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THE PRESENT AUTHORITY OF THE ANCIENT ROMAN CANON LAW WITHIN THE CHURCH OF ENGLAND

There is no doubt that some elements of the pre-Reformation canon law of the Catholic church continue to comprise an integral part of the ecclesiastical law of the Church of England.

> « The law of the Church of England and its history are to be deduced from the ancient general canon law, from the particular constitutions made in this country to regulate the English church, from our own canons, from the rubric, and from any other acts of parliament that may have passed upon the subject; and the whole may be illustrated also by the writings of eminent persons » (1).

There remain, however, interesting questions as to the extent to which such laws continue to be applicable and the means by which they may be deduced.

At the Reformation, Henry VIII, established a new independent Church of England under his immediate authority as supreme head in earth (2). The break with Rome was complete. Yet law and authority have always been inextricably intermixed, so that much of the legislation of the Reformation was concerned to separate the English Church from the Papacy as a law-maker. A comparatively early stage in this process, for example, was the forbidding of appeals to Rome from the English ecclesiastical courts by the Act in Restraint of Appeals of February, 1533 (3).

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(1) *Per* Sir John Nicholl in *Kemp v. Wickes* (1809), 3 Phillim. 264 at p. 276.
(2) Supremacy Act, 1534, 26 Hen. VIII, c. 1.
(3) 24 Hen. VIII, c. 12.

The effect of the Reformation was thus to cut off the law of the English Church from the jurisprudence of the rest of the Western Catholic Church. Yet it was evidently recognised that the framework of the former canon law would have to be preserved in some way, as well as a great deal of its content, if the new Church of England was to be properly and effectively governed within the Catholic tradition.

At first attention was focussed on the « domestic canon law » enshrined in national and provincial constitutions of the English Church. In May 1532, the clergy in Convocation were induced to put forward certain proposals which ultimately came to be set out in legislative form in the Submission of the Clergy Act of 1534 (4). These included an undertaking not to make any new canons or constitutions in Convocation except with royal assent, and those provincial canons and constitutions already in existence were to be made the subject of inquiry by a commission of thirty-two persons drawn equally from Parliament and the clergy who were empowered to determine which of such laws should be abolished and which should receive the royal assent to be retained (5). This Act, and the inquiry set up under it, was intended to deal solely with the reform of those canons and constitutions made by the English Church. Pending the outcome of the inquiry by the commission of thirty-two, the authority of the existing national canons and constitutions was expressly preserved, so long as they were « not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal... » (6).

Yet much of the former *ius commune* would of necessity still have been required to regulate many aspects of the life of the English Church. Most of the law of marriage, for example, was founded on the canon law enshrined in the *Corpus Juris Canonici*: the comprehensive jurisprudence of the Western Catholic Church could not easily be dispensed with. Such laws, however, fell outside the scope of this inquiry. Nevertheless, the incongruity of a Church supposedly independent of the See of Rome still being governed by laws and practice which had their origins in the Roman Church and

(4) 24 Hen. VIII, c. 19.
(5) Section 2.
(6) Section 7.

the Papacy must have been something of an anathema to the crown and the reformers within the new Church, and it would seem that some means had to be found to preserve such portions of the old law which were necessary without acknowledging their source and authority.

This was accomplished with no little skill by the framers of the Reformation legislation. The result was the Ecclesiastical Licences Act, 1534 (7), which recited that:

> « For where your grace's realm recognising no superior under God, but only your grace, has been and is free from subjection to any man's laws, but only to such as have been devised, made and ordained within this realm, for the wealth of the same, or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent to be used amongst them, and have bound themselves by long use and custom to the observation of the same, not as to the observance of the laws of any foreign prince, potentate or prelate, but as to the accustomed and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom, and none otherwise ».

The effect of this statute was to represent the Pope as never ever having had any legislative authority in England, and that those parts of the former *ius commune* which had applied in England prior to the Reformation had enjoyed authority only by virtue of having been accepted and customarily observed here. By such means, the binding nature of the former Roman canon law could be explained, but in terms of it having always been English customary law. Now it followed, that since the Crown was the source and fount of all English law, including, of course, those parts of the common law derived from custom and usage, then these laws might be retained and exercised as English customary law after the Reformation without it having to be acknowledged that they had ever depended on the Pope for their authority.

Having thereby rendered the former canon law of Rome « domestic » in nature, the scope of the inquiry instigated by the

(7) 25 Hen. VIII, c. 21.

Submission of the Clergy Act was extended by a further statute passed in 1543 (8) to determine which parts of the pre-Reformation canon law of Rome might also conveniently continue to be used within the realm: in the meantime, the authority of these « other ecclesiastical laws or jurisdiction spiritual, as be yet accustomed and used here in the Church of England » was to be maintained until the task of the commission had been accomplished.

The deliberations of the commission, however, came to nothing, for before any new code of canons for the Church of England could be compiled, Henry VIII died. A new commission was appointed (9), but this attempt too was doomed to failure, for although the commissioners came close to completing their task, their powers were again terminated on the death of Edward VI which had come so soon afterwards that no extension of their inquiry could be effected. During Mary's reign, the matter rested while the nexus with Rome was re-established, but on the accession of Elizabeth this partially completed code was revised by Foxe the martyrologist on the authority of Archbishop Parker and published in 1571 as the *Reformatio Legum Ecclesiasticarum*. Although introduced into Parliament, it was shelved without receiving Parliamentary approval or the royal assent, so that it never acquired any legal authority. This failure to authorise any comprehensive body of canons by which the Church of England was to be governed meant that in many respects the « effect of the Tudor legislation was to leave the Church in possession of its traditional jurisprudence and the legislation of the medieval popes as the basis of its law » (10).

Nevertheless, although the authority of considerable portions of the pre-Reformation canon law were maintained by this means in the new reformed Church of England, it was now in the form of English customary law, and this was to have far reaching consequences both as to the perception of the legislative authority of the Roman Church before the Reformation, and the extent to which those laws were to be recognised as having validity by the English common-law courts. The view thus became current, as was no doubt intended by those responsible for these legislative reforms, that the

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(8) 35 Hen. VIII, c. 16.

(9) By Statute 3 & 4 Edw. VI, c. 11.

(10) *Report of the Archbishops' Commission on Canon Law*, London, 1947, p. 47.

ancient canon law was never binding but was susceptible to acceptance or rejection, and this has clearly coloured a great deal of judicial thinking when the authority of the pre-Reformation canon law has been in issue. This is evident in the dictum of that arch-protagonist of the common law, Sir Edward Coke, in *Caudrey's Case* (11):

> « So albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by and with a general consent, are aptly and rightly called, the King's Ecclesiastical laws of England... ».

Thus political expediency became firmly established as historical fact. So it was that Sir Matthew Hale in his *History of the Common Law of England* might assert (12):

> « But all the strength that either the Papal or Imperial Laws have obtained in this kingdom, is only because they have been received and admitted either by the Consent of Parliament, and so are part of the Statute Laws of the Kingdom, or else by immemorial Usage and Custom in some particular Cases and Courts, and no otherwise... ».

It is this legal view, therefore, which found expression in Tindal C.J.'s advice of the judges to the Lords in *R. v. Millis* (13) « that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England... ».

It followed, therefore, that those parts of the pre-Reformation canon law which were maintained as a result of the Reformation legislation and the subsequent failure of any code of canons to receive the royal assent, continued to have authority within the English Church, but now in the form of customary law (14). Thereafter, such laws have been regarded as constituting a part of the general law of the realm (15), or of the English common law in the wider sense of that term which includes those canons and consti-

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(11) (1591), 5 Co. Rep. 1a, at p. 9a.

(12) At pp. 28-9.

(13) (1843), 10 Cl.& Fin. 534, at p. 680.

(14) *Per* Lord Blackburn in *Mackonochie v. Lord Penzance* (1881), 6 App. Cas. 424, at p. 446.

(15) *Ibid.*

tutions allowed by custom and consent (16), and so might properly be described as the Queen's (or King's) ecclesiastical laws (17).

It must be supposed, however, that this is a very special form of customary law, for it does not actually depend on a proven period of user or practice but derives its being from statute. The material date at which a particular rule of the ancient canon law must be shown to have been accepted and used is, it is submitted, the time of the Reformation legislation itself when those surviving elements of pre-Reformation canon law were incorporated into the English law (18).

Yet, having said this, there still remains the practical difficulty of ascertaining precisely what parts of the ancient canon law have survived sufficiently so as to remain authoritative within the modern ecclesiastical law of the Church of England. There are, it would seem, three distinct questions which need to be addressed in order to ascertain whether a particular rule of canon law is still effective. First, was the rule of the ancient canon law one which was applicable in the English Church prior to the Reformation; second, to what extent did it survive the translation into English customary law at the time of the Reformation as not being contrary to the royal prerogative; and third, has it endured as a rule of customary law to the present day?

Pre-Reformation Canon Law.

It is apparent that there were significant areas of jurisdiction which, though regarded by the Church as being ecclesiastical and therefore within the purview of the spiritual courts, were either never accepted as such in England, or came to be removed into the ambit of temporal control and supervision. An example of such might be seen in the fact that, contrary to almost universal practice elsewhere and a decision of the Roman Rota in 1370 that the

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(16) *Ibid.* As Whitlock J. said in *Ever v. Owen* (1627), Godb. 432: « There is a common law ecclesiasticall, as well as our common law. *Jus commune ecclesiasticum*, as well as *jus commune laicum* ».

(17) *Caudrey's Case* (1591), 5 Co. Rep. 1a, at p. 9a (quoted above.).

(18) See *R. v. Archbishop of Canterbury* [1902] 2 K.B. 503 where a practice (to entertain an action to hear objections to the confirmation of the election of a bishop) not observed at the date of the statute 25 Hen. VIII, c. 20, was not incorporated into it.

English practice was unlawful, the temporal courts rather than the ecclesiastical courts possessed the cognizance of all civil suits involving clerics (19). Likewise the right of patronage was treated by the English common-law courts as being of temporal cognizance (20) (the advowson (21)). Nor would the barons at the Parliament of Merton in 1236 accept the Church's law (22) by which illegitimate children might be legitimated by the subsequent marriage of their parents (23). It may be conjectured that they foresaw the damaging effect that it might have on the rights of heirs to the succession to land (24). Statutes also sought to make detailed provisions to remedy perceived defects in matters normally associated with ecclesiastical supervision where royal or other temporal interests were involved, e.g. the granting of benefices to aliens (25), the Crown's right of presentation to a benefice (26), appropriations (27), etc.

The limits of the ecclesiastical jurisdiction might be enforced by the temporal courts by means of the prerogative writ of prohibition or a threat of *Praemunire*. The latter, originally conceived by the Statute of Praemunire (28) to stop appeals to the Roman Curia without a royal licence, began to be used in the late fifteenth

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(19) HELMHOLZ, *Roman Canon Law in Reformation England*, Cambridge, 1990, pp. 10-11.

(20) LYNDWOOD, *Provinciale seu Constitutiones Angliae*, ed. Oxford, 1679, V, de Poenis, 15, c. 1, *Eternae*, gl. ad v. *Jure Patronatûs*, p. 316, explains that the right of patronage belongs by custom to the Royal Court. See also the Statute of Advowsons, 1285 (13 Edw. I, st. 1, c. 5).

(21) It is categorised by the common law as being an incorporeal hereditament: BLACKSTONE, *Commentaries*, II, 21.

(22) See *Extra*, 4, 17, 6, addressed by Pope Alexander III to the bishop of Exeter.

(23) « [E]t omnes Comites et Barones una voce responderunt quod nolunt leges Angliae mutare quae usitatae sunt et approbatae': HOLDSWORTH, *History of English Law*, II, 218.

(24) The concern that a determination of legitimacy by an ecclesiastical court might affect inheritance to property was evidently one of which the Papacy was aware: see *Extra*, 4, 17, 7, where Alexander III conceded in letters to the bishops of London and Worcester that though the Church might decide questions of legitimacy, any question involving property rights was to be left to the King's courts.

(25) Statutes 3 Rich. II, c. 3; 7 Rich. II, c. 12.

(26) Statute 13 Rich. II, st. 1, c. 1.

(27) Statutes 15 Rich. II, c. 6; 4 Hen. IV, c. 12.

(28) 27 Edw. III, st. 1, c. 1 (1343).

century as a means of curtailing ecclesiastical jurisdiction where it touched and concerned matters outside the strict purview of spiritual supervision, e.g. debt, as part of the Church's testamentary jurisdiction or directly to enforce a contract made on oath on the ground of breach of faith (*laesio fidei*), crime, by means of a defamation suit in the Church courts, etc. so as to have been arguably derogating from the rights and dignity of the English crown ([29]).

There is, however, a distinction to be drawn between the authority of the ancient canon law as it might impact on the State, and its authority within the English Church itself. It may be appreciated that as a general proposition, the authority of a general council or Pope with respect to matters spiritual exercised within those national Churches which comprised the wider Catholic Church, is of an altogether different kind and quality from that which touched and concerned the temporal lives of the subjects of those states. But even if it is accepted that by definition the *ius commune* of the Western Catholic Church extended to the English Church, it does not necessarily follow that every law within that body was equally effective and applicable in England ([30]).

Although the Western Church was clearly hierarchical in structure, the relationship of a national church to the stream of law which was emanating from a superior legislator, be it general council or Pope, was not as well defined as such a structure might suggest. It does seem that there was a subtlety in the prescribed effects of such legislation which has escaped us. Yet the canonists were aware of levels of law which might dictate different standards of observance, as well as parts of the laws themselves that might attract greater authority than others.

([29]) R.H. HELMHOLZ, *Roman Canon Law in Reformation England*, pp. 24-7.

([30]) The question of the binding nature of the ancient canon law was to precipitate one of the great academic debates of the late nineteenth century between William Stubbs, bishop of Oxford, and Frederick William Maitland. Maitland's arguments that the *ius commune* of the pre-Reformation Church was binding were brought together in his *Roman Canon Law in the Church of England*, London, 1898, and his view has continued to enjoy considerable support, though some reassessment may now have to be made in light of more modern scholarship. See C. DONAHUE, « Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 Years in the Light of some Records from the Church Courts », *Michigan Law Review*, 72 (1974), pp. 647-716.

The canons of a general council of the Church, in that such a council purported to represent the thinking of the whole body of the Church, were intended to apply throughout the Western Catholic Church (31). On a par with such canons were those Papal decrees which had been issued since that time when the legislative authority of the Church had been placed in the hands of the Papacy (32). Many Papal decretals, orders, and rescripts, directly concerned the English Church, and, except where they were couched merely in the form of entreaties, were intended to have had binding effect upon the recipients. Such rulings may have arisen from a request for clarification on a particular point of law addressed to the Pope by, say, an English bishop, or an order directed to an individual or group of persons to obey the law, or a judgment handed down from the Curia in a case concerning an English dispute. Where the determination of the Pope on a specific issue was considered worthy of general application it might then be included among those decretals which came to form a part of the *Corpus Juris Canonici* (33).

As well as positive enactment, however, it is evident that custom was an important and valuable source of law. The canon law permitted three kinds of custom. There were customs which extended the law beyond its existing limits while not being inconsistent with it (*praeter legem*) (34), and there were customs which interpreted a doubtful or obscure law (*juxta legem*). Thus, both these forms of custom might in certain situations or places add to the general canon law, and as a result were able to give rise to a peculiarly English body of law. But it is the third form of custom which is particularly significant, for these customs and usages might be contrary to and derogate from those written laws which but for the custom would have had general effect throughout the Church (*contra legem*). It is by means of such customs and usages that the

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(31) Lyndwood suggests that the term « canon » should properly describe the rulings of a general council: *Provinciale*, IV, de Desp. Impub., 2, c. 1, *Ubi non est*, gl. ad v. *decreti*, p. 272.

(32) *Decretum Grat.*, D. 19, c. 1; LYNDWOOD, *Provinciale*, V, de Haereticis, 5, c. 2, *Item quia*, gl. ad v. *decretalibus*, p. 297.

(33) See e.g. the elaborate ruling of Pope Alexander III addressed to the Archbishop of Canterbury in response to a case being submitted by the archbishop for his opinion concerning the validity of a marriage, which was incorporated into the canon law as *Extra*, 4, 16, 2.

(34) e.g. as to punishment.

law and practice of the English Church might differ from that of the *ius commune*.

This is not an easy concept to understand if one thinks in terms of modern Parliamentary statute relative to custom. Nevertheless, with the exception of those canons of the ecumenical councils of the Church which were intended to enshrine divine law, it was recognised that canons were framed to suit particular places or times ([35]), and so might be changed in other localities or different circumstances ([36]). Accordingly, the *Corpus Juris Canonici* itself acknowledged that an established local contrary custom and usage ([37]) might apply in place of a particular canon, decree, etc. ([38]), if it was good and reasonable ([39]). Thus, English customs deviated from the *ius commune* in a number of ways, such as clerical dress ([40]), the obligation of the parishioners to maintain the nave of the parish church ([41]), the payment of mortuary ([42]), etc.

([35]) *Decretum Grat.*, D. 29, c. 1; LYNDWOOD, *Provinciale*, III, 23, de Celeb. Miss., c. 11, *Effraenata*, gl. ad v. *temporum qualitate*, p. 240.

([36]) *Decretum Grat.*, D. 14, c. 2.

([37]) i.e. a custom of at least forty years duration: *Corpus Juris Canonici, glossis diversorum illustratum Gregorii Papae XIII*, Lyons, 1671, gl. v. *usque ad hoc tempus* ad *Decretum Grat.*, C. 18, q. 2, c. 31.

([38]) *Decretum Grat., dictum post* D. 3, c. 3 (« Sicut enim moribus utentium in contrarium nonnullae leges hodie abrogatae sunt ita moribus utentium ipsae leges confirmantur »); *ibid., dictum post* D. 3, c. 6; *ibid.*, D. 11, c. 5; *ibid., dictum post* D. 14, c. 1; *Extra*, 1, 4, 11; *Extra*, 1, 23, 10; ATHON, *Constitutiones Legatinae D. Othonis et D. Othoboni* (LYNDWOOD, *Provinciale*, ed. Oxford, 1679), Constit. Othonis, c. 14, *Quoniam de habitu*, gl. ad v. *et cappis clausis*, p. 37; LYNDWOOD, *Provinciale*, III, de Vita et Honest. Cleric., 1, c. 1, *Ut clericalis ordinis*, gl. ad v. *cappis clausis*, pp. 118-9; e.g. see Stats of Bishop Giles of Salisbury, 1257, nos. 22, 23 (POWICKE & CHENEY, *Councils and Synods, with other Documents relating to the English Church*, Oxford, 1964, II, pt. i, 558-9, attrib. Archbishop Langham, *Provinciale*, I, de Consuet., 3, c. 1, *Statutem et infra*, p. 19). C.f. *Decretum Grat.*, D. 11, c. 4 (but note the doubt expressed that the basic rule had been changed in the *dictum post.*); *Extra*, 1, 4, 3.

([39]) *Extra*, 1, 4, 11. As to what was good and reasonable, see: *Decretum Grat.*, D. 11, c. 6; *Extra*, 1, 4, 10; LYNDWOOD, *Provinciale*, I, de Consuet. 3, c. 1, *Statutum et infra*, gl. ad v. *consuetudini laudibili*, p. 22.

([40]) LYNDWOOD, *Provinciale*, III, de Vita et Honest. Cleric., 1, c. 1, *Ut clericalis ordinis*, gl. ad v. *cappis clausis*, pp. 118-9.

([41]) LYNDWOOD, *Provinciale*, I, de Offic. Archid., 10, c. 4, *Archidiaconi*, gl. ad v. *reparatione*, p. 53.

([42]) LYNDWOOD, *Provinciale*, I, de Consuet., 3, c. 1, *Statutem et infra*, gl. ad v. *de mansuetudine ecclesiae*, p. 21.

In a real sense, therefore, it is possible to say of those direct and positive enactments by which the Church was to be regulated, that they were of authority only to the extent that they had been received by each community (43). This is perhaps nicely illustrated by Lyndwood (44). In attempting to reconcile a constitution of Archbishop Peccham with a constitution of Pope Boniface VIII by which nuns were required to remain enclosed, he noted that the latter derived its authority from the *ius commune* and could therefore not be abrogated by a constitution of an inferior, and, since Archbishop Peccham must have known of Boniface's constitution, he concluded that he could not give a good answer as to how the Archbishop's constitution might have any effect, « unless perhaps that constitution of Boniface was not accepted or enforced in England » (45).

This is entirely consistent with philosophical views about the nature of law which were current in England between the thirteenth and fifteenth centuries. Bracton, for example, says of English laws and customs that they had been approved by the consent of those who used them and therefore may not be changed without the advice and consent of those by whom they were made (46). According to a later development of this theory, it is Parliament, as the representative of the people, that supplies the necessary consents (47). Furthermore, it is on such grounds of laws having to be received and approved by the people that the

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(43) See: ATHON, Constit. Othonis, c. 14, *Quoniam de habitu*, gl. ad v. *et cappis clausis*, p. 37; ATHON, Constit. Othoboni, c. 24, *Judicii*, gl. ad v. *committantur*, p. 123; LYNDWOOD, *Provinciale*, II, de Judiciis, 1, c. 1, *In causis*, gl. ad v. *viris discretis*, p. 80: « Illa Consitutio non fuit a Subditis acceptata... »; *ibid.*, III, de Vit. & Hon. Cleric., 1, c. 1, *Ut clericalis*, gl. ad v. *cappis clausis*, p. 118.

(44) An early fifteenth century glossator on the English constitutions. See later.

(45) *Provinciale*, III, de Statu Reg., 19, c. 2, *Sanctimoniales*, gl. ad v. *cum socia*, p. 212. See also: *ibid.*, I, de Constit., 2, c. 1, *Quia incontinentiae*, gl. ad v. *injungendo mandamus*, p. 13; *ibid.*, I, de Sacra Unc., 6, c. 4, *Cum sacri*, gl. ad v. *reluctantes*, p. 38.

(46) *De Legibus et Consuetudinibus Angliae*, fo. 1b (ed. Samuel E. Thorne (Cambridge, Mass., 1968), II, 21): « Quae quidem, cum fuerint approbatae consensu utentium et sacramento regum confirmatae, mutari non poterunt nec destrui sine communi consensu eorum omnium quorum consilio et consensu fuerint ».

(47) See FORTECUE, *De Laudibus Legum Anglie* (ed. & trans. S.B. Chrimes, Cambridge, 1942), c. 9, p. 25, c. 13, pp. 31-3.

possibility of a custom contrary to the general law is sanctioned ([48]).

It must also be borne in mind that when we speak of papal legislation, we must not think in terms of the modern Parliamentary statute. During the medieval period and even later, in the absence of any formal enforcement machinery such as a professional police force, many early Parliamentary statutes were obliged to provide expressly for their own enforcement, either by making some special provision for the purpose ([49]) or by using existing officials or procedures ([50]). Some relied on informers who would initiate proceedings to enforce the legislation ([51]), often with the incentive of receiving a reward of the whole or part of the penalty imposed on the offender ([52]). But this was open to substantial abuse ([53]), and depended on private individuals for enforcement. What then was the status of a criminal or quasi-criminal statute where enforcement was at best problematic and required the co-operation of an unwilling public? ([54]) Moreover, at this time, even a statute was not sacrosanct, for the common-law judges felt themselves able to apply a sort of equity to disregard a statute where they thought that the legislator would not have wanted the statute to be applied in the particular circumstances of a case ([55]). A statute might even be declared void for unreasonableness ([56]).

([48]) See BRACTON, *supra*, fos. 2, 4 (II, 22, 27). See also: ULLMANN, *Law and Politics in the Middle Ages*, Cambridge, 1975, pp. 31, 62; DOE, *Fundamental Authority in Late Medieval English Law*, Cambridge, 1990, p. 19.

([49]) e.g. the Statute of Labourers, 1351, 25 Edw. III, st. 1 provided for supervision by Justices of Labourers.

([50]) The office of Justice of the Peace was frequently resorted to, e.g.: 13 Edw. I, Statute of Westminster II, 1285, c. 6 (hue and cry); *ibid.*, c. 47, statutes 13 Ric. II, st. 1, c. 19 and 17 Ric. II, c. 9 (restrictions on salmon fishing); statute 12 Ric. II, c. 6 (artificers and labourers to practise archery on a Sunday and not play games).

([51]) See e.g. Statute of Provisors, 1365, 38 Edw. III, st. 2 (especially c. 4).

([52]) e.g. 19 Hen. VII, c. 19; 3 Hen. VIII, c. 6; 23 Hen. VIII, c. 4, s. 3; 24 Hen. VIII, c. 1, s. 5; 27 Hen. VIII, c. 12; 34 & 35 Hen. VIII, c. 6; 5 & 6 Edw. VI, c. 6, s. 28; 1 Eliz. c. 12; 23 Eliz. c. 8.

([53]) See Statute 4 & 5 Hen. VII, c. 20 (1488) (covin if friends sued).

([54]) In a later era similar problems were caused, for example, by the Factories Act, 1819, 59 Geo. III, c. 66.

([55]) e.g. Herle J. in *Tregor v. Vaghan* (1334), Y.B. Pasch. 8 Edw. III, pl. 26, fo. 30: « Ils sont ascun statutes faits que celuy mesme que les fist ne les voleit pas mettre en fait... ».

([56]) POLLOCK & MAITLAND, *History of English Law, Cambridge*, 2nd. ed. 1898, I, 509; see Coke in his report of *Dr. Bonham's Case* (1610), 8 Co. Rep. 113b, at 118.

If this was true of English statute law, then it was much more with respect to the legislative processes of the Church. The need to formulate laws and regulations at a distance in order to exercise some degree of control and supervision over the constituent elements of the universal Church must have been fraught with considerable practical difficulties. Enforcement was for the most part left to the national Church, and the enshrining of a rule of the canon law in an English constitution was not only a means of promulgating a particular canon or decree, but would indicate approbation with all the attendant local enforcement machinery being made available to carry it into effect. On the other hand, a rule of law which might otherwise be regarded as having application throughout the whole Church, so that it might be said in that sense to have been binding, might nevertheless not be enforced within the national Church, so as to give rise to a contrary custom and practice. It is on such a basis that portions of the *ius commune*, while being perfectly valid and in a sense binding legislation, did not have any effect in England where local custom and usage was maintained to the contrary, and there was no desire by the English Church and those exercising jurisdiction therein to enforce the *ius commune* in that particular respect.

In order, therefore, to test the extent to which a particular rule of the ancient canon law applied to the pre-Reformation English Church, the possibility that it might be one of those parts of the *ius commune* which had no effect in England because there was a contrary local custom and usage must be eliminated. It would seem that the constitutions of the English Church may be particularly helpful in this respect.

The national and provincial councils and diocesan synods were the means by which the English Church legislated for its own particular local needs. Archiepiscopal and episcopal constitutions might declare or revoke customary law, make provision for punishment where none was provided for by the canon law or where it was deficient due to passage of time, and make rules for the correction of morals ([57]). But it would seem that an archbishop was not able to legislate directly in contravention of papal law ([58]). By

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([57]) LYNDWOOD, *Provinciale*, I, de Maj. et Obed., 14, c. 1, *Presbyteri*, gl ad v. *juramento*, p. 70.

([58]) *Ibid.* Lyndwood therefore questions the validity of a statement in a constitution of Archbishop John Peccham which he alleges is contrary to Papal law,

such means also, the canons of the General Councils of the Church, or the decrees of Popes relevant to the English Church might be promulgated throughout the country. Thus local convocations or synods at national, provincial, diocesan, and even archidiaconal level, might be used to disseminate the law of the Church from General Council to country rectory. At each stage in the process of dissemination, however, it seems that account might be taken of local custom and practice, and the basic rule of canon law modified and adapted accordingly (59).

The authority of a particular canon, Papal decree or constitution, may therefore have varied according both to the extent to which it was received and the formality with which it had been issued. The national, provincial, and even diocesan constitutions of the English Church may thus furnish evidence of those parts of the *ius commune* which were received and applied in England. Such local constitutions may also show where the English law deviated from that of the *ius commune* as a result of local custom and usage. But the converse does not hold true. It cannot be said that where a rule of the *ius commune* did not appear in the English canons and constitutions, then it must have had no authority in England and would not have been included among those laws maintained as English customary law. What might be called « domestic » canon law was never intended to, and never did, amount to an exhaustive or independent body of law by which the English Church was to be governed, but was additional to or interpretive of the *ius commune*. Thus, it cannot be concluded that where the local constitutions are silent concerning a rule of the *ius commune*, such a rule would have had no authority in England so as not to have been included among those laws maintained at the Reformation as English customary law.

There is, however, yet a further factor. It was not always easy for lawyers and subordinate legislators of the day to determine the precise meaning or requirements of a particular canon or decree. Clarification and interpretation was frequently required, and this might be supplied by commentators and glossators on the canon law. It may be that our understanding of the role of the canonists

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« quam tollere vel alterare non potest Archiepiscopus, nec aliquis Papa inferior... »: *Provinciale*, III, tit. 6, c. *Auditis*, gl. ad v. *Nos misericordiam*, p. 136. See also *Provinciale*, III, de Statu Reg., 19, c. 2, *Sanctimoniales*, gl. ad v. *cum socia*, p. 212.

(59) *Decretum Grat.*, D. 14, c. 2.

themselves in the « legislative » process is still not complete. As Professor Cheney remarked, « It is hard to gauge precisely the authority of a Hostiensis or a Durandus... » (60). Contemporary parallels may again be observed in English common law. From an examination of the Year Books (61), it seems that not only were the views of the judges in a case authoritative, but also the comments of respected counsel (and indeed others with whom the complier of the manuscript source of the Year Book may have spoken on the point) might equally well be used to furnish an understanding of the points of law involved. What then the authority of a Sjt. Kebell or a Sjt. Moyle? We shall go wrong if we try to imagine medieval English lawyers using their Year Books in the same way that we approach precedents in the common law of the twentieth century. Likewise, the canonists exercised an influence in accordance with the esteem in which they were personally held, for it was through such gloss and commentary that the canon law was interpreted and made accessible for use by the lawyers. Such commentaries were no mere aids or explanations of the law as might be found in a modern text-book, but at their best such expositions of the law were regarded as sources of the law itself. Thus, through the medium of commentary and gloss, a canon might be interpreted and developed, and it is in that enhanced form that the canon may actually come to be applied in the courts. As the meaning and implications of a law might be differently expressed, then so might the application of that law differ in various parts of the Church.

Thus, although individual laws, or even whole branches of law, might not have had any authority in the English Church, this did not mean that as a *body of laws* the *ius commune* was not binding, for the body of the canon law itself made provision for the non-application of some of its constituent parts. Nevertheless, from a practical point of view, this does not greatly assist in establishing whether a particular rule of the *ius commune*, even though enshrined in the *Corpus Juris Canonici*, was actually applicable within the English Church.

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(60) C.R. CHENEY, *Episcopal Visitation of Monasteries in the Thirteenth Century*, Manchester, 1931, p. 2.

(61) Records of cases on points of law kept by practising lawyers, which in the sixteenth century were printed in a chronological order, attributed to a regnal year of each sovereign, covering the years 1272-1536.

It may thus be appreciated that it may be very difficult accurately to determine precisely what pre-Reformation canon law was applicable in England, or what « gloss » was put on that those laws. The glossators or commentators themselves may therefore be a most valuable aid to determining what were the laws observed in a national Church, and what form they took. One such was William Lyndwood who around 1420 compiled a collection of provincial constitutions from the time of Archbishop Stephen Langton, 1222, to Archbishop Henry Chichele of 1416. Entitled the *Provinciale, seu Constitutiones Angliae*, the constitutions were arranged under subject headings within books and titles much in the form and style of the *Decretals of Gregory IX*, and were comprehensively glossed with great learning and ability. It is in these glosses that much information is to be found, for throughout Lyndwood discusses and comments on these English constitutions in the context of the *ius commune*. It is quickly apparent how great was the dependence of the English lawyer of his day on the *Corpus Juris Canonici* and its commentators, for no argument is propounded, no statement made, without full authorities being cited from those sources. To Lyndwood, the canon law is evidently being interpreted and applied to the English Church through the medium of the national and provincial canons, and so where the English law is divergent, the peculiarly English position is set out and the relevant canon law examined.

Lyndwood's compilation of English canons and his glosses on them have consequently always been highly regarded by English ecclesiastical lawyers as being of great value in ascertaining those ancient canons which were observed in the pre-Reformation English Church (62).

Laws in operation might also be evidenced from the records of those exercising a jurisdiction or authority. It must, however, be borne in mind that though contemporary practice may be very valuable in showing a compliance with a rule of law, or the existence of a custom or practice different from the general law, a certain degree of circumspection is required, for it is also possible that actions may have been taken and procedures employed otherwise than strictly in accordance with law!

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(62) See Sir John Nicholl in *Kemp v. Wickes* (1809), 3 Phillim. 264, at p. 279.

Subject to the Royal Prerogative and English Law.

It has already been noted that at the Reformation the former canon law was not retained as a whole, but only those laws which were « not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal... » (63). Any law of the pre-Reformation Church which tended to derogate from the royal prerogative was thus swept away by this legislation. This had the effect of obviating all those very considerable parts of the former canon law which related to matters such as Papal authority, appeals, etc. Likewise, any rule of the canon law which was inconsistent with any provision of the legislation by which the reformed Church of England was to be established under the supremacy of the Crown was abrogated. Changes in practice brought about as a result of the doctrinal changes of the Reformation might also have the effect of altering the pre-existing law (64). But otherwise, subject to any existing custom to the contrary, the old law remained operative.

The Post-Reformation Canon Law of the Church of England.

The survival of such laws in the form of English customary law, however, has one important repercussion. By the ancient canon law, as has been observed, a rule of the *lex scripta* might have been resisted where there was a contrary custom in existence. But not so once such rules were to be treated as English customary law, for in English law a custom will always be destroyed by a statute with which it is in conflict (65), and it follows, therefore, that an ecclesiastical custom cannot prevail against positive law (66). Thus, it would seem that the possibility of a custom *contra legem* in the

(63) Submission of the Clergy Act, 1534 (25 Hen. VIII, c. 19), s. 7; *simile* statute 35 Hen. VIII, c. 16.

(64) See e.g. Lord Lyndhurst L.C., in *R. v. Millis* (1844), 10 Cl. & Fin. 534 at p. 860, who suggested that because at the Reformation marriage ceased to be regarded as a sacrament, it then became possible for the ceremony to be celebrated by a deacon.

(65) *Per* Lord Blackburn in *Mackonochie* v. *Lord Penzance* (1881), 6 App. Cas. 424, at p. 446.

(66) *Per* Dr. Lushington in *Westerton v. Liddell* (1855), Moore's Special Rept., quoted *Ridsdale v. Clifton* (1877), 2 P.D. 276, at p. 331.

post-Reformation Church of England no longer exists. It is certainly clear that a rule of the ancient canon law, even if it survived the Reformation, will be destroyed by subsequent inconsistent legislation.

Statute.

Parliamentary statute became a most important source of English ecclesiastical law. In some cases, particularly in the days shortly after the Reformation, Parliament might be seen to have reiterated certain rules of the old canon law in statutory form so as to make them binding as statute law. The Statute 5 & 6 Edw. VI, c. 4 to suppress disturbances in churches is a good example of this, for it created no new offence, but the old canon law was given statutory teeth to deal with a real and pressing situation. Where this occurred, therefore, such laws, though based on pre-Reformation canon law, ceased to be enforceable as such, and were enforceable and capable of interpretation as any other piece of parliamentary legislation, the old canon law being subsumed within the statutory form.

But perhaps the greatest significance of the statute in the area of ecclesiastical law emerged when royal supremacy became transformed into parliamentary supremacy and acts of Parliament became the means whereby the ecclesiastical laws were altered in the same way as alterations were effected in the temporal laws of the country (67).

A statute might totally destroy an ecclesiastical jurisdiction by transferring the sole cognizance of certain causes to the temporal courts. Examples of such legislation may be seen in the abolition of the benefit of clergy (68); the removal of all jurisdiction over wills from the ecclesiastical courts (69); the transfer to the temporal courts the jurisdiction over questions relating to marriage, i.e. as to validity, legitimacy of issue, divorce, etc. (70); the abolition of the payment of tithes (71), etc. But a statute which does not go so far as

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(67) E.G. MOORE, *Introduction to English Canon Law*, Oxford, 1967, p. 7.
(68) Criminal Justice Act, 1827, 7 & 8 Geo. IV, c. 28, s. 6.
(69) Probate Act, 1857, 20 & 21 Vict. c. 77.
(70) Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85.
(71) Tithe Act, 1936, 26 Geo V & Edw. VIII, c. 43.

to remove jurisdiction wholly out of the cognizance of the ecclesiastical courts might nevertheless prescribe rules and procedures which supersede those hitherto observed in those courts, for example the procedures for the discipline of clergy first introduced by the Church Discipline Act of 1840 ([72]).

In practice the formulation of legislation directly concerning spiritual matters is now delegated to the General Synod of the Church of England. By virtue of the Church of England Assembly (Powers) Act, 1919, the General Synod is authorised to pass measures which after having been accepted by Parliament and having received the royal assent, possess the same force as an act of Parliament.

It is therefore always possible for new laws to be made and old laws rendered ineffectual by statute and legislative measures of the Church of England, including any of the former pre-Reformation canon law inconsistent with such legislation.

Custom.

The determination of any question as to the existence of a custom is generally for the temporal courts to determine ([73]), as the period of user sufficient to found a custom in the ecclesiastical courts is only forty years ([74]) as opposed to the requirement of time immemorial ([75]) in the temporal courts. At common law, a customary right once established can be extinguished only by act of Parliament, and never by mere disuse ([76]).

But a custom concerning a purely ecclesiastical duty which is wholly an ecclesiastical matter may be tried in the spiritual

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([72]) 3 & 4 Vict. c. 86.

([73]) *Luch's Case* (1618), Hob. 247; *Anon. Case* (1624), Lat. 48; *Pollard v. Awker* (1699), 12 Mod. 260; *Churchwardens of Market Bosworth v. Rector of Market Bosworth* (1699), 1 Ld. Raym. 435; *Jones v. Stone* (1700), 1 Ld. Raym. 578, Holt. K.B. 596, 2 Salk. 550; *R. v. Reeves* (1734), Kel. W. 196; *Rhodes v. Oliver* (1836), 2 Har. & W. 38; *Dolby v. Remington* (1846), 9 Q.B. 179; *Davey v. Hinde* [1901] P. 95, at p. 124.

([74]) Coke, *Institutes of the Lawes of England*, London, ed. 1642, pt. ii, 649, 653; *Saunderson v. Clagget* (1721), 1 P. Wms. 657, at p. 663. See also fn. 37, *supra.*

([75]) i.e. from the year 1189.

([76]) *Scales v. Key* (1840), 11 Ad. & El. 819; *Hamerton v. Honey* (1876), 24 W.R. 603; *Wyld v. Silver* [1963] Ch. 243; *New Windsor Corporation v. Mellor* [1974] 2 All E.R. 510, *per* Foster J. at p. 518.

courts (77), and the different criteria of the ecclesiastical law can be applied there.

One such difference is that an ecclesiastical custom can grow up which is capable of overruling a pre-existing ecclesiastical custom. This is, of course, only possible because of the shorter period necessary to found a custom in ecclesiastical law, for in the temporal courts no contrary custom could come into existence subsequent to another custom as both customs would have to have been in existence from the same time, namely from time immemorial (78). As English customary ecclesiastical law, therefore, a rule of pre-Reformation canon law might always be obviated by a later ecclesiastical custom to the contrary. So, in *Archdeacon of Exeter v. Green* (79) which concerned the customary right to receive procurations on an ecclesiastical visitation, the Chancellor, Sir Charles Chadwyck-Healey, stated that: « The question is whether a custom has grown up which supersedes the ancient rule » (80).

The question may be raised, however, as to how far such a rule of the ancient canon law which was observed at the time of the Reformation, may subsequently be abrogated by *non-user.*

The matter was considered by the House of Lords in the case of *Bishop of Exeter v. Marshall* (81) where the point at issue was whether a clerk in holy orders on being presented to a living in another diocese was obliged to produce letters testimonial and commendatory from his former bishop. Although there evidently had been a rule of the ancient canon law that such letters were required, Lord Westbury rejected the contention that such letters were still required (82):

> « If it had been pleaded and proved that this alleged old rule and usage had been received, observed, and acted upon in the Church of *England* since the Reformation, it is possible that it might have been shown that this particular kind of testimonial was, by law, an essential criterion of the

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(77) *Saunderson v. Clagget*, 1 P. Wms. 657, at pp. 662-3, 1 Stra. 421, at p. 422; *R. v. Dean & Chapter of Hereford* (1897), 13 T.L.R. 374.

(78) See n. 75 above.

(79) [1913] P. 21.

(80) At p. 31.

(81) (1868) L.R. 3 H.L. 17.

(82) *Ibid.*, at pp. 53, 54-5.

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

This case is not without its difficulties. Lord Westbury appears to have confused the requirement of reception and approbation described by Coke in *Caudrey's Case* with regard to the canon law *prior* to the Reformation (83) with some sort of need to show continued acceptance and usage as evidence of a rule of the canon law having been received and adopted as a part of the ecclesiastical law of the Church of England. As it stands, however, the suggestion here is that even if it is established that a rule of pre-Reformation canon law at the time of the Reformation was received and accepted so as to have become English customary law, it must further be proved that the rule continued to be « uniformly recognised and acted upon » in the Church of England since the Reformation, and has not been permitted to fall into disuse.

The non-observance of a custom if reasonable and deliberately undertaken in opposition to the custom will indeed have the effect of abrogating that custom (84). But this contrary custom, even though negative in nature, must be more than mere neglect, for neglect can never found a custom (85).

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(83) See above.

(84) *Report of the Archbishops' Commission on Canon Law*, pp. 64-5, quoting from SUAREZ, *De Legibus ac Deo Legislatore*, 1612, VII, c. xviii, 7, as trans. in *Selections from Three Works of Francisco Suarez, S.J.* (Oxford, 1944), II, pp. 593, 594.

(85) *Ibid.* Thus Grosseteste writes in his *Epistolae (Roberti Grosseteste Episcopi quondam Lincolniensis Epistolae*, ed. H.R. Luard (Rolls Series, 25), 1861), ep. no. cxxvii, p. 421: « Consuetudo enim negatio non est, neque privatio, neque negligentia, sed consuetudo est legitimae seu licitae actionis frequentatio... Et si quis pertinaciter vellet contendere negationes, privationes, omissiones, et negligentias sub nomine consuetudinis comprehendi, nullo tamen modo posset praedictas negationes convincere esse consuetudines, sed corruptelas ».

Thus, while it is accepted that a rule of the pre-reformation as English customary ecclesiastical law can be abrogated by a custom to the contrary, the grounds for supposing that where it can be proved that an ancient rule of canon law did become a rule of English customary law at the time of the Reformation, the onus of proof remains with the party who seeks to rely on the custom to establish that the custom has continued to be uniformly observed to the present time are somewhat dubious. Nor is it persuasive that this may incur the Court in practical difficulties, for the practicalities of establishing the existence of a custom at the time of the Reformation are no different from those experienced by a common-law court which considers itself bound by a custom once it is proved to have existed from time immemorial irrespective of whether that custom has been continually observed thereafter (86).

Nevertheless, although the reasoning of *Bishop of Exeter v. Marshall* may be open to criticism, as a House of Lords decision, it will continue to be binding on the lower courts, and it would seem unlikely that there will be much pressure to change the approach requiring the continued existence of pre-Reformation canon law as formulated there. It has therefore been followed in later cases (87). It ought to be recognised, however, that to allow a rule of common law to be abrogated by mere non-user is not in accordance with either the general common law nor with the requirements of ecclesiastical law as understood prior to this case.

Canons of the Church of England.

The failure of the Church of England to produce an authorised body of canons shortly after the Reformation, was a deficiency which was keenly felt within the Church. In 1603, therefore, the Convocations of Canterbury and York drew up a body of Canons in an attempt to create a systematised collection of regulations by which many important aspects of Church government and the spiritual life of the Church and its members might be directed. These Canons of 1603 came to be a most important source of new law for the Church of England. It is worth noting, that even these canons were not entirely free of all influences of the ancient canon

(86) See note 76 above.

(87) See *Re St. Mary's Westwell* [1968] 1 All E.R. 631, at p. 633.

law, for in a considerable number of instances the canons were content to rely substantially on the law as it had existed before the Reformation (88).

The Canons of 1603 have now been replaced by a new body of canons made in 1964 and 1969, and published in 1969 as the *Canons of the Church of England*. There have been several amendments to the original canons, and a fifth edition has recently been published.

At one time it was a matter of considerable controversy how far the Canons of 1603 (and therefore the modern *Canons of the Church of England* also) were binding on the laity. The question was finally settled by Lord Hardwicke in his oft cited judgment in the case of *Middleton v. Crofts* (89).

> « We are all of opinion that the canons of 1603, not having been conferred by parliament, do not proprio vigore bind the laity; I say proprio vigore by their own force and authority; for there are many provisions contained in these canons, which are declaratory of the ancient usage and law of the Church of England, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons » (90).

These statements concerning the Canons 1603 are equally applicable to the modern *Canons of the Church of England*. Their authority extends only to the internal administration of the Church of England and to those spiritual persons who hold office therein, so that the laity are not bound by them. But it should be noted that where the canons are merely declaratory of the ancient canon law, Lord Hardwicke makes it clear that the laity remain bound by that law as English customary law.

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(88) e.g. canon 21 (communion to be received at least three times a year), *Decretum Grat.*, D. 2 de cons., cc. 16,19; canons 31 & 32 (ordination of priests and deacons), *Extra*, 1, 11, cc. 3, 13, 15, *ibid.*, 1, 23, 9, *Decretum Grat.*, D. 59, c. 2; canon 47 (non-resident incumbent to provide a curate), *Extra*, 3, 5, 30 (Fourth Lateran Council, 1215, c. 32); canon 74 (clerical dress), *Extra*, 3, 1, 15 (Fourth Lateran Council, c. 16); canon 86 (parochial visitations), *Extra*, 1, 23, cc. 1, 3; etc.

(89) (1736), 2 Atk. 650, Str. Rep. 1056.

(90) 2 Atk., at p. 653.

Where, however, a canon purports to introduce new law or to change the law, it might be said that as a general rule a new canon per se cannot have any effect if it is contrary to the general law of the land, whether statutory or common law (91). Thus the Canons of the Church of England cannot take away a custom cognizable in the temporal courts, e.g. concerning the appointment of churchwardens (92). But this is not so where the custom is a purely an ecclesiastical one enshrining a rule of pre-Reformation canon law, and it appears to have been recognised as accepted practice from a very early date that such English canons might change the received canon law (93).

CONCLUSION.

It may thus be appreciated that the Ecclesiastical Law in England is founded on the pre-Reformation canon law of the Roman Catholic Church which applied in England subject to local custom and usage. At the Reformation, large portions of the *ius commune* were swept away, but not all. Subsequently, as the Church of England developed its own distinct identity, new laws have been introduced by Parliamentary statute and General Synod measure, which, where inconsistent with the former rules of ancient canon law, have repealed them. The Canons of the Church of England by virtue of their own authority also have the effect of obviating any incompatible rule of the pre-Reformation canon law concerning the internal administration of the Church or the regulation of ecclesiastical persons and officials, and may also evidence a contrary practice and custom by which an ancient rule of the canon law might be seen to have been superseded. Moreover, in order to remain binding, it would seem that the old rule of the canon law must be shown still to be observed and followed, otherwise it will be regarded as having fallen into desuetude and be no longer enforceable. Some parts of the old canon law are of course still maintained within the Canons of the Church of England, but then

(91) MOORE, *Canon Law*, p. 6.

(92) *Anon. Case* (1606), Noy 139; *Butt's Case* (n.d.), Noy 31; *Warner's Case* (1619), Cro. Jac. 532; *Evelin's Case* (1639), Cro. Car. 551, Jones W. 439; *Anon.* (1675), 1 Vent. 267; ROLLE, *Un Abridgment des plusieurs Cases et Resolutions del Common Ley*, London, 1668, II, Prerogative le Roy (L), para. 1, p. 234.

(93) See HELMHOLZ, *Reformation Canon Law*, p. 170.

their validity is derived from the authority of the Canons themselves. The ancient canon law unsustained as a rule of statute or canon, has therefore become a relatively small part of English ecclesiastical law (94), and continues to be susceptible to further diminution by virtue of non-observance, contrary practice, and legislative change. Nevertheless, though the form may have changed, the jurisprudence of the modern Church of England still finds much of its inspiration in the ancient canon law of the pre-Reformation Catholic Church. And where particular rules of the pre-Reformation canon law which had authority in the English Church have survived the Reformation, while remaining unaltered by legislation or contrary custom continue to be observed and practised, then they still have authority today as a part of English ecclesiastical law (95).

(94) Much of the law and practice of ecclesiastical visitation, for example, remains intact, though even here the basic legal requirements for visitations are set out in the Canons of the Church of England.

(95) *Martin v. Mackonochie* (1868), L.R. 2 A. & E. 116, at p. 153.