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Article 4

Privileged Communications to Clergymen

The following historical survey, developed by means of excerpts from the earliest American cases to the current statutes, reflects the great contribution of American legal thought to the growth of genuine freedom of conscience.

Privileged Communications to Clergymen

New- York, Court of General Sessions,

The People,
vs.
Daniel Phillips and wife.

On an indictment for receiving stolen goods.

[Sampson, The Catholic Question in America† (1813)]

THIS CASE, like many others of importance, had its origin in a trivial occasion: One Philips,* together with his wife, was indicted for a misdemeanor in receiving stolen goods, the property of James Cating. The vigilant justices of the police discovered that after lodging his information before them he had received restitution, and thereupon had him brought up and interrogated him with a view to further discovery. He shewed so much unwillingness to answer, that suspicions fell upon him and he was threatened with a commitment to bridewell. He was admonished that it was his duty on his oath to reveal the whole truth, and the duty of magistrates to enquire into it, and to enforce obedience to the law. He then mentioned that he had received the restitution of his effects from the hands of his pastor, the Reverend Mr. Kohlmann, Rector of Saint Peter's. Thereupon, a summons was issued to that gentleman to appear at the police office, with which he instantly complied. But upon being questioned touching the persons from whom he received the restitution, he excused himself from making such disclosure, upon the grounds that will be fully stated in the sequel. He was then asked some questions of a less direct tendency, as to the sex or colour of the person who delivered the goods into his hands, and answered in like manner. Upon the case being sent to the Grand Jury he was subpœnaed to attend before them, and appeared in obedience to the process, but, in respectful terms, declined answering. Bills of indictment were found, upon other testimony, against Charles Bradley and Benjamin Brinkerhoff, both coloured men, as principals, and against Philips and wife as receivers. . . .

† Not officially reported, but set forth by the attorney who participated in the case as *amicus curiae*, and later reprinted in 1 Western Law Journal 109 (1843).

The original records of the case are on display in the library of the Court of General Sessions of the County of New York.

*The original spelling, punctuation and grammar has been followed even when inconsistent or incorrect.

Among the witnesses returned on the back of the indictment was the Reverend Anthony Kohlmann, who being called and sworn, was asked some questions touching the restitution of the goods. He in a very becoming manner entreated that he might be excused, and offered his reasons to the Court, which are here omitted to avoid repetition, but will be found at length in the sequel.

Mr. George Wilson objected also on behalf of his clients. The case was novel and without precedent, and Mr. Sampson, an amicus curiae, interposed, and observed that in no country where he had been, whether Protestant or Catholic, not even in Ireland, where the Roman Catholic religion was under the ban of proscription, had he ever heard of an instance where the clergyman was called upon to reveal the solemn and inviolable secrecy of sacramental confession, and with the ready assent of Mr. Riker, obtained an adjournment of the trial until Counsel could be heard in deliberate argument. . . .

CLINTON, Mayor. In order to criminate the defendants, the Reverend Anthony Kohlmann, a minister of the Roman catholic church of this city, has been called upon as a witness, to declare what he knows on the subject of this prosecution. To this question he has declined answering, and has stated in the most respectful manner the reasons which govern his conduct. That all his knowledge respecting this investigation, is derived from his functions as a minister of the Roman catholic church, in the administration of penance, one of their seven sacraments; and that he is bound by the canons of his church, and by the obligations of his clerical office, to the most inviolable secrecy – which he cannot infringe, without exposing himself to degradation from office – to the violation of his own conscience, and to the contempt of the catholic world.

In corroboration of this statement, a book entitled "The Catholic Christian instructed in the sacraments, sacrifices, ceremonies, and observances of the church, by the late right reverend R. Chalhoun, D.D." has been quoted, which declares, "That by the law of God and his church, whatever is declared in confession, can never be discovered, directly or indirectly, to any one, upon any account whatsoever, but remain an eternal secret between God and the penitent soul – of which the confessor cannot, even to save his own life, make any use at all to the penitent's discredit, disadvantage, or any other grievance whatsoever." Vide Decretum Innocentie XI. die 18 November, Anno. 1682 (page 120) and the same book also says, that penance is a sacrament, and consists, on the part of the penitent, of three things, to wit – contrition, confession, and satisfaction on the part of the minister in the absolution pronounced by the authority of Jesus Christ.

The question then is, whether a Roman catholic priest shall be compelled to disclose what he has received in confession – in violation of his conscience, of his clerical engagements, and of the canons of his church, and with a certainty of being stripped of his sacred functions, and cut off from religious communion and social intercourse with the denomination to which he belongs.

This is an important enquiry; It is important to the church upon which it has a particular bearing. It is important to all religious denominations, because it involves a principle which may in its practical operation affect them all; we have therefore, devoted the few moments which we could

spare, to an exposition of the reasons that have governed our unanimous opinion: But before we enter upon this investigation, we think it but an act of justice to all concerned in it, to state, that it has been managed with fairness, candour, and a liberal spirit, and that the counsel on both sides have displayed great learning and ability; and it is due particularly to the public prosecutors, to say, that neither in the initiation nor conducting of this prosecution, has there been manifested the least disposition to trespass upon the rights of conscience — and it is equally due to the reverend Mr. Kohlmann to mention, that the articles stolen, were delivered by him to the police, for the benefit of the owners, in consequence of the efficacy of his admonitions to the offenders, when they would otherwise, in all probability, have been retained, and that his conduct has been marked by a laudable regard for the laws of the country, and the duties of his holy office.

It is a general rule, that every man when legally called upon to testify as a witness, must relate all he knows. This is essential to the administration of civil and criminal justice.

But to this rule there are several exceptions — a husband and wife cannot testify against each other, except for personal aggressions — nor can an attorney or counsellor, be forced to reveal the communications of his client — nor is a man obliged to answer any question, the answering of which may oblige him to accuse himself of a crime, or subject him to penalties or punishment.

In the case of Lord Melville, upon a witness declining to testify, lest he might render himself liable to a civil action, the question was referred to the twelve judges; and eight, together with the lord high chancellor, against four, were of opinion, that he was bound to answer. To remove the doubt which grew out of this collision, an act of parliament was passed, declaring "that a witness cannot by law, refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatever, by reason only, or on the sole ground that the answering of such question, may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or of any other person or persons." This statute has settled the law in Great Britain. The point in this state may be considered as res non adjudicata — but I have little doubt that when determined, the exemption from answering of a witness so circumstanced will be established.

Whether a witness is bound to answer a question, which may disgrace or degrade him, or stigmatize him by the acknowledgment of offences, which have been pardoned or punished, or by the confession of sins or vices, which may affect the purity of his character, and the respectability of his standing in society, without rendering him obnoxious to punishment, is a question involved in much obscurity, and about which there is a variety of doctrine, and a collision of adjudications.

After carefully examining this subject, we are of opinion that such a witness ought not to be compelled to answer. The benevolent and just principles of the common law, guard with the most scrupulous circumspection, against temptations to perjury, and against a violation of moral feeling; and what greater inducement can there be for the perpetration of this offence, than placing a man between Scylla and Charybdis, and in such an awful dilemma that he must either violate his oath, or proclaim his

infamy in the face of day, and in the presence of a scoffing multitude? And is there not something due to the feelings of human nature, which revolt with horror at an avowal that must exclude the witness from the pale of decent society, and subject him to that degradation which is as frequently the cause as the consequence of crimes?

One of the earliest cases we meet with on this subject is that of Cooke (4 St. Tr. 748. Salkreld, 153–) who being indicted for treason, in order to found a challenge for cause, asked a juror whether he had not said he believed him guilty. The whole Court determined he was not obliged to answer the question – and Lord Chief Justice Treby said, "Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petit larceny, and they have not been obliged to answer: for though their answer in the affirmative will not make them criminal nor subject to punishment, yet they are matters of infamy, and if it be an infamous thing, that's enough to preserve a man from being bound to answer. A pardoned man is not guilty; his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereupon he will be forced to forswear or disgrace him."

In the case of Rex vs. Lewis and others (4 Espinasses nisi prius cases, 225) the witness was asked if he had not been in the house of correction, in Sussex. Lord Ellenborough, relying upon the opinion just quoted, declared, that a witness was not bound to answer any question, the object of which was to degrade or render him infamous. In the case of MacBride vs. MacBride (same book 243) Lord Alvanly, on a witness being asked whether she lived in a state of concubinage with the plaintiff, overruled the question, saying, that he thought questions as to general conduct, might be asked, but not such as went immediately to degrade the witness, and concluded by saying, "I think those questions only should not be asked, which have a direct and immediate effect to disgrace, or disparage the witness."

In the supreme court of New-Jersey (Pennington's Reports, the State, vs. Bailey, 415) the following question was proposed to a witness. Have you been convicted of petit larceny and punished? The Court after argument decided, that a witness could be asked no question, which in its answer might tend to disgrace or dishonor him, and therefore, in the particular case the witness was not bound to answer the question.

In the case of *Bell,* an insolvent debtor, which occurred in the Court of Common Pleas, for the first Judicial District of Pennsylvania (Browne's Reports, 376) a question was asked the father of the insolvent, which went to impeach and invalidate a judgement he had against the insolvent, which question the Court overruled. *Rush,* the President, saying, "I have always overruled a question that would affect a witness *civilly,* or subject him to a *criminal prosecution;* I have gone farther, and where the answer to a question would cover the witness with *infamy or shame,* I have refused to compel him to answer it."

In the case of Jackson ex dem Wyckoff, vs. Humphrey (1 Johnson's Reports 498) a deed was attempted to be invalidated at the circuit, by the testimony of the judge, taking the proof on the ground that the proof it was taken in Canada, and also, that the subscribing witness could not have known the facts respecting the identity of the grantor, as testified by him before the

judge who took the proof, and also to impeach the general character of the witness. The testimony was overruled by the judge, and a verdict found for the plaintiff, and a motion for a new trial prevailed. The Court declaring, that "The judge, before whom the proof of the deed was made, was a competent witness to prove that it was done in Canada, and if that fact be established, the proof was illegal and void. Though the judge was a competent witness, *he would not have been bound to answer any questions impeaching the integrity of his conduct as a public officer;*" and we believe it to be the general if not established practice of our Courts to excuse a witness from answering questions which relate to sexual intercourse, in actions brought for a breach of promise of marriage, or by parents for seduction.

We have gone more particularly into this branch of the subject, because it has a very intimate connexion with the point in question. None of these propositions – *that a witness is not obliged to confess a crime, or subject himself to a penalty, or to impair or injure his civil rights by his testimony – or to proclaim his turpitude or immorality,* can be considered as including within its purview, the precise case before us. They all, however, touch upon it, in a greater or less degree. With the exception of the second position, there is this strong difference, they are retrospective and refer to past conduct, whereas in the case now pending, if we decide that the witness shall testify, we prescribe a course of conduct by which he will violate his spiritual duties, subject himself to temporal loss, and perpetrate a deed of infamy. If he commits an offence against religion; if he is deprived of his office and of his bread, and thrown forlorn and naked upon the wide world, an object for the hand of scorn, to point its slow and moving finger at, we must consider that this cannot be done without our participation and coercion.

There can be no doubt but that the witness does consider, that his answering on this occasion, would be such a high handed offence against religion, that it would expose him to punishment in a future state – and it must be conceded by all, that it would subject him to privations and disgrace in this world. It is true, that he would not be obnoxious to criminal punishment, but the reason why he is excused where he would be liable to such punishment, applies with greater force to this case, where his sufferings would be aggravated by the compunctious visitings of a wounded conscience, and the gloomy perspective of a dreadful *hereafter;* although he would not lose an estate, or compromit a civil right, yet he would be deprived of his only means of support and subsistence – and although he would not confess a crime, or acknowledge his infamy, yet he would act an offence against high heaven, and seal his disgrace in the presence of his assembled friends, and to the affliction of a bereaved church and a weeping congregation.

It cannot therefore, for a moment be believed, that the mild and just principles of the common Law would place the witness in such a dreadful predicament; in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath – If he prevaricates he violates his judicial oath – Whether he lies, or whether he testifies the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience.

The only course is, for the court to declare that he shall not testify or act at all. And a court prescribing a different course must be governed by feelings and views very

different from those which enter into the composition of a just and enlightened tribunal, that looks with a propitious eye upon the religious feelings of mankind, and which dispenses with an equal hand the universal and immutable elements of justice.

There are no express adjudications in the British courts applied to similar or analogous cases, which contradict the inferences to be drawn from the general principles which have been discussed and established in the course of this investigation: Two only have been pointed out as in any respect analogous, which we shall now proceed to consider.

In the case of Du Barre &c. (Peake's cases at nisi prius 77) the following question was agitated, whether as the Defendant was a Frenchman who did not understand the English language and his attorney not understanding French was obliged to communicate with him by an interpreter, the interpreter ought to be permitted to give evidence, the Defendant's Counsel contending that this was a confidence which ought not to be broken, Lord Kenyon decided that the interpreter should only reveal such conversation as he had with the Defendant in the absence of the attorney. *Garrow* for the Plaintiff, said that a case much stronger than this had been lately determined by Mr. Justice Buller, on the Northern Circuit. That was a case in which the life of the prisoner was at stake. The name of it was, The King, vs. Sparkes. There the prisoner being a Papist had made a confession before a Protestant Clergyman of the crime, for which he was indicted and that confession was permitted to be given in evidence on the trial, and he was convicted and executed. Lord Kenyon upon this remarked, "I should have paused before I admitted the evidence here admitted."

The case referred to by Garrow, is liable to several criticisms and objections. In the first place it was stated by a Counsel in the cause, and is therefore liable to those errors and perversions which grow out of that situation. Secondly, it is the determination of a single Judge, in the hurry of a circuit, when a decision must be made promptly, without time for deliberation, or consultation, and without an opportunity for recurrence to books. Thirdly, it is virtually overturned by Lord Kenyon, who certainly censures it with as much explicitness as one Judge can impeach the decision of his colleague, without departing from judicial decorum. Fourthly, the depositary of the secret was a Protestant Clergyman, who did not receive it under the seal of a sacrament, and under religious obligations of secrecy, and would not, therefore, be exposed to ecclesiastical degradation and universal obloquy by promulgating it. — And lastly, the decision of Mr. Justice Buller, was, to say the least, erroneous; for when a man under the agonies of an afflicted conscience and the disquietudes of a perturbed mind, applies to a minister of the Almighty, lays bare his bosom filled with guilt, and opens his heart black with crime, and solicits from him advice and consolation, in this hour of penitence and remorse, and when this confession and disclosure may be followed by the most salutary effects upon the religious principles and future conduct of the penitent, and may open to him prospects which may bless the remnant of his life, with the soul's calm sunshine and the heart-felt joy, without interfering with the interests of society, surely the establishment of a rule throwing all these pleasing prospects into shade, and prostrating the relation between the penitent and the comforter, between the votary and the minister of religion, must be pronounced a heresy in our legal code.

The other case was decided by Sir Michael Smith, Master of the Rolls of Ireland. On the 24th February, 1802, (2 M'Nally, 153) a bill was filed praying to be decreed the estates of the late Lord Dunboyne, by the heir at law, who alleged that the will, under which the Defendant claimed, was a nullity, as Lord Dunboyne having been a Popish Priest, and having conformed and relapsed to Popery, had no power to make a will. Issue was joined, and the Plaintiff produced the Reverend Mr. Gahan, a Clergyman of the church of Rome, to be examined, and interrogatories to the following effect, were among others, exhibited to him: "What Religion did the late Lord Dunboyne profess from the year 1783 to the year 1792? What Religion did he profess at the time of his death, and a short time before his death?" The witness answered to the first part, viz. that "Lord Dunboyne professed the Protestant religion during the time, &c. but *demurred* to the latter part in this way, "That his knowledge of the matter enquired of (if any he had) arose from a confidential communication to him, in the exercise of his clerical functions, and which the principles of his religion forbid him to disclose, nor was he bound by the laws of the land to answer."

The Master of the Rolls determined against the demurrer; the reasons he assigns are loose and general, and very unsatisfactory, and the only authority cited by him in support of his decision, was that of Vaillant vs. Dodermead, reported in 2 Atkyns 524, which I shall now consider with a view of showing that there is no point of resemblance or analogy between that and the adjudication of the Master of the Rolls.

The Defendant in this case having examined Mr. Bristow, *his Clerk in the Court,* the Plaintiff exhibited interrogatories for cross-examining him, to which he demurred, for that he knew nothing of the several matters enquired of in the interrogatories, besides what came to his knowledge as clerk in court, *or agent for the Defendant* in relation to the matters in question in this cause. The Lord High Chancellor overruled the demurrer, and compelled him to answer for the following irresistible reasons. Because the matters enquired of were antecedent transactions to the commencement of the suit, the knowledge whereof, could not come to Bristow as clerk in court, or solicitor: because this was a cross-examination, and whenever a party calls upon his own attorney to testify, the other side may examine him: and because he states that he knew nothing but as clerk or agent. Now the word *agent* includes non-privileged as well as privileged persons. The only privileged persons are Counsellors, Solicitors and Attorneys; *an agent* may be a Steward or Servant.

What analogy can be traced between the cases? Did the Catholic Priest cloak himself under any generality or indefiniteness, of expression? Did he obtain any information from Lord Dunboyne previous to his acting as his confessor, or in any other capacity than as confessor? Was he called upon by the Defendant to testify, and in consequence thereof exposed to the cross-examination of the Plaintiff? Surely not. The case then relied upon, does in no respect, in no similitude of principle or resemblance of fact quadrate with the case adjudicated, or in any degree, or to any extent support it.

With those who have turned their attention to the history of Ireland, the decisions of Irish courts, respecting Roman Catholics, can have little or no weight.

That unfortunate country has been divided into two great parties, the oppressors

and oppressed. The Catholic has been disfranchised of his civil rights, deprived of his inheritance, and excluded from the common rights of man; statute has been passed upon statute, and adjudication has been piled upon adjudication in prejudice of his religious freedom. The benign spirit of toleration, and the maxims of an enlightened policy, have recently ameliorated his condition, and will undoubtedly, in process of time, place him on the same footing with his Protestant brethren; but until he stands upon the broad pedestal of equal rights, emancipated from the most unjust thraldom, we cannot but look with a jealous eye upon all decisions which fetter him or rivet his chains.

But there is a very marked distinction between that case, and the case now under consideration. The Reverend Mr. Gahan did not pretend that he derived his information from Lord Dunboyne, in the way of a sacrament, but only as a confidential communication: he would not therefore be exposed by a promulgation, to degradation, breach of oaths, and a violation of his clerical duties. But the only imputation would be on his personal honor as a gentleman.

Penance implies contrition for a sin, confession of a sin, and satisfaction or reformation for a sin. Now can conversion to the church of Rome, in the eye of a Roman Catholic Layman, or a Roman Catholic Priest, require contrition, or confession, or reformation? And if it does not, a declaration of such conversion cannot be the sacrament of penance. In Gahan's case there was no sacrament, or religious obligation of secrecy. In the case of Mr. Kohlmann there is the strongest that religion can impose, involving every thing sacred in this world and precious in that to come.

But this is a great constitutional question, which must not be solely decided by the maxims of the common law, but by the principles of our government: We have considered it in a restricted shape, let us now look at it upon more elevated ground; upon the ground of the constitution, of the social compact, and of civil and religious liberty.

Religion is an affair between God and man, and not between man and man. The laws which regulate it must emanate from the Supreme Being, not from human institutions. Established religions, deriving their authority from man, oppressing other denominations, prescribing creeds of orthodoxy, and punishing non-conformity, are repugnant to the first principles of civil and political liberty, and in direct collision with the divine spirit of christianity. Although no human legislator has a right to meddle with religion, yet the history of the world, is a history of oppression and tyranny over the consciences of men. And the sages who formed our constitution, with this instructive lesson before their eyes, perceived the indispensable necessity of applying a preventitive, that would forever exclude the introduction of calamities, that have deluged the world with tears and with blood, and the following section was accordingly engrafted in our state constitution:

"And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked princes* have scourged mankind, This convention doth further in

*The constitutional provision is incomplete as set forth herein and should read: "wherewith the bigotry and ambition of weak and wicked *priests* and princes . . . ." N. Y. Const., Art. XXXVIII (1777) (emphasis supplied). – Ed.

the name, and by the authority of the good people of this state, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state, to all mankind. Provided, that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

Considering that we had just emerged from a colonial state, and were infected with the narrow views and bigotted feelings, which prevailed at that time so strongly against the Roman Catholics, that a priest was liable to the punishment of death if he came into the colony, this declaration of religious freedom, is a wonderful monument of the wisdom, liberality, and philanthropy of its authors. Next to William Penn, the framers of our constitution were the first legislators who had just views of the nature of religious liberty, and who established it upon the broad and imperishable basis of justice, truth, and charity: While we are compelled to remark that this excellent provision was adopted by a majority of one, it is but proper to say, that the colonial statute against Roman Catholic Priests, originated more from political than religious considerations. The influence which the French had over the six nations, the Iroquois, and which was exercised to the great detriment of the British colonies, was ascribed to the arts and management of the Jesuits, and it was therefore, in violation of all respect for the rights of conscience, deemed of essential importance to interpose the penalty of death against their migration into the colony.

A provision conceived in a spirit of the most profound wisdom, and the most exalted charity, ought to receive the most liberal construction. Although by the constitution of the United States, the powers of congress do not extend beyond certain enumerated objects; yet to prevent the danger of constructive assumptions, the following amendment was adopted: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In this country there is no alliance between church and state; no established religion; no tolerated religion – for toleration results from establishment – but religious freedom guaranteed by the constitution, and consecrated by the social compact.

It is essential to the free exercise of a religion, that its ordinances should be administered – that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. We have but two in the Protestant Church – Baptism and the Lord's Supper – and they are considered the seals of the covenant of grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? Every man who hears me will answer in the affirmative. Will not the same result follow, if we deprive the Roman catholic of one of his ordinances? Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated.

It has been contended that the provision of the constitution which speaks of practices inconsistent with the peace or safety of the

state, excludes this case from the protection of the constitution, and authorizes the interference of this tribunal to coerce the witness. In order to sustain this position, it must be clearly made out that the concealment observed in the sacrament of penance, is a practice inconsistent with the peace or safety of the state.

The Roman catholic religion has existed from an early period of christianity – at one time it embraced almost all Christendom, and it now covers the greater part. The objections which have been made to penance, have been theological, not political. The apprehensions which have been entertained of this religion, have reference to the supremacy, and dispensing power, attributed to the bishop of Rome, as head of the catholic church – but we are yet to learn, that the confession of sins has ever been considered as of pernicious tendency, in any other respect than it being a theological error – or its having been sometimes in the hands of bad men, perverted to the purposes of peculation, an abuse inseparable from all human agencies.

The doctrine contended for, by putting hypothetical cases, in which the concealment of a crime communicated in penance, might have a pernicious effect, is founded on false reasoning, if not on false assumptions: To attempt to establish a general rule, or to lay down a general proposition from accidential circumstances, which occur but rarely, or from extreme cases, which may sometimes happen in the infinite variety of human actions, is totally repugnant to the rules of logic and the maxims of law. The question is not, whether penance may sometimes communicate the existence of an offence to a priest, which he is bound by his religion to conceal, and the concealment of which, may be a public injury, but whether the natural tendency of it is to produce practices inconsistent with the public safety or tranquillity. There is in fact, no secret known to the priest, which would be communicated otherwise, than by confession – and no evil results from this communication – on the contrary, it may be made the instrument of great good. The sinner may be admonished and converted from the evil of his ways: Whereas if his offence was locked up in his own bosom, there would be no friendly voice to recall him from his sins, and no paternal hand to point out to him the road to virtue.

The language of the constitution is emphatic and striking, it speaks of *acts of licentiousness,* of *practices inconsistent* with the *tranquillity and safety of the state;* it has reference to something actually, not negatively injurious. To acts committed, not to acts omitted – offences of a deep dye, and of an extensively injurious nature: It would be stretching it on the rack so [to] say, that it can possibly contemplate the forbearance of a Roman catholic priest, to testify what he has received in confession, or that it could ever consider the safety of the community involved in this question. To assert this as the genuine meaning of the constitution, would be to mock the understanding, and to render the liberty of conscience a mere illusion. It would be to destroy the enacting clause of the proviso – and to render the exception broader than the rule, to subvert all the principles of sound reasoning, and overthrow all the convictions of common sense.

If a religious sect should rise up and violate the decencies of life, by practicing their religious rites, in a state of nakedness; by following incest, and a community of wives. If the Hindoo should attempt to introduce the burning of widows on the funeral piles

of their deceased husbands, or the Mahometan his plurality of wives, or the Pagan his bacchanalian orgies or human sacrifices. If a fanatical sect should spring up, as formerly in the city of Munster, and pull up the pillars of society, or if any attempt should be made to establish the inquisition, then the licentious acts and dangerous practices, contemplated by the constitution, would exist, and the hand of the magistrate would be rightfully raised to chastise the guilty agents.

But until men under pretence of religion, act counter to the fundamental principles of morality, and endanger the well being of the state, they are to be protected in the free exercise of their religion. If they are in error, or if they are wicked, they are to answer to the *Supreme Being,* not to the unhallowed intrusion of frail fallible mortals.

We speak of this question, not in a theological sense, but in its legal and constitutional bearings. Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.

There being no evidence against the Defendants, they were acquitted.

Hoffman (Recorder), Douglass and Cunningham (Aldermen), concur.

Both the Mayor and the Recorder were members of the Court trying Daniel and Mary Phillips although Chapter 10 of the Laws of 1787, required that only one of them need be present. The reporter noted that this unusual procedure was followed "on account of the importance of the case."

The next reported case in New York (1817) involved a protestant clergyman who was permitted to testify, over objection by the defendant's counsel, to a confession made to him as a minister of the gospel.

New York, Court of Oyer and Terminer, and Gaol Delivery,[1]

The People *vs.* Christian Smith — *On an indictment for murder-manslaughter.*

[2 City Hall Recorder (Rogers) 77 (N.Y. 1817)]

Though confessions made in confidence to a divine of the Roman Catholic order, whose duty it is to receive auricular confessions according to the canons of that church, will not be received in evidence, yet, admissions made by a prisoner to a divine of the protestant churches, will be received.

. . .

Countrymen, this case contains for you, much useful instruction. Here you may learn the awful consequence of harbouring, for a long period, a settled malignity against a neighbour: you may profit by the example afforded by the two wretched men, the subjects of the following case, whose private feuds were so destructive, so deadly, as to produce the melancholy castastrophe about to be unfolded. . . .

It is your duty – God commands, and your own happiness requires, that you should cultivate peace, and friendship, and brotherly love, and exercise, among each

[1] The crowd of people was so great, that the court was adjourned for the trial to the church.

other, all the social and lovely charities of life. By so doing, you may render each hamlet delightful – each village a paradise.
. . .

The prisoner was indicted for the murder of Bornt Lake, on Sunday, the 27th day of October last, by firing and discharging at the said Lake, a certain musket, loaded with shot, by means of which, he, the said Bornt Lake, instantly died.

Lester opened the cause to the jury, on behalf of the prosecution, stating, that he expected to prove in the course of the trial, that the deceased and the prisoner, being neighbours, certain unhappy differences subsisted between them, for sixteen years; and, that previous to the day laid in the indictment, the prisoner had expressed his hostility towards the deceased, and threatened revenge.

On the morning of the 27th of October last, the deceased was found dead in the public highway, near the land of the prisoner. A rammer and clasp belonging to a musket were found near him, and his back was pierced by a great number of wounds, proceeding from gun shot. On searching the house of the prisoner two muskets were found, one of which was found concealed in the rafters of the garret, without a rammer and clasp; and those found, exactly fitted the musket. The counsel concluded by stating, that he expected to prove this to be a case of the most diabolical malice, which had ever disgraced the records of our criminal courts.

Daniel Lake, a witness on behalf of the prosecution, stated, that before the deceased was killed, and during the same month, he, the witness, had a conversation with the prisoner on the subject of certain lawsuits and other differences between the deceased and the prisoner, and offered himself as a mediator; but the prisoner alleged that this would be of no use, as an unsuccessful attempt of that nature, had once before been made: that the prisoner still continued to trespass upon him; and that he, the prisoner, could not bear with the night-walking of the deceased, and intended to fix him. The witness stated, that the deceased and the prisoner had been at variance a number of years, and the dispute extended to their respective families.

On his cross-examination, the witness stated, that the prisoner complained of divers trespasses committed by the deceased, to vex and injure; and, among other things, that he had frequently let the swine of the prisoner out of his pen at night, and taken them up, under the town law, and had recovered the penalty, on the ground that the prisoner suffered the swine to run at large.
. . .

The Rev. Peter J. Van Pelt, was here called as a witness on behalf of the prosecution, to prove certain confessions made by the prisoner to him while confined in the prison in this village.

Price inquired of the witness whether the confessions spoken of were made by the prisoner to the witness while he was visiting him as a minister of the gospel? The witness replied, that he had heard nothing from the prisoner but what he believed to have been communicated to him as a minister of the gospel.

Mr. Price then objected to the testimony of the witness. He said he was not aware of any express decision in support of the objection, but that he thought it dangerous in the extreme to permit a witness, in the relation of the one offered, to divulge a communication which must, undoubtedly,

have been made, and ought to have been received, in the strictest confidence. It had been decided by De Witt Clinton, while mayor of the city of New-York, that auricular confessions, made in the confidence of church discipline, were inadmissible evidence against a prisoner.[2] He saw no distinction between that and the present case. There was no good reason for restricting such rule to any particular sect or denomination. It had no relation to the character of the person in whom confidence is placed; and whether made to a minister of the gospel, or a counsellor at law, is perfectly immaterial. It arises, altogether, from the presumption, that a prisoner, for his temporal or eternal safety, considers himself compelled to make the confession. In this view, it is not to be regarded as voluntary, and, therefore, is inadmissible.

His honour the Judge then asked the witness if he had any objection to state the communication made by the prisoner? The witness answered, that he had not.

His Honour thereupon decided that the testimony was admissible, and took distinction between auricular confessions made to a priest in the course of discipline, according to the canons of the church, and those made to a minister of the gospel in confidence, merely as a friend or adviser.

The witness, on being sworn, testified, that shortly after the prisoner had been committed to prison, and since, he sent for the witness, and professed to relate to him all the circumstances of his case. The witness visited the prisoner, and had several conversations with him, with a view of exhorting him to penitence and preparation for his great trial hereafter. The account which the prisoner gave of the unhappy transaction is, in substance, as follows:

The deceased and himself had frequently disputed and quarrelled, and the mind of the prisoner, by reason thereof, became harassed and disturbed. On the night preceding the affair, the prisoner was restless, and remained awake much during the night. About daylight, hearing a noise like the shaking of a tree on his land, he went to the door, and heard the noise more distinct. He went out, and ascertained with certainty, that there was somebody at the black-walnut tree. This induced him to take his gun and go to the tree. When he came up,

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[2] The case to which the counsel alludes was of this nature: A man belonging to the Roman Catholic denomination, was brought to trial in the Court of Sessions, in New-York, for grand larceny. On the trial, Mr. Coleman, a priest of that denomination, who, it appears, had previously restored to the owner the property laid in the indictment, having derived the information which led to a discovery of the goods by means of a confession made to him by one of the members of his church, was called as a witness on behalf of the prosecution, to prove that the prisoner had confessed to him the felony.

By the established canons, or ordinances of that church, confessions are to be made by the members, at least once a year, to the priest, in private; and from the examination of Mr. Coleman, it appeared that no other confessions were made to him by the prisoner, in relation to this affair, except those made in the ordinary course of church discipline. According to the rules and ordinances of the church, the priest is forbidden to divulge these confessions; and the witness declared that no consideration whatsoever, not even the most severe punishment, would induce him to depart from the established ordinances of the church.

On an objection raised by the prisoner's counsel to this evidence, it was decided by his honour De Witt Clinton, then Mayor of New-York, that although confessions made to a Roman Catholic priest were received in England, and no privilege could be claimed by a priest of that order in English courts, yet, his honour considered that, in this country, we were at liberty to establish a different rule. His honour decided in favour of the privilege claimed, and that the testimony of Mr. Coleman could not be required.

it being still dusky, he saw a man under the tree, on his knee, picking up black walnuts in a basket. Approaching, the prisoner accosted the other, by saying, "I have caught you at last." By this time he found that the man was the deceased, who made no answer, but crept or crawled away with his basket containing the nuts, through the fence between the land of the prisoner and that of Burbank. The deceased went along on one side of the fence, and the prisoner on the other, into the main road: the prisoner, following the deceased, saying, "Deliver up the nuts, and give up yourself like a man." The deceased made off very fast towards his own house, and the prisoner followed him, demanding his nuts, which the other refused to deliver. The prisoner, thereupon, made towards the deceased, resolutely, to get his nuts, but not to do any mischief to the deceased. Whereupon the deceased seized the muzzle of the gun, when, fearing that he would wrest it away, the prisoner cried out for help to his family, repeating this: "Will none of you, or, is there nobody to help me?" In the struggle, by a sudden and strong jerk, the deceased drew the band and the rammer from the musket, by reason of which, the deceased and the prisoner were separated. The deceased was going off, hastily, with the band and rammer – the prisoner followed, and being angry and bewildered, he discharged the gun; but whether he took aim at the deceased, or not, the prisoner did not know.

The witness asked the prisoner whether he saw the deceased fall, to which the prisoner answered no; but that he heard the deceased, as he fell, cry out, "Lord have mercy on me!" –

The prisoner told the witness, that when the gun was fired, he, the prisoner, was but a short distance from the deceased, and did not distinctly see him. That the deceased was a stronger man than the prisoner, and the witness himself is of that opinion. The prisoner did not state to the witness, that at the time the scuffle ensued, the deceased threatened the prisoner with any bodily injury.

In assigning the reason why the deceased came on his premises, the prisoner said he supposed the deceased intended to steal and carry away his property. The prisoner showed much contrition at having killed the deceased. . . .

The jury were out 7 hours, and on their return pronounced a verdict of "Not guilty." Whereupon his honour Judge Van Ness, addressed the prisoner in substance as follows:

"Christian Smith, you have been tried and acquitted by a jury of your country, for having taken away the life of one of your fellow creatures. I mean not to censure the jury who acquitted you – it is not my province so to do, I hope they will be able, upon future consideration, to reconcile their verdict to their consciences. But I should feel myself wanting in my duty as a man, if I did not express my opinion that, notwithstanding their verdict, I consider you a guilty – very guilty man. Upon an ancient grudge, you considered yourself justified in doing what you have done; and the jury have, I fear, confirmed your false and fatal judgment. But, beware – you have not yet escaped. Believe me, your most awful trial is yet to come. You are now an old man, and your days must be few in this world, and you will shortly be compelled to appear before another court, where there is no jury but God himself – Unless you repent, and devote your future life to an humble atonement of your guilt, your condemnation there is certain. I am thus plain with you, in order

that those who have listened to your trial, may learn that whatever may be considered to be the law of Staten Island, your conduct is unjustifiable in the sight of God and man."

As a result of the *Smith* case,[3] the Legislature of 1828 enlarged the holding of the *Phillips* case by enacting the following statute:

> No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination. (N.Y. Rev. Stat. 1828, Pt. 3, c. 7, tit. 3, §72).

At present, statutory protection of the disclosures made to a clergyman is provided by Section 351 of the New York Civil Practice Act which is substantially the same as the original statute.[4]

Thirty states have statutes similar to the New York enactment.[5] Of the states which have no statutory provisions relating to the privilege, there is reported a lower court decision in one of them, Pennsylvania, which seems to recognize the privilege.[6] Although the Federal Rules of Procedure do not explicitly declare such confessor-penitent communications privileged,[7] the general rule, nevertheless, seems to be recognized in federal courts.[8]

In April 1955, a Catholic priest turned over to agents of the Federal Bureau of Investigation $6,800 which he said was part of $7,780 taken from a Denver bank during a robbery. The priest said the money was given to him by the bandit who confessed the crime, and that "my lips are sealed. I have a sacred obligation by which I must abide even if it means my life." The United States District Attorney did not reveal the name of the priest.[9]

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[3] For a discussion of the evolution of the privilege at common law, see 8 Wigmore, Evidence §2394 (3d ed. 1940).

[4] C.P.A. §351: Clergymen not to disclose confessions. A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs.

However, Section 354 of the Act permits the person confessing to waive the provisions relating to confidential communications.

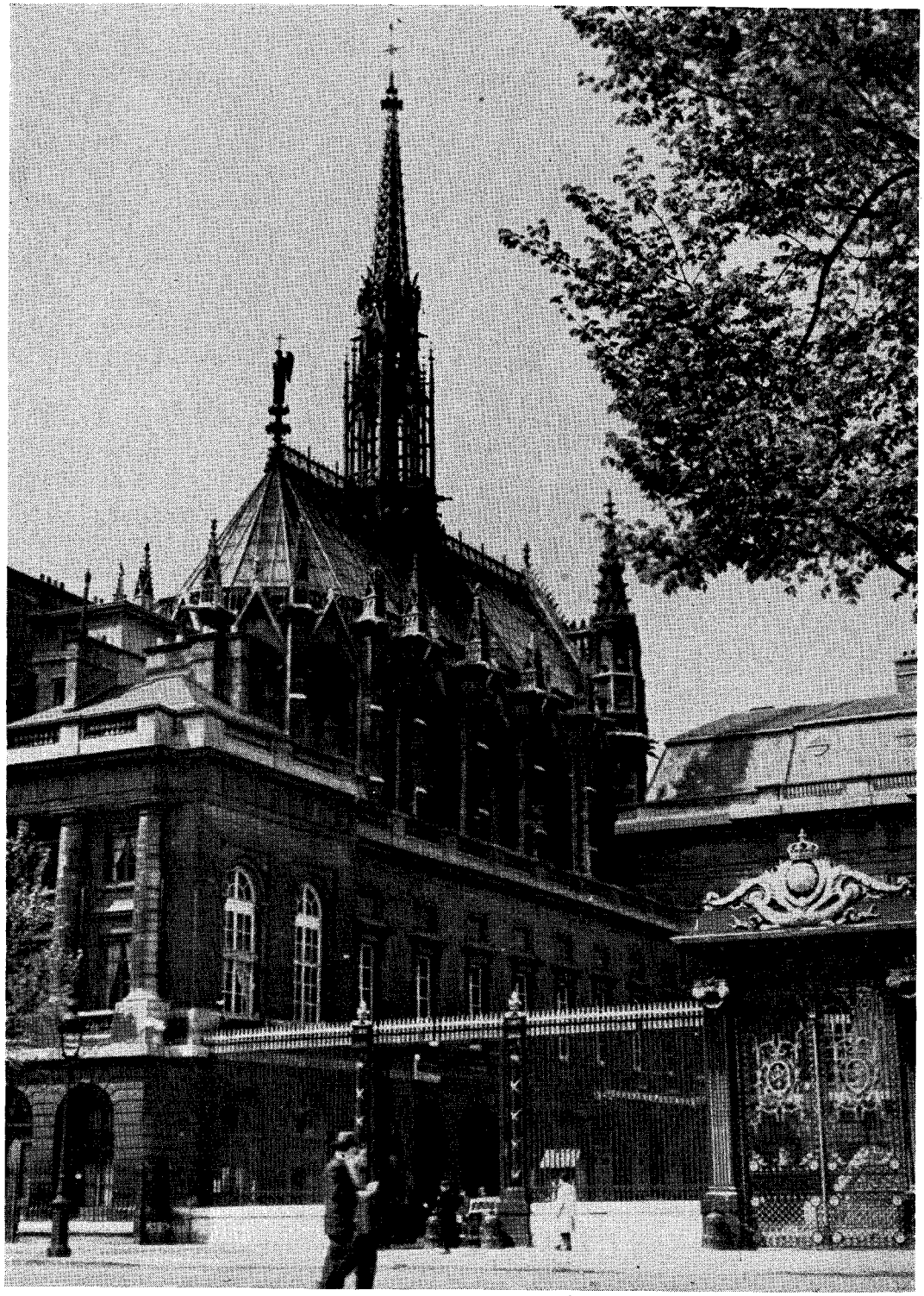
[5] Ariz. Code Ann. §23-103; Ark. Stat. §28.606; Calif. Code Civ. Proc. §1881(3); Colo. Rev. Stat. §153-1-7; Ga. Code Ann. §38-419.1; Idaho Code §9-203; Ind. Stat. Ann. §2-1714; Iowa Stat. §622.10; Kan. Gen. Stat. §60-2805(5); Ky. Rev. Stat. §421.210(4); La. Rev. Stat. §15:477 (Crim. Proc.); Mich. Comp. Laws §617.61; Minn. Stat. §595.02(3); Mo. Rev. Stat. §491.060(4); Mont. Rev. Code §93-701-4(4); Neb. Rev. Stat. §§25-1201(4), 25-1206; Nev. Comp. Laws §8973; N. J. Stat. Ann. §2A:81-9; N. Mex. Stat. Ann. §20-1-12(e); N. D. Rev. Code §31-0106; Ohio Rev. Code §2317.02(B); Okla. Stat. §12-385(5); Ore. Rev. Stat. §44.040(c); S. D. Code §36.0101(2); Utah Code Ann. §78-24-8(3); Vt. Stat. §1740; Wash. Rev. Code §5.60.060(3); W. Va. Code §4992(d); Wis. Stat. §325.20; Wyo. Comp. Stat. §3-2602(2).

[6] *In re* Shaeffer's Estate, 52 Dauph. 45 (Pa. Orph. 1942).

[7] Fed. Rules Crim. Proc., Rule 26; Fed. Rules Civ. Proc., Rule 43 (a).

[8] United States v. Keeney, 111 F. Supp. 233 (D.D.C. 1953).

[9] N. Y. Times, April 13, 1955, p. 34, col. 3.



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