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The Priest – Penitent Privilege in South Carolina – Background and Development

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THE PRIEST — PENITENT PRIVILEGE IN SOUTH CAROLINA — BACKGROUND AND DEVELOPMENT

I. EXISTENCE OF THE PRIVILEGE AT COMMON LAW

Unlike confidential communications between an attorney and his client, the common law did not hold communications, confidential or otherwise, between clergymen and penitents to be privileged.[1] However, there are expressions by judges in certain cases which indicate that the judiciary felt an aversion to forcing a clergyman to reveal communications received by him as confessions pursuant to the discipline of the church.[2]

There is some doubt as to the existence of such a privilege prior to the Restoration,[3] primarily based upon the trial of Henry Garnet, Superior of the Jesuits in England, who was tried, convicted and executed for treason.[4] In that trial, the defendant was questioned as to what he would do if he were asked to reveal what had been said to him during a confession. His answer was that he would have to conceal the communication because he was bound to keep the secrets of a confession. The point was pressed no further in the questioning and the defendant was not required to disclose any confessional secrets. This case may be explained as an excep-

1. Normanshaw v. Normanshaw, 69 L. T. Rep. 468 (n. s.) (1893) (clergyman did not have the right to withhold a communication from a court of law); Broad v. Pitt, 3 Car. & P. 518, 172 Eng. Rep. 528 (C. P. 1829) (dictum) (Best, C. M., "The privilege does not apply to clergymen . . . ."); Wilson v. Rastall, 4 T. R. 743, 100 Eng. Rep. 1283 (K. B. 1792) (dictum) (Buller, J., in discussing the privilege of communication between attorney-client, said, "The privilege is confined to the cases of counsel, solicitor, and attorney . . . . "); Anonymous, Skin. 404, 90 Eng. Rep. 179 (K. B. 1693) (dictum) (in recognizing the attorney-client privilege, Holt, C. J., said, ". . . otherwise of a gentleman, parson & c."). *Cf.* R. v. Hay, 2 F. & F. 4, 175 Eng. Rep. 933 (Q. B. 1860) (impliedly admitted the privilege of priest-penitent to exist, but still cited a priest for contempt for failure to disclose name of person from whom he had received a stolen watch); Garnet's Trial, 2 How. St. Tr. 218 (1606) (where a priest was not required to disclose any confidential communications made to him by confession). *Contra*, R. v. Griffin, 6 Cox Crim. Cas. 219 (Cent. Crim. Ct. 1853) (privilege allowed to communications made to the chaplain of a workhouse who visited the defendant as spiritual advisor).

2. Broad v. Pitt, *supra* note 1 (although failing to recognize the privilege, Best, C. M., indicated, "I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence."); Garnet's Trial, *supra* note 1 (by implication).

3. 8 WIGMORE, EVIDENCE § 2394 (3d ed. 1940).

4. Garnet's Trial, *supra* note 1.

tion to any privilege which might have then existed. In the words of Sir Edward Coke, ". . . [B]y the common law, a man indicted of high treason could not have the benefit of clergy . . . nor any clergymen privilege of confession to conceal high treason. . . ."[5] Thus, it seems that Lord Coke recognized the existence of the privilege prior to the Reformation except in cases of high treason. But, it is generally conceded that the privilege did not exist at common law after the Restoration.[6]

Accordingly, the privilege has not been included in the common law of most American jurisdictions.[7] The majority of the jurisdictions, however, have abrogated the common law by statute, granting a privilege to such communications.[8] The terminology of the statutes varies somewhat and each state statute must be examined individually to ascertain who may claim the privilege and under what circumstances it will be allowed.[9] The courts have a tendency to construe the statutes very strictly and require that the terms of the statute be met exactly before the privilege can be invoked.[10]

II. THE PRIVILEGE IN THE FEDERAL COURTS

The privilege under discussion has caused less difficulty in the federal courts since it has been recognized by the United States Supreme Court for some time,[11] however, the recognition has been only incidental and in conjunction with the other traditional privileges that existed at common law.[12]

5. 2 COKE, INSTITUTES 629, as quoted in 2 BEST, EVIDENCE § 584 (Morgan ed. 1881).

6. 8 WIGMORE, EVIDENCE § 2394 (3d ed. 1940); 5 JONES, EVIDENCE § 2181 (2d ed. 1926); 2 BEST, EVIDENCE § 584 (Morgan ed. 1881).

7. Johnson v. Commonwealth, 310 Ky. 557, 221 S. W. 2d 87 (1949); State v. Morehous, 97 N. J. L. 285, 117 Atl. 296 (1922); Bahrey v. Poniatishin, 95 N. J. L. 128, 112 Atl. 481 (1920).

8. See 45 VA. L. REV. 599, n. 4 for a current compilation of the existing statutes in the individual states.

9. A typical statute would read, "A clergyman, priest, or religious practitioner of an established church cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." CAL. CODE CIV. PROC. § 1881 (Deering 1959).

10. Johnson v. Commonwealth, *supra* note 7; *In re* Koellen's Estate, 162 Kan. 395, 176 P. 2d 544 (1947); State v. Brown, 95 Ia. 381, 64 N. W. 277 (1895). *But see*, Boyles v. Cora, 232 Ia. 882, 6 N. W. 2d 401 (1942) (dictum); *In re* Swenson, 183 Minn. 602, 237 N. W. 589 (1931).

11. Totten v. U. S., 92 U. S. 105 (1876) (dictum).

12. U. S. v. Keeney, 111 F. Supp. 233 (D. D. C. 1953) (dictum), *rev'd on other grounds* 218 F. 2d 843 (D. C. Cir. 1954); McMann v. S. E. C., 87 F. 2d 377 (2d Cir. 1937) (dictum) *cert. denied* McMann v. Engle, 301 U. S. 684 (1937); Totten v. U. S., *supra* note 11 (dictum).

Professor Moore indicates that privileged communications are controlled principally by the state statutes, which, under Rule 43(a) of the Federal Rules of Civil Procedure, will clearly govern in the absence of any contrary federal statutes or rules of court.[13] The effect of Rule 43(a) is to favor the admissibility of evidence, if possible,[14] and it might be argued that in the absence of any express statutory or judicial utterance by the State, the common law rule denying the privilege would apply, and under Rule 43(a), the evidence would be admitted.[15] This reasoning probably would be rejected by the federal courts because the exclusion of the privileged communication in civil suits is favored by the federal courts, notwithstanding the language of Rule 43(a).[16] It would seem, however, that given a judicial decision of a state court denying the privilege, the district courts sitting in that state would be bound to follow the state common law and admit the communication in evidence.[17] Conversely, if there is a state statute granting a privilege to confidential communications between clergymen and penitents, the district court would be bound to exclude such evidence in accordance with the state statute.[18]

On the other hand, in federal criminal actions, the federal courts will exclude the testimony as privileged only if the

13. 5 MOORE, FEDERAL PRACTICE § 43.07 (2d ed. 1951).

14. FED. R. CIV. P. 43(a), "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

15. GREEN, *Admissibility of Evidence under the Federal Rules*, 55 HARV. L. R. 197 at 222, "Rule 43(a) is founded on the assumption that when a choice may be made between two rules, the one which will admit the evidence should always be chosen. Taken as a general principle this assumption is sound, but like many another broad principle it is not universally correct. Sometimes the rule excluding the evidence should be chosen." See also, Mullen v. U. S., 263 F. 2d 275 (D. C. Cir. 1959).

16. *Compare* Mullen v. U. S., *supra* note 15, *with* U. S. v. Brunner, 200 F. 2d 276 (6th Cir. 1952).

17. 5 MOORE, FEDERAL PRACTICE § 43.04 at 1326 n. 20 (2d ed. 1951), "It is clear, therefore, that state common law is applicable under Rule 43(a) if it favors the reception of the proposed testimony." *Cf.* note 15 *supra*.

18. *Id.* at § 43.07. Privileged communications ". . . are controlled principally by state statutes, which under Rule 43(a) will clearly govern, if no federal statues or rules of court contrary to the state statutes are enacted or promulgated. . . ." *But see*, U. S. v. Brunner, *supra* note 16; *see* note 33 *infra*.

privilege is recognized under the common law as interpreted "in the light of reasoning and experience."[19] Thus, a literal interpretation of Criminal Rule 26 would lead to the conclusion that the priest-penitent privilege would not be recognized in federal criminal actions because of the non-recognition of the privilege under the common law,[20] unless the privilege could be sustained in the light of reason and experience.[21] The privilege, however, has been allowed in one federal criminal prosecution on that basis.[22]

Criminal Rule 26 is to be contrasted with Civil Rule 43(a). The latter rule results in the application of state law by the district courts in civil suits, where state substantive law should govern the rights of the parties.[23] Although the application of state law in civil suits results in a lack of uniformity in the rules of evidence used by federal courts and, in particular, those pertaining to privileged communications, this divergency of application of evidence rules is not necessarily bad or unjust.[24]

By contrast, uniform application of rules of evidence in federal courts appears to be desirable, if not essential, in criminal cases, since all federal crimes are statutory and all criminal prosecutions in federal courts are based on acts of Congress.[25] To rule otherwise would result in some defendants being acquitted and others being convicted under the same facts merely because they were fortunate or unfortunate enough to be tried in a particular district court.

In a recent federal decision[26] the court was squarely confronted with the admission into testimony of a communication that should have been excluded because privileged, but the court reversed on other grounds.[27] The defendant had been

19. FED. R. CRIM. P. 26, "The admissibility of evidence and the competency and privileges of the witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See Mullen v. U. S., 263 F. 2d 275 (D. C. Cir. 1959); Brunner v. U. S., 168 F. 2d 281 (6th Cir. 1948) (by analogy).

20. See note 1 *supra*.

21. See note 19 *supra*.

22. Mullen v. U. S., *supra* note 19 (priest-penitent privilege recognized in a criminal prosecution in spite of its non-existence under the common law).

23. See note 17, 18 *supra*.

24. 18 U. S. C. A. 255, Notes of Advisory Committee on Rules.

25. *Ibid.*

26. Mullen v. U. S., 263 F. 2d 275 (D. C. Cir. 1959).

27. The charge to the jury concerning the violation of the criminal statute was held to be erroneous and was reversed without consideration of the other alleged errors.

indicted under a federal statute[28] for mistreating her children by chaining them in her house while she was absent. The district court allowed a Lutheran minister to testify that the defendant had made certain statements to him as a penitent in preparation for receiving communion as a Lutheran communicant. Judge Fahy, in giving an additional ground for reversal in a special concurring opinion, maintained that, notwithstanding the lack of objection by the defendant's counsel and the absence of a federal statute granting the privilege, the testimony of the minister should have been excluded because it had been made to the clergyman in his professional capacity. The clergyman was bound to silence by the discipline and laws of the Lutheran Church. By way of dictum, he intimated that the privilege should have been allowed even if it had not been a criminal action.

After an enlightening discussion of the history of the privilege at common law, Judge Fahy concluded: "Sound policy — reason and experience — concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent." Thus, the privilege was extended to the communication between clergyman and penitent in the absence of any legislation by Congress and in spite of the non-existence of the privilege at common law.[29]

Judge Edgerton, concurring with Judge Fahy's opinion above, indicated in a separate opinion also that he would extend the privilege further. He would not limit exclusion of the testimony to the traditional privileges, however disputed they might be, but would include almost any confidential communication made:

> I think a communication made in reasonable confidence that it will not be disclosed, and in such circumstances that disclosure is shocking to the moral sense of the community, should not be disclosed in a judicial proceeding, whether the trusted person is or is not a wife, husband, doctor, lawyer, or minister.[30]

Whether such a broad application of the concept of privilege should be carried to the extent proposed by Judge Edgerton is open to serious doubt, even in criminal cases, although

28. D. C. CODE § 22-901 (1951), which makes it a criminal offense to "torture, cruelly beat, abuse, or otherwise wilfully mistreat any child. . . ."
29. Mullen v. U. S., *supra* note 26 at 280.
30. Mullen v. U. S., *supra* note 26 at 281.

it is quite true that there are some confidential relationships outside of the traditional ones which result in delicate and difficult situations when the privilege is excluded and the testimony required. Any privilege of non-disclosure is bound to exclude evidence in a judicial proceeding which may be sorely needed, and in some cases may lead the court to erroneous results. The traditional privileges, including the priest-penitent privilege, are based upon public policy and involve a balancing of the interest of the private individual in protection of his most private and intimate communications against the necessity of the exposure of such communications for the public good and the administration of justice.

While the rules of evidence in federal criminal prosecutions look to the common law to determine admissibility, the principles gleaned therefrom have to be interpreted in the light of reason and experience.[31] Accordingly, the confidential communication between clergyman and penitent is recognized to be in the same category as the other traditional privileges which existed at common law.[32] There seems to be some doubt surrounding the admissibility of privileged communications in federal courts in civil actions where the court is not bound to look at the state law,[33] but it is likely that the priest-penitent privilege will attach in such a case only if it would shock the community's sense of ethics to require disclosure of a confidential communication made to a priest in his professional capacity.[33a]

III. PRIVILEGE IN THE STATE COURTS

Unlike the federal courts, the judiciary of the states have been reluctant to allow the privilege in the absence of a statute specifically granting it because such a privilege did not exist at common law.[34] Most states have granted by statute a privilege to communications between clergymen and peni-

31. See note 19 *supra*.
32. Mullen v. U. S., 263 F. 2d 275 (D. C. Cir. 1959).
33. U. S. v. Brunner, 200 F. 2d 276 (6th Cir. 1952) (testimony of wife was allowed against her husband in a *civil* action).
33a. Mullen v. U. S., *supra* note 32 (by implication); U. S. v. Brunner *supra* note 33, (by analogy).
34. State v. Morehous, 97 N. J. L. 285, 117 Atl. 296 (1922) (statement made to major in the Salvation Army was not privileged, even assuming that he was a clergyman, in the absence of a statute); Bahrey v. Poniatishin, 95 N. J. L. 128, 112 Atl. 481 (1920) (witness was allowed to disclose communication made to her by the priest who was defendant in a slander suit; no statute granting the privilege). *Compare* People v. Phillips, 1 West L. J. 109 (N. Y. 1820), *with* Christian Smith's Trial, 1 Amer. St. Tr. 779 (N. Y. 1817) as discussed in 8 WIGMORE, EVIDENCE § 2394 n. 7 (3d ed. 1940).

tents.[35] However, the statutes are strictly construed by the courts and the communication must meet exactly the terms of the statute before the privilege will be allowed.[36] Though the courts have not clearly stated their reasons, the narrow construction by the courts is probably based on the supposition that such a statute is in derogation of the common law and therefore to be strictly construed.

The statutes usually require that the communication be made to the clergyman in his professional capacity and in the course of discipline enjoined by the church or denomination of the minister.[37] The mere fact that the communication was made to a clergyman in confidence is not sufficient, as it is required to be penitential in character or in pursuance of the discipline of the church.[38] All faiths are included in the privilege if the person taking the penitence is a recognized minister of a particular faith, or takes a confession according to the discipline enjoined by that church.[39] Either the declarant or the minister should be allowed to claim the privilege,[39a] and the failure to object to the admission of a privileged communication should not render the testimony

35. See note 8 *supra.*

36. See note 10 *supra.*

37. The following cases excluded testimony by a clergyman as being privileged: Cook v. Carroll, Ir. R. 515 (1945) (no statute granting the privilege); *In re* Swenson, 183 Minn. 602, 237 N. W. 589 (1931); Dehler v. State, 22 Ind. App. 383, 53 N. E. 850 (1899). The following cases allowed the clergyman to testify: Johnson v. Commonwealth, 310 Ky. 557, 221 S. W. 2d 87 (1949); Christensen v. Pestorious, 189 Minn. 548, 25 N. W. 363 (1933); State v. Brown, 95 Ia. 381, 64 N. W. 277 (1895). *But see,* UNIFORM RULE OF EVIDENCE 29(c) which requires a "confession of culpable conduct" before the communication can be penitential.

38. Sherman v. State, 170 Ark. 148, 279 S. W. 353 (1926) (a close decision indicating a very strict construction of the statute); State v. Morgan, 196 Mo. 177, 95 S. W. 402 (1906); Knight v. Lee, 80 Ind. 201 (1881); Gillooley v. State, 58 Ind. 182 (1877). See also UNIFORM RULE OF EVIDENCE 29(c) and A. L. I. MODEL CODE OF EVIDENCE Rule 219(c) (1942) ". . . '[P]enitential communication' means a *confession* of culpable conduct made secretly and in confidence by a penitent to a priest in the course of the discipline or practice of the church . . . of which the penitent is a member." (Emphasis added.)

39. Johnson v. Commonwealth, *supra* note 37 (Methodist); Reutkemeier v. Nolte, 179 Ia. 342, 161 N. W. 290 (1917) (Presbyterian); Dehler v. State, *supra* note 37 (Catholic); Knight v. Lee, *supra* note 38 (Christian). Other cases ignore denominational connection: Christensen v. Pestorious, *supra* note 37; Sherman v. State, *supra* note 38; Alford v. Johnson, 103 Ark. 236, 146 S. W. 516 (1912); State v. Brown, *supra* note 37.

39a. See Cook v. Carroll, Ir. R. 515 (1945) as discussed in 6 LOYOLA L. REV. 1 (1951) and 8 WIGMORE, EVIDENCE § 2396 (Supp. 1957); Westover v. Aetna Life Ins. Co., 99 N. Y. 56, 1 N. E. 104 (1885) (dictum). See also note 55a *infra*; Final Draft of The Rules of Evidence, Notes on R. 29 (Utah 1959).

any more admissible than without the objection.[40] Whether the declarant is a member of the same church as the minister or not, does not appear to limit the privilege;[41] but the courts may have a tendency to find that the communication was not made to the minister acting in his professional capacity when the confessor is not a member of the minister's church. Exactly what weight the courts place on membership cannot be determined from the cases, but it seems to be a factor considered in conjunction with the other circumstances surrounding a communication.[42] Voluntary statements made to other members of the same congregation are not privileged,[43] but if the communication is made to other officers of the church, acting in an official capacity, the communication is privileged.[44] Clergymen are usually allowed to testify as to their opinion of a person's state of mind, or to their opinion of the person's intention, or to a person's mental competence,[45] and,

40. The statutes generally require a waiver by the declarant, as in Act No. 196 of Acts and Joint Resolutions, 51 STAT. 344 (S. C. 1959). *But see* Cook v. Carroll, *supra* (privilege is lodged in the priest exclusively and the parishioner should not have been allowed to testify without his consent). *Contra,* Bahrey v. Poniatishin, 95 N. J. L. 128, 112 Atl. 481 (1920) (no statute granting the privilege).

41. *In re* Swenson, 183 Minn. 602, 237 N. W. 589 (1931) (penitent *not* a member of the clergyman's church, nor a member of *any* church, still the communication was held to be privileged); Reutkemeier, 179 Ia. 342, 161 N. W. 290 (1917) (member, testimony excluded); Dehler v. State, 22 Ind. App. 383, 53 N. E. 850 (1899) (member, testimony excluded). *Contra,* UNIFORM RULE OF EVIDENCE 29(b), " '[P]enitent' means a *member of a church* or religious denomination or organization who has made a penitential communication to a priest *thereof* . . . ." (Emphasis added.) UNIFORM RULE OF EVIDENCE 29(c) states that ". . . 'penitential communication' means a *confession* of culpable conduct made secretly and in confidence *by a penitent* to a priest in the course of discipline or practice of the church . . . *of which the penitent is a member.*" (Emphasis added.) *Accord,* A. L. I. MODEL CODE OF EVIDENCE Rule 219(c) (1942).

42. *In re* Koellen's Estate, 162 Kan. 395, 176 P. 2d 544 (1947) (member, testimony allowed). *Cf.,* State v. Morgan, 196 Mo. 177, 95 S. W. 402 (1906) (not member, testimony allowed); State v. Brown, 95 Ia. 381, 64 N. W. 277 (1895) (not member, testimony allowed). See also UNIFORM RULE OF EVIDENCE 29.

43. Milburn v. Haworth, 47 Colo. 593, 108 Pac. 155 (1910) (statements made by the defendant in the presence of other members of his church, including the minister, were held not to be privileged); Commonwealth v. Drake, 15 Mass. 161 (1818) (voluntary statements to other church members confessing a crime was held admissible in the absence of a statute granting the privilege).

44. Reutkemeier v. Nolte, 179 Ia. 342, 161 N. W. 290 (1917) (on request a young girl appeared before the church session consisting of the pastor and three ruling elders, held that the statements were privileged communications). *Contra,* Knight v. Lee, 80 Ind. 201 (1881).

45. Buuck v. Kruckeberg, 121 Ind. App. 262, 95 N. E. 2d 304 (1950) (minister allowed to testify to the soundness of the mind of the grantor of a deed). *But see,* Boyles v. Cora, 230 Ia. 822, 6 N. W. 2d 401 (1942) (by analogy) (a general statute granting a privilege to confidential communications was held to apply to observations made in a professional

on occasion, may qualify as an expert witness to indicate such observations.[46] A court may inquire into the facts and circumstances surrounding and leading up to the communication to determine if it is privileged, but it cannot compel disclosure of the communication, for obvious reasons, in order to make the ruling.[47]

A real problem is the determination of whether or not the communication or confession is made to the clergyman in his professional capacity. The courts have been very strict on this point and require that the statement be made to the clergyman in his professional character by a penitent asking for spiritual aid and comfort. In essence, the determination is to be made by the trial judge after a consideration of all the facts and circumstances surrounding the challenged communication. Therefore, this threshold problem is within the discretion of the trial judge and he should be allowed a large measure of freedom when confronted with the introduction of testimony which might be privileged. In the final analysis, it is the duty of the trial court to draw the line of departure and to determine when a communication ceases to be mere conversation and assumes the character of a confidential communication. The judge in the trial court should, out of fairness to the individual, scrutinize the surrounding facts closely where there is any question of privilege. The vast majority of the cases will be clearly privileged or non-privileged, but it is in the penumbra between these two extremes that care should be taken to prevent the disclosure of any confidential communication which the statutes have protected with a privilege.

IV. THE PRIEST-PENITENT PRIVILEGE IN SOUTH CAROLINA

No case has been found in South Carolina, either granting or denying the privilege to testimony, concerning a communication made by a penitent to a clergyman. It may be argued that South Carolina, primarily a common law state, would have followed the rule under the common law denying the privilege. This question has been rendered moot by the passage of a statute in 1959 granting the privilege.

In February, 1959, a bill was introduced in the Senate of

capacity as well as to communications heard in a professional capacity). Partridge v. Partridge, 220 Mo. 321, 119 S. W. 415 (1909) (priest allowed to testify to the intention of the grantor of a deed which the priest had drawn in his capacity as a notary public); Estate of Toomes, 54 Cal. 509 (1880) (priest allowed to testify upon the issue of sanity of the testatrix in a contested will suit).

46. Estate of Toomes, *supra* note 45.

47. *In re* Swenson, 183 Minn. 602, 237 N. W. 589 (1931).

South Carolina providing that no clergyman or confidential employee of such clergyman should be allowed to testify in any of the courts of this state concerning any communication made to the clergyman in his professional capacity.[48] The bill passed the Senate with very little, if any, debate[49] and was sent to the House of Representatives.[50] The House substantially amended the bill by completely rewriting the first section.[51] The bill was then returned to the Senate which accepted the amendment in toto and, as amended, passed the present statute which became effective May 18, 1959 upon the approval of the Governor.[52]

The original bill, as introduced by the Senate, was both narrowed and expanded by the amendment attached by the House of Representatives.[53] The original bill extended the privilege to the confidential secretaries and employees of the clergymen as well as to the broad general classification of ministers of the gospel and priests. There was no requirement that the clergymen be ordained and the construction of the statute as to who would be a "minister of the gospel" was left to the courts. It also stated that the minister *"would not be allowed,"* in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity. Thus, the burden of excluding the testimony

48. Senate Bills § 8-1215 (1959). "In the courts of this State, no minister of the gospel or priest of any denomination, or the stenographer or confidential clerk of any such minister or priest who obtains such information by reason of his employment, shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church. This prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred." *Cf.*, UNIFORM RULE OF EVIDENCE 29. It is interesting to compare the changes in the Uniform Rules proposed by the New Jersey Commission on Evidence, N. J. Commission on Evidence, Report (1956).

49. Journal of the Senate, 404 (1959).

50. House Journal, South Carolina Regular Session, 489 (1959).

51. House Journal, South Carolina Regular Session, 1324 (1959).

52. Journal of the Senate, 1354 (1959); House Journal, South Carolina Regular Session, 1614 (1959); Act No. 196 of Acts and Joint Resolutions, 51 STAT. 344 (S. C. 1959), "In any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred." *Cf.*, UNIFORM RULE OF EVIDENCE 29 and A. L. I. MODEL CODE OF EVIDENCE, R. 219 (privilege is allowed only when *confession* is made to a minister by a *member* of his church).

53. *Compare* note 48 *supra*, *with* note 52 *supra*.

clearly was to lie on the trial judge and not on the opponent of the evidence to object. The privilege specified was allowed only in the courts of the state and, therefore, was not available to persons in administrative hearings or similar type actions. It could be argued that the federal district courts would not be compelled to recognize the privilege as they were, by implication, excluded from the terms of the bill. This, however, does not seem to be a justifiable conclusion from the reading of the original bill.[54]

The amendment, which was subsequently adopted by both of the legislative houses, makes substantial changes in the original bill, by extending the privilege to any legal or quasi-legal trial, hearing, or proceeding before any court, commission or committee.[55] It further provides that the clergyman *"could not be required"* to testify to any communications of confidence, but does not prevent him from testifying if he should desire to do so. Therefore, a question still remains as to whether a clergyman may, of his own accord, disclose a confidential communication made to him, which would otherwise be privileged.[55a]

Both the amendment and the original bill allowed a waiver by the party in whose favor the privilege is conferred, but failed to specify if the waiver would have to be express or could be implied from the circumstances.[56] Neither excluded testimony of a communicant as to any communication by the clergyman and this relatively unimportant point may create a problem.

The statute, as passed, seems to be substantially in accord with similar statutes of many of the other states.[57] The amendment of the original bill probably strengthens the privilege considerably by extending it to other proceedings than those within the courts of the state, but it is questionable whether or not it is proper to exclude the confidential secretaries who may overhear or may learn of the confidential communication by virtue of their positions. The superimposed requirement that the clergyman be an ordained minister, priest, or rabbi would seem to be a substantial improvement in the original bill, preventing too broad an interpretation

54. See note 48 *supra.*
55. See note 52 *supra.*
55a. See Mullen v. U. S., 263 F. 2d 275 (D. C. Cir. 1959).
56. See note 48, 52 *supra.* See also, Mullen v. U. S., *supra* note 55a (fact that minister testified as a character witness did not waive the privilege).
57. See note 8, 9 *supra.*

of those persons who might be construed to be clergymen.[58] It would avoid abuse by persons who might claim to be "spiritual advisors."

The amended bill is well drafted and upon application of the statute to factual situations few problems of interpretation should arise. This is not to say that there will be no problems for the courts to resolve. For example, just when is a clergyman acting in his professional capacity pursuant to the functions of his office and according to the usual course of practice or discipline of his church? The vast majority of communications will be either clearly within or without the scope of the privilege, but, upon occasion, a close question may present itself.[59] It is within the discretion of the trial judge to allow or exclude the testimony, and the decision can be made from an inquiry into the facts and circumstances surrounding the communication without an actual disclosure of the questioned communication.[60]

The basis for the privilege, as indicated by the decisions, is generally rested upon public policy.[61] Accordingly, the court should give a liberal construction to the statute in order to effectuate the broad general intention of the legislature. It is peculiar to note that, although the statute is stated to be based upon public policy, other state courts have consistently required strict compliance to the terms of the statute.[62] It is hoped that such will not be the case in South Carolina, and that the courts will broadly construe the statute in order to preserve the privilege of confidential communications to bona fide clergymen by persons seeking spiritual aid and guidance. The need for such evidence in any one case does not override the need of the general public to be secure in their intimate communications to men of the church. While there are relatively few cases on the point, the mere fact that the privilege has been granted by legislation in the majority of the states would seem, in itself, to indicate the

58. See note 48, 52 *supra.*

59. Johnson v. Commonwealth, 310 Ky. 557, 221 S. W. 2d 87 (1949); *In re* Swenson, 183 Minn. 602, 237 N. W. 589 (1931). *But see,* Sherman v. State, 170 Ark. 148, 279 S. W. 353 (1926); Alford v. Johnson, 103 Ark. 236, 146 S. W. 516 (1912); State v. Brown, 95 Ia. 381, 64 N. W. 277 (1895).

60. *In re* Swenson, *supra* note 59.

61. *In re* Swenson, *supra* note 59; Reutkemeier v. Nolte, 179 Ia. 342, 161 N. W. 290 (1917).

62. See note 10 *supra.*

overwhelming approval of the privilege in this country today.[63]

V. REASONS FOR THE EXISTENCE OF THE PRIVILEGE

Most of the opinions by the various courts which have had an opportunity to discuss a ruling made in accordance with a priest-penitent statute have founded their results upon the exigencies of public policy.[64] This often-used, catch-all term does not alone provide a sufficient reason for the existence or creation of the privilege. It is merely a nebulous means of justifying an end-result. Professor Wigmore has analyzed the underlying reasons in terms of why *any* privilege existed at common law. He indicates that there are four basic conditions by which the existence of any privilege is governed. These are:[65]

> (1) The communications must originate in a *confidence* that they will not be disclosed;
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
>
> (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposition of litigation. (All italics in original.)

All of the conditions must be present before a privilege should be recognized, and, absent the satisfaction of any one, the communication will be removed from its preferred position in the eyes of the law. It would seem, considering the above conditions, that the priest-penitent privilege would have existed under the common law along with the other traditional privileges. This does not appear to be true, although it may be debated whether or not the privilege was recognized under the common law. It is likely that the non-recognition of the privilege was caused by the implied failure to satisfy the third condition stated above.[66]

Even so, there is no reason for the various American

63. See note 8 *supra;* UNIFORM RULE OF EVIDENCE 29; A. L. I. MODEL CODE OF EVIDENCE, R. 219.
64. See, *e.g.*, *In re* Swenson, *supra* note 59.
65. 8 WIGMORE, EVIDENCE § 2285 at 531 (3d ed. 1940).
66. *Id.* at 532.

jurisdictions blindly to follow the common law rule,[67] substituting it for their own reasoning and experience where its value cannot be sustained on the merits of the rule.[68] The benefit to be derived from protecting this confidential communication would seem much greater than the possible benefit accruing to litigants by allowing exposure. A person would hardly be likely to make the necessary soul-cleansing admission of guilt necessary, in many cases, for spiritual rehabilitation if he realizes that the communications might later be used against him. It is common knowledge that such confessions or confidential communications are recognized by many churches and religious groups as necessary for the rehabilitation of those persons who have violated the principles of the church. Participation is not only encouraged, but in the doctrines of some of the churches, it is required. The court should take judicial notice that the discipline of nondisclosure is traditionally enjoined upon all clergymen by the doctrines of their respective churches when such is the case.[69] It is difficult, indeed, to understand how the privilege allowing a penitent uninhibited disclosure to his spiritual advisor could be denied in this country with its established principles of freedom of religion and its atmosphere of religious tolerance in all areas. The problem has been alleviated in South Carolina by the passage of the statute discussed above, and it is hoped that the courts will interpret the statute in a manner in keeping with the spirit of the protective cloak that the legislature has attempted to place around such confidential communications.

HERBERT L. MOODY, JR.

67. Stone, *The Common Law in the United States*, 50 HARV. L. R. 4 at 24 (1936), "In ascertaining whether challenged action is reasonable, the traditional common-law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken. Action plainly unreasonable at one time and in one set of circumstances may not be so in other times and conditions."

68. Mullen v. U. S., 263 F. 2d 275 (D. C. Cir. 1959), "When reason and experience call for recognition of a privilege which has the effect of restricting evidence the dead hand of the common law will not restrain such recognition."

69. *In re* Swenson, 183 Minn. 602, 237 N. W. 589 (1931).