Volume 27 | Issue 2 Article 2

January 1921

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WEST VIRGINIA
LAW QUARTERLY
And THE BAR

VOLUME XXVII JANUARY, 1921 NUMBER 2

THE LEGAL STATUS OF THE CLERGYMAN*

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"The people," said Sir William Blackstone, in his famous Commentaries on the laws of England,[1] "are divisible into two kinds; the clergy and the laity." And as to the clergy he said: "This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the service of Almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the reformation on account of the ill use which the popish clergy had endeavored to make of them."

The chief privilege to which the clergyman was once entitled was the so-called benefit of clergy. By the ancient common law of England an ordained clerk who committed a felony could not be tried in a temporal court. The Church, and the Church alone, had power to deal with such offenders. "Touch not mine anointed and do my prophets no harm" was the Scriptural injunction.[2] Gradually this exemption of the clergy was restricted; after a long struggle between Church and State it came about that a clergyman could be tried and convicted in a temporal court, but upon claiming his privilege he was discharged; and an increasing number of offences were made felonies without benefit of clergy. At the same time where the crime was clergyable the privilege was extended to laymen who could read,[3] on the ground that anyone who could read was presumptively a clergyman. The whole doctrine of benefit of

*This article contains the substance of a lecture delivered in July, 1920, at the summer session of the Harvard Divinity School.

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[1] 1 BLACKSTONE, COMMENTARIES, 376.

[2] 1CHRONICLES XVI, 22.

clergy was swept away in England by a statute in 1827,[4] although it persisted in a few of the United States until the middle of the 19th century.[5]

At common law the clergy were indeed an especially favored class. But there was nothing strange in this. In mediæval England there were many specially privileged classes. The struggle for liberty was largely a fight against encroachments upon, or interferences with, the special privileges of these classes. The nobility wrung Magna Charta from a reluctant sovereign. The merchant and trade guilds, the municipal and private corporations, the bar itself, all possessed and fought for their peculiar privileges and exemptions. Only gradually was evolved the modern ideal of equality before the law—the abolition of all special privileges. In England today although the connection between Church and State persists, the personal privileges of the clergymen have largely disappeared. And in this country, where federal and state constitutions forbid laws respecting an establishment of religion, the clergy do not constitute a separate privileged class.

Blackstone's dictum therefore is no longer a correct statement of the law. The people are not divisible into two kinds. The clergy and the laity are equally responsible to the temporal courts and the law of the land. If a clergyman in the course of a sermon uses violent language, he may be criminally liable for a breach of the peace.[6] If in the course of a sermon he makes a statement which would be slanderous if made by anyone else he is liable in damages to the person defamed,[7] although like any other person he is justified if what he says is true or if his words are but a fair comment or criticism upon the acts of public officials. A priest who being about to administer the last sacrament to a dying man ejects a third person from the sick-room, may be held liable for battery.[8]

As far as the relation of the clergyman to his church is concerned, that is a matter of contract, express or implied. In the absence of any express agreement the canons and rules and customs of the particular church prevail. When the church is an established church,

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[3]The passage used as a test of ability to read was PSALMS LI, 1. This came to be called the "neck-verse".

[4]STAT. 7 & 8 GEO. IV, c. 28, § 6.

[5]See WHITE, LEGAL ANTIQUITIES, c. VIII.

[6]Delk *v.* Commonwealth, 166 Ky. 39, 178 S. W. 1129 (1915).

[7]Hassett *v.* Carroll, 85 Conn. 23, 81 Atl. 1013 (1911), Ann. Cas. 1913A 340.

[8]Shaffer *v.* Sawyer, 124 Mass. 294 (1877).

as in England, and formerly in Massachusetts and Virginia and some other states, these canons and rules and customs are in themselves law. Where Church and State are separated, the canons, rules and customs are but evidence of the contract between the parties. Of course the different churches differ as to these matters to such an extent that it is hard to generalize. The hierarchical government of the Roman Catholic Church is at the opposite extreme from that of the churches having a congregational form of government. The manner of selecting the minister, the tenure of office, the methods of removing him, the amount of his compensation, the character of his duties—all these things are determined by the contract between him and his church; in other words, in the absence of any express agreement, by the canons, rules and customs of his church.

The clergyman, as has been pointed out, is subject like any other person to the law of the land. This does not mean however that there is a failure to recognize the peculiar function of the clergyman and his particular contributions to the life of the body politic. The clergyman still enjoys a few special privileges, which are allowed however not because he is a member of a privileged class, not on account of favor to him, but for the public good.

The clergyman is exempt from jury duty. Several classes of laymen have the same exemption, teachers, for example, and lawyers, policemen, firemen. This exemption is not based upon any favor to these classes but is due to the recognition that their callings are such that an interference in the performance of their duties is against the public interest. If the clergyman is willing to serve as a juror, he may so serve in most states; he is exempted but not disqualified.

In time of war clergymen are usually exempted from military service. They were so exempted by the Selective Service Law of 1917. This does not mean, of course, that the clergyman does not make a vital contribution to the success of his country's arms in war but his contribution is not necessarily in the direct application of force. In Massachusetts statutes expressly provide that a minister of the gospel cannot be compelled to accept the office of constable, nor to be enrolled in the militia, nor to keep watch and ward. At common law the sheriff may call upon citizens actively to aid him in enforcing the law, as members of the *posse comitatus,* but in England it has been held that clergymen are exempt from this

service.[9] But this exemption was probably the result of the establishment and applied only to the clergy of the established religion.

Public service companies, including railroads, street railways, telephone and telegraph companies, water companies, and the like, are forbidden, both by common-law principles and by statutes, to make discriminations in the rates they charge. An exception has been made, both at common law and by statute, in the case of charitable institutions and undertakings. Some statutes, including the Interstate Commerce Act, extend the exception to the individual clergyman and allow the giving of reduced rates and even of free service to ministers of religion. As far as charities are concerned, the policy is somewhat like that which allows exemption from taxation of property owned by charitable institutions. Although it may be illegal affirmatively to make grants of public funds to aid such institutions, yet this indirect aid is allowed as an encouragement to charitable undertakings, which are encouraged because they are beneficial to the public. In the case of the individual minister the benefit to the public is less direct, for ministers, like laymen, sometimes travel for purposes other than the promotion of charitable undertakings; but it is felt that since ministers do not come into competition with business men no injustice is done to anybody by allowing them special rates.[10] But it is illegal to charge different rates to members of different denominations.[11] Sometimes dealers in commodities give special rates to clergymen, but the law is not concerned with this, for those who are not engaged in public service undertakings may make such discriminations as they choose.

The minister stands of course in a peculiarly confidential relationship toward the members of his church and toward any others for whom he may act as spiritual adviser. The clergyman must be peculiarly careful not to abuse the confidence reposed in him. When for instance property is left by will to the spiritual adviser of the testator or testatrix, the transaction is scrutinized most carefully. In some states there is a presumption that undue influence was exerted by the clergyman. But in a majority of states there is no such presumption unless perhaps where the clergyman drew

[9]See VIN. ABR., SHERIFF (B).

[10]In a few states formerly ministers were exempt from taxation. 34 CYC. 1146. Such exemption cannot be justified except where, as formerly in some states, ministers were paid out of the public treasury.

[11]United States *v.* Chicago, *etc.* Ry. Co., 127 Fed. 785. See L. R. A. 1918D 916.

the will; but the confidential relation is an important element in determining whether in view of all the circumstances the independent exercise of the will-power of the testator was prevented.

At one time in England clergymen were so successful in inducing persons on the point of death to leave their property to the Church, that Parliament felt it necessary to enact the so-called Statute of Mortmain which, in order to prevent "improvident dispositions made by languishing or dying persons, or by other persons, to the disinherison of their lawful heirs," provided that devises of lands for charitable uses should be invalid. In some of our states there are statutes providing that no devise or bequest for a charitable purpose shall be good unless the will is executed within a certain period (a month, three months, a year) before the death of the testator. In some states also there are statutes which limit the proportion of the testator's estate which can be devised or bequeathed for charitable purposes (one-third or one-half, usually only in cases where he leaves a wife, child or parent). But except for these restrictions the law is liberal in upholding gifts for charitable purposes, including the promotion of religion.

Confidential communications by a client to his lawyer are privileged; that is to say, the lawyer is not allowed to go upon the witness stand and testify to what the client told him in his professional capacity. Public policy requires that men should be allowed freely to discuss their affairs with their legal advisers. This privilege did not at common law extend to communications made by a patient to his physician nor by a penitent to his priest. But by statute in more than half the states it has been so extended, the statutes applying not merely to statements made under seal of the confessional but to all statements made, according to the discipline enjoined by a church, to a spiritual adviser in his professional capacity. These statutes recognize a policy that men should be allowed freely to consult their spiritual advisers concerning their spiritual shortcomings. The person making the communication may waive the privilege and allow the clergyman to testify. It may be added that even in the absence of such a statute very seldom does a wise lawyer ask a clergyman to testify as to confidential communications. Lord Chief Justice Coleridge once said "Practically, while barristers and judges are gentlemen, the question can never arise. I am told it never has arisen in Ireland in the worst times."[12]

[12]Letter to Gladstone, cited 5 WIGMORE, EVIDENCE, § 2394.

There is one function of the minister which is of the greatest importance in the law. The minister is authorized to perform the ceremony of marriage. From the point of view of the law marriage is the creation of a civil status. The minister in performing the ceremony is acting as a public officer.[13] In order to perform his duties properly he must be familiar with the law. He should know, first, who may lawfully marry; secondly, the formalities necessary to constitute a valid marriage; and thirdly, the formalities which, though not necessary to the validity of the marriage, are required by statute, so that a failure to comply with them would render the minister civilly liable or liable to punishment by way of fine or otherwise. Unfortunately as to all these matters the laws of the different states are not uniform. Nevertheless in their broad outlines they are the same throughout the United States.

Marriages are prohibited between ascendants and descendants by blood or affinity, between brothers and sisters, uncles and nieces, aunts and nephews. In some states the laws go further and forbid marriages between first cousins. In England until recently marriage with a deceased wife's sister was forbidden, but in 1907 by act of Parliament such a marriage was made lawful, although a clergyman of the Church of England who marries his deceased wife's sister is liable to ecclesiastical censure; and on the other hand, a clergyman is not liable to censure for refusing to perform a ceremony of marriage between a man and his deceased wife's sister. By some oversight the law as to other persons related by marriage, *e. g.,* a deceased husband's brother or deceased wife's niece,[14] was left unchanged. Bigamous marriages are of course void. So are marriages under the age of consent, if the parties separate before reaching the age of consent. In most states the age for males is eighteen, for females sixteen. Between the age of consent and majority (twenty-one years in the case of males, eighteen for this purpose in most states in the case of females), the consent of the parent or guardian of the minor is required. Marriages of lunatics or idiots are usually not void, but are voidable, that is, they may be set aside by legal proceedings. Marriages induced by fraud are sometimes likewise voidable. In some of the states marriages between white persons and negroes (or in California Mongolians) are void. In some states marriages are voidable for impotency.

[13]Goshen *v.* Stonington, 4 Conn. 209 (1821).
[14]Charter *v.* Ferguson, [1919] 1 Ch. 128.

There has been an attempt to avoid confusion by inducing states to adopt uniform statutes as to marriage and divorce. A National Congress on Uniform Divorce Laws met in 1906 and drafted a Uniform Annulment of Marriage and Divorce Act which has been adopted in Delaware, New Jersey and Wisconsin. This provides for annulments for impotency, consanquinity or affinity, former marriage to a living person, fraud, force or coercion, insanity, and non-age. It provides for divorce *a vinculo matrimonii* for adultery, bigamy, conviction for crime (involving imprisonment for two years), extreme cruelty, willful desertion for two years, and habitual drunkenness for two years. For the same causes and for hopeless insanity of the husband the libellant may obtain a divorce *a mensa et thoro*. Five states have adopted a Uniform Marriage Evasion Act invalidating marriages contracted in states other than that of the residence of the parties for the purpose of evading the law of their state of residence.

The validity of the marriage depends primarily upon the consent of the parties. In this it is like a contract although in fact it is more than a contract, for it is the creation of a legal status. A mock marriage, one not intended by either party as a marriage, is not legally binding because of the absence of consent. Is anything more than consent required? In some states common-law marriages are allowed, that is, marriages resting wholly upon the consent of the parties, no formal cermony being performed. Where common-law marriages are not allowed a marriage is valid only when solemnized in accordance with the statutory provisions. The statutes usually provide that marriages shall be solemnized by a clergyman or by a magistrate. At common law a marriage was not valid if the person performing the ceremony was not in fact a clergyman or magistrate; but by statute in some jurisdictions a marriage solemnized by a person who professes to be a clergyman or magistrate is valid if consummated with a full belief of either of the persons so married that they have been lawfully married. Of course a person who without authority undertakes to perform a marriage ceremony commits a criminal offense for which he may be punished.

In every state there are statutes providing for certain formalities, the omission of which does not in any way affect the validity of the marriage but subjects either the parties to the marriage or the person performing the ceremony to certain punishments. There are usually provisions for the procuring of a marriage license prior

to the celebration of the marriage, and the filing of a certificate that the marriage has been performed.

In conclusion then it may be said that although there are rules of law especially affecting clergymen, giving them certain exemptions and certain privileges and imposing certain burdens upon them, yet in the United States today the clergy do not constitute a separate privileged class. It may be said that the clergyman in the United States has no peculiar legal status except in so far as, in performing the cermony of marriage, he is a public officer and has the status which public office confers.