Greenlaw v King (1838) 1 Beav 137; 48 ER 891 per Langdale LJ; (v) Russell v Jackson (1851) 9 Hare 387; 68 ER 900 per Turner VC; (vi) Anderson v Bank of British Columbia (1876) 2 Ch D 644 per Jessel MR and James LJ; (vii) Wheeler v LeMarchant (1881) 17 Ch D 675 per Jessel MR. Though (viii) Normanshaw v Normanshaw (1893) 69 LTR 468 (per Jeune P); (ix) McTaggart v McTaggart [1949] Probate 94 (per Denning LJ, as he then was); (x) Attorney-General v Mulholland and Foster [1963] 2 QB 477 (per Denning, LJ, as he then was); and (xi) D v NSPCC [1978] AC
Spigelman CJ in *R v Young*¹⁰⁶ – that religious confession privilege is “sufficiently definite, widely accepted and permanent”¹⁰⁷ so that it is a recognised existing privilege “as distinct from ... a new category of privilege”,¹⁰⁸ then perhaps it can expect more sanguine treatment if it is ever considered in the High Court of Australia. But even if it is conceded with the Supreme Court of Canada, that the evidence of the existence of a confidential

171 (per Edmund-Davies LJ et al) have likewise been cited against the privilege (Nokes also says that *McTaggart v McTaggart* is a case that “suggest[s] or assert[s] that no privilege exists (Nokes, GD, “Professional Privilege” (1950) 66 LQR 88, 98), McWilliams reads *Attorney-General v Mulholland and Foster* against the privilege when he finds the “budding of a discretion” in *D v NSPCC* (McWilliams, PK, Canadian Criminal Evidence, 3rd ed, Ontario, Canada Law Book Limited, 1984, pp 920-922). These four cases were discussed in chapter five as obiter authority in favour of a broader though discretionary religious communications privilege. One additional case against religious confession privilege is: (xii) *Butler v Moore* (1804-1806) 2 Sch & Lef 249. This case before the Irish Master of the Rolls, Sir Michael Smith, which raised the admissibility of a priest’s evidence as to the testator’s Catholicism (which would have invalidated his will) was discussed in chapter six (pp 238,240). Its precedential value has been dismissed by WM Best, (*A Treatise on the Principles of Evidence*, London, S Sweet, 1849, pp 459-460) and Clinton (Mayor Clinton was the judge in *The People v Phillips* (1813) NY Ct Gen Sess, reprinted in “Privileged Communications to Clergymen” (1955) 1 *The Catholic Lawyer* 198) on account of its anti-Catholic bias.

For: (i) Garnet’s case (1606) 2 Howells State Trials 217 per Salisbury, Northampton and perhaps Sir Edward Coke, as he then was; (ii) *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96 per Kenyon LJ; (iii) *R v Radford* (1823) unreported (cited in *R v Gilham* (1828) 1 Moody Cr Cas 186; 168 ER 1235), per Best CJ (later Wynford LJ); (iv) *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528 per Best CJ (later Wynford LJ); (v) *Attorney-General v Briant* (1846) 15 LJ Exch 265; (1846) Revised Reports 71; 153 ER 808 per Alderson B; (vi) *R v Griffin* (1853) 6 Cox Cr Cas 219 per Alderson B; (vii) *R v Castro* (1874) 2 Charge of the Chief Justice 648 per Cockburn LJ; (viii) *Ruthven v De Bour* (1901) 45 Sol J 272 per Ridley J; (ix) *Tannian v Synnott* (1903) 37 Ir. L. T. 275 per Chief Baron Palles of Ireland. Several other cases that might be added to this “ayes” list are: (x) *In re Keller* (1887) 22 LR Ir 158; (xi) *Cook v Carroll* [1945] Ir Rep 515 (per Gavan Duffy J); (xii) *R v Lynch* [1954] Tas SR 47 (per Crisp J); (xiii) *R v Howse* [1983] NZLR 246 (per Cooke P, later Lord Cooke of Thornton). *In re Keller* might be omitted since all nine judges involved studiously avoided direct reference to religious confession privilege, though the Irish Court of Appeal granted the requested writ of habeas corpus which saw the Reverend Keller released from incarceration for contempt. *Cook v Carroll* might be omitted, since it strictly dealt with religious communications privilege rather than religious confession privilege, though it does contain some fiery condemnation of the English Judges who opined against religious confession privilege on grounds of pure religious prejudice. *Lynch and Howse* are strictly not relevant to consideration of a common law privilege because they were decided on interpretation of applicable statutory provisions, though *Lynch* in particular does contain dicta accepting the existence of religious confession privilege in common law (mentioned briefly supra p 265). An additional case in favour of religious confession privilege is (xiii) *The People v Phillips* (1813) NY Ct Gen Sess. (Reprinted in “Privileged Communications to Clergymen”, *The Catholic Lawyer* 1 (1955) 198). *The People v Phillips* might be omitted despite its careful treatment of the English authorities because it was essentially decided on United States constitutional grounds. It was considered in detail in chapter six because of Judge Clinton’s insights into the issue of anti-Catholic prejudice which he considered the only reason there was any English authority against religious confession privilege. (xiv) *R v Gruenke* (1991) 3 SCR 263. This case might similarly be excluded from a strict analysis of English common law authority because, even though it represents a 9-0 affirmation of religious confession privilege in some form from the highest Canadian court, the 1982 Canadian Charter of Rights and Freedoms had a significant influence on that result.


¹⁰⁷ Ibid, p 701, para 102.

¹⁰⁸ Idem.
religious communications privilege at common law is inconclusive,109 there is certainly room in Kirby J’s language in Daniels to argue that religious confession privilege is a fundamental common law human right.110 For there are at least as many constitutional and international human rights instruments available as interpretive helps for Australian courts to protect the right to freedom of religious practice as there were human rights instruments protecting the right to confidential legal representation at criminal trial and which he referenced in Daniels.111

The fact that Australia also has a direct constitutional guarantee of freedom of religious practice112 may provide greater protection for religious confession privilege than is even provided by the Canadian Charter of Rights and Freedoms.113 In Canada, that Charter so bulwarked freedom or religious practice that it removed any need for the Supreme Court of Canada in R v Gruenke114 to consider whether religious confession privilege was either an important common law right or a fundamental human right. The protection is stronger in Australia not because the guarantee of free religious practice has been a part of the constitutional architecture since federation, but because the commonwealth religious confession privilege statute115 cannot be repealed without an argument that such repeal is constitutionally prohibited as having no purpose other than the

110 Ibid, p 701, para 102.
112 The Australian Constitution 1901, section 116.
113 For details of the Canadian Charter of Rights and Freedoms, see chapter five note 128.
proscription of a religious practice. That religious confession is practiced only in some Christian churches does not undermine this defensive argument, because section 116 of the Australian Constitution and the First Amendment to the United States Constitution upon which it was modeled, both intended to protect diverse rather than egalitarian religious practice. Indeed, though Kirby J's idea that legal professional privilege is a fundamental human right (presumably because an accused person's right to a fair trial is considerably impeded if consultations with counsel are not beyond the scope of adversarial review) resonates with international human rights instruments, it cannot claim the express constitutional guarantee available to religious practices. In any event, it is equally compelling to observe that compulsion to disclose religious confessions, is as germane to that freedom of conscience and belief protected by international human rights instruments as legal professional privilege is to the right to a fair trial in similar instruments.

**International human rights in the High Court of Australia**

Because the High Court of Australia has referred to international human rights instruments to protect legal professional privilege against statutes that seemed to abrogate it, the likely Australian judicial response to a formal claim of religious confession privilege at common law cannot be completely answered without further consideration of how the High Court currently treats international human rights

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116 See chapter six, p 248.

117 *Daniels Corporation v ACCC* [2002] 192 ALR 561, p 583, para 85. See also per McHugh J, pp 573-574, para 44.

118 Note however, the discussion infra (pp 291-297) where it is noted that this rationale for legal professional privilege and those traditionally advanced in favour or self-incrimination privilege and religious confession privilege have never been the subject of convincing objective empirical proof and are probably not susceptible to such proof.
instruments in its jurisprudence. This consideration will not resolve the much larger questions of whether international treaties or customary international law have direct application in Australian domestic law; how the competing federal and state interests in the subject matter of international treaties is appropriately balanced under the Australian constitution; or how Australian constitutional law might be appropriately reformed to clarify the role of the Executive in treaty ratification though recognising the sovereignty of state and federal parliaments. But I will highlight the High Court of Australia’s willingness to use “international norms … as an interpretive aid … to help resolve statutory ambiguity or to fill lacuna in the common law”.119 While it is less likely that a lower level court, or even what Spigelman CJ characterised as an intermediate Court of Appeal in Australia120 would give these lofty notions much time,121 the High Court has confirmed that international treaty obligations have some impact on Australian domestic law.122 Though there has been some retreat from the influence accorded to international human rights instruments in Minister for Immigration and Ethnic Affairs v Teoh,123 the references of both McHugh and Kirby JJ in Daniels to legal professional privilege not only as a

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119 Donaghue, S, “Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia”, (1995) 17 Adelaide Law Review 213, 244. Note that the Donaghue article discusses all these larger questions in the wake of the decision of the High Court in Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, though it does not discuss how the High Court has apparently retreated since 1995. See also notes 123 and 125.

120 R v Young (1999) 46 NSWLR 681, 698 and 700 (paras 84 and 91 respectively).

121 Note also Donaghue’s 1995 discussion of the likely future direction of the High Court in light of the record of the various Justices in the then past. While Kirby J is recorded as having “declined to lend [his … support to the wide role for international law advocated by Einfeld J in Minister for Foreign Affairs & Trade v Magno (1992) 112 ALR 529, 535, Donaghue notes that Kirby J was a “vocal advocate of the importance of international law” while he served in the New South Wales Court of Appeal (Donaghue, op cit, p 253).


common law right, but also as a “fundamental human right”, confirm that international human rights instruments will continue to have influence in future consideration of evidential privileges and immunities.

Elizabeth Evatt, a member of the United Nations Human Rights Committee from 1993 to 2000, has written that “Justices of the High Court of Australia have recognised the importance of developing the law consistent with international human rights principles where possible”. But she has expressed concern that the protection of United Nations “[c]ovenant rights and freedoms ... on a de facto basis ... leaves them vulnerable to restriction and erosion by legislation [in the absence of entrenched protection]”. She has observed High Court of Australia use of international jurisprudence in Mabo “to recognise native title”; in Australian Capital Television to find “an implied protection of freedom of communication in regard to public affairs and political discussion”; and in Teoh, to confirm that Australian “ratification of the Convention on the Rights of the

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124 Daniels Corporation v ACCC [2002] 192 ALR 561, 573-574 (para 44, per McHugh J) and 583-584 (paras 85 and 86, per Kirby J).


126 She has previously served five years on the English Law Commission at the invitation of Lord Scarman; as Chief Judge of the Family Court of Australia from its inception in 1975, and as President of the Australian Law Reform Commission (http://www.newcastle.edu.au/services/library/collections/archives/int/evatt.html site and visited 6 December 2003).

127 Evatt, E, op cit, p 293.


130 Evatt, E, op cit, p 293.

131 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

132 Evatt, E, op cit, p 293.

Child gave rise to a legitimate expectation that decision makers would exercise their discretion in matters affecting children in conformity with the terms of the Convention”. 134

Such international influence may increase the possibility that confidential religious communications privilege would receive a favourable hearing in the High Court of Australia, particularly since the United States135 and Canada136 have already recognised it in their common law jurisprudence and it is arguably implicit in the original United Nations Declaration of Human Rights in 1948.137 However, though the Federal Government eventually dropped its legislative efforts to “override” Teoh,138 McHugh J’s dissent in that case denying that Australia’s ratification of the Convention on the Rights of the Child obliged domestic decision makers to act in strict conformity with that convention, has proven more indicative of development of the law in Australia than the majority view.139

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134 Evatt, E, op cit, p 293.
137 Article 18 states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”
138 Wendy Lacey noted in 2001 that there were a variety of efforts to “override the decision” in Teoh including “three Commonwealth Bills, one State Act [as well as] several ‘executive statements’ at both Federal and state level” (“In the wake of Teoh: Finding an appropriate Government Response”, [2001] Federal Law Review 9). Elizabeth Evatt also noted that the majority view in Teoh was not shared by the Executive (op cit, p 293).
139 Note in particular that the majority in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502 declined to apply the legitimate expectations doctrine articulated in Teoh, finding simply that Lam had not been prejudiced by any procedural unfairness in the decision to deport him, even though letters provided by the carers of his two children were not considered by the Immigration authorities. See also Sir Anthony Mason’s view that this decision in Lam reduced the likelihood that future High Court decisions would override administrative decisions solely because of international treaty obligations (“The tension between legislative supremacy and judicial review” (2003) 77 ALJ 803, 808-809).
However, in the thesis context of privileges and immunities, it remains the fact that the High Court in *Daniels* not only drew strength from international human rights norms as it reinforced the status of legal professional privilege, but the court declined to insist on the traditional distinction between privileges and immunities which Beazley JA had made in *R v Young*. As in the House of Lords in *D v NSPCC*, there is in the High Court’s language in *Daniels*, an elision of these concepts. For in their majority judgement, Gleeson CJ, Gaudron, Gummow and Hayne JJ said that “legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps more accurately, an important common law immunity.” Since legal professional privilege may be waived, which fact is recognised statutorily in New South Wales, and in *Daniels* is characterised as an immunity, the old distinction between privileges and immunities is arguably signalled as a distinction of history with declining contemporary significance. I will now review the historical distinction between immunities (protecting Crown self-interest) and privileges (exceptions to witness compellability to limit the risk of tyranny) to determine whether logic familiar in one category can now be reasonably inducted into the other.

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140 *R v Young* (1999) 46 NSWLR 681, 704, para 126 where she noted that an immunity could not be waived like a privilege.

141 *D v NSPCC* [1978] AC 171. See also discussion supra in chapter five, pp 192-206.

142 *Daniels Corporation v ACCC* [2002] 192 ALR 561, 565, para 11, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.


144 *Daniels Corporation v ACCC* [2002] 192 ALR 561, 573-574, para 44, per McHugh J; p 583, para 85, per Kirby J.
Privilege and immunity

Stone and Wells list six “groups of rules”145 in the law of evidence (all of which they name 'privileges’) which as “considerations ... extraneous to rational inquiry ... sacrifice truth simpliciter on the ground that otherwise some important social or public interest would be injured”146 (italics original). Their list includes “rules protecting political institutions ... rules protecting judicial institutions [including legal professional privilege and] ... rules protecting individual liberty and security”147 including self-incrimination privilege. All of these “must be protected, if necessary, by casting truth to the dogs”.148 Since they describe even ‘rules protecting political institutions’ as privileges, even the Stone and Wells categories imply that the distinction between privilege and immunity has diminishing significance and that the logic is becoming transferable.

The rules protecting individual liberty and security manifest “the general tendency of English law to prevent vexation and oppression of individual liberty disproportionate to the end to be achieved ... [and] is so pervasive that it tends to cover and obscure many rules primarily based on other considerations”.149 Self-incrimination privilege in particular is justified by two arguments, the first of which Stone and Wells say is the more compelling:

First ... without such a privilege, the universal obligation to testify would be a veritable terror to most in the community, for few are without sin. Terror would

146 Idem.
147 Ibid, pp 70-73.
148 Ibid, p 70.
149 Ibid, p 73.
produce evasion and prevarication and hence more truth would, in the long run, be lost without it than because of it. Secondly ... though the guilty need no protection, the innocent do, and to compel self-incrimination would encourage overzealous officials and blackmailing neighbours.\(^{150}\)

Stone and Wells’ observation of the tendency in English law to protect individual liberty absent a compelling interest to do otherwise\(^ {151}\) is the same argument which has often been used to support religious confession privilege.\(^ {152}\) For the recalcitrance of the clergy despite compulsive efforts, is said to be likely to bring the legal system into disrepute.\(^ {153}\) Save for these subjective arguments vested in freedom of conscience, neither self-incrimination privilege nor religious confession privilege have been the subject of objective justification and it is doubtful that a convincing empirical test to prove the need for either could be constructed.\(^ {154}\) However, if it is acceptable to justify self-incrimination privilege, now also deemed a common law right,\(^ {155}\) with only statements about the need

\(^{150}\) Ibid, p 562.

\(^{151}\) Ibid, p 73.

\(^{152}\) For example, Bentham observed that the compulsion of confessional evidence would result in such “casual, and even rare” “assistance to justice” that it is outweighed by the infamy attaching to the system that compelled “the violation of so important a professional as well as religious duty”. He also considered that the public interest in facilitating the repentance enabled by this Catholic practice and his expectation that priests would find ways to avert prospective mischief without breaching confidence in the absence of repentance, more than justified state recognition of confessional privilege (\textit{Rationale of Judicial Evidence}, New York and London, Garland Publishing Inc.,1978 (Reprint of the 1827 ed published by Hunt and Clarke, London), Vol 4, pp 589-591).


\(^{154}\) Doubtful because generalised statistical analysis of decisions in cases made where the privilege was ignored (if either privilege were ever completely abrogated) could not prove that a particularised decision in a case where either privilege was recognised was objectively aberrant. The only convincing empirical proof of the value of either privilege, would involve running an identical case twice before the same judicial forum to measure and analyse the results. Note, however, that attorney preparation for significant North American jury trials often includes the presentation of evidence and argument to simulated juries to determine strategy including the advisability of settlement.

\(^{155}\) See notes 38-41 supra and supporting text.
to protect freedom of conscience, then such logic should also suffice to justify religious confession privilege.

Stone and Wells' justification for the privilege protecting communications between solicitor and client – “that if it did not exist no man would feel safe in obtaining legal advice, and hence the whole system of administration of justice would tend to break down”156 – summarises all that has been written about that privilege. However, this negative justification is not completely convincing even when those writers cite Best's observation, “that after the first harvest of secrets immediately following the abolition of the privilege, there would be no more, for men would not confide in their legal advisors”.157 For no one has satisfactorily shown that the judicial system would grind to a halt without legal professional privilege as we have come to know it. Indeed, Stone and Wells seem to sense this when they endeavour to shore up the argument with the statement that without legal professional privilege, “[l]egal advice would become valueless”158 and cross-examination the “most powerful weapon for ascertaining truth”159 “would be deprived of ... [its] efficiency”.160 But they do not explain161 except to say that Lord Brougham162 dismissed the contemporary utilitarian criticism163 that the real reason

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156 Stone and Wells, op cit, p 71.

157 Ibid, p 572. Note once again that this argument is simply a restatement of one of Bentham’s arguments in favour of religious confession privilege when he said that religious confessions “would be kept back, under the apprehension [that they would be] ... use[d] for a judicial purpose” (op cit, p 587).

158 Idem.

159 Idem.

160 Idem.

161 Stone and Wells, op cit, p 573.

162 Greenough v Gaskell (1833) 1 Myl & K 98, 103; 39 ER 618, 621.

163 Lord Brougham was apparently here referring to Bentham and his utilitarian disciples. Wigmore (Evidence in Trials at Common Law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, pp 541-554) considered and dismissed Bentham’s strong criticisms of legal professional privilege (citing
for the existence of legal professional privilege can be found in the “particular importance which the law attributes to the business of legal professors.” Such circular justification for legal professional privilege does not provide much analogical help for a theorist looking for logic with which to defend religious confession privilege. That Bentham criticised legal professional privilege as an unnecessary fetter on the search for truth, but believed it was unjust to compel disclosure of religious confessions, may manifest no more than the workings of his social conscience. For religious confession privilege would benefit persecuted Catholics whereas legal profession privilege only benefited the wealthy who could afford to engage lawyers in both civil and criminal matters. But his logic-affirming religious confession privilege vests in practicality and tolerance.

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Rationale of Judicial Evidence (1827), 7 The Works of Jeremy Bentham 473, 474, 475, 477, 479 (Bowring ed. 1842). Bentham and his disciples questioned rhetorically why the justice system would be so irrevocably damaged by subjecting attorney client communications to judicial scrutiny and suggests United States style ‘miranda’ warnings (as they are now called) by attorneys would simply limit the nature and content of such discussion, a result not without precedent. The most emphatic Benthamite point apparently being that only those truly guilty of crime could have any protest against the removal of the privilege which would then make professional lawyers true ministers of justice instead of abettors of crime. Though Wigmore suggests Bentham’s arguments are only superficially convincing, Wigmore’s mostly civil law examples to rebut the attack are not themselves convincing since it is in the criminal arena where the constitutional issues (the essential subject of the Benthamite criticisms) loom largest. Indeed, Wigmore’s defence of legal professional privilege only begins to become convincing when he observes that legal professional privilege can only be deemed an evil “to the extent that the bar is unprincipled” (ibid, p 553) and if that sort of “treachery” (idem) which he finds implicit in Benthamite criticisms were well founded, “more radical remedies are needed than denial of the privilege”(idem).


164 Greenough v Gaskell (1833) 1 Myl & K 98, 103; 39 ER 618, 621. Lord Brougham also said that the real reason for legal professional privilege “is out of regard to the interests of justice, which cannot be upheld ... without the aid of men skilled in jurisprudence ... If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counselor half his case”.

165 Wigmore called Bentham the greatest critic of all privileges (Evidence in Trials at Common Law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 877). See also note 163.

166 In essence, Bentham’s practical argument why “catholic confession” should be privileged, is that compelling disclosure will not result in any more evidence being made available to a court since either confessions will not be made, or the priest will accept punishment for contempt rather than disclose. His tolerance argument is that it is “altogether inconsistent and incompatible” with the notion that “the catholic religion [is supposed] ... to be tolerated” to coerce the disclosure of religious confessions (Bentham J,
However, other rationales have been advanced to defend legal professional privilege, significantly by McHugh J in *Carter v Northmore Hale Davy & Leake*. There he accepted that the traditional rationale advanced to defend legal professional privilege – “that the doctrine is necessary for the ‘proper functioning of the legal system’” – “hardly seems applicable” when the “legal advice” limb of the privilege is considered separately from its “contemplated litigation” limb. For McHugh J, since the High Court had held that “legal professional privilege is not a rule of evidence but a substantive rule of law”, the “best explanation” of ‘legal advice privilege’ “is that it is a ‘practical guarantee of fundamental, constitutional or human rights’”. He elaborated:

By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not

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169 Idem.

170 Idem.

171 Idem.

172 Mason J similarly doubted that legal professional privilege should extend to the provision of legal advice (*Baker v Campbell* (1983) 153 CLR 52, 75). See also p 260 supra.

173 Idem.

174 Idem.

necessary, corollary of the rule of law and a potent force to ensuring that the equal protection of the law is a reality.

This Court has accepted that, although the doctrine is based on the requirements of the public interest, its application in particular cases does not depend upon balancing it against other rights that are grounded in the public interest. Not even the public interest in courts having all the relevant evidence before them has been considered sufficient to override the public interest in maintaining the unqualified operation of the privilege. As Deane J pointed out in Attorney-General (N.T.) v Maurice: 176 “Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed even to promote the search for justice or truth in an individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials.” 177

In defending legal professional ‘privilege’, McHugh J not only used the ‘public interest’ tool used to defend traditional ‘immunities’, he engaged the rhetoric of constitutional law to protect legal professional privilege as if it were the subject of a guarantee in an Australian Bill of Rights. A consideration of the objective utility of this defence of legal professional privilege in the civil sphere is well beyond the scope of this thesis. But it is significant in the context of this consideration of religious confession privilege to observe


that even McHugh J’s defence of legal professional privilege in *Carter* is founded in constitutional logic which only seems relevant where the State is pitted against the citizen. With respect, that logic lacks compelling force when the State is a bystander and the dispute is a civil one between citizens who do not want to disclose their communications with their respective lawyers.\textsuperscript{178} But when the dispute is between a citizen and the State as in *Young* and *Daniels* and in religious confession privilege cases, such constitutionally premised defences certainly have convincing power.

Stone and Wells expect the distinction between immunity and privilege to endure when they write that the “privilege for state documents and communications”\textsuperscript{179} is more than a “mere privilege ... [since] once it comes into play, it not only forbids ... proof of [the contents of a document or communication through] a particular channel, but also by any other channel”.\textsuperscript{180} However, they believe that the courts have the same power and interlocutory tools to examine and inspect in cases where State secrets are an issue, despite the fact that the State’s interest has been characterised in commentary as an immunity interest rather than as a privilege – and they believe that the courts should make “freer use”\textsuperscript{181} of this power. Indeed, Stone and Wells find that judicial self-denial of its right to inspect in cases where the head of the government department concerned personally asserts the claim of immunity/privilege,\textsuperscript{182} is the only difference between government claims of immunity on grounds of the public interest, and other cases where different public interest factors are argued in favour of a privilege. Again however, State

\textsuperscript{178} Though when exercising its powers to compel evidence, the court may certainly be seen as an agency of the state, the state is not ordinarily a party in civil disputes.

\textsuperscript{179} Stone and Wells, op cit, p 591.

\textsuperscript{180} Idem.

\textsuperscript{181} Ibid, p 592.

\textsuperscript{182} Stone and Wells, op cit, p 594.
assertions of immunity will only be trumped if it is perceived that some constitutional right of a citizen will be trampled if such State immunity claim is upheld.

Though there remains an argument that immunities and privileges remain different since privileges can be waived and State immunities cannot (which Beazley JA identified as a significant difference between the two types of rules of evidence in her Young dissent\textsuperscript{183}), if a government privilege has been waived following the leak of otherwise privileged material into the public domain, it is difficult to see even a government claim of privilege withstanding judicial scrutiny. Similarly, the doctrine that government public interest immunity is absolute in the sense that it does not need to be asserted to be found extant by a judge and that it bars secondary routes to the evidence, can be discounted in practice if judges retain a right of inspection as Stone and Wells assert.\textsuperscript{184} This insight itself recalls Best CJ’s statement in Broad v Pitt\textsuperscript{185} in 1828 that religious confession privilege could be waived. Previous to the decision in R v Gilham\textsuperscript{186} disapproving his earlier decision in R v Radford\textsuperscript{187} in 1823, Best CJ had similarly considered that religious confession privilege was absolute.

\textsuperscript{183} R v Young (1999) 46 NSWLR 681, 704 para 126 citing McNicol SB, Law of Privilege, chapter one. The other distinctions Beazley JA notes between immunities and privilege are that immunities do not rely upon the assertion of a claim by the parties and that “secondary evidence cannot be given of evidence the subject of the claim”.

\textsuperscript{184} Stone and Wells, op cit, pp 591-597.

\textsuperscript{185} Broad v Pitt (1828) 3 Carr & P 518; 172 ER 528. Discussed in chapter four, pp 148-150 and mentioned in chapter five, p 182.

\textsuperscript{186} R v Gilham (1828) 1 Moody Cr Cas 186; 168 ER 1235. Discussed in chapter one, pp 19-22 and in chapter four, pp 148-150.

\textsuperscript{187} Unreported but referred to in R v Gilham (1828) 1 Moody Cr Cas 186; 168 ER 1235.
Privilege/immunity in a criminal setting

Because religious confession and religious communications privilege issues are most likely to arise in the context of criminal cases, and because the privileges considered in both Young and Daniels were similarly considered in a criminal law context, the reasoning is more susceptible to persuasive inductive transfer than if the context were civil. In both Young and Daniels, the onus of proving the case against the appellants (as prospective defendants in further litigation after the subject pre-trial matters were resolved) beyond reasonable doubt would have been significantly interfered with if the privilege/immunity question were decided against them. For Abadee and Barr JJ in R v Young, this proposed interference with an accused person’s fundamental common law rights in a criminal trial was the primary reason why the statutory sexual assault communications privilege under consideration in that case should not be interpreted generously. Interference with confidential religious communications privilege has the same practical result. For arguably the adduction of evidence that an accused person expected to be kept confidential also deprives that person of a fair trial and represents a form of self incrimination without caution. But to understand the validity of this comparison between the rights of Mr Young to have access to all the evidence (despite the existence of a statutory sexual assault communications privilege barring the adduction of a sexual assault counsellor’s evidence at trial) and an accused person’s claim of a common law religious communications privilege in a criminal trial, it is necessary to compare the historical development of both self incrimination and legal professional privilege.

188 R v Young (1999) 46 NSWLR 681, 721-723. Lord Simon had also confirmed this principle in D v NSPCC [1978] AC 171, 232, when he said that “[T]he public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged.”
J Noel Lyon’s 1965 observation that allowing compelled disclosure of discussions between lawyer and client and between priest and penitent “would be tantamount to compelling the client to give evidence against himself”\(^{189}\) is a good starting point, although its merger of the two privileges is superficially unhelpful to modern readers who see the privileges as quite distinct. Neither privilege arose in a vacuum, but both were justified by similar strands of reasoning. Stone and Wells considered that the most powerful historical reason which justified the self incrimination privilege, was the “evasion and prevarication”\(^{190}\) that terror of the universal obligation to testify would produce and which would ultimately result in the loss of more truth than it would see adduced.\(^{191}\)

Wigmore has explained that while legal professional privilege originated in “the oath and honor of the attorney”,\(^{192}\) a professional obligation which the court understood though it did not hold itself competent to “judge its standards”,\(^{193}\) it was superseded in the late eighteenth century by a new justification that “looked to the necessity of providing

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\(^{190}\) Stone and Wells, op cit, p 562.

\(^{191}\) See more detailed discussion of the policy behind the self-incrimination privilege supra, pp 290-292. See also note 152 and 166 where Bentham used this same argument to justify religious confession privilege.

\(^{192}\) Wigmore, op cit, Vol 8, p 543.

\(^{193}\) Idem. There is resonance here with religious confession privilege since, for example, in In re Keller (1887) 22 LR Ir 158, 160, the Reverend Mr Keller pointed out to Judge Boyd at first instance that “the nature and obligations of a Catholic priest or the laws of Catholic discipline, or the laws or usages of Catholic discipline” were subjective matters for the priest and beyond his purview as a secular judge. In re Keller is discussed in chapter four, pp 159-162. Note, however, that while the High Court of Australia in Wylde v Attorney-General for New South Wales (1948) 78 CLR 224, 262-263 per Latham CJ found that it was not for the court to determine the soundness of any particular doctrine or the wisdom of any particular ritual, the court went on to find that the charitable trust property matters which faced it, could not be resolved without making some such determinations in this case since there were no ecclesiastical courts of law to determine such doctrinal questions (pp 270-271 per Latham CJ). In the United States, the Supreme Court unequivocally banned judicial scrutiny of ecclesiastical decisions (Watson v Jones 80 U.S. [13 Wall.] 679; 20 L. Ed. 666(1872)) but has found ways to decide cases involving theological questions which avoid theological answers but arguably trivialise religious practice (for example, Employment Division v Smith 494 US 872 (1990)). Note also that the religious confession privilege recognised by the Uniform Commonwealth Evidence Act (originated in NSW in 1989 by the Evidence (Religious Confessions) Amendment) makes the member of clergy asserting religious confession privilege, the arbiter of whether what was heard was a religious confession or not. This point is discussed infra, pp 308-309.
subjectively for the client’s freedom of apprehension in consulting his legal advisor”.

The logic is the same. What may be even more significant in the 1743 Exchequer case that Wigmore cites to demonstrate the new logic, are references to the relationship between attorney and client as a “sacred” thing, invoking an “inviolable secrecy” – terms clearly calculated to bring to mind the secrecy surrounding confessions made to priests and the language of canonical practice. Baron Alderson was even more explicit in R v Griffin in 1853 when he reversed the comparison because legal professional privilege had become more well known and said:

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 legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance.

While these eighteenth and nineteenth century religious analogies are unlikely to persuade an Australian court in the twenty-first century where the convincing power and utility of religious symbolism has retreated if it is understood at all, freedom of religious belief and practice has found its way into human rights norms as thoroughly and


195 Annesley v Earl of Anglesea (1743) 17 Howell St. Tr. 1139.

196 Ibid, p 1240.

197 Idem.

198 R v Griffin (1853) 6 Cox Cr Cas 219.

199 Idem.
fundamentally as the right to a fair trial. Indeed, freedom of religious practice arguably including the right to practice religious confession according to the dictates of one’s own conscience has greater constitutional entrenchment as a human right in Australia than the fundamental common law and human right to legal professional privilege affirmed by the High Court in Daniels.

Young and Daniels reflect a judicial inclination to protect the rights of persons accused of crime or likely to be accused of crime, even greater than when self incrimination privilege and legal professional privilege evolved after Tudor times. If the compulsion of evidence of a religious confession would abrogate free exercise of religion by a person accused of crime, then that evidence should be no more compellable than evidence which would incriminate the same person or deny that person confidential access to his legal advisor. For while the public interests which now justify the three privileges are distinct, it is difficult to argue in Australia that the public interest undergirding religious confession privilege is less entrenched than that which undergirds self incrimination privilege and legal professional privilege since only religious confession privilege can argue endorsement in the Constitution.

However, while the First Amendment to the United States Constitution protecting freedom of religious belief and practice, now binds the states as well as the Federal

\[200\] Wright and Graham catalogue extensive American constitutional debate as to whether the free exercise limb of the First Amendment mandates recognition of religious confession privilege or whether the non-establishment limb of the same amendment constitutionally bars it. Their commentary notes that a religious confession privilege statute has never been struck down on the latter ground and that all fifty states now have such statutes, the effective result of the debate being that while such accommodation of religious practice will not violate free exercise, neither will it positively mandate it either (Wright CA, and Graham KW, Federal Practice and Procedure: Evidence, 3rd ed, St Paul Minnesota, West Publishing Co, 1992, Vol 26, pp 54-78). Note similar discussion of this American constitutional question in Mayes, JE, “Striking down the clergymen-communicant privilege statutes: let free exercise of religion govern” (1986) 62 Indiana LJ 397.

\[201\] ‘Greater’ since free exercise of religion is at least referenced in the Australian Constitution (s 116).
Government, section 116 of the Australian Constitution only protects free exercise of religion against intrusion by the Federal Government – a protection in the case of religious confessions which is affirmed by section 127 of the Commonwealth Evidence Act of 1995. The High Court of Australia is generally considered to have discountenanced the idea that statutory instruments may exercise “gravitational pull” upon the common law jurisdictions without similar statutory instruments since its decision in Esso Australia Resources Ltd v Federal Commissioner of Taxation. However, a close review of Esso’s treatment of the idea of statutory gravitational pull upon the common law, reveals that the idea that statutes exercise gravitational pull is alive and well, though it did not assist the court in that case.

Gravitational pull of religious confession privilege statutes in Australian common law jurisdictions

The High Court’s decision in Esso decided two things. Firstly it confirmed that the dominant purpose test is the common law test for claiming legal professional privilege (rather than the sole purpose test which had been preferred since the High Court’s earlier decision in Grant v Downs). Second, it stated that sections 118 and 119 of the

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202 Wallace v Jaffree 472 U.S. 38, 49-50 (1985) held that the Fourteenth Amendment imposes the same substantive limits on US state legislative powers as the First Amendment imposes on Congress. Everson v Board of Education 330 U.S. 1,8,15 (1947) had earlier held that the Fourteenth Amendment binding the States included the First Amendment’s establishment clause and Cantwell v Connecticut 310 U.S. 296, 303 (1940) contained dictum to similar effect.

203 Mason P used this phrase to justify the derivative application of a statute that recognised the status of “legal professional privilege ... [as] a fundamental common law doctrine that furthers the rule of law” (Akins v Abigroup Ltd (1998) 43 NSWLR 539, 546).

204 Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49. Spigelman CJ in R v Young (1999) 46 NSWLR 681, 692, observed that Akins v Abigroup Ltd had applied a derivative method of statutory interpretation “in part to follow the Full Federal Court in Adelaide Steamship Co Ltd v Spalvins (1998) 81 FCR 360” which had since been overruled by the Full Federal Court in Esso. He expected that the Esso appeal which was pending when he wrote his Young judgement would decide authoritatively “concerning the derivative application of the Evidence Act 1995”, an “issue that has divided the courts for some years”.

205 Grant v Downs (1976) 135 CLR 674.
Commonwealth *Evidence Act* 1995 did not abrogate the common law legal professional privilege in pretrial circumstances by necessary or derivative application even though those sections only anticipated legal professional privilege applying when evidence was “adduced” in court. But the decision in *Esso* did not decide that the derivative reading of sections of the *Evidence Act* was inappropriate in all cases in the future. In particular, it did not overrule the suggestion in *Akins v Abigroup Ltd* that statutes in one Australian jurisdiction might exert gravitational pull on the common law in another. For though McHugh and Kirby JJ disagreed that the sole purpose test for determining the availability of legal professional privilege should be changed, Kirby J affirmed that while there was too much statutory difference in the legal professional privilege context for any state statutory provision to exert influence on common law in other Australian jurisdictions, in areas of less complicated law such influence was not only likely, but desirable in the interests of consistency and overall common law seamlessness.

While admitting that there was a “fundamental difficulty with th[e] line of reasoning” that uses statutes analogically “in developing common law principles”, the joint majority judgement of Gleeson CJ and Gaudron and Gummow JJ also observed:

> Certain legislatures in Australia have enacted legislation concerning [legal professional] privilege which differs in a number of respects from the common law principles ... One respect concerns whether the test to be applied for

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206 This was the reason why James J did not accept that a derivative reading of the NSW sexual assault communications privilege was appropriate in *R v Young*. He considered that there was too much diversity in the Australian statute law to find a common thread of common law. See notes 85-87 and supporting text.


208 Ibid, p 61, para 23.

209 Ibid, p 61, para 22.
determining privilege is the sole purpose test or the dominant purpose test. There are other differences, which are not material to the present case, but which should not be overlooked ... Other legislatures have not enacted similar legislation. Furthermore, the legislation, even in the jurisdictions where it applies, in its terms leaves untouched certain areas in which the privilege may operate. In such a setting, there is no consistent pattern of legislative policy to which the common law in Australia can adapt itself. The fragmentation of the common law implicit in the qualification that such adaptation should occur only in those jurisdictions in which the Evidence Act applies is inconsistent with what was said in Lange, and is unacceptable.210

These judges then noted that in unitary jurisdictions like England and New Zealand, it was much easier to keep the common law on a course parallel to related legislation,211 but that was not the position in Australia in the context of legal professional privilege so that analogical adaptation of related statutes did not provide assistance in deciding Esso.212 Such reasoning had provided assistance in Australia in the law related to marital rape where there was a “uniform pattern of legislation in five states”213 denying the old common law proposition “that, by marriage, a wife gave irrevocable consent to sexual intercourse with her husband”.214 In that case, it was both consistent and appropriate to adapt the old common law so that the law in Australia was consistent and

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210 Ibid, p 61, para 23.
211 Ibid, pp 62, 63, paras 23, 24, 28.
212 Ibid, p 63, paras 27, 28.
214 Idem.
seamless, and so, as the High Court had expressed in *Lange*, 215 “[t]here is but one common law in Australia which is declared by this Court as the final court of appeal”. 216 They also noted with approval, a federal United States case 217 where the federal common law had been analogically adapted to accord with the theme of related statutes “in every State of the Union”. 218

Kirby J’s accord with the majority on Esso’s contention that statutes can and do influence the common law, though not in this case since the legal professional privilege statutes were so diverse, was expressed in these words:

I am foremost in accepting the view that the common law operates in a world of statute law. I do not doubt that, the elements of law being interactive, the content of statute law can, and in many circumstances does, influence the content of the common law, and has long done so. As the influence of the *Evidence Acts* which operate in federal courts and courts of the Australian Capital Territory and New South Wales spreads, they may come to have an effect on the development of the common law in Australia. However the Act presently extends to these three Australian jurisdictions alone. The milieu of statute law in the other jurisdictions is quite different ... It would therefore be premature to draw inferences from the Act as to the content of the uniform doctrine of the common law of privilege applicable throughout Australia. 219

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216 Ibid, p 563, as quoted by the majority in *Esso* at pp 61-62, para 23.
219 Ibid, p 81, para 91.
McHugh J did not address the ‘gravitational pull’ point. Callinan J made observation only that he rejected “the theory that the Act operates to alter the common law, so as in some way to make its provisions applicable to circumstances other than the adducing of evidence”,220 though he did not elaborate whether he rejected analogical theory completely, or whether he too simply disagreed that Commonwealth Evidence Act abrogated legal professional privilege outside a courtroom in this case.

The religious confession privilege statute law in Australia is nowhere near as complicated as is the statute law in relation to legal professional privilege. There are seven jurisdictions with statutes confirming such privilege221 and three without.222 Even though the extant statutes express the privilege in different ways,223 they feature an unambiguous consistent theme of recognition. In light of the High Court’s confirmation that analogies can and should be drawn between statute law and common law to keep the law of Australia as consistent and seamless as possible224, in the absence of any statutory instrument abrogating religious confession privilege, a decision in the High Court.

220 Ibid, p 99, para 144.


222 Queensland, South Australia and Western Australia.

223 The statutory provisions operative in New South Wales, the Australian Capital Territory, and the Commonwealth have been identical since 1995. Tasmania adopted the Uniform Evidence Act including the identical religious confession privilege provision (s 127) and it was proclaimed effective from 1 July 2002 (Evidence Act 76/2001). Norfolk Island adopted the same legislation in 2004. Only the Northern Territory and the state of Victoria now have religious confession privilege statutes that diverge from the Commonwealth template and the Northern Territory’s Law Reform Commission discussion paper which questioned whether the Northern Territory should also adopt the Uniform Evidence Act, observed that the Victorian Law Reform Commission, “[a] Parliamentary Committee of Western Australia and the WALRC” have all “recommended the adoption of the UEA” and that the “Queensland LRC appears to be moving in the same direction, though, perhaps, not as clearly” (www.nt.gov.au/justice/docs/lawmake/discussion_paper_uniform_evidence_act.pdf p 3, site last visited June 27, 2006).

224 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
Court of Australia denying a religious confession privilege of some kind at common law, seems unlikely. If it is further accepted that there is a line of authority in favour of confidential religious communications privilege at English common law, then finding a broader privilege in a contemporary Australian context is not difficult to imagine either. For such a privilege would not be inconsistent with any Australian statute and is clearly consistent with that tolerance which is enjoined by the Australian constitution.

Consequences of a recognition of religious confession privilege at common law

If the existence of religious confession privilege at common law is accepted, then religious confession privilege legislation will be interpreted against the backdrop of that common law existence. In that context, a religious confession privilege statute affirming religious confession privilege will likely be seen as curing a defect in that underlying common law – either reducing the scope of a privilege deemed too wide by parliament, or strengthening a privilege interpreted too narrowly by past judges. In the absence of any statute expressly abrogating privilege, it is self-evident that religious confession privilege statutes have generally been passed to affirm a common law privilege previously construed too narrowly. That is certainly true of the statutes in New York, New Jersey, Delaware and New South Wales.

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227 Reese, S, “Confidential Communications to the Clergy” (1963) 24 Ohio St LJ 55.

The tension between the public interest in judicial access to all relevant evidence and the existence of any privilege circumscribing that access, has recently been answered in favour of privileges or immunities which have achieved status as common law rights absent clear statutory language to abrogate such rights. Though religious confession privilege may not in the past have been accepted as having status as a common law right, this thesis’ proof that it existed as a customary inheritance of the common law which has never been reversed, gives it such status. That understanding should lead informed judges to rule against the admission of religious confession privilege evidence – and in time, that understanding should also dissuade law enforcement agencies from seeking the disclosure of such evidence. In practice in the criminal courtroom, a more complete understanding of the origins of religious confession privilege would increase the burden of a prosecutor seeking to adduce such evidence.

More generous statutory interpretation could include the recognition that the New South Wales legislature intended to leave the decision as to whether a member of the clergy had received a confession with that member of the clergy, rather than for judicial

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229 See, for example, Spigelman CJ in *R v Young* (1999) 46 NSWLR 681, p 696, alluding to Knight Bruce VC in *Pearse v Pearse* (1846) De G & Son 12 at 28-29; 63 ER 950 at 957.


231 See discussion supra, pp 281-285.

232 In contrast to the unreported decision of a District Court Judge at Orange, New South Wales, on 1 September 1999 (*R v Mills*), where the judge insisted on a voir dire despite the expressed objections of two clergymen that they were not obliged to disclose that a confession had taken place, let alone disclose its contents under section 127 of the *Evidence Act 1995*.

233 The statutory provision which was adopted by the Commonwealth when it passed the Uniform Evidence Act in 1995, was originated in New South Wales by the *Evidence Amendment (Religious Confessions) Amendment Act 1989* which inserted section 10(6) into the then *Evidence Act 1898*. Section 127 of both the New South Wales and Commonwealth *Evidence Acts* have affirmed since 1995 that "[a] person who is or was a member of the clergy ... is entitled to refuse to divulge [even] that a religious confession was made, ... [and not just] the contents of a religious confession made". The religious confession privilege provisions in Victoria (*The Evidence Act 1958*, s 28 which provision has ancestry dating back to 1890), Tasmania (the original provision was s 96 of the *Evidence Act 1910*, though Tasmania adopted the Uniform Evidence Act in 2001), and the Northern Territory (*The Evidence Ordinance 1939*, s 12), are not decisive on whether the
determination through a voir dire. While the statutes confirming religious confession privilege in Australian jurisdictions do not conclusively answer the question of whether the privilege belongs to priest or penitent or both, it seems likely that the more explicit confirmation that the priest has an interest in the privilege in the identical Commonwealth/New South Wales/Australian Capital Territory/Tasmania/Norfolk Island provision will exert some ‘gravitational pull’ on the interpretation of the statutory provisions in Victoria and the Northern Territory in the interests of that seamlessness which the High Court has extolled. The Victorian statute might receive the liberal interpretation signalled by Cooke J in R v Howse in New Zealand, where the New Zealand Court of Appeal opined that confessions received without the ritual familiar in traditional Christian churches were as entitled to the protection of the privilege as

privilege belongs to priest or penitent or both. Nor has it been decided that the penitent has no separate interest in the privilege under the Uniform provision (which applies in the Commonwealth, NSW, Tasmania, Norfolk Island and the ACT), though it is certainly open to the priest to claim the privilege in these jurisdictions.

234 See discussion of “seamlessness” supra, pp 303-307, and particularly the application of the concept established in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 in Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49. Note that the US religious confession privilege statutes have been categorised by a number of writers according to whom the statute says owns the privilege – the priest, the penitent or both. Julie Ann Sippel found that the penitent held the privilege in thirty-eight states, the priest in eleven, and equivocally, that both held the privilege in Alabama and Ohio (“Priest-penitent privilege statutes: Dual protection in the confessional” (1994) 43 Catholic ULR 1127, 1128, 1134-1135). Michael Mazza found a fourth category where the statutes “seem to be more rules of witness compellability that rules of privilege”, finding that penitent ownership of the privilege is clear in only seventeen states (“Should clergy hold the priest-penitent privilege?” (1998) 82 Marquette LR 171, 183-191). However, the leading authority in the US Federal jurisdiction where there is no statutory privilege, excluded a Lutheran clergyman’s evidence allowed at first instance despite his willingness to give it “in the absence of the penitent’s consent to its use” (Mullen v US (1959) 263 F 2nd 275, 277). Despite this statement, another federal court has found that the clergy hold the privilege, though acknowledging that not all federal courts have yet come to the same conclusion (Eckmann v Board of Education 106 FRD 70,73 (ED Mo. 1985)).

235 The Evidence Act 1958, s 28.


confessions more formally received.\textsuperscript{238} And further, that while “liberal constru[ction]\textsuperscript{239} of the statute did not cancel the requirement that the communication required some “spiritual response”\textsuperscript{240} to attract the privilege, still “a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief”\textsuperscript{241}

\textbf{Residual common law jurisdictions}

While recent publicity in South Australia surrounding the introduction of a Private Member’s Bill in Parliament to reduce the ambit of religious confession privilege in child abuse cases suggests that a significant part of that state’s population believes there is a religious confession privilege at common law\textsuperscript{242}, academic evidence text writers have generally denied that lay expectation\textsuperscript{243}. The recognition that such academic assertion is mistaken, would see the lay belief in the existence of a common law privilege affirmed in not only South Australia, but also Western Australia and Queensland, where legislation affirming religious confession privilege has never been passed. The acceptance of this thesis’ finding that there is a religious confession privilege at common law, would also correct misapprehension in future law reform commissions which are otherwise likely to

\textsuperscript{238} Cooke J said in interpreting section 31 of New Zealand’s \textit{Evidence Amendment Act 1980}: “The discarding of the [the requirement that a privileged confession be made in the course of discipline enjoined by a denomination] in 1895 indicates that there does not have to be a formal confession made as a matter of religious duty or ritual or established custom” (ibid, p 250).

\textsuperscript{239} Idem.

\textsuperscript{240} Idem.

\textsuperscript{241} Ibid, p 251.

\textsuperscript{242} In September 2003, Nick Xenophon, an independent Member of the House of Representatives in South Australia, introduced the \textit{Children’s Protection (Mandatory Reporting) Bill 2003}, proposing to abrogate religious confession privilege in cases where child abuse was alleged. As of this writing, the legislature has deferred the bill and Nick Xenophon has advised the writer that he did not have the votes to see the bill passed into law.

\textsuperscript{243} For example, the 2000 6\textsuperscript{th} Australian Edition of \textit{Cross on Evidence} (Butterworths, Sydney, para 25310) and the 13\textsuperscript{th} edition of \textit{Phipson on Evidence} in 1982 (Buzzard, JH, May, R, and Howard, MN, eds, London, Sweet & Maxwell, para 15-09) still assert that there is no religious confession privilege at common law.
repeat the denials of their predecessors as they have simply parroted the standard textual denials. Such future Law Reform consideration will then be enabled to provide more enlightened consideration, advice and recommendations about how the law can most appropriately be improved in its delivery of social justice.

Conclusion to chapter seven

All of the High Court of Australia judges who have made curial reference to religious confession privilege first hand, have denied that it existed at common law. In each such reference however, the comments were obiter dicta and recognised the existence of religious confession privilege by statute in Australia. Crisp J implicitly recognised common law religious confession privilege in a case that involved the interpretation of Tasmania’s previous religious confession privilege statute, but again his comments were obiter and did not manifest significant research. The New South Wales Court of Criminal Appeal’s majority reasoning in R v Young suggests both that new privileges

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244 The 1985 ALRC report (Report 26, Vol 1, p 253) stated that “[i]t is generally accepted that the better view of the common law cases is that no privilege is recognized as arising out of the priest-penitent (or minister-parishioner) relationship”. The Commission’s 1987 report (#38, para 210, p 119) stated that religious confession privilege only existed then in three jurisdictions (Victoria, Tasmania and the Northern Territory), and was limited to churches having sacramental confession. The Queensland LRC (Report No 41, 1991) did not address the common law position but its recommendation against creating a statutory privilege analogous to that then recently created in New South Wales because “[t]he integrity of the legal system relies upon access to the truth” (ibid, p 1), implies that that Commission believed there was no privilege at common law. The West Australian LRC’s 1993 summary of the common law was that “it appears [clerics have no right] to refuse to reveal confidential communications to courts” (Project No 90, p 75).


246 McGuinness v Attorney-General (Vic) (1940) 63 CLR 73, pp 102-103, per Dixon J; Baker v Campbell (1983) 153 CLR 52, per Gibbs CJ (pp 65-66) and per Dawson J (p 128).


are unlikely to be acknowledged in Australia unless they are already recognised in 
practice in the public consciousness; and that the common law rights of an accused 
person will not be easily extinguished, particularly if a statute leaves room for doubt of 
the legislative intent.

The High Court decision in Daniels\(^{249}\) confirming legal professional privilege as a 
fundamental common law human right, may not be of much analogical assistance if an 
appellant were not able to convince the court that religious confession privilege is a well 
settled common law principle.\(^{250}\) However, the widespread lay belief in the existence of 
religious confession privilege,\(^{251}\) the “gravitational pull”\(^{252}\) of religious confession privilege 
statutes in seven out of ten\(^{253}\) Australian jurisdictions; the recognition of a case-by-case 
confidential religious communications privilege in the Supreme Court of Canada;\(^{254}\) the 
respect due to constitutional religious freedom;\(^{255}\) and the recognition of freedom of 
conscience and belief in international human rights instruments,\(^{256}\) all suggest that the

\(^{249}\) Daniels Corporation v ACCC [2003] 192 ALR 561.

\(^{250}\) The Supreme Court of Canada was not convinced that a confidential religious communications privilege existed at common law in Canada (R v Gruenke [1991] 3 SCR 263, 287-288, per Lamer J).

\(^{251}\) This was Spigelman CJ’s threshold criterion for the recognition of a new privilege in R v Young (1999) 46 NSWLR 681, 700-701, paras 93 and 102.

\(^{252}\) Akins v Abigroup Ltd (1998) 43 NSWLR 539, 547-548, per Mason P.


\(^{254}\) R v Gruenke [1991] 3 SCR 263.

\(^{255}\) Australian Constitution 1901, section 116.

\(^{256}\) Article 18 of the United Nations’ Universal Declaration of Human Rights 1948; Article 2.2 of the United Nations’ International Covenant on Economic, Social and Cultural Rights 1966; Articles 2.1 and 18 of the United Nations’ International Covenant on Civil and Political Rights 1966; together with the 1966 Optional Protocol to the International Covenant on Civil and Political Rights by which all parties (including Australia) “recognize[d] the competence of the [United Nations Human Rights] Committee to receive and consider communications from individuals ... claim[ing] to be victims of a violation by that State Party of any of the rights set forth in the covenant” (ibid, Article 1).
High Court of Australia would recognise a confidential religious communications privilege (including a religious confession privilege) in practice. That is not to say that judges in lower courts would be similarly inclined in the three remaining common law jurisdictions. In the unlikely event that a court did become aware of the potential evidence of a member of the clergy, the writer expects that the paradigmatic judicial expectation of access to all the evidence in the interest of justice, despite the competing public interest in clerical confidentiality, would see the conduct of a voir dire at least. The only judge likely to resist prosecution access to religious confessional evidence, would be a judge aware of the common law outlined in this thesis, including the existence of a judicial discretion not to review such evidence at all.

The recognition that there is a religious confession privilege at common law, will also have a significant influence in Australia’s seven existing statutory jurisdictions. For the knowledge that this statutory privilege was not created ex nihilo but exists as modern confirmation of a misunderstood and ancient common law ‘right’, would burden the prosecution to prove why evidence of a confidential religious communication should be admitted. Where a judge otherwise entitled to see all the evidence believes that a religious confession privilege statute is an innovation, that judge is more likely to construe the statute narrowly and thus burden the defence to demonstrate why the communication at issue is covered by the relevant provisions.

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257 Queensland, South Australia, Western Australia.
CONCLUSION TO THESIS

The purpose of this thesis has been to review the familiar assertion that religious confession privilege does not exist at common law, against the historical materials that are used to support that assertion. The materials used have included the historical, secular and canonical practices which formed the common law before case reporting evolved, as well as detailed consideration of all the cases which have been discussed in connection with religious confession privilege. The thesis began by observing that from the beginning, the treatment of religious confession privilege in evidence law texts, was misdirected by three foundational errors, and that misdirection has never been cured.

Evidence texts

Since texts about evidence law began to appear at the beginning of the nineteenth century, most of them have denied the existence of religious confession privilege. The first of those denials came in what Stone and Wells¹ have called “the pioneering books on evidence in our modern sense”² by Peake³, Phillipps⁴ and Starkie.⁵ But careful

¹ Stone, J, Evidence, Its History and Policies, Revised by WAN Wells, Sydney, Butterworths, 1991
² Ibid, p 36.
consideration of those texts in chapter one, suggests that it was Peake who arrived at that conclusion, and that the others followed uncritically without apparent independent review of the reports of the cases Peake cited for his proposition. There is irony in the template that Peake thus set. For Peake himself was also the reporter of the only reported English case in his generation which treated religious confession privilege at all, and Peake preferred the unreported conclusion about religious confession privilege of a circuit judge only cited in arguendo in that case over the contrary opinion of the Chief Justice in the case that he was actually reporting.

But ‘Peake’s irony’ is only one among many ironies that have shaped the law of evidence with respect to religious confession privilege. For it was not only contemporary text writers who followed his conclusion. Indeed, only Best in 1849, Badeley in 1865, Nokes in 1950, Winckworth in 1952, and McNicol in 1992 doubt the conclusion that there was no religious confession privilege at common law, and they do not trace the

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6 Supra, pp 16-19.
7 Du Barré v Livette (1791) 1 Peake 108; 170 ER 96.
8 Buller J.
9 Baron Alderson used this phrase to describe the authority of the proposition that there was no religious confession privilege after Peake’s report of Du Barré v Livette when, as one judge on an appellate panel, he similarly doubted in arguendo submissions made by counsel in Attorney-General v Briant (1846) 15 LJ Exch 265, 271. Note that while there are various reports of Attorney-General v Briant, only the LJ Exch report carries the Alderson discussion with counsel.
10 R v Sparkes, unreported but referred to in Du Barré v Livette (1791) 1 Peake 108; 170 ER 86.
11 Kenyon LCJ.
error to Peake. Best doubted the standard text denials of religious confession privilege, since he could see that religious confession privilege existed before the Reformation. Badeley said that even if the common law did turn its face against the religious practices of Roman Catholicism, that injustice had been cured by legislative reform since and in any event, confession in Anglican practice had always been protected. Nokes pointed out that many of the cases cited against religious confession privilege since Anon in 1693 were irrelevant in any consideration of the question, though he noted that there had been many cases containing judicial statements which denied the privilege.

Winckworth agreed with Stephen’s conclusion that the question of whether religious confession privilege existed had never been “solemnly decided” in an English court, though unlike Stephen, Winckworth did not find the authority against the privilege compelling enough to opine that it did not exist. And Nichols considered that there is a “paucity of judicial authority to support the claim that there is no privilege arising out of the priest-penitent relationship”.

One of the other historical ironies in the treatment of religious confession privilege was Park J’s denial that religious confession privilege existed in R v Gilham. That denial is ironic on three counts. First, because his only cited authorites were texts written by

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17 Best, op cit, pp 458-460.
18 Badeley, op cit, p 32.
19 Anon (1693) Skin 404; 90 ER 179.
20 Nokes, op cit, pp 96-97.
21 These words come from Sir James Stephen’s Digest of the Law of Evidence in 1876 (London, MacMillan and Co, 1876, p 171), but are reflected in Winckworth’s statement that “the question has never really been raised in any English court since the Reformation” (Winckworth, op cit, p 15).
22 McNicol, op cit, p 334.
23 R v Gilham (1828) 1 Moody 186; 168 ER 1235.
Peake and Starkie which both rested upon Peake’s flawed commentative conclusion from *R v Sparkes* as cited and disapproved by Kenyon LCJ in *Du Barré v Livette*.

Secondly, because *Gilham* was not a case about religious confession privilege at all, though it was so cited in commentary between 1828 and 1881. And thirdly, because when Best CJ, six weeks later, reacted to the news that Park J had disapproved Best CJ’s unreported decision in favour of religious confession privilege in *R v Radford* in 1823 with his comments in *Gilham*, Best CJ apparently did not even read the report of Park J’s judgement, but simply responded to what he thought had been decided with a new and probably unnecessary distinction of his own. The essence of all of the irony is that the judges and text writers who are supposed to be expert in the reading of cases to extract their precedential common law principles, in the case of religious confession privilege, have been united by their common failure to do so. For in a yet further irony, it is fair to conclude that the common law of religious confession privilege as a portion of the law of evidence has been developed and sustained far more by a form of hearsay than it has been by close precedential analysis.

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24 *R v Gilham* (1828) 1 Moody 186, 198; 168 ER 1235, 1239 where Park J criticised Best CJ’s *R v Radford* unreported affirmation of religious confession privilege with the statement that "his lordship could not have excluded this evidence because it was a breach of confidence in the clergyman to give it, because a minister is bound to disclose what has been revealed to him as matter of religious confession, Rex v Sparkes, cited Peake, N.P.C. 79, 1 Starkie on Evidence, 105."

25 *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 96.

26 Technically, the ratio decidendi of *R v Gilham* affirms that confessions of crime to third parties (the mayor and others) were inadmissible if they had arguably been induced by spiritual advice provided by a member of the clergy.

27 The dates respectively of the decisions in *R v Gilham* and *Wheeler v LeMarchant* (1881) 17 Ch D 675; 50 LJ Ch 793; [1881-5] All ER 1807. After 1881, *Wheeler v LeMarchant* is cited by most text writers as the leading authority against religious confession privilege, rather than *R v Gilham*.

28 In his decision in *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528.

29 Unreported and only referenced in the *Gilham* report as an 1823 decision of Best CJ on circuit at the Exeter Summer Assizes.
That conclusion is strengthened when Sir George Jessel MR’s contribution to the common law with regard to religious confession privilege is analysed. For though Winckworth suggested that Sir George Jessel also followed what Winckworth called “Peake’s dictum”, the only authority Sir George Jessel cited for his obiter comments denying the existence of religious confession privilege at common law came from Lord Cottenham’s judgement in *Reid v Langlois*, and Lord Cottenham referenced only “professional men” in a case about legal professional privilege. Sir George Jessel and James LJ who sat with him in *Anderson v Bank of British Columbia* may have correctly expressed a late nineteenth century English judicial view that legal professional privilege was the only so-called professional privilege when they both denied the existence of religious confession privilege at common law. But since their obiter dicta comments against religious confession privilege have not been applied in any binding precedential way ever since, and since many British jurisdictions have enacted statutes to confirm religious confession privilege since their denials, their statements represent dubious additional authority for Peake’s 1801 proposition.

30 Sir George Jessel opined twice against the existence of religious confession privilege at common law while he sat as Master of the Rolls in the English Court of Appeal. First in *Anderson v Bank of British Columbia* (1876) LR 2 ChD 644, 650-651, and secondly in *Wheeler v LeMarchant* (1881) 17 Ch D 675; 50 LJ Ch 793; [1881-5] All ER 1807. His obiter dicta comments against religious confession privilege in the second case are cited much more frequently than those in the first, though he only cited Lord Cottenham’s authority in the first case.

31 Winckworth, op cit, p 14.

32 *Reid v Langlois* (1849) 1 Mac & G 627; 41 ER 1408. See also chapter one, notes 82-86 and supporting text.

33 Wright and Graham suggest that one possible explanation for the denials of religious confession privilege in texts about English common law is that “[b]y the time Catholics in England had regained their civil rights and could claim the privilege, English law had already set its face against all privileges other than the attorney-client privilege” (Wright, CA, and Graham, KW, *Federal Practice and Procedure: Evidence*, 3rd ed, St Paul Minnesota, West Publishing Co, 1992, § 5612, p 42).

34 See chapter six, note 168 and supporting text.
Wigmore’s analysis of religious confession privilege at common law commencing in 1904,\(^{35}\) was more balanced than Peake’s had been a century earlier. For Wigmore acknowledged that there might have been a privilege before the Reformation.\(^{36}\) However, his failure to identify exactly how that privilege was extinguished by the time of the Restoration is unsatisfactory.\(^{37}\) Wigmore’s analysis is also exposed by Wright and Grahams’ careful suggestion that he “exaggerated … the impact of the authorities he cites”\(^{38}\) after the Restoration, for it is simply not possible to work out which of the “dozen cases”\(^{39}\) he cites are what he called “two decisive rulings”\(^{40}\) against religious confession privilege. While Wright and Graham admit that Wigmore correctly characterises four of his authorities as dicta, they diminish the authority of his opinion when they point out that three other cases he does not label as dicta “seem to fall in the same category”;\(^{41}\) that two more of Wigmore’s authorities are the non-precedential decisions of trial courts, one of which was unreported, and that one of his possibly “decisive rulings” is an Irish case that manifests significant religious prejudice.\(^{42}\) But like Peake a century earlier, Wigmore’s opinion against the existence of religious confession privilege has drawn with it a host of uncritical followers. Though Wright and Graham conclude that the privilege is

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\(^{35}\) The first edition of his monumental work on Evidence Law was published in 1904 (Wigmore, JH, A Treatise on the Anglo-American System of Evidence in trials at common law: including the statutes and judicial decisions of all jurisdictions of the United States and Canada, Boston, Little Brown, 1904).

\(^{36}\) Wigmore, JH, Evidence in trials at common law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 869.

\(^{37}\) See discussion in chapter six, pp 229-234.

\(^{38}\) Wright and Graham, op cit, § 5612, p 41.

\(^{39}\) Ibid, p 39.


\(^{41}\) Wright and Graham, op cit, pp 39-40.

\(^{42}\) Idem.
undeveloped in England, they summarise their view that the judicial and academic authority against the privilege “is seldom impressive, usually consisting of one of two judicial opinions or a citation to Wigmore” — and the writer has identified much more uncritical citation of Wigmore’s authority for the non-existence of religious confession privilege than Wright and Graham name. Wigmore’s conclusion that there is no religious confession privilege at common law is the more surprising since he clearly felt that the case for such a privilege was morally compelling. And indeed his “four fundamental conditions … recognized as necessary to the establishment of a privilege against the disclosure of communications” have proven a foundation for the recognition of religious communication privilege at common law in both Ireland and Canada despite the lack of compelling authority in England.

After showing that the early text writers could not be relied upon to provide a balanced view of even the common law materials that they did review, I moved on to consider in detail all the materials that must be reviewed if one is to come to an authoritative conclusion about the existence of religious confession privilege in English law before the Reformation and thereafter. That research included careful analysis of what Wigmore

43 Ibid, p 41.
46 After analysing the case for recognition of religious confession privilege according to his own “four canons”, he states “[i]n the whole … this privilege has adequate grounds for recognition” (Wigmore, JH, Evidence in trials at common law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, pp 877-878).
47 Wigmore, op cit, Vol 8, p 527.
called “an indecisive incident in the Jesuit trials under James I,\textsuperscript{50}…a statute of much
earlier date and of ambiguous purport,\textsuperscript{51} together with the general probabilities to be
drawn from the recognition of Papal ecclesiastical practices prior to Henry VIII”.\textsuperscript{52}

History

I began chapter two by explaining that one must set aside modern paradigmatic thinking
to understand English society and law before the concepts of ‘state’ and ‘common law’
evolved their modern meanings. In particular, I explained first, that church and state
were not separated in medieval minds, since ecclesiastical jurisdiction included what are
now considered the very secular questions of marriage, bigamy, divorce and adultery,
estate administration, crime and contract;\textsuperscript{53} and secondly, that the modern idea that the
common law is what one finds in the cases, is a far from adequate explanation of the
complex relationship that existed between statutes (as the king’s quasi judicial
settlement of petitions addressed to him), custom, the canon law as well as the decisions
of secular and ecclesiastical courts.\textsuperscript{54} Since Sir Edward Coke confirmed that the Statute
Articuli Cleri in 1315 was authority for the existence of religious confession in the
fourteenth century, I analysed the relevant provisions for two purposes. First, I explained
how statutes before the separation of church and state at the Reformation were used to
express and settle the common law, rather than to simply create new positive law, as is
the modern expectation.\textsuperscript{55} Secondly, I tested his conclusions both that religious

\textsuperscript{50} Wigmore here referred to Garnet’s case (1606) 2 Howell’s State Trials 217.

\textsuperscript{51} Wigmore here referred to the Statute Articuli Cleri in 1315 (9 Edward II St.1).

\textsuperscript{52} Wigmore, op cit, Vol 8, p 869.

\textsuperscript{53} Supra, chapter two, pp 41-48.

\textsuperscript{54} Supra, chapter two, pp 48-58.

\textsuperscript{55} Idem.
confession privilege clearly existed from 1315 through to 1606, and that it had been abrogated in cases of treason.56 Since neither Coke as Attorney-General and Prosecutor nor any of the Nine Commissioners who sat with the jury in Garnet’s case denied the existence of religious confession privilege which Henry Garnet asserted as his defence, it seemed odd to suggest that the decision was “ambiguous”57 where the existence of the privilege was concerned. Certainly as a trial court decision made by a jury, Garnet’s case does not represent a precedential authority affirming religious confession privilege, but it is disingenuous to suggest that the efforts of Coke and the Commissioners to show that Garnet had not received a sacramental confession somehow denied that religious confession privilege would have been a legitimate defence on more appropriate facts. Similarly, Coke’s reflective commentary twenty years later,58 in which he preferred to interpret the decision as an authority for a treason exception to religious confession privilege (in effect affirming that the defence was good but that it failed because of the exception), is hardly “ambiguous”. Clearly, early seventeenth century judicial opinion accepted that sacramental religious confessions should not be adduced as evidence in cases that did not involve treason.

**Canon law**

In chapter three, I traced the evolution of the seal of confession in Roman Catholic canon law and showed how that seal was respected in ‘secular’ laws passed before

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56 Supra, chapter two, pp 58-75.

57 Wigmore, op cit, Vol 8, p 869.

Norman times. After the twenty-first canon of the Fourth Lateran Council of 1215 affirmed that the seal of confession was binding throughout the Holy Roman Empire, confirming much earlier respect for confessional secrecy in England which had been endorsed by William the Conqueror’s appointees as Archbishop of Canterbury, it is not possible to find any suggestion that confessional secrecy was ever doubted until the English Reformation under Henry VIII. History which affirms secular respect for canon law between the time of William the Conqueror and Henry VIII includes Henry II’s penance and grudging respect for the laws of the church after the murder of Thomas A’Becket in 1170; the fact that most of the king’s secular judges were priests until Pope Innocent IV (1243-1254) outlawed such appointments, and Edward II’s recognition of confessional secrecy in the Statute Articuli Cleri in 1315. But since there has been considerable debate about the place of confession in Anglican practice after the English Reformation, in chapter three I also considered the effect of the introduction of conditional language into the first Anglican canon mandating confessional secrecy in 1603, and to the respect due Anglican canon law in English secular courts since.

The reason why some modern commentators do not expect English secular courts to respect confessional secrecy is because confession became voluntary after the English Reformation. But the contrary view holds that the voluntariness of Anglican confession

59 Supra, chapter three, pp 95-97.
60 Supra, chapter three, pp 91-93.
61 Supra, chapter three, pp 100-101.
62 Supra, chapter three, pp 101-103.
63 For example, Nokes doubts “in the twentieth century” whether a clergyman would be ecclesiastically punished for breaching confessional secrecy under compulsion by a secular court (Nokes, GD, "Professional Privilege" [1950] 66 LQR 88, 101-102). Norman Doe thinks that the secular courts do not need to respect Anglican canonical secrecy because the 113\textsuperscript{th} canon in 1603 is only phrased as a recommendation (Doe, N, The Legal Framework of the Church of England, Oxford, Clarendon Press, 1996, p 353).
has not diluted the priest’s obligation to keep confessional secrets at all.\textsuperscript{64} That no English judge when mentioning religious confession privilege has ever referenced the 113th 1603 Anglican canon appears to underscore the first view. But there never has been an English case that raised the point for precedential decision either. History confirms that Henry VIII found it politically expedient to retain the Roman Catholic canon law intact, including that in relation to confession.\textsuperscript{65} And though confession certainly became voluntary, when a body of uniquely Anglican canon law was finally issued shortly after the death of Elizabeth I, the obligation of secrecy remained, though conditional language was added which seemingly confirmed Coke’s later proposition that there was a treason exception to religious confession privilege.\textsuperscript{66} When Bursell’s belief that Nokes is mistaken in his view that a member of the clergy would not be censured for breach of confessional secrecy\textsuperscript{67} is coupled with Bursell’s observation that modern statutory discretions allow judges “to exclude evidence … whether by preventing questions from being put or otherwise”,\textsuperscript{68} it seems fair to conclude that English courts have tools available which they will use to prevent the unnecessary friction between church and state\textsuperscript{69} which would arise if questions about confessional secrecy were pressed in secular courts. Bursell also makes the understated practical point that the


\textsuperscript{65} See discussion supra, chapter three, pp 106-111. Note also that the \textit{Act for the Submission of the Clergy} in 1535 (25 Henry VIII, c.19) forbade the enactment of new church canon law “except in convocations summoned by the King’s writ”, and the \textit{Act of Six Articles} in 1539 (31 Henry VIII, c.14) reaffirmed Roman Catholic doctrine as the doctrine of the by now separate Church of England.

\textsuperscript{66} Note that Coke was as reluctant to cite Anglican canon law authority for his treason exception to religious confession privilege in his magnum opus on the common law as he was to cite French Catholic canon law authority (see discussion in chapter two, supra, pp 72-73).

\textsuperscript{67} Bursell, op cit, pp 107-108. See also note 63 supra.

\textsuperscript{68} Section 82(3) of the \textit{Police and Criminal Evidence Act, 1984} as cited in Bursell, op cit, p 109.

\textsuperscript{69} McNicol, S, \textit{Law of Privilege}, Australia, Butterworths, 1992, pp 330-331, 337.
absence of English cases about religious confession privilege is in no small part the consequence of continuing clerical unwillingness to disclose that confessions have been heard at all.\textsuperscript{70}

But what does all this canonical debate mean? Was Wigmore right to doubt that “the general probabilities to be drawn from the recognition of Papal ecclesiastical practices prior to Henry VIII”\textsuperscript{71} were insufficient to prove that confessional secrecy was recognised in English law before the English Reformation? While there may be some doubt that even Anglican canon law affirming religious confession privilege would prevent a contemporary English court from compelling confessional evidence, that cannot be a correct statement of the position in the sixteenth century.

\textbf{Common law}

In chapter four I then reviewed each English case that has either mentioned religious confession privilege or has been cited in commentary as authority in relation to religious confession privilege. Because the text writers were so certain that there was no religious confession privilege at common law, and because Sir James Stephen had observed that the modern law of evidence grew up at a time when it was unlikely that a Roman Catholic privilege would be explicitly recognised,\textsuperscript{72} I explained how evidential privileges generally had evolved. That review suggested the insight that the denial of religious confession privilege in the early evidence law texts may well have been a casualty of the need to set out the relevant material in categories, including a category that naturally

\textsuperscript{70} Bursell, op cit, p 89.

\textsuperscript{71} Wigmore, op cit, Vol 8, p 869.

saw religious confession privilege grouped with other evidential privileges. The only problem that flowed from that grouping was that the great bulk of material that had to be catalogued concerning legal professional privilege quickly overwhelmed the material that could be cited in connection with religious confession privilege. While these two privileges had more in common than the privilege against self-incrimination, the privilege or immunity that protected state secrets or spousal privilege, the risk that they would not be properly distinguished, was realised in many of the texts that treated them. In particular, the independent and antiquarian history of religious confession privilege was not just glossed over, it was ignored completely. It is also understandable, though inaccurate, to observe that the importance of legal professional privilege in evidence law texts prepared primarily as handbooks for barristers, meant that the errors where religious confession privilege was concerned did not need to be corrected because the small number of cases raising the issue did not necessarily expose the error, as would have been the case if the error concerned legal professional privilege. The habit of grouping legal professional privilege and religious confession privilege together in texts treating privilege more generally, also explains why so many cases that really concerned legal professional privilege are cited in connection with religious confession privilege – both by judges (who learned their law from the texts as students and later consulted the same texts in practice) and text writers.

My separate treatment of the legal professional privilege cases and the ‘irregular confession’ cases that were cited in connection with religious confession privilege

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73 Supra, chapter four, pp 136-140.

74 Supra, chapter four, p 137.

75 Supra, chapter four, pp 137-140.

76 Supra, chapter four, pp 136-155.
confirmed that neither set of cases really advances understanding of religious confession privilege. Certainly analogies to religious confession privilege may have influenced the early development of legal profession privilege,\(^{77}\) and Baron Alderson’s reverse analogy back from legal professional privilege to religious confession privilege in *R v Griffin*\(^ {78}\) was used to justify the exclusion of confessional evidence in that case. But after I had considered all the cases, I found that the Wright and Graham summary that the law relating to religious confession privilege has not been developed in English law\(^ {79}\) was proven. For while some of the cases showed judges working hard to avoid confronting religious confession privilege when it did present itself,\(^ {80}\) there was no elaboration of the relevant law, as might have been expected in the wake of that discussion in *Garnet’s case*. Perhaps Hill J’s decision that the evidence Father Kelly was asked to provide in *R v Hay* did not involve the disclosure of confessional material in breach of the Catholic seal is an exception. But it is not convincing in light of both Father Kelly’s belief that such disclosure constituted a breach of his priestly obligation and his expectation that such breach would see him subjected to severe ecclesiastical discipline, such that disclosure must have seemed to him like a form of self-incrimination. My review of the extra-judicial comments in the House of Lords occasioned by the publicity surrounding the case of *R v Constance Kent* did not contribute additional enlightenment either, since none of the Lords who contributed to the discussion were well informed and there was informed comment outside the House that took the contrary view.\(^ {81}\)

\(^{77}\) Supra, chapter four, p 137.

\(^{78}\) *R v Griffin* (1853) 6 Cox Cr Cas 219.

\(^{79}\) Wright and Graham, op cit, § 5612, p 41.

\(^{80}\) For example both *R v Hay* (1860) 2 F & F 4, 7; 175 ER 933 and *In re Keller* (1887) L.R. Ir. 158 are cases marked by judicial reluctance to tackle the religious confession privilege issue head on. See discussion in chapter four, pp 159-164.

\(^{81}\) Supra, chapter four, pp 171-177.
Confidential religious communications privilege

Though religious confession privilege may not have been developed in English common law, the discussion in chapter five confirms that ample material exists not only to advance such development but also to expand it to favour confidential religious communications more generally and not just the narrower class of religious confessions. Before the twentieth century, that material includes the comments of Lord Kenyon CJ in Du Barré v Livette\(^{82}\) disapproving Buller J’s reputed decision in R v Sparkes;\(^{83}\) Best CJ’s obiter statements suggesting the existence of judicial discretion to exclude evidence of religious confessions if the priest did not want to reveal them in Broad v Pitt;\(^{84}\) Baron Alderson’s clear exercise of judicial discretion in excluding the religious confession evidence discussed in R v Griffin;\(^{85}\) and even some of the statements made by Jeune P in Normanshaw v Normanshaw,\(^{86}\) despite the fact that those last statements have been frequently cited as authority denying the existence of religious confession privilege.\(^{87}\)

Though there are denials in the twentieth century that judges have any discretion to exclude evidence that is relevant and necessary for the attainment of justice in a case,\(^{88}\) these statements are tempered even in England: by judicial interpretation of what is

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\(^{82}\) Du Barré v Livette (1791) 1 Peake 108; 170 ER 86.

\(^{83}\) Unreported but referred to in Du Barré v Livette (1791) 1 Peake 108; 170 ER 86.

\(^{84}\) Broad v Pitt (1828) 3 Carr & P 518; 172 ER 528. See discussion supra, chapter four, pp 148-150.

\(^{85}\) R v Griffin (1853) 6 Cox Cr Cas 219.

\(^{86}\) Normanshaw v Normanshaw (1893) 69 LTR 468.

\(^{87}\) See chapter five, note 27.

necessary to the attainment of justice in a case;\textsuperscript{89} by statutory discretions;\textsuperscript{90} by observations that judges can exercise considerable moral authority upon the course of a trial by disapproving a line of questioning by counsel;\textsuperscript{91} and if the judge considers that the public interest in the preservation of a particular confidence outweighs the public interest in court, access to all the evidence.\textsuperscript{92}

However, the twentieth century development most likely to lead to recognition of a broad common law confidential religious communications privilege in England, was Lord Hailsham's observation that "[t]he categories of public interest immunity are not closed".\textsuperscript{93} That idea not only resonated with his brother Lord Simon in \textit{D v NSPCC};\textsuperscript{94} but with Beverley McLachlin a year earlier in Canada,\textsuperscript{95} who noticed an almost identical sentiment expressed by North J in \textit{Bell v University of Auckland}\textsuperscript{96} eight years earlier in New Zealand. In the New Zealand case, what is more significant in the religious communications privilege context, is that North J adapted the same famous phrase from Lord Macmillan in connection with the law of negligence\textsuperscript{97} and applied it in relation to

\textsuperscript{89} For example, Lord Denning said "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, a necessary question in the course of justice to be put and answered" (\textit{Attorney-General v Mulholland and Foster} [1963] 2 QB 477, 489-490).

\textsuperscript{90} Bursell cites such discretion in England in section 82(3) of the \textit{Police and Criminal Evidence Act, 1984} (Bursell, Judge RDH, "The Seal of the Confessional", Ecclesiastical Law Journal 1(7) (1990), 84,109). See also discussion supra, chapter three, pp 120-121 and chapter five, pp 223-225.

\textsuperscript{91} Per Lord Simon in \textit{D v NSPCC} [1978] AC 171, 239. See also discussion supra, chapter five, pp 197-198.

\textsuperscript{92} Per Lord Edmund-Davies in \textit{D v NSPCC} [1978] AC 171, 245-246. See also discussion supra, chapter five, pp 199-202.

\textsuperscript{93} \textit{D v NSPCC} [1978] AC 171, 230.

\textsuperscript{94} \textit{D v NSPCC} [1978] AC 171, 236, 241.

\textsuperscript{95} McLachlin, B, “Confidential Communications and the Law of Privilege” (1977) 2 UBCL Rev 266, 269.

\textsuperscript{96} \textit{Bell v University of Auckland} [1969] NZLR 1029.

\textsuperscript{97} \textit{Donoghue v Stevenson} [1932] AC 562, 619; [1932] All ER Rep 1, 30.
“the categories of privilege”.\textsuperscript{98} That Lord Hailsham and North J should use the same phrase to confirm that the law in relation to both public interest immunity and privilege is not stationary, has proven prophetic. For though the two “groups of rules”\textsuperscript{99} have discrete origins, the significance of the historical differences between them has been reduced because the same public interest arguments are now used to justify both. In Canada, the Supreme Court used the public interest in freedom of religion under the 1982 Charter of Rights and Freedoms to require case-by-case consideration of claims that confidential religious communications should not be admitted as evidence.\textsuperscript{100} Though the Supreme Court did not recognise confidential religious communications as a new class of privilege as Wigmore had suggested\textsuperscript{101} would be the result of the application of his four canons, the Supreme Court did direct that Canadian judges could use Wigmore’s criteria to weigh the competing public interests that argued for and against the admission of such otherwise relevant evidence. That result is not very different from the “balancing operation” that Lord Edmund-Davies described in connection with new categories of public interest immunity in \textit{D v NSPCC}.	extsuperscript{102} In Ireland too, it was public interest inspired by the Wigmore principles that lay at the heart of Gavan Duffy J’s decision that confidential communications with a member of the clergy were privileged. As later in Canada, that decision flowed from the fact that a

\textsuperscript{98} \textit{Bell v University of Auckland} [1969] NZLR 1029, 1036.


\textsuperscript{100} \textit{R v Gruenke} (1991) 3 SCR 263.

\textsuperscript{101} Wigmore stated that his “four fundamental conditions [were] recognized as necessary to the establishment of a privilege against disclosure of communications” and that “a privilege should be recognized” “[o]nly if there four conditions are present” (op cit, Vol 8, p 527).

\textsuperscript{102} \textit{D v NSPCC} [1978] AC 171, 245.
constitutional instrument entrenched the public interest in protecting the kind of religious freedom that was essential in Ireland.\textsuperscript{103}

**Religious confession privilege in Australia**

While there has not been a clear case in Australia which has invited elaboration of these same principles in relation to confidential religious communications, the historical difference between public interest immunity and privilege has been narrowed in Australia nonetheless. For in developing the dominant purpose test in relation to legal professional privilege since the sole purpose test was set out in *Grant v Downs*\textsuperscript{104} in 1976, the High Court of Australia has used arguments that have justified public interest immunities in the past.\textsuperscript{105} However, it is not just the analogical use of argument that has drawn the two groups of rules closer together in Australia. In *Daniels v ACCC*,\textsuperscript{106} six of the judges used language that confirmed that legal professional privilege was not just a rule of evidence,\textsuperscript{107} nor even simply a rule of substantive law.\textsuperscript{108} It was an important\textsuperscript{109}

\textsuperscript{103} *Cook v Carroll* [1945] Ir. Rep. 515.

\textsuperscript{104} *Grant v Downs* (1976) 135 CLR 674.

\textsuperscript{105} For example, before they made their famous statement that legal professional privilege was a common law right so firmly entrenched in the law that it was not to be exorcised by judicial decision, Stephen, Mason and Murphy JJ also said that “[t]he existence of [legal professional] privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available” (*Grant v Downs* (1976) 135 CLR 674, 685). Though Jacob J’s judgement in the same trial wished to keep “Crown privilege” (not immunity) separate from legal professional privilege, in his reasoning he nonetheless noted that the same public interest factors as militated in favour of disclosure of legally privileged material in *Grant v Downs*, also militated in favour of disclosure of Crown privileged material when a public inquiry was required by the public interest (Ibid, p 691).

\textsuperscript{106} *Daniels Corporation v ACCC* (2002) 192 ALR 561.

\textsuperscript{107} Ibid, p 564 (para 10 per Gleeson CJ, Gaudron, Gummow and Hayne JJ) and p 583 (para 85 per Kirby J).

\textsuperscript{108} Ibid, pp 564-565, para 11, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{109} Idem.
and fundamental common law immunity\textsuperscript{110} which embodies a substantive legal and human right\textsuperscript{111} that “is not limited to judicial or quasi-judicial proceedings”.\textsuperscript{112} This conflation of the nature of privileges and immunities in Australia, is also obvious in the High Court’s decision in \textit{Baker v Campbell}. For while Stephen, Mason and Murphy JJ had said in \textit{Grant v Downs} that legal professional privilege was a common law right so firmly entrenched that it was “not to be exorcised by judicial decision”,\textsuperscript{113} seven years later in \textit{Baker v Campbell} in 1983, Dawson J also said that self-incrimination privilege was also “too fundamental a bulwark of liberty to be categorized simply as a rule of evidence”:\textsuperscript{114} that legal professional privilege “stems from a right which is no less fundamental”,\textsuperscript{115} and that the two rights were conceptually connected.\textsuperscript{116} This language confirms not only that public interest will be the dominating factor in future judicial consideration of the scope of evidential privileges in Australia, but suggests that international human rights norms will also be an integral part of future High Court decisionmaking where evidential privileges are concerned.

In chapter seven, I identified the most obvious High Court of Australia decisions where international human rights norms have influenced Australian jurisprudence in the last fifteen years.\textsuperscript{117} While the decisions in \textit{Mabo}\textsuperscript{118}, \textit{Australian Capital Television}\textsuperscript{119} and

\begin{flushleft}
\textsuperscript{110} Ibid, pp 573-574, para 44, per McHugh J; p 583, para 85, per Kirby J.

\textsuperscript{111} Ibid, pp 583-584, para 86, per Kirby J.

\textsuperscript{112} Ibid, p 583, para 85, per Kirby J.

\textsuperscript{113} \textit{Grant v Downs} (1976) 135 CLR 674, 685.

\textsuperscript{114} \textit{Baker v Campbell} (1983) 153 CLR 52, 128.

\textsuperscript{115} Idem.

\textsuperscript{116} Idem.

\textsuperscript{117} Supra, chapter seven, pp 285-289.

\textsuperscript{118} \textit{Mabo v Queensland} (No 2) (1992) 175 CLR 1.
\end{flushleft}
Teoh\textsuperscript{120} do not bear directly upon issues of privilege or immunity, various references in the judgements in Daniels do. In particular, McHugh and Kirby JJ’s characterisation of legal professional privilege as not only a common law right but a “fundamental human right”\textsuperscript{121} demonstrates this point. In Australia, the human rights argument in favour of religious confession privilege is domestically unavoidable, since free exercise of religion is the only international human rights norm expressly entrenched in the Australian Constitution.\textsuperscript{122} If the High Court could be convinced that international human rights norms were also a valid consideration in a common law confidential religious communications privilege case, the applicable norms ought to be more compelling than in a legal professional privilege case, since the norms protecting freedom of religious practice are more direct than they are for legal professional privilege. For the best argument using international human rights norms in favour of legal professional privilege relies upon the fact that legal professional privilege is seen as an integral part of the right to a fair trial, and is seldom mentioned in international human rights instruments as a protected norm in its own right. On the other hand, both religious confession and confidential religious communication directly present themselves as fundamental examples of free exercise of religion when any international human rights instrument is read. Despite the strength of this argument, I have conceded that arguments that rely upon international human rights instruments will not gain much traction in courts below the High Court in the Australian judicial hierarchy since, for example, Spigelman CJ has doubted that even the New South Wales Court of Appeal as “an intermediate court of

\begin{itemize}
  \item \textsuperscript{119} Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.
  \item \textsuperscript{120} Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.
  \item \textsuperscript{121} Daniels Corporation v ACCC [2002] 192 ALR 561, 573-574 (para 44, per McHugh J) and 583-584 (paras 85 and 86, per Kirby J).
  \item \textsuperscript{122} Section 116.
\end{itemize}
appeal"123 is at liberty to improvise with new categories of privilege.124 If the human rights argument is to have any convincing power at all in intermediate and lower courts in Australia, it will necessarily draw upon the limited jurisprudence that surrounds section 116 of the Constitution, including the finding that a law that was expressly directed at proscribing an otherwise lawful religious practice, would breach this constitutional provision.125

However, the High Court of Australia has affirmed that what Mason P (as he then was) called “the gravitational pull of statutes” in *Akins v Abigroup Ltd*126 will influence the development of the common law with respect to evidential privileges in Australia. That is because Australia has “one common law … declared by th[e High Court of Australia] as the final court of appeal”.127 For though there was an insufficiently uniform pattern in legislation with respect to the availability of legal professional privilege in pre-trial circumstances for the High Court to declare “one common law” on the fine privilege point at issue in *Esso*,128 the “uniform pattern of legislation in five states”129 had provided the Court with assistance in making the common law seamless where marital rape was concerned.130 The High Court also noted with approval the United States Supreme

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123 R v Young (1999) 46 NSWLR 681, 698, para 84.
124 Ibid, p 700, para 91.
125 Per Pincus J in *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 11 FCR 543, 577-578, though note that his decision was overturned by the Full Federal Court on appeal who considered that the Minister had not intended to prohibit the free exercise of the practice of Islam when he had deported an Imam. See discussion supra in chapter six, pp 246-248.
128 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.
130 Idem.
Court decision\textsuperscript{131} that an 1886 “federal rule”\textsuperscript{132} that did not allow the application of wrongful death statutes in maritime cases “should adapt by analogy to the position established in the various states”,\textsuperscript{133} since the federal position was no longer “acceptable in …1970 [when] every State of the Union [had passed] a wrongful-death statute”.\textsuperscript{134} Though there was “no consistent pattern of legislative policy”\textsuperscript{135} with respect to the pre-trial application of legal professional privilege “to which the common law [could adapt] itself”\textsuperscript{136} in \textit{Esso}, the High Court said the “fragmentation of the common law”\textsuperscript{137} which only enabled common law adaptation in jurisdictions where the Uniform \textit{Evidence Act} applied, was “inconsistent with what was said in \textit{Lange} and unacceptable”.\textsuperscript{138} Since there are seven out of ten jurisdictions in Australia\textsuperscript{139} that now have religious confession privilege statutes, and since five of those jurisdictions have adopted the Uniform \textit{Evidence Act} formulation of the privilege,\textsuperscript{140} it seems reasonable to suggest that the High Court would “adapt” the common law in Queensland, South Australia and Western Australia to that Uniform \textit{Evidence Act} template standard if an appropriate case were presented for decision in the interests of \textit{Lange} ‘seamlessness’.\textsuperscript{141} That likelihood is the

\textsuperscript{131} \textit{Moragne v States Marine Lines Inc} (1970) 398 US 375.

\textsuperscript{132} \textit{Esso Australia Resources Ltd v Federal Commissioner of Taxation} (1999) 201 CLR 49, 63, para 26.

\textsuperscript{133} Idem.

\textsuperscript{134} Idem.

\textsuperscript{135} \textit{Idem}.

\textsuperscript{136} \textit{Esso Australia Resources Ltd v Federal Commissioner of Taxation} (1999) 201 CLR 49, 61, para 23.

\textsuperscript{137} Idem.

\textsuperscript{138} Idem.

\textsuperscript{139} See chapter seven, note 221.

\textsuperscript{140} See chapter seven, note 223.

\textsuperscript{141} \textit{Esso Australia Resources Ltd v Federal Commissioner of Taxation} (1999) 201 CLR 49, 61, para 23 per Gleeson CJ and Gaudron and Gummow JJ and at , p 81, para 91 per Kirby J.
stronger when the High Court’s willingness to invoke human rights norms from international law is factored into such consideration.

**Extinction theories**

Since the text writers are so consistent in their denials of the existence of religious confession privilege at common law, in chapter six I summarised the theories that have been advanced to explain that extinction, since those denials have not been adequately explained anywhere. Those theories were first, that religious confession privilege was extinguished at or by the English Reformation or by the Restoration of the monarchy after the Cromwellian Interregnum. Secondly, that as a Roman Catholic privilege, religious confession privilege was extinguished by the institutional prejudice against that religion that lasted from the English Reformation through to the nineteenth century. Thirdly, that any perceived need to pass a religious confession privilege statute demonstrated that the privilege did not exist at common law. Fourthly, that religious confession privilege does not exist in British Commonwealth jurisdictions that have not adopted or retained any established church. And finally that Sir George Jessel MR’s dicta in *Anderson v Bank of British Columbia*\(^{142}\) and *Wheeler v LeMarchant*\(^{143}\) so captured the spirit of the common law against any privilege except a narrow legal professional privilege in the late nineteenth century, that his dicta extinguished any residue of religious confession privilege that may have arguably endured till he made his statements.

\(^{142}\) *Anderson v Bank of British Columbia* (1876) 2 Ch D 644.

\(^{143}\) *Wheeler v LeMarchant* (1881) 17 Ch D 675.
Each of those theories was analysed and dismissed as follows. There is no explanation why the English Reformation or the Restoration of the monarchy could have extinguished religious confession privilege.\(^{144}\) It is not reasonable to believe that simple religious prejudice could permanently extinguish a privilege that was recognised in antiquity absent an abrogating statute, particularly when every legislature that has addressed the issue since has passed an affirming statute to put the matter beyond doubt.\(^{145}\) Statutes have a variety of moving causes. While some religious confession privilege statutes may have been passed because the legislators incorrectly believed no religious confession privilege existed at common law, their mistaken belief does not retrospectively validate the incorrect interpretation of history which motivated them to legislate, nor does it invalidate the resulting statute.\(^{146}\) In Australia, the existence of a constitutional guarantee of free exercise of religion makes irrelevant the suggestion that the absence of a state church somehow removed common law religious confession privilege. That the same constitutional provision which entrenches free exercise of religion in Australia also proscribes Commonwealth creation of a state church,\(^{147}\) also demonstrates the misconception in this theory for extinction of religious confession privilege at common law. For from the beginning of the Australian Commonwealth, it was intended that there be no state church but that there should be free exercise of religion.\(^{148}\) And finally, while it is axiomatic that the common law is the capture or

\(^{144}\) See discussion supra, chapter six, pp 228-236.

\(^{145}\) See discussion supra, chapter six, pp 236-242.

\(^{146}\) See discussion supra, chapter six, pp 242-246.

\(^{147}\) The full text of section 116 of the Australia Constitution states: “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth”.

\(^{148}\) See discussion supra, chapter six, pp 246-254.
expression of custom,\textsuperscript{149} both develop. Even if Sir George Jessel MR did express the feelings of many judges in his age about religious confession privilege,\textsuperscript{150} those feelings were the consequence of misinformation. In any event, his feelings have been superseded by society’s interest in fostering free exercise of religion in the twentieth century. Sir George Jessel MR did not cite any binding or convincing authority for his view of religious confession privilege, and though his dicta have often been cited, they have not been expressly followed in any precedential decision that has denied religious confession privilege since, because there have not been any such cases.\textsuperscript{151}

\textbf{Final conclusion}

This thesis therefore ends with the finding that there was religious confession privilege at common law before the English Reformation. That privilege has endured and it has not been abrogated by statute or extinguished by common law development since. Indeed, it has been reaffirmed legislatively in many jurisdictions that have felt the need to consider it – often because misinformed judges have denied it. While the writer can wish with J Noel Lyon that the “legal writers should stop stating categorically that no [religious confession] privilege exists at all”,\textsuperscript{152} the writer’s more modest hope is that this material will enable advocates to convince judges in the twenty-first century that proper analysis of the relevant common law sustains a different conclusion. It is also to be hoped that the recognition that religious confession privilege existed at common law will enable the

\textsuperscript{149} See quotes from Oliver Wendell Holmes Jr. supra, chapter six, pp 254-255.

\textsuperscript{150} See the discussion about the extra judicial comment elicited by public discussion of the case of \textit{R v Constance Kent} supra in chapter four, pp 171-177.

\textsuperscript{151} See discussion supra, chapter six, pp 254-262. See also chapter one, pp 25-35.

\textsuperscript{152} “Privileged Communications – Penitent and Priest” [1964-65] 7 \textit{Crim LQ} 327, 328.
more generous interpretation of existing statutes suggested in chapter seven.\textsuperscript{153} In essence, that argument holds that judges do not need to interpret religious confession privilege narrowly because the public interest requires the court to see all the evidence, because there is a countervailing public interest in fostering confidential relationships between priest and penitent. That countervailing public interest is implicit in the need perceived by the legislature to pass a religious confession privilege in the first place. If this analysis is accepted, the gravitational pull of existing Australian religious confession privilege statutes should also see state judges in Queensland, South Australia and Western Australia acknowledge religious confession privilege at common law, even if the Commonwealth Uniform \textit{Evidence Act} is never adopted in those states.

\textsuperscript{153} Supra, chapter seven, pp 307-310.
BIBLIOGRAPHY

BOOKS


Bartley, G, *Sexual Assault Communications Privilege Under Siege*, 01/105, Continuing Professional Education Department of the College of Law (26 March 2001)

Bellamy, G and Meibusch, P, *Commonwealth Evidence Law, Uniform Commonwealth and New South Wales Evidence Acts with commentary*, 2nd ed, Canberra, Attorney-General’s Department, AusInfo


Byrne, D, and Heydon, JD, *Cross on Evidence*, 4th Australian ed, 1991


Carswell, D, ed, *Trial of Guy Fawkes and Others (The Gunpowder Plot)*, William Hodge and Company Ltd, Glasgow and Edinburgh, 1934


Cobbett’s *Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours from the earliest period to the present time*, London, Printed by TC Hansard, Published by R Bagshaw, Brydges Street Covent Garden, 1809


*Constitutions and Canons Ecclesiastical*, London, Robert Barker, 1612


*Doctrine in the Church of England (DCE)*, London, 1938


Holmes, OW, Jr, *The Path of the Law*, Bedford Massachusetts, Applewood Books


Monier-Williams, Sir M, Buddhism in its Connexion with Brahmanism and Hinduism and in its Contrast with Christianity, London, John Murray, 1890


Nichols, S, Law of Privilege, Butterworths Australia, 1992


Rodes, RE, Jr, *Lay Authority and Reformation in the English Church*, Notre Dame and London, the University of Notre Dame Press, 1982


Smirke, E, Roscoe's *Nisi Prius*, 10th Ed, London, Stevens and Sons, Sweet and Maxwell, 1861


Wigmore, JH, *A Treatise on the Anglo-American System of Evidence in trials at common law: including the statutes and judicial decisions of all jurisdictions of the United States and Canada*, Boston, Little Brown, 1904


**ARTICLES**


Adams, LR Jr, and Polk, ME, “Privileged Communications – Some Recent Developments” (1952) 5 *Vanderbilt LR* 590


Allred, VC, “The confessor in court” (1953) 13 *The Jurist* 2

Allred, VC, “Privileged communications to clergymen” (1955) 1 *The Catholic Lawyer* 198


Australia Law Reform Commission, Report No 26 (1985)

RELIGIOUS CONFESSION PRIVILEGE – THOMPSON – BIBLIOGRAPHY


Bevilacqua, A, Cardinal, “Confidentiality obligation of clergy from the perspective of Roman Catholic priests” (1996) 29 Loyola LR 1733


Bursell, RDH, “The seal of the confessional” (1990) 7 Ecclesiastical LJ 84


Callahan, MJ, “Historical inquiry into the priest penitent privilege” (1976) 36 The Jurist 328

Campbell, Sister S, “Catholic sisters, irregularly ordained women and the clergy-penitent privilege” (1976) 9 UC Davis LR 523


Collett, TS, “Sacred secrets or sanctimonious silence” (1996) 29 Loyola LR 1747


Doyle, DJ, “Religious freedom and Canadian church privileges” (1984) 26 Journal of Church and State, 293


Hogan, EA, Jr, “A modern problem on the privilege of the confessional” (1951) 6 Loyola LR 1

Hopwood, JT, “Confessions in criminal cases” (1865) 3 Juridical Society Papers 129; (1860) 6 The Jurist pt 2, 319

Horner, C, “Beyond the confines of the confessional: the priest-penitent privilege in a diverse society” (1997) 45 Drake LR 697

Hurley, WE, “Privileged Communications in Oregon” (1957) 36 Oregon LR 132

Jones, DO, “Privileged Communications with Clergy in the United States – An analytical study of the laws of each state, territory and protectorate concerning such privileged communications” Doctor of Ministry Dissertation, San Francisco Theological Seminary, 16 April 1979

Kelliher, J, “Privileges (Canon Law)” (1966) 11 New Catholic Encyclopaedia 810

Kimball, EL, “Confession in LDS Doctrine and Practice” (1996-7) BYU Studies 36 no.2, 7

Kuhlmann, FL, “Communications to clergymen - When are they privileged?” (1968) 2 Valparaiso ULR 265


Lacey, W, “A prelude to the demise of Teoh: The High Court decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam”, [2004] Sydney Law Review 7
Latko, EF, “Auricular confessions” (1966) 4 *New Catholic Encyclopaedia* 131

Law Reform Commission of Western Australia, “Report on Professional Privilege for Confidential Communications” (1993) Project No 90


Lindsay, JR, “Privileged Communications Part 1: Communications with Spiritual Advisors” (1959) 13 *N Ir LQ* 160

Loder, RE, “When silence screams” (1996) 29 *Loyola LR* 1785

Luisell, DW, “Confidentiality, Conformity and Confusion: Privileges in Federal Court Today” (1956) 31 *Tulane LR* 101

Lupu, IC, and Tuttle, R, “The Distinctive Place of Religious Entities in our Constitutional Order” (2001) 46 *Villanova LR* 1

Lyon, JN, “Privileged Communications - Penitent and Priest”, (1964-65) 7 *Criminal LQ* 327


McCarthy, JL, “Seal of Confession” (1966) 4 *New Catholic Encyclopaedia* 133


McLachlin, B, “Confidential Communications and the Law of Privilege” (1977) 2 *UBCL Rev* 266


Mason, Sir A, “The tension between legislative supremacy and judicial review” (2003) 77 *ALJ* 803
Medina, JM, "Evidence: 'Is there a time to keep silence?' - The priest-penitent privilege in Oklahoma" (1974) 27 Oklahoma LR 258


New South Wales Parliamentary Debates (N.S.W.), Legislative Council, 21 November 1989

Nokes, GD, “Professional privilege” (1950) 66 LQR 88

Nolan, RS, “The law of the seal of confession” (1913) 13 Catholic Encyclopaedia 649

Northern Territory Discussion Paper considering adoption of Australia’s Uniform Evidence Act


Pearce, RG, “To save a life: why a Rabbi and a Jewish lawyer must disclose a client confidence” (1996) 29 Loyola LR 1771


Pollan, JH, “Henry Garnet” (1913) 6 Catholic Encyclopaedia 386

Pollan JH, “The Gunpowder Plot” (1913) 7 Catholic Encyclopaedia 81


Quick, CW, “Privileges under the Uniform Rules of Evidence” (1957) 26 U Cincinnati LR 537
Reese, S, “Confidential communications to the clergy” (1963) 24 Ohio St LJ 55


Robilliard, St JA, “Religion conscience and law” (1981) 32 Northern Ireland Legal Quarterly 358


“Sacerdotal Privilege in English Law” (1956) 221 LTR 268

Shaefer, AG, and Levi, PS, “Resolving the conflict between the ethical values of confidentiality and saving a life: A Jewish view” (1996) 29 Loyola LR 1761


Sippel, JA, “Priest-penitent privilege statutes: Dual protection in the confessional” (1994) 43 Catholic ULR 1127


Stake, RP, "Professionalism and confidentiality in the practice of spiritual direction" (1985) 98 Harvard LR 1450

Steringer, CR, "Comment: The clergy-penitent privilege in Oregon" (1997) 76 Oregon LR 173

Stoyles, RL, "The Dilemma of the Constitutionality of the Priest-Penitent Privilege - The Application of the Religion Clauses" (1967) 29 U Pitt LR 27


Thomas, OS, “Between Scylla and Charybdis: When none of the choices are good” (1996) 29 Loyola LR 1781

Toth, VA, “The clergyman: his privileges and liabilities” (1960) 9 Clev-Mar LR 323


Wantland, WC, “The seal of confession and the Episcopal Church of the United States of America” (1996-7) 4 Ecclesiastical LJ 580


Yellin, JM, “The history and current status of the clergy-penitent privilege” (1983) 23 Santa Clara LR 95

INTERNET ONLY

Anselm, St, Archbishop of Canterbury, see http://www.britannia.com/bios/abofc/anselm.html (last visited 10 April 2004)

Butler v Moore (1804-1806) 2 Sch & Lef 249, Context of the case, see http://en.wikipedia.org/wiki/Butler_v._Moore (last visited 22 July 2006)

Chelmsford, Lord Frederic Thesiger, Judicial career, see http://encyclopedia.thefreedictionary.com/Lord%20Chelmsford (last visited 28 August 2004)

Cooke, Lord Robin, Judicial career, see http://www.politicallinks.co.uk/POLITICS2/BIOG/I/bio.asp?id=2208 (last visited 10 July 2004)

Denning, Lord Alfred Thompson, Obituary, see http://www.guardian.co.uk/obituaries/story/0,,313455,00.html (last visited 11 July 2006)


Exomologesis, Dictionary definition, see http://monarch.gsu.edu/jcrampton/foucault/techterms.html (last visited 8 July 2006)

High Court of New Zealand, see http://www.courts.govt.nz/courts/high_court.html (last visited 28 July 2003)


McLachlin, Beverley CJ’s appointment to the Supreme Court of Canada, see http://www.scc-csc.gc.ca/about_court/judges/McLachlin/index_e.asp (last visited 28 July 2003)

Religious Discrimination in NSW, see http://www.hinet.net.au/~fcjowett/essay.htm (last visited 11 May 2001)

Roman Catholic Popes, detailed chronology, see http://www.newadvent.org/cathen/12272b.htm (last visited 10 April 2004)

Stephen, Sir James, Judicial career, see http://www.infoplease.com/ce6/people/AO846659.html (last visited 30 July 2003)
