ENGLISH LAW AND THE SEAL OF CONFESSION

IN 1552 the Council of Trent, in affirming the previous decisions of Popes and Councils, declared that the Sacrament of Penance consists of three essential and indispensable elements; *viz.*, contrition, confession and satisfaction; that these are of divine institution; that every penitent must confess his grievous sins at least once a year, and that no minister who is not in priest's orders has the power of absolution. The wilful omission of any material circumstance vitiates the whole confession and renders it null and void. It is, therefore, clear that the Catholic cannot evade the obligation of confession without grave injury to conscience. The priest, on the other hand, cannot deny his duty of hearing confession to any who seeks it, though he may refuse to give absolution afterwards. The Church goes further and binds him to an inviolable secrecy as to what is told him in the privacy of the confessional. He is bound, under the most solemn obligation, never under any circumstances or whatever demand be made upon him, to reveal any sin which a penitent has confessed for the purpose of sacramental absolution. The priest, by his very act of administering the Sacrament, binds himself to a secrecy, a secrecy which he cannot violate without mortal sin, and the forfeiture of all that is most valuable in life. 'The Seal, as it is called, is of divine right most strictly binding the priest, in every case, even where the welfare of the State is at stake, and even after the death of the penitent, to reveal nothing that he has heard in confession, so that the Sacrament be not rendered intolerable and hateful to the people.' And we know from the high standard of the priesthood that no priest would so violate his religion and his honour as to be guilty of such a crime for all that the world could offer. The priest remains under this obligation even when in doubt as to having heard the matter in question in the confessional. This rule of the Church is so eminently reasonable that to decree otherwise would ren-

der the proper reception of the Sacrament difficult, if not impossible, as few would be willing, under those conditions, to confess at all. And so they would lose not only the benefit accruing from that Sacrament, but indeed from all the Sacraments, except Baptism, in so far as Penance is a necessary preliminary to their reception. Accordingly, the inviolability of the confessional has obtained recognition and protection in all those countries where the exercise of the Catholic religion is sanctioned by law.

Courts of Justice are necessarily concerned with the discovery of truth and the application of legal principles to ascertained facts. Nevertheless, English Law recognises the principle that, however desirable it may be, for the administration of public justice, that the truth should be divulged, there are cases where the mischief likely to result from judicial investigation warrants an exception being made to the general rule. In accordance with this rule, a barrister or solicitor will never be compelled nor is indeed permitted by the Court to disclose, without his client's express consent, any communication made to him in confidence. Because of the impossibility of conducting legal business without such professional assistance and in order to ensure that full and unreserved confidence exists between client and adviser, the law regards such communications as privileged. Similarly, all matters of evidence, the disclosure of which would be contrary to public policy or prejudicial to the interests of the State, are rigidly excluded. Communications passing between officials of the State and the Executive are confidential and privileged from disclosure, even in a court of justice. So far these have been the only specific instances which have been re cognised as illustrations of the rule of professional or confidential privilege. Protestant clergymen and medical men are among the classes to which the rule has been held not to extend. At one time, it seems to have been the law in Ireland that communications made to a Catholic priest were not privileged. But it is doubtful if this were ever the rule in England.

There can be no doubt that previous to the Reformation the Seal of Confession was recognised and protected at Common Law, and it is submitted that the proceedings of the sixteenth and seventeenth centuries, so far from effecting any change in the sacred and inviolable character of the confessional, tended rather to encourage the continuance of it. Both Parliament and Convocation directly enjoined the practice. Now the rule of the Common Law on this subject was the same as that prescribed by the Church, for at that time the State was in alliance with the Church, and before the Reformation the Church and State were Catholic. Therefore, the rule of the Church upon any matter of religious discipline, which was considered of universal and absolute obligation, was binding upon the State, as a body composed of Catholics. The Fourth Council of Lateran (a General Council, whose decrees were binding on all the Churches of Christendom), held in the year 1215, under Pope Innocent III, promulgated a canon to the effect that a priest guilty of a breach of his solemn obligation, rendered himself liable to incur the severe penalties of deposition from his priestly office and life-long confinement in a monastery. A passage in the *Decretum* of Gratian, published in 1151, is similar, in language and intent, to the above canon. They differ only with respect to the mode of punishment prescribed for an offender. There can be little doubt, therefore, that this was the law of the universal Church on this matter, and we may safely assume that it was adopted and enforced by the Common Law.

That this was so, there is in the Laws of Henry I the clearest and most indisputable proof. The rule of Canon Law was actually part of the Law of England. Among those Laws, an ordinance, which follows very closely the language of the canon in the *Decretum*, is recorded. As Henry came to the throne in 1100, and died in 1135, the Law establishing the sacredness of the confessional was evidently in force in this country long before the publication of the *Decretum* in 1151 and longer still before the summoning of the Council of the Lateran. It is important to notice

that the rule exists without limitation or exception, and is applicable to all crimes and sins and binding on all tribunals. There is also ample evidence that several canons to the like effect were promulgated by various Provincial Councils until the Reformation. That this was the state of the law before the Reformation on the subject cannot be questioned, and it is considerably strengthened by the fact that the whole realm was, at that time, Catholic, the established religion of the State the Catholic religion, and the very judges ecclesiastics.

It is a rule of interpretation that the Common Law on any matter cannot be altered or repealed except by the Legislature. That is except by an Act of Parliament. And as we have just seen the position of the Common Law with regard to the inviolability of confession, we must now consider whether it has been changed in any way by the Legislature, especially during the Reformation period. A statute of the reign of Henry VIII, so far from abrogating the Comon Law rule, confirmed and established it. This Act authorised the King to appoint a Commission of thirty-two persons to revise the canons, constitutions and ordinances made by the clergy of the Realm,

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

Now the canons, constitutions and ordinances, referred to in the above Act, must have comprised those relating to the confessional, for they were then in full force. It is also clear that they were not included in the exception, as they were neither ' contrariant to the laws, statutes and customs of this Realm nor to the damage or hurt of the King's Prerogative Royal.' And a later statute emphasises this by declaring that ' auricular confession was expedient and neces-

sary to be retained, and continued, used and frequented in the Church of God.'

During the reign of Edward VI the practice of confession was not only openly sanctioned, but universally prevalent. Constant references were made to it in the Books of Common Prayer, and both special and private confession were directly urged upon the laity.

It is quite clear, then, that at Common Law the sacredness and inviolability of the confessional were well secured; and that, whatever effect the legislation of the Reformation period may have had on other matters of Church discipline, this rule of the Church was confirmed and preserved intact by the Law.

Our modern Law of Evidence is not as old as the Reformation, but has grown up from the practice of the Courts and the decisions therein in the course of the last two centuries. Assuming this in their favour, certain text writers, despite the fact that there are no recorded cases directly on this point, have forcibly maintained that the privilege does not exist, and could not have existed, for at a time when the religion was regarded with such disfavour the Law would hardly have created an exception in favour of auricular confessions to Roman Catholic priests. And the cases upon which these writers rely for the exclusion of priests from the privilege in no way support or establish the rule they lay down. In not one of them has the question of clerical privilege ever been decisively settled. In *R. v. Sparkes,* the prisoner, who was a Catholic, is reported to have made a confession of his crime to a Protestant clergyman: this confession was permitted to be given in evidence, and he was convicted and sentenced. But the case seems to have been imperfectly reported and is, therefore, untrustworthy. Moreover, the decision there is equally consistent with the view that the clergyman volunteered the testimony and was justified in giving it. On this very instance being cited before Lord Kenyon in 1791, he is reported to have said: 'I should have paused before I admitted the evidence there ad-

mitted.' His lordship, if he is correctly reported, went on to say that 'the popish religion is now unknown to the Law of this country.' This statement is remarkable in the view of the fact that only a month previously *21, Geo. III, C. 32,* had come into force, conferring upon Roman Catholic priests legal recognition and capacity, and the Catholic religion was certainly then known to the Law of England. Together with *10, Geo. IV, C. 2,* that statute reflected the new attitude adopted by the Constitution towards the Church and her members.

In another case before Baron Alderson, at the Central Criminal Court, part of the evidence against the prisoner consisted of certain conversations he had had with his spiritual adviser. The learned judge expressed the opinion that such statements were not receivable in evidence, and the prosecution withdrew them. He hastened to add, however, 'I do not lay this down as an absolute rule, but I think such evidence ought not to be given.'

A case which is often relied upon by text writers as illustrating the non-existence of the privilege is that of *Butler v. Moore.* It came before the Master of the Rolls, Sir Michael Smith, in Ireland in 1802. The question before the Court related to the validity of Lord Dunboyne's will, and it appears that the Catholic priest, who attended him in his last illness, was called as a witness and asked whether he died a Catholic. The priest refused to give evidence of what he declared to be 'a confidential communication, made to him in the exercise of his clerical functions.' It was admitted that there had been no previous decisions on the subject, and the refusal of the priest was defended on the analogy of other cases of privilege. The Master of the Rolls, however, decided against the privilege, thinking the analogy of the cases not so strong and the principle upon which the privilege was claimed not so clear as to justify him deciding otherwise.

The report of the case is as unsatisfactory as can be: the judgment is very short, and completely ignores the rights which a priest might possess at Common Law, and, being

an Irish decision, it is certainly not binding on any Court in England. How far a particular form of religious belief being disfavoured by the Law at that period affected the decision in the Irish case, it is not easy to say.

Chief Justice Best, in another case, though holding that such a privilege did not attach to clergymen, said: 'I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence.'

These cases, in so far as the Reports can be relied upon, by no means establish beyond question the non-existence of the privilege. From the extra-judicial statements of the Judges, it seems that they strongly discountenance the practice of compelling clergymen of any denomination to disclose what was told them in confidence.

It is sometimes contended that, though the privilege formerly existed, it was lost at the time of the Reformation and has never been restored. Mr. Baddeley in a very interesting pamphlet on the privilege, published in 1865, shows us that this contention is untenable. 'The right of Catholics,' he says, 'to have their professions recognised in courts at the present day rests upon a different ground from that of Anglicans, but not very difficult to support. That they had the right originally, by the Common Law as well as the laws ecclesiastical, cannot be doubted. If they lost it at that time, they lost it not because the privilege was taken away or treated as illegal by any special enactment, but because the religion itself was proscribed . . . But happily 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.'

By virtue of the Relief Acts the rights of Catholics with regard to religious doctrine and ceremonial were recognised. The express intention of those Acts was to free

Catholics from the temporal penalties they would incur at law from obeying the dictates of conscience or the commandments of the Church. If confession is authorised or permitted by the Acts as being a religious rite, and it appears that this is so, its secrecy is authorised and permitted also, for, in the words of Baron Alderson, 'if you make a thing lawful to be done, it is lawful in all its consequences.'

Moreover, the exclusion of priests from the privilege cannot be supported on grounds of public policy. What possible injury to the public can this privilege cause? So far from tending to defeat the administration of justice, the inviolability of the confessional aids and strengthens it at every turn. It is recognised in Scotland and in France, where the breaking of it is visited with civil as well as ecclesiastical punishment. Also in America, certain States protect clergymen of every religious denomination from disclosing anything which they have learnt in confession. Moreover, the official character of the priest has been recognized by the Law of England. It has permitted the relationship between priest and flock to exist. 'To receive from afterwards, in defiance of the solemn trust he has been allowed to undertake, a disclosure which can only be made by an act of sacrilegious perjury on his part, would be a procedure too contrary to decency, morality and policy to warrant the supposition of its ever again being tolerated, far less enforced by any English Court of Justice.'

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