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Judge Baker was unwilling to be bound by an arbitrary test and insisted, as he usually did, on considering existing conditions that he and his brethren on the federal bench in Indiana sustained a wartime state regulation of coal prices.<sup>11</sup>

M. S. BRECKENRIDGE.

#### ADMISSIBILITY OF CONFIDENTIAL CONFESSION TO SPIRITUAL ADVISER

The case of *State v. Alma Petty Gatlin*, tried before Judge Cameron McRae at a Special Term of the Superior Court of Rockingham County last February, aroused the interest of the public generally by its sensationalism; it is of peculiar interest to the profession—for the first time in North Carolina the question of the admissibility of a confidential confession as evidence was squarely raised. The case itself will not go before the Supreme Court; Mrs. Gatlin was acquitted. The question, therefore, remains unsettled. There is one point to be borne in mind in considering these cases; whether the minister may be *compelled* to testify is quite a different question from whether the matter secured from the confidential confession is *admissible* as evidence.

#### HISTORY OF THE QUESTION

Is a confidential communication to a minister, priest or spiritual adviser admissible as evidence? The question is, at least, as old as the Roman Law of an early period. In Rome not only were such communications excepted from evidence, but the priest who revealed them was punished, even where he had sworn not to reveal the information. The theory was that the communication passed through

<sup>11</sup> *Am. Coal Mining Co. v. Special Com.*, 268 Fed. 563 (D. Ind. 1920), appeal dismissed on company's motion, 258 U. S. 632, 42 S. Ct. 273. See notes 19 Mich. L. Rev. 74, 415; Simpson, "Due Process and Coal Price Regulation," 9 Iowa L. Bull. 145 (1924); *People v. United Mine Workers*, 201 Pac. 55 (Colo., 1921). Even by this broad rule there would be no foundation for general price regulation such as attempted but overthrown in Montana. *Holter Hdwe. Co. v. Boyle*, 263 Fed. 134 (D. Mont., 1920). See *State v. Goldstein*, 93 So. 308 (Ala. App., 1922); *Territory v. McCandless*, 24 Hawaii, 485 (1918). And it is hard to see what caused the United States Supreme Court in one case to permit an inference of approving state regulation of laundry rates. *Okla. Operating Co. v. Love*, 252 U. S. 331, 40 Sup. Ct. 338 (1920). Rent regulation was sustained as an emergency measure during the war. *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 158 (1921); *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405 (1924); cf. *State v. R. R. Com.*, 183 N. W. 687 (1921) wherein the Wisconsin Act was held invalid because of being applicable only to Milwaukee; *Rumbo v. Winterroud*, 228 S. W. 258 (Tex. Civ. App., 1921) holding invalid statute which prohibited farm landlord taking more than certain percent of produce as rent.

the representative to the principal, God, and that the priest could lawfully and rightfully swear that he knew nothing of it.<sup>1</sup> During the Middle Ages the laws on the Continent prohibited the priest from revealing such confessions; especially are the Capitularies of the French kings to be noted here.<sup>2</sup> In England, however, in the days of King Ethelred the law seemed to recognize no distinction between laymen and clergymen;<sup>3</sup> probably the effect of early Roman Law in England had worn off and the strong Roman Catholic movement had not yet begun. In those days the rising monarchy was reflecting in the laws its growing power, and it was probably due to this fact that, in the case of high treason, if we may rely upon early *dicta*, the courts first mentioned a rule denying the privilege and upholding the admissibility of confidential confessions as evidence.<sup>4</sup> However, we can speak with no certainty of the state of the law before the Reformation.<sup>5</sup> Even after the Reformation cases in point are rare, but *dicta* upon the subject become more frequent.<sup>6</sup> By 1802, in a case squarely in point, the court felt so sure of the ground that it began the decision with these words, "There is no difficulty in this case . . ." By 1860 a priest had been fined for contempt because of his refusal to testify as to a confession;<sup>8</sup> this decision seems to have

<sup>1</sup> Mascarudus, *De Probat.*, Vol. I, Quaest. 5, n. 61 [also see Greenleaf, *Evidence*, Vol I, sect. 247 (13th edition)].

<sup>2</sup> *Capit. Reg. Francorum*, lib. 7, paragraph 118; *Leges Barbar. Antiq.*, Vol. III, pp. 313, 316.

<sup>3</sup> *Ancient Laws and Institutes of England*, Vol. 1, p. 347; Peake, *Evidence*, Am. from the 5th London edition, p. 253; Best, *Evidence*, paragraph 583, 584.

<sup>4</sup> Note to *Reg. v. Hay*, 2 Fost. & F. (Eng.) 4 (1860).

<sup>5</sup> *Garnett's Trial*, 2 How. St. Tr. 218, 255 (1606). The famous Gunpowder Plot Case is the one here cited; Garnett was implicated,—and executed. Apparently, all that could be found against the Jesuit priest was that he refused to tell confessions made to him.

<sup>6</sup> *Anon.*, 2 Skinner, 404 per Holt, C. J. (1693); *Du Barre v. Livette*, Peake's Case 77, citing *Reg. v. Sparks* (1701); *Wilson v. Ralstall*, 4 T. R. 753, 759, *dicta* by Buller, J. (1792); *Broad v. Pitt*, 3 C. & P. 518, *dicta* by Best, C. J. (1828); Best, C. J., claimed the law was settled by a prior case, *Reg. v. Gilham*, but this case did not raise the question. He placed his reliance then, not upon a case, but upon *dicta*. *Reg. v. Gilham*, Moody Cr. C. 186 (1828).

<sup>7</sup> *Butler v. Moore*, Rolls, Ireland, 24 Feb. (1802). One of the earliest cases squarely in point, which has been fully reported. There the Roman Catholic priest objected to testifying as to information secured at a death-bed confession. *Held*, that "every man is bound to make discovery unless specially protected by law . . . candidly admitted here . . . that no special exemption could be shown in this case." Cited *Vaillant v. Dodmond*, 2 Atkyns, 524.

<sup>8</sup> *Reg. v. Hay*, *supra*, n. 4. Years later it was said, in a case in which a vicar was compelled to testify, that it was "not to be supposed for a moment that a clergyman had the right to withhold information from a court of law." *Normanshaw v. Normanshaw*, 69 L. T. N. S. 468 (1893). Even earlier, though,

gone to the limit. But—the law could not have been settled, for only seven years before, Baron Alderson considered that the law favored the privilege and decided against the admissibility of a confidential confession to a minister. He cited no cases, however, and rendered the decision, it would seem, upon an analogy only.<sup>9</sup> As late as 1890 Coleridge, C. J., told of having argued for the privilege, but even he had his doubts upon the state of the law; he was mistaken at least, in his belief that the question had never arisen in Ireland,<sup>10</sup> if not also in his belief concerning the law here discussed.

In the United States we followed, from an early date, what was apparently the stronger view at common law, that there was no privilege,<sup>11</sup> but this fact seems to have been overlooked by some leading commentators.<sup>12</sup> The common law cases in the United States are rare; the reports of recent years reveal but two cases, both of them from New Jersey; both of these admitted the information secured by communication to the spiritual adviser.<sup>13</sup> More than half of the states have protected the privilege by statute.<sup>14</sup> But these statutes have been construed strictly;<sup>15</sup> on the face of the decisions such

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we find the *dicta* that the privilege was recognized in Catholic countries, but "not recognized in England." *Anderson v. Bank of British Columbia*, L. R. 2 Ch. Div. 644 (1876), 35 L. T. N. S. 76.

<sup>9</sup> *Reg. v. Griffin*, 6 Cox C. Cr. 219 (1853). Baron Alderson decided this case on *principle*, not authority. He suggested the analogy to the lawyer-client relation; he refused, however, to lay down his decision as "an absolute rule". Counsel pressed the point no further.

<sup>10</sup> *Life and Correspondence*, Vol. II, 364 (1904). A letter from Coleridge, C. J., to Mr. Gladstone. *Butler v. Moore*, *supra*, n. 7, was an Irish case.

<sup>11</sup> Priest excused from testifying, when he *objected*. *People v. Phillips*, 1 West, L. J. (N. Y.) 109 (1813). This case was supported by (it did not cite) *Dicta* in *Broad v. Pitt*, *supra*, no. 6; *dicta* in *Reg. v. Hay*, *supra*, no. 4; decision in *Reg. v. Griffin*, *supra*, n. 9. Minister allowed to testify when he *wished to do so*. *Smith's Case*, 2 N. Y. City Hall Rec. 77 (1817). This case, we observe, follows. *Broad v. Pitt*, *supra*, n. 6. *Reg. v. Gilham*, *supra*, n. 6.

<sup>12</sup> Wigmore, *Evidence*, Vol. 5, paragraph 2394 (second edition); Underhill, *Criminal Evidence*, paragraph 295 (third edition).

<sup>13</sup> Information given priest at confessional, *held* admissible. *Bahrey v. Poniatishin*, 112 Atl. 481 (1921 N. J.). Information confidentially given a Salvation Army major as spiritual adviser, *held* admissible and "not privileged." *State v. Morehouse*, 117 Atl. 296 (1922 N. J.).

<sup>14</sup> California, Colorado, Iowa, Kansas, Michigan, Missouri, Nebraska, Wisconsin, Arizona, Arkansas, Idaho, Montana, Nevada, Oregon, Utah, Washington, Wyoming, Indiana, Kentucky, New York, North Dakota, Ohio, Oklahoma, South Dakota, Vermont, Porto Rico, Philippine Islands, Alaska.

<sup>15</sup> Communications must arise under confessional supported by the discipline of the church. *People v. Gates*, 13 Wend. (N. Y.) 311 (1835).

Minister must be in his professional capacity. *State v. Morgan*, 196 Mo. 177, 35 S. W. 402 (1906).

Must be confessions of sin only. *Gilhooley v. State*, 58 Ind. 182 (1877); *Hill v. State*, 61 Neb. 589, 85 N. W. 836 (1901).

strict interpretation implies that the courts, generally, consider that these statutes have changed the common law and have recognized a new exception to the general principles of admissibility. This further supports the view that such confessions were admissible at common law.

#### THEORY AND POLICY

##### *The Constitutional Objection*

The objection to the statutes usually involves their constitutionality. The Constitution of North Carolina (and of other states) guarantees the right to worship God "according to the dictates of their own consciences."<sup>16</sup> But the statutes apply alike to the followers of all creeds; they protect no particular religion; they encourage men to go to their ministers, confess their sins, admit their spiritual bankruptcy, and begin anew to live honestly and honorably; they assure penitents freedom in yielding to their consciences. More than a score of the states have denied the validity of this constitutional objection, though there is at least subtlety in the suggestion that ministers should be just as free to yield to their consciences and notify the police as criminals are to yield to theirs and confess to ministers. Law finds no difficulty in forbidding doctors and lawyers from committing breaches of confidence; if law can protect one fiduciary relation, it has power to protect another by express legislative enactment.

##### *Social Policy*

The most forceful objection to the protection of the privilege is that it throws a veil around the wrongdoer, and that, whether it be the best policy or not, so long as the theory of our law is that every wrong should be punished, no obstacle should be placed in the way of the prosecution of wrongdoers. Confession, "the queen of proofs," (Enrico Ferri) is certainly "best evidence." Any claim that the matter is privileged should have the burden of proving its justification, for it may well be argued that public policy is against pro-

Confessor must be a member of the clergyman church. *Alford v. Johnson*, 103 Ark. 236, 146 S. W. 516 (1912); *State v. Morgan*, *supra*.

Confession must be of a private and confidential nature. *Milburn v. Hawthorn*, 47 Colorado 593, 108 Pac. 155 (1910).

Of a penitential character, made in obedience to some supposed religious duty. *Knight v. Lee*, 80 Ind. 201 (1881).

Not a mere justification of his acts. *State v. Brown*, 95 Iowa 381, 64 N. W. 277 (1895).

<sup>16</sup> Wigmore, *Evidence*, Vol. 5, paragraph 2395 (second edition). Ample justification for the statutes is shown.

tecting a confessed wrongdoer. *Ethically*, it might be claimed that a denial of the privilege invites breaches of confidence; the layman abhors the idea of a minister listening sympathetically to a confession only to turn upon a confiding penitent, announce his wrong to the world, and hand him over into the clutches of the law. A Catholic, firmly wedded to his confessional, and protected in his freedom to worship God as he pleases, would no doubt revolt at the idea of the Father Confessor publishing to the world his sins of the month. But law regards the law of the land as a duty higher than the moral duty arising out of friendship and sympathy; friends are frequently called upon to testify against friends and even the bonds of family kinship are sometimes broken in the vigorous prosecution of those who have broken the laws of the land.

*Sociologically*, the privilege might be defended because it tends to encourage men to yield to their better natures, confess their past errors, and reform. But sociology is also interested in deterring law-breaking; if we provide a way by which men may relieve themselves of the compulsions to confess, a very important factor in the detection of crime will have been destroyed. *Psychologically*, where the privilege is protected, this enables the criminal to find release for suppressed fears and inhibited worries by confessing to a minister. The minister having given the assurance of divine forgiveness, it would appear that we would have fewer confessions to the police and other authorities and, therefore, more of the wrongdoers would go unpunished, for once the compulsion to confess has found an outlet, there would be no "drive" operating in the criminal's mind tending to force him to confess.

The common law cases show considerable conflict, but His Honor, Judge McRae, was clearly justified in admitting the testimony, though he could have found ample authority to support a contrary opinion. The numerous American statutes point to a tendency away from the "common law" view toward a recognition of the privilege.

D. S. GARDNER.

#### WHEN IS A CHECK PAID—LIABILITY OF COLLECTING AGENT

It is universally conceded that a check given in payment of a debt in the ordinary course of business does not discharge the debt until it be paid, in the absence of any agreement to the contrary. In a recent North Carolina case<sup>1</sup> the plaintiff in suing to enjoin the sale of his

<sup>1</sup> *Litchfield v. Reid*, 195 N. C. 161, 141 S. E. 543 (1928).