

THE PRINCIPLES AND RULES OF ECCLESIASTICAL LAW AND MATRIMONIAL RELIEF

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The Commonwealth Matrimonial Causes Act, 1959, s. 25(2) provides: Subject to this Act, a court exercising jurisdiction under this Act in proceedings for a decree of nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage shall proceed and act and give relief as nearly as may be in conformity with the principles and rules applied in the ecclesiastical courts in England immediately before the commencement of the Imperial Act known as The Matrimonial Causes Act 1857.

It is intended in this article to attempt to demonstrate how the principles and rules applied in the ecclesiastical courts may be ascertained and to evaluate to some extent the learning which those courts have passed on to us. English courts have not always been happy with a similar statutory provision¹ which requires them to pay a continuing regard to the law as it was over one hundred years ago.² Probably, the Australian courts will be able to interpret s. 25(2) rather more strictly.³ Nevertheless it is clear that in some circumstances the Australian courts will be required to apply the old ecclesiastical principles and rules and it is appropriate, therefore, to consider some of the factors involved in this process.

I *Ecclesiastical Courts and Ecclesiastical Law*

Immediately before the enactments of the Matrimonial Causes Act of 1857,⁴ there were about four hundred ecclesiastical courts in England.⁵ The records of many of these courts survive but most, even those of the years immediately before 1857, are of no practical interest to us at the present time. It is only to the small number of ecclesiastical courts which was held at Doctors' Commons, the home of the civilians, that we look for our knowledge of ecclesiastical rules and principles as they were applied in England immediately before the enactment of the Matrimonial Causes Act, 1857.⁶ It was in these courts, alone among the ecclesiastical courts, that there was a Bar and a trained judiciary.⁷ Even at Doctors' Commons records were not always kept in

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¹ Matrimonial Causes Act (20 & 21 Vict. c. 85) 1857, s. 22, Supreme Court of Judicature (Consolidation) Act (15 & 16 Geo. 5 c. 49) 1925, s. 32.

² See J. Jackson, *The Formation and Annulment of Marriage* (1951), 1-5.

³ Cf. Z. Cowen and D. Mendes Da Costa, *Matrimonial Causes Jurisdiction* (1961) 56 and P. E. Joske, *Marriage and Divorce* (1963) 166.

⁴ 20 & 21 Vict. c. 85.

⁵ For example, see Reports of the Commissioners on the Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales, sess. 1831-32 (199) Vol. 24, p. 1 at Appendix D, No. 11.

⁶ 20 & 21 Vict. c. 85.

⁷ Returns respecting Jurisdiction, Records, Emolument and Fees, of Ecclesiastical

an accurate manner:⁸ in other ecclesiastical courts they were often chaotic.⁹ Moreover reports were made only of decisions at Doctors' Commons and it was to these alone that the new courts referred after 1857. Accordingly it is Doctors' Commons View alone of ecclesiastical law which is of practical interest to us in Australia at the present day.

Ecclesiastical law was composed of four elements: Civil Law, Canon Law, Common Law, and Statute. Whenever there was any clash between these elements, the Civil Law submitted to the Canon Law, both of these to the Common Law, and all three to Statute.¹⁰ The ecclesiastical law was applied by a method familiar to us at the present day: "The authorities to which I shall have occasion to refer are of three classes," said Sir William Scott.¹¹

First the opinions of learned professors given in the present or similar cases, secondly the opinions of eminent writers as delivered in books of great legal credit and weight, and thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority: where private opinions, whether in books or writing, incline on one side and public decisions on the other, it will be the undoubted duty of the Court which has to weigh them, *stare decisis*.¹²

Several years later Dr. Lushington¹³ expressed a like opinion:

. . . if I could have found any decisions of these courts which were applicable to this point, I should have considered them the very best proof. . . . The next mode, though perhaps a less satisfactory method, is to look to books of practice . . . a variety of authorities have been cited from the civil law. Now I must observe that to constitute these authorities law in England, they must have been received and cited upon here. . . . Then how stands the question with reference to analogous proceedings in other courts of this country.¹⁴ When authorities were few or slight then a judge must . . . endeavour to find out what are the true principles of law and reason applicable to the case, following, as far as practicable, or rather not contradicting former decisions.¹⁵

Accordingly, the ecclesiastical authorities may be listed in order of importance as follows:

- (i) the relevant decisions of the ecclesiastical courts;
- (ii) books of practice;
- (iii) analogous proceedings in other courts, the civil law, opinions of professors;
- (iv) true principles of law and reason.

Courts of England and Wales: sess. 1830 (205) Vol. 19, p. 51 at Appendix A, p. 84 q. 14.

⁸ *Norton v. Seton* (1819) 3 Phill. Ecc. 147; 161 E.R. 1283. Cf. T. E. James, "The Court of Arches During the Eighteenth Century: Its Matrimonial Jurisdiction" (1961) 5 *A.J.L.H.* 55.

⁹ See generally A. H. Manchester, "The Reform of the Ecclesiastical Courts" (1966) 10 *A.J.L.H.* 51.

¹⁰ Preface to R. Burn, *Ecclesiastical Law* (ed. 1809). By "Civil Law" the civilians understood Roman Law.

¹¹ Later Lord Stowell and probably the most distinguished of all the civilians.

¹² *Dalrymple v. Dalrymple* (1811) 2 Hag. Con. 54, 81; 161 E.R. 665, 675. Cf. *Kemp v. Wickes* (1809) 3 Phill. Ecc. 276; 161 E.R. 1320.

¹³ Another highly distinguished civilian. For brief lives of both Scott and Lushington see A. H. Manchester, "Learned Civilians" (1965) 8 *The Lawyer* 37.

¹⁴ *Ray v. Sherwood* (1836) 1 Curt 173, 177; 163 E.R. 58, 60.

¹⁵ *D. v. A.* (1845) 1 Rob. Ecc. 279, 297; 163 E.R. 1039, 1045 *per* Dr. Lushington.

II *The Relevant Decisions of the Ecclesiastical Courts*

In discussing the relevant decisions of the ecclesiastical courts, it will be useful to consider both the ecclesiastical reporters, the ecclesiastical courts' use of precedent and the content of the ecclesiastical reports.

Indeed no evaluation of the work of the ecclesiastical reporters, on the lines of that done by Wallace¹⁶ and Fox¹⁷ on reporters in other courts, appears to have been done.

Ecclesiastical reports were not published until 1818, although in all other courts regular and authorised reports were being published by the beginning of the nineteenth century.¹⁸ The first crack in the negative resolution of the civilians appeared when Christopher Robinson, at the instigation of Sir William Scott himself, prepared the first volume of Admiralty reports which was published in 1799.¹⁹ His avowed intention was to "make known the principles on which our tribunals administer the law of Nations".²⁰ That wish, incidentally, was so close to the heart of the government that it paid the expenses of publishing the decisions of Hay and Marriott, whose preface expresses the hope that "now the veil of the temple is drawn back, some advocate equally accurate with Dr. Robinson will publish reports of cases adjudged in the Ecclesiastical and testamentary Courts, and under judicial approbation and sanction. Severe remarks to their prejudice have fallen from persons who know little of those courts".²¹ Indeed, some had attributed to the civilians a "jealousy of the common lawyers, and a concealment of what passes among the little knot of practitioners (which) seems to have occasioned that respectable and learned profession to be compared to the Talmudists among the Jews, who dealt only in oral traditions or secret writings. . . ." ²²

Eventually, Joseph Phillimore published the first volumes of his ecclesiastical reports in 1818.²³ However, he only undertook this "unprecedented work" at the "earnest and repeated exhortation" of a friend and "in the face of so much opposition".²⁴ Indeed, in the advertisement to his first volume, Phillimore, who was already a distinguished civilian advocate and Regius Professor of Civil Law in the University of Oxford, even apologises "for some inaccuracies which he is fearful will be found to have occurred . . . novelty of the undertaking—and his own inexperience in the work of reporting". To some extent we may perhaps put down Phillimore's bashfulness to the manner of the times: certainly he was not slow at a later date to protest the accuracy of his reports.²⁵ Why the civilians were so slow to publish reports is less certain. Others, as we have seen, ascribed unworthy motives to account for this reticence. Phillimore himself comments that their enemies attributed this omission to the desire of the "closed shop" of Doctors' Commons to keep its mysteries to itself.²⁶ It is just as likely, however, that the civilians'

¹⁶ *The Reporters* (4 ed. 1882).

¹⁷ *A Handbook of English Law Reports*.

¹⁸ See generally C. K. Allen, *Law in the Making* (7 ed. 1964) 210 ff., and V. Veeder, "English Reports 1537-1865" in *2 Select Essays in Anglo-American History* (ed. by a Committee of the Association of American Law Schools, 1908), 123.

¹⁹ 1 Robinson's Admiralty Reports.

²⁰ Preface to 1 Robinson's Admiralty Reports.

²¹ Preface to 1 *Decisions in the High Court of Admiralty: During the Time of Sir George Hay and Sir James Marriott* (1801).

²² *Op. cit.* n. 21 above.

²³ Phillimore's Ecclesiastical Reports.

²⁴ Preface to 1 Lee's Ecclesiastical Reports.

²⁵ See the text below at n. 33.

²⁶ Preface to 1 Phill. Ecc.

laggardliness in this respect was due in part to their conservatism and even more to the fact that budding reporters were discouraged at the lack of profit in such a venture. Indeed, Robinson actually made a loss on his reports in some years.²⁷ Yet, however that may be, Joseph Phillimore's volumes commenced a series of ecclesiastical reports which continued until the Act of 1857.

THE ECCLESIASTICAL REPORTERS²⁸

Reporter	Became Advocate	Published 1st Volume	No. of Vols. Published	Covers Period	Later Career
<i>Phillimore</i> (1775-1855)	1804	1819	3	1809-1821	Distinguished advocate and Regius Professor of Civil Law at Oxford (1809-1845). Many distinguished public services.
ed. Lee			2	1752-1758	
<i>Haggard</i> (1794-1856)	1818	1822	6	1788-1821 and 1827-1832	Served as Chancellor of Lincoln (1836), Winchester (1845), Manchester (1847).
<i>Addams</i> (1784-1871)	1814		2	1822-1826	Became Q.C. (1858).
<i>Curteis</i> (1798-1894)	1826		3	1833-1844	After 1857 retired to the country.
<i>Robertson</i> (1804-1886)	1836		2	1844-1851	Became Chancellor of Rochester and St. Alban's.
<i>Spinks</i> (1819-1899)	1849		2	1853-1855	Became Q.C. (1886): Bench-er of Inner Temple (1887).
<i>Deane</i> (1812-1902)	1839		1	1855-1857	Became Q.C. (1858): leader in Probate, Divorce and Admiralty Court: Knighted and member of Privy Council (1885): various ecclesiastical appointments.
<i>Swabey</i> (1821-1883)	1853		1	1855-1857	Chancellor of Oxford, Ripon: a leading advocate in the Court of Probate and Divorce.

Moreover, the ecclesiastical reporters were well qualified for their task. Each reporter, when he published his first volume of reports, was an advocate of several years' standing. Indeed, it is interesting to note that of the eight reporters under our particular attention, five—at later stages of their careers—held appointments as Chancellors: (they included one Queens Counsel), and of the other three, two became Queens Counsel²⁹ Also the ecclesiastical judges and advocates appear to have helped in the preparation of reports. Addams, for example, acknowledges the liberal assistance afforded by the Court.³⁰

²⁷ See Robinson's entry in the *Dictionary of National Biography*.

²⁸ The authorised reporters are listed here. Other reports are those of Stillingfleet, Brooke and the Notes of Cases. The Notes of Cases were intended simply to supply full and accurate notes of important cases in the interval between the decision and the publication of the authorised reports: Preface to 1 Notes of Cases (1843).

²⁹ See the table of the ecclesiastical reporters. Phillimore and Deane held appointments as Chancellors.

³⁰ Preface to 1 Addams Reports.

Phillimore's edition of Lee's reports was made from Lee's own manuscript notes³¹ while both Phillimore and Haggard claimed the help of the judges.³² Indeed, when Haggard reported a number of cases which had been reported already by Phillimore, Phillimore felt obliged to point out the authenticity of his own reports:

Of these the first three were at the particular request of Lord Stowell, submitted to his (Lord Stowell's) revision before they were published, and severally underwent repeated and elaborate correction from his hand, as the manuscript and the proof sheets now in the Editor's possession most abundantly testify. The fourth . . . was read over by Lord Stowell after it had appeared in print, and was approved of by him. The fifth . . . is almost a literal transcript from the judgment as it was printed in the second volume of this work.³³

Of his own version of two further cases reported by Haggard, he says:

The judgment in the former case is taken from a copy corrected by Lord Stowell and circulated in print soon after it was delivered; and the Report has, besides, the advantage of being prefaced by the arguments of the leading counsel on each side:—the latter, from the personal share the Editor had in the cause may be relied upon. . . .

Phillimore then acknowledges his obligations to Sir John Nicholl, "who throughout the course of this laborious work has been uniformly ready and willing, not only to supply the Editor with the notes of his judgments, but to render every assistance within his power which could contribute to the value and authenticity of these Reports".³⁴ Phillimore, Haggard and Addams, therefore, clearly had the co-operation of the judges—Scott, especially, playing a leading role—and of the advocates. Not all the cases reported, however, lie within the recollection of the reporter. Phillimore, for example, explained that he included pre-1809 cases "whenever he has thought the opportunity favourable for their insertion, and he has known the notes in his possession to be authentic".³⁵ Similarly, in his Consistory reports Haggard used cases which had before appeared in an authentic form and thanked the profession "for their liberal communication of many valuable Notes, and much useful information respecting cases which had been adjudged during the period of time long antecedent to his own personal attendance at the Bar". He lamented, however, "that of several Cases, which from their importance would have composed valuable additions to this work, accurate notes could not be obtained, and that they live only in the imperfect but highly favourable recollection of those who happened to attend the Judgments".³⁶ With his later "Ecclesiastical Reports", however, no such reservations are necessary. Haggard acknowledged "the kind communication of the learned Judges, whose decisions he has reported, and the facilities and assistance extended to him by members of both branches of the Profession (which) have afforded the fullest opportunities of rendering these reports valuable by their accuracy and authenticity".³⁷ No doubt the subsequent reporters enjoyed a similar confidence, so justifying deservedly Swabey's expectation that "there can be little doubt that the series

³¹ *Per* Joseph Phillimore: Preface to 1 Lee's Reports.

³² In the prefaces to their respective reports.

³³ In the advertisement to 3 Phillimore's Reports.

³⁴ As n. 33.

³⁵ Preface to 1 Phill. Ecc.

³⁶ Preface to 1 Hag. Con.

³⁷ Preface to 1 Hag. Ecc.

of reports, of which this is the concluding volume, will for many years to come furnish important precedents".³⁸

For on any reckoning the standard of ecclesiastical reporting appears to have been high. The reporters were well qualified. The reports, which appear to have been published at the request of and in collaboration with the profession, were made from manuscript judgments, personal knowledge and in some cases the notes and recollection of the profession. They were published during the lifetimes of the several editors with a view to publication and they were accepted by the profession, which was small in number, and by the courts as authoritative.³⁹

At this time the position does not appear to have been so happy in other jurisdictions. Contemporary reports were contrasted unfavourably with the "untiring research and mature deliberation of the old reports".⁴⁰ As late as 1843 the *Law Times* reported that on counsel in one case citing a report as being precisely in point, which it was, the court had rejected the report.⁴¹ No such objection appears ever to have been made against the ecclesiastical reports.⁴² Even those contemporaries hostile to the ecclesiastical system conceded that the ecclesiastical reports "contain a very great amount of learning of high value . . . the most masterly judgments which are to be found on this subject . . . the reports of the proceedings in the Ecclesiastical Courts are full of instruction".⁴³ Even the Notes of Cases which were published with modest intent only were cordially recommended.⁴⁴

It is suggested in addition that the civilians' early and strong regard for the value of precedent enhances the reputation of the reports. Certainly there is no doubt as to the civilians' views on precedent. So Phillimore said of Lee's judgements that "they afford a remarkable illustration of the uniformity of principle which has for so many centuries regulated the decisions of our highest Ecclesiastical Tribunals: inasmuch as, if any individual will take the trouble of comparing these judgments . . . with the decisions of the same courts which have been published in later times, he will scarcely be able to find one, which involves any point of law or any principle of practice, in which the decision is not to the same effect as it would have been if decided at the present day".⁴⁵

The judges were prepared to admit not only the regular reports, once their publication began, but also the notes of counsel and judges,⁴⁶ their own recollections⁴⁷ and the court records themselves.⁴⁸ Occasionally the court might itself supply the parties with a note of a case,⁴⁹ for despite their position as ecclesiastical courts, their judges looked on them as being strictly courts of law: ". . . the Consistorial Courts, as well as the Court of Arches, are Courts

³⁸ Preface to Deane and Swabey's reports.

³⁹ These points follow Fox's suggestions: *A Handbook of English Law Reports*.

⁴⁰ (1843) 7 *Jurist* 429.

⁴¹ 1 *Law Times* 347 and 325. Cf. (1848) 9 *Law Magazine* 1; 17 *Jurist* 97 and 18 *Jurist* 30.

⁴² Yet see *B-n v. B-n* (1852) 2 Rob. Ecc. 588, 590; 163 E.R. 1423, 1424.

⁴³ (1841) 5 *Jurist* 953. And see 10 *Law Magazine* 327 on Lees' Reports.

⁴⁴ 9 *Law Times* 325.

⁴⁵ Preface to Lee's Reports.

⁴⁶ *Ray v. Sherwood* (1836) 1 Curt 173, 186; 163 E.R. 58, 63; *Anichini v. Anichini* (1839) 2 Curt. 210, 214; 163 E.R. 387, 388; *Morgan v. Morgan* (1841) 2 Curt. 679, 687 and 691; 163 E.R. 548, 552 and 553; *Astley v. Astley* (1828) 1 Hag. Ecc. 714, 722; 162 E.R. 728, 731.

⁴⁷ *Miles v. Chilton* (1849) 1 Rob. Ecc. 684, 698; 163 E.R. 1178, 1183.

⁴⁸ *Norton v. Seton* (1819) 3 Phill. Ecc. 147; 161 E.R. 1283.

⁴⁹ *Huguenin v. Meddowcroft* (1843) 7 *Jurist* 354.

of law and not Courts of Equity. . . .” said Dr. Lushington⁵⁰ who confessed that he knew “nothing more painful than to have to exercise a judicial discretion without landmarks to guide the judgment”.⁵¹

Accordingly, the courts were true to precedent long before the reports were published. *Welde v. Welde*⁵² heard in 1730, cites a case of 1702: in 1754 Sir George Lee, although he felt the case was a compassionate one, refused alimony as there was no precedent for it:⁵³ and in 1808 Scott could assert confidently that “This has been fully determined in a case before the Delegates . . . when the effect of all these dicta were brought before the court, and it has been since acted on in various cases . . . in this country.”⁵⁴ Indeed, even at this time, a judge might complain that ‘no authority has been cited for that proposition’,⁵⁵ or ask ‘how this case is distinguished’: for, when I read the libels, it appeared to me that this was a decided point and I was rather surprised to see it raised again”.⁵⁶ No doubt there was even more point in such comment once the reports were published for by this time, at all events, “the presumption is that there would have been one (a precedent) if, in the opinion of the profession, such a course could have been maintained”.⁵⁷

It is submitted, therefore, that in the years immediately before 1857 the decisions of the ecclesiastical courts were well reported and on this count are worthy of our respect. Yet, despite the excellence of the reports, it is clear that they do not contain an overabundance of authority on nullity at least, as the following chart indicates:

Ground of Nullity	Number of Cases Reported	Number of Decrees Granted
Duress	1	1
Want of understanding	4	3
Mistake	0	0
Impotence	19	10
Undue publication of banns	20	12
Defective Licence	24	12
Prior marriage	6	6
Want of age	0	0
Consanguinity and Affinity	5	2
TOTAL	79	46

Of course, the accuracy of the above analysis can only be approximate, especially as it does not account for *dicta*. Nevertheless it does give some idea of the extent of the ecclesiastical precedents which are available.

In this respect it is worthy of note that forty-four of the above cases are devoted to the formalities of marriage, namely, the old learning on undue publication of banns and defective licence. Such learning is of no value to Australian courts today. One could quibble, too, at the value of the authorities in other categories. The one judgment we have on duress, for example, was overruled on appeal,⁵⁸ while cases on prohibited relationships are of no great

⁵⁰ *B-n v. B-n* (1853) 2 Rob. Ecc. 580, 584; 163 E.R. 1420, 1422.

⁵¹ *Anonymous* (1857) Deane 295, 298; 164 E.R. 581, 582.

⁵² (1730) 2 Lee 578; 161 E.R. 446.

⁵³ *Bird v. Bird* (1754) 1 Lee 621; 161 E.R. 227. See also 1 Lee 209; 161 E.R. 78.

⁵⁴ *Turner v. Turner* (1808) 1 Hag. Con. 414, 417; 161 E.R. 600, 601 per Sir William Scott.

⁵⁵ *Meddowcroft v. Gregory* (1816) 2 Hag. Con. 207, 213; 161 E.R. 717, 720 per Sir William Scott.

⁵⁶ *Cope v. Burt* (1809) 1 Hag. Con. 434, 435; 161 E.R. 608 per Sir William Scott.

⁵⁷ *Anonymous* (1857) Deane 295, 300; 164 E.R. 581, 583 per Dr. Lushington.

⁵⁸ *Harford v. Morris* (1776) 2 Hag. Con. 423; 161 E.R. 792.

importance to an Australian audience. On the other hand, valuable *dicta* do exist. For example, the observations of Sir William Scott in *Wakefield v. Wakefield*,⁵⁹ form the basis of our law on mistake: and the cases on impotence are the basis of our learning on that topic. Thus, Dr. Lushington's judgment in *D. v. A.*⁶⁰ is the basis of our attempts to define consummation of marriage.⁶¹ Nevertheless, the reported cases on impotence⁶² by no means cover the whole of the ground on that topic. No doubt the gaps which exist are due in large part to the public morality of the day. Parties were reluctant to bring such cases to court.⁶³ The men were reluctant, perhaps, to concede their lack of virility.⁶⁴ The women were expected to submit to their husbands,⁶⁵ many may have lacked knowledge of sexual matters⁶⁶ and, if they thought themselves ladies, they were aware of the need to show "delicacy". "A woman without delicacy is a beast," proclaimed the *Lady's Magazine* of 1818,⁶⁷ "a woman without the appearance of delicacy, a monster." A more practical rein on causes for impotence was provided by the old rules of evidence⁶⁸ and the difficulty of proving incurability in the woman; Sir John Nicholl, for example, commented that there had been only one suit by a husband within his recollection.⁶⁹

Accordingly, it is clear that, despite the admirable quality of the ecclesiastical reports, we cannot rely on the reports alone to answer all questions concerning the ecclesiastical principles and rules, in so far as such matters have not been decided at the present day.

III *Books of Practice*

It is quite obvious, then, that the reports alone do not provide a comprehensive or even always a sufficient knowledge of the principles and rules of ecclesiastical law. Accordingly, when relevant decisions were lacking, the ecclesiastical courts turned, as we have seen, to their books of practice. Indeed, in 1879 a court remarked that "The first source to which one usually resorts is that of the books of recognised authors on the practice of Ecclesiastical Courts. . . ."⁷⁰ The civilians had written excellent treatises for many years. Indeed, they had done so at a time when the student of the common law had little more to guide him than the Year Books, a facility which has been attributed to their knowledge both of the common and civil law with a consequent desire to compare the two and perhaps discover common underlying principles.⁷¹ The principal writers in ecclesiastical law, perhaps, were Godolphin, Ayliffe and Oughton:⁷² and of these, Ayliffe, to whose "high authority" Sir

⁵⁹ (1807) 1 Hag. Con. 394; 161 E.R. 593.

⁶⁰ (1845) 1 Rob. Ecc. 279; 163 E.R. 1039.

⁶¹ See *Baxter v. Baxter* (1948) A.C. 274; *R. v. R.* (1952) 1 A.E.R. 1194; *contr. G. v. G.* (1952) A.L.R. 768

⁶² See *Rayden on Divorce* for a list of the cases.

⁶³ See *per* Sir William Scott in *Briggs v. Morgan* (1820) 3 Phill. Ecc. 325, 328; 161 E.R. 1339, 1340.

⁶⁴ See the comparatively recent case of *C. v. C.* (1921) P. 399, 400.

⁶⁵ *Dysart v. Dysart* (1847) 1 Rob. Ecc. 470, 542; 163 E.R. 1105, 1129. *Cf. Waring v. Waring* (1813) 2 Phill. Ecc. 132; 161 E.R. 1098.

⁶⁶ As late as *Lewis v. Hayward* (1866) 35 L.J.R. (N.S.) P. & M. 105 H.L., a judge spoke of the knowledge which came after marriage.

⁶⁷ *Cit.* E. S. Turner, *A History of Courting* 144.

⁶⁸ See *F. v. D.* (1865) 4 Sw. & Tr. 86, 92-93; 164 E.R. 1448, 1450-1451.

⁶⁹ *Norton v. Seton* (1819) 3 Phill. Ecc. 147, 159; 161 E.R. 1283, 1288.

⁷⁰ *Martin v. Mackonochie* (1879) 4 Q.B.D. 697, 746.

⁷¹ See generally, W. S. Holdsworth, *Sources and Literature of English Law* 203 ff.

⁷² Their principal works being J. Godolphin, *Repertorium Canonicum* (3 ed. 1687);

Francis Jeune, P. referred in *Moss v. Moss*,⁷³ is the writer whose work has received most attention subsequently. Indeed, one early nineteenth century common law judge was said to have relied on Ayliff's *Parergon* whenever a point of ecclesiastical law arose.⁷⁴ Yet Ayliffe's influence on the law of marriage during the first half of the nineteenth century is less certain. Certainly his work is cited, yet if frequency of citation is to be the test, Sanchez⁷⁵ might have to be preferred.

On the other hand, Scott referred to Godolphin and Oughton as "the oracles of our own practice".⁷⁶

Godolphin's *Repertorium Canonicum*⁷⁷ is written in a style which is both fresh and clear even at the present day. He cites cases freely in the modern manner and notes the opinions of other writers. Oughton's *Ordo Judiciorum*,⁷⁸ written in Latin, was also a highly authoritative work. Ayliffe's *Parergon*,⁷⁹ published in 1726, in some respects is an academic work compared even with Godolphin. Ayliffe, for example, in his chapter on marriage does not refer to cases decided at Doctors' Commons but to the Civil Law, whence he derives his definition of marriage; other sources include Sylvius Aeneas, Panormitan, Papal Canon Law, Bartolus, Hostiensis and Oldradus.⁸⁰

In truth, Ayliffe may well have been rather out of date during the nineteenth century. So a magazine of 1840⁸¹ refers to Ayliffe—along with Burns, Gibson and Godolphin—as a storehouse of canon law. On the other hand, the same article does go on to refer to the *Parergon* as the "best compilation of canon law. It is arranged and condensed with extraordinary care and industry: and an excellent lawyer, the late Mr. Justice Taunton, used to say that whenever a question of law came before him, he always resorted to Pa. and was never disappointed". Nevertheless, s. 25(2) requires conformity with the principles and rules applied immediately before 1857 and it is submitted that Ayliffe may not reflect the ecclesiastical law of that period as accurately as do other more contemporary texts. Thus Ayliffe is good evidence of the law as it stood in 1726 and during the nineteenth century it was no doubt an excellent "storehouse of canon law". It is suggested, however, that Ayliffe is only marginally useful as general background if considered as a pointer to the ecclesiastical law immediately preceding 1857. The same reasoning would apply with even more force to Sanchez, for, although an English judge has referred quite recently to his work in the warmest terms,⁸² contemporary opinion on Sanchez' authority is less certain.⁸³ Accordingly, it is suggested that, when Australian courts must turn to the old texts, for their knowledge of ecclesiastical law immediately preceding 1857 they should bear in mind that, although ecclesiastical courts of this period did refer from time to time to the old ecclesiastical texts, especially when more recent authority was lacking, these old ecclesiastical texts do not always state the pre-1857 law

T. Oughton, *Ordo Judiciorum* (1728); J. Ayliffe, *Parergon Juris Canonici Anglicani* (1726; 2 ed. 1734).

⁷³ (1897) P. 263.

⁷⁴ (1840) 24 *Law Magazine* 117.

⁷⁵ A Spanish Jesuit (1551-1610) whose chief work is *De Sancto Matrimonio*.

⁷⁶ *Briggs v. Morgan* (1820) 3 Phill. Ecc. 325, 329; 161 E.R. 1339, 1341.

⁷⁷ 3 ed. 1687.

⁷⁸ *Op. cit.* n. 65.

⁷⁹ *Op. cit.* n. 65.

⁸⁰ *Parergon* (ed. 1726) 359-67.

⁸¹ (1840) 24 *Law Magazine* 117.

⁸² Langton, J., *Intract v. Intract* (1933) P. 190, 195.

⁸³ *D. v. A.* (1845) 1 Rob. Ecc. 279, 297; 163 E.R. 1039, 1045 per Dr. Lushington. *Turner v. Meyers* (1808) 1 Hag. Con. 414, 416; 161 E.R. 600, 601 per Sir William Scott.

with any precision. It may well be that for such an authoritative statement our courts should look not to the classical texts but to the texts published in the years immediately preceding 1857. Our courts might consider, for example, Rogers' excellent work,⁸⁴ or Robert Phillimore's edition of Burns'⁸⁵ or even Waddilove's Digest.⁸⁶ This view is reinforced also by a comparison of the 1809 and 1842 editions of Burns, the latter citing naturally a far greater proportion of case law than did the former, and so dimming, it is suggested, the former practical lustre of the classical texts.

Unfortunately some uncertainty exists as to the precise authority of the pre-Reformation canon law. The greatest of all the ecclesiastical judges, Sir William Scott, said this of a case with a Scottish element:

The canon law . . . is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire or has been varied, I take it to be a safe conclusion that, in all instances where it is not proved that the law of Scotland has resiled from it, the presumption is that it continues the same. Shew the variation and the court must follow it: but if none is shewn, then must the Court lean upon the doctrine of the ancient general law.⁸⁷

Other and later ecclesiastical authority did not agree with this view, nor did some other contemporary judges. For example, some years later Sir John Nicholl said:

. . . the text referred to does not come up to the point; even if it did, something more would have to be shewn, namely, that it has been received as the law in this country: it might not be necessary for this purpose to shew a case precisely similar: it would be sufficient to shew that it is according to the general rules observed here. But it is a strong, and almost a conclusive, presumption against the present proceeding that no suit appears ever to have been brought by any but the injured party.⁸⁸

Similar views were expressed in the House of Lords.⁸⁹ It was these views of the old canon law's authority which Lord Merriman, P. followed in the comparatively recent case of *Harthan v. Harthan*.⁹⁰ Lord Merriman said that the canon law of Europe did not, and never had, as a body of laws formed part of the law of England. He concluded that "in the absence of precedent, it was the duty of ecclesiastical courts to determine as a matter of principle whether a particular doctrine of canon law should be accepted as part of the ecclesiastical law of this country".⁹¹ Historically, however, as Maitland first showed and as others now accept,⁹² the true position was more akin to that stated by Scott. It could be argued, then, that in the years immediately before the 1857 Act, and it is with this period only that Australian courts are concerned, there was no certainty in the ecclesiastical courts as to the authority of the old canon law. It could be claimed, perhaps, that the pre-1857 authorities which maintain that the old canon law was not thereby accepted as part of

⁸⁴ *Ecclesiastical Law* (1 ed. 1843 and 2 ed. 1849).

⁸⁵ *Ecclesiastical Law* (1842).

⁸⁶ *A Digest of Ecclesiastical Law* (1849).

⁸⁷ *Dalrymple v. Dalrymple* (1811) 2 Hag. Con. 54, 81; 161 E.R. 665, 675.

⁸⁸ *Norton v. Seton* (1819) 3 Phill. Ecc. 147, 164; 161 E.R. 1283, 1289.

⁸⁹ *R. v. Millis* (1844) 10 Cl. & Fin. 534, 680.

⁹⁰ (1949) P. 115.

⁹¹ (1949) P. 115, 128.

⁹² F. W. Maitland, *Roman Canon Law in the Church of England, Essays I & II* (1898); E. W. Kemp, *An Introduction to Canon Law in the Church of England* (1957); 13 *Hals. Laws* 10 (s).

English ecclesiastical law, conflict with the earlier authority of Scott and may indeed have been made *per incuriam*.

This divergence of view could be of practical importance. For example the Australian law on nullity still lacks an authoritative definition of consummation of marriage, especially in view of Barry, J.'s restrictive interpretation in *C. v. G.*⁹³ of the House of Lords' decision in *Baxter v. Baxter*.⁹⁴ If, however, the old canonical rules were to influence the Australian court, it is clear that the Australian view on consummation might well differ from the view favoured in England since *Baxter v. Baxter*, for the canonical authorities required there to be seminal emission for a marriage to be consummated.⁹⁵ Moreover, it is clear that from a practical point of view, not all lawyers would be pleased at the prospect of mastering the old classical learning reaching back to the days of Gratian.

However, it seems unlikely at the present time that the *per incuriam* doctrine can overrule a doctrine which was expressed in the ecclesiastical courts and approved quite deliberately and with knowledge of Scott's views, by the House of Lords in 1844 and affirmed by the Court of Appeal in 1948. Indeed, whether historically correct or not, there is little doubt but that Tindal, C.J. was expressing in *Millis* the rule which was applied in this respect by the ecclesiastical courts. Even granted that this is the position, however, it is still clear that a knowledge of the old canonical principles will still be highly relevant in some cases as was the case, indeed, in *Harthan v. Harthan*.⁹⁶ For, as Sir John Nicholl said, it will be enough to show simply that the canonical principle is "according to the general rules observed here".⁹⁷ That will not always be an easy task. Nevertheless, it is clear that an Australian court which was influenced by, and was aware of, the old canonical principles on consummation, for example, might still well apply a different doctrine on this point than did the English court in *R. v. R.*⁹⁸

IV Analogous Proceedings

However, if the precedents and the books of practice were of no assistance, the ecclesiastical courts turned to analogous proceedings in other courts, the civil law and the opinions of professors. Thus, on one occasion Dr. Lushington said: "Perhaps it may be thought that I have entered too minutely into this investigation, and have referred unnecessarily to the proceedings in other courts. I have done so in accordance with the practice of all who have preceded me, and with the example of Sir John Nicholl in *Whish and Wollatt against Hess*."⁹⁹ And on another occasion the learned doctor gave a further insight into the civilians method when he said:

Then how stands the question with reference to analogous proceedings in other Courts of this country? It is not necessary to penetrate deeply into the mode in which the subject has been considered in Courts of Common Law, because I have had the good fortune to find a decision in a Court of Equity, which appears to have a strong bearing on the subject: a decision which, from the period at which it took place, I consider more

⁹³ (1952) A.L.R. 768.

⁹⁴ (1948) A.C. 274.

⁹⁵ P. V. Harrington, "The Impediment of Impotency" (1959) 19 *Jurist*, 66.

⁹⁶ (1949) P. 115.

⁹⁷ See n. 81 above.

⁹⁸ (1952) 1 A.E.R. 1194.

⁹⁹ *Trevanion v. Trevanion* (1836) 1 Curt. 406, 443; 163 E.R. 140, 156.

valuable than if it had been pronounced in any proceeding at the present time. The case which I advert to . . . was decided by Lord Nottingham in 1677. I will state the reason why the decision in this case is entitled to great weight. In the first place it is notorious that the proceedings in the Court of Chancery were originally much more founded on the doctrines and practice of the civil law than those of the Common Law Courts of the country were. In the second place, the decision was given at a time when the proceedings of that Court were more in conformity to its ancient forms of process than they have subsequently been. Thirdly, it is the authority of Lord Nottingham, than whom a higher authority could not be produced.¹⁰⁰

The civilians were also familiar with a host of commentators on the civil law.¹⁰¹ Yet, as is clear from the above discussion, they followed the method of the common lawyers. Not for them the modern civilian method of reasoning from principles to instances, of putting their faith in syllogisms, of asking "What shall we do this time?" Instead, like the common lawyer, they reason from instances to principles, put their faith in precedents, and ask "What did we do last time?"¹⁰² And in so reasoning they acted strictly as courts of law paying little regard to any concept of justice. That is quite clear from their view of "true principles of law and reason".

V *True Principles of Law and Reason*

At an earlier date such a principle might have evoked a doctrine of Natural Law. Before the Reformation it was quite common even for the common lawyers to acknowledge a theory of natural justice.¹⁰³ During the debate on Lord Hardwicke's marriage bill of 1753¹⁰⁴ some claimed, for example, that the legislature could not make void that which was valid by the law of God and the law of nature.¹⁰⁵ During the same period a popular text named the Law of Nature and the Revealed Law of God as being two of the "six principal foundations" on which English law was based.¹⁰⁶ Blackstone, too, also paid similar homage to the superior obligation of the law of nature.¹⁰⁷ In truth, however, such passages amount to little more than empty rhetoric, and this was true even of the ecclesiastical courts. So the greatest of all the ecclesiastical judges, Sir William Scott, said: "I . . . nothing upon the question whether human laws have considered this matter rightly: I only assert the fact that they have so considered it."¹⁰⁸ "The judge must give a reluctant obedience to the law," he said in a further case, "no matter what his personal feelings might be."¹⁰⁹ And in still another case he commented further that the canon law then established could not be shaken by any considerations of hardship.¹¹⁰ It is very probable, in view of Scott's great prestige, that the other judges

¹⁰⁰ *Ray v. Sherwood* (1836) 1 Curt. 173, 181; 163 E.R. 58, 61.

¹⁰¹ See, e.g., *Scrimshire v. Scrimshire* (1752) 2 Hag. Con. 395; 161 E.R. 782.

¹⁰² T. M. Cooper, "The Common and the Civil Law—A Scot's View" (1949-50) 63 *H.L.R.* 468, 471.

¹⁰³ See generally: P. Vinogradoff, "Reason and Conscience in Sixteenth Century Jurisprudence" (1908) 24 *L.Q.R.* 373; W. G. Friedman, "Legal Theory" (3 ed.) 52; C. K. Allen, "Law in the Making" (7 ed. 1964) 198 and 383.

¹⁰⁴ 26 *Geo.* 2 c. 33.

¹⁰⁵ The Commons finally passed the bill on July 6, 1753.

¹⁰⁶ *Wood's Institutes* (9 ed. 1763).

¹⁰⁷ 1 *Comm.* 41 (4 ed. 1770).

¹⁰⁸ *Horner v. Horner* (1799) 1 Hag. Con. 337, 353; 161 E.R. 573, 579.

¹⁰⁹ *Cresswell v. Cosins* (1815) 2 *Phill. Ecc.* 281, 283; 163 E.R. 1145, 1146.

¹¹⁰ *Mortimer v. Mortimer* (1820) 2 Hag. Con. 310, 316; 161 E.R. 753, 756.

followed a similar course. "The humanity of the Court has been loudly and repeatedly invoked," said Scott again. "Humanity is the second virtue of courts but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily described upon first impressions . . . my situation does not allow me to indulge the feelings, much less first feelings of an individual. The law has said . . . my duty . . ." ¹¹¹ So the ecclesiastical court was responsible for the strict interpretation of Hardwicke's Act. ¹¹² In *Johnston v. Parker*, ¹¹³ for example, a marriage was annulled 22 years after the ceremony and although there had been seven children of the union, three of whom were still alive, the "husband" petitioner obtained a decree on the ground that at the time of the marriage he himself was a minor and did not have his father's consent. Scott observed that "The words of the Act of Parliament are positive and peremptory, and the Court is under the necessity of enforcing it . . . of the history of the parties I know nothing . . ." ¹¹⁴ And there were other hard cases. Even Dr. Lushington set his sights rather low; "Courts of justice cannot adopt their system to a few extraordinary cases," he said. ¹¹⁵ "The great object to be sought for is that mode of administering the law which may produce justice in the great majority of cases, without overwhelming it by extravagant expense, or destructive delay." Of course in cases of hardship a judge might do what he could to help. For example, Dr. Lushington remitted a penance in a criminal case on the ground of the parties' ill health ¹¹⁶ and Sir George Lee allowed a woman extra time to prove her case. ¹¹⁷ Dr. Lushington also suggested that a court ought not to be prevented from doing "justice" by an absence of authority or by technical rules. ¹¹⁸ And a contemporary magazine expressed the belief that "the enlightened judges in the ecclesiastical courts looked not just at precedents but at the reasons of them". ¹¹⁹

Generally, however, if an injustice did exist it would have to wait for legislation to remedy it. ¹²⁰ Yet, in retrospect, the civilians' attitude on this point was not so remarkable. There was a lack of creative impulse in the natural law theories of the time: man's reason was now supreme: ¹²¹ and so small a group as the civilians was bound to be influenced by the practice of the common lawyers, especially as they no doubt felt susceptible to the charges of being alien which were levelled at them occasionally.

Accordingly, the ecclesiastical courts were not influenced by any overriding principle of natural law or justice. And if there were no authority, the judges do not appear to have sought justice as such but rather true principles of law and reason. So when Dr. Lushington was faced with such a situation in the well known case of *D. v. A.*, he said: "I must rather endeavour to find out what are the true principles of law and reason applicable to the case, following, as far as practicable, or rather not contradicting, former

¹¹¹ *Evans v. Evans* (1790) 1 Hag. Con. 35; 161 E.R. 466.

¹¹² 26 Geo. 2 c. 33.

¹¹³ (1819) 3 Phill. Ecc. 39; 161 E.R. 1251.

¹¹⁴ (1819) 3 Phill. Ecc. 39, 41; 161 E.R. 1252.

¹¹⁵ *Lambert v. Lambert* (1834) 1 Curt. 638; 163 E.R. 3.

¹¹⁶ *Chick v. Ramsdale* (1835) 1 Curt. 34; 163 E.R. 12.

¹¹⁷ *Bird v. Bird* (1754) 1 Lee 531; 161 E.R. 196.

¹¹⁸ *Coode v. Coode* (1838) 1 Curt. 755, 763; 163 E.R. 262, 265.

¹¹⁹ (1839) *Jurist* 2.

¹²⁰ For example, the case of *Mary Dix*, 21 *Hansard Debates* 99 (1st ser., 1812).

¹²¹ W. G. Friedman, *Legal Theory* (3 ed.) 52.

decisions."¹²² That was a case where the woman respondent to a suit of nullity of marriage suffered from a natural, incurable malformation of her sexual organs so that only partial connection was possible. Dr. Lushington pointed out that the authorities were of little help. He then referred to true principles of law and reason, saying that "in order to constitute the marriage bond between young persons, there must be the power, present or to come, of sexual intercourse. Without that power neither of the two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence."¹²³ He then went on to discuss the meaning of sexual intercourse in what has become a classic statement. Having done that, he made a number of observations on the evidence in the case, sought further advice of a doctor and was then able to pronounce judgment. The application of true principles of law and reason by the civilians, therefore, was not an esoteric art, nor did it involve the consideration of any theory of justice or of natural law. It was, in short, a method well known to our own judges.

VI Conclusion

It is submitted, then, that the mechanics of ascertaining the principles and rules applied in the ecclesiastical courts present no difficulty. It is submitted further that the ecclesiastical reports are worthy of great respect. On the other hand, it is suggested that a continuing reliance on the old principles and rules, in the absence of precedent, may lead both to an unwarranted complexity in our understanding of the law, and to placing an unwelcome and inappropriate burden on the courts. The Court of Appeal appears to have faced up to such a task in *Harthan v. Harthan*,¹²⁴ and it may be that, in so far as it did not do so in *Baxter v. Baxter*,¹²⁵ the House of Lords is open to criticism. Not all courts, however, would welcome or be equal to such a task. Yet that appears to be the law.

¹²² (1845) 1 Rob. Ecc. 279, 297; 163 E.R. 1039, 1045.

¹²³ 1 Rob. Ecc. 279, 298; 163 E.R. 1039, 1045.

¹²⁴ (1949) P. 115.

¹²⁵ (1948) A.C. 274.