THE CHRISTIAN RELIGION AND THE COMMON LAW.

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WHILE looking through some volumes of English Chancery Reports recently, I came upon the report of a cause, heard before Lord High Chancellor Eldon, in the year 1817, which, beyond the questions directly involved in the case, possesses something of permanent and historical interest. In form the pleadings consisted of what is known to equity lawyers as an information and bill, prosecuted in the name of the attorney-general; and in that particular case, the prosecution was for the purpose of quieting the possession of the relator and plaintiff; one claiming as surviving trustee, the other as minister of a protestant dissenting meeting-house. The pleadings, including the information, bill, and answer, are voluminous; but it would be quite aside from my purpose and wholly unnecessary to give any general analysis of the pleadings or to state all the questions they present. There were two subjects discussed by the learned counsel, Sir Samuel Romilly and his associates for the plaintiffs, and by the Solicitor-General for the time being, and the eminent civilian, Phillimore, for the respondents, which give to the cause, as I have said, something of historical value and interest. The first of those subjects was the English statutes of toleration, and the second is involved in the question: "Does the Christian religion form part of the common law of England, or does the common law take cognizance of offences against the Christian religion? and if so, to what extent and upon what principle?" The remaining pages of this report will be devoted mainly to answering these questions. To show how the discussion

of these subjects became pertinent to the practical issues of the cause, some reference to the pleadings is necessary. With other averments of the information and bill, it was stated that about one hundred and fifty years before the institution of the suit, a meeting-house, or place of worship for Protestant Dissenters from the established church, was erected at Wolverhampton; and, as well at the time of erecting the same, as from time to time thereafter, various grants and pecuniary bequests and other endowments had been made thereto by different persons for the purpose of supporting a minister, and of defraying the expenses of maintaining the church and for other purposes of like nature. The particular meeting-house which was the subject matter of controversy in the suit, was erected in 1701, in place of a more ancient one, and under a trust-deed, whereby the purpose was declared to be, "for the worship and service of God." The legal title to this meeting-house and other property connected with it was vested in trustees for the purposes aforesaid, and declarations of trust thereof were duly executed by the trustees. Additional averments set forth that the meeting-house was originally built by Protestant Dissenters, professing Trinitarianism, and for many years such principles were professed by the subscribers and congregation assembled therein, and the said several funds and endowments were by the trusts thereof declared, or by the intention of the donors directed to be expended, and were accordingly for many years laid out in maintaining and promoting a belief in the doctrine of the Holy Trinity; but in 1782 a division in opinion upon the subject of the Trinity arose among the trustees and subscribers, and the result was, as claimed by the plaintiffs, that a minority of the then acting trustees and subscribers obtained possession of the meeting-house and other premises, excluded the minister who had been elected by a considerable majority of the trustees and subscribers, and proceeded to elect a minister of their own choice, who for

several years received the profits and emoluments of his office, as minister, arising out of the said grants and endowments, although he never preached, nor professed to believe, the doctrine for the maintenance of which the meeting-house was originally built and the said grants and endowments made; and ever since that time the trust premises had been appropriated to support and teach doctrines wholly opposed to those of the original founders, and contrary to the original trusts or intentions of the institution. The prayer of the bill was for an account of the trust premises—a declaration that the relator, Mander, who claimed to be sole surviving trustee, was as such entitled to retain possession of the meeting-house and other premises upon the trusts aforesaid, and that he might be quieted in such possession by injunction; and that the other plaintiff might in like manner be quieted in his office of minister, and in the use of the meeting-house, for the purpose of public worship.

The defendants' answer, which is very long, traverses many of the allegations of the bill, and they deny that the trust funds and endowments were, by the trusts thereof declared, or by the intentions of the donors, or by any other means, directed to be, or that the same were for many years expended in maintaining and promoting a belief in the doctrine of the Holy Trinity; and on the contrary, they insisted that the meeting-house and premises were, by the said deed appropriated for the purpose of promoting the worship and service of Almighty God, and for the use of Protestant Dissenters, without any mention of Trinitarianism, or any other doctrine whatever, to be preached in such meeting-house; and that such funds and endowments had been, as they believed, so applied. They admitted that while they were in possession of the meeting-house the doctrine of the Holy Trinity had not been taught there, except by the said plaintiff, Steward, the minister, who, after having for three years preached and inculcated the

Unitarian doctrine, began to preach and inculcate the doctrine of Trinitarianism. They said that they were not all of them of exactly the same religious opinions; but although of different persuasions, they all believed in the existence of God, and the propriety of worshipping and serving Him, and insisted that the question as to their religious belief was irrelevant to the matter in dispute in the cause, and that the intention of the persons endowing the chapel was, that it should be a meeting-house for the worship and service of God, and for the benefit of Protestant Dissenters, without regard to any particular tenets; and they insisted generally that the plaintiffs were not entitled to any part of the relief prayed. This state of the pleadings presents, with sufficient clearness, the only question I am now considering, and that is, how far, or in what manner the speculative opinions of any of the *cestuis que trust*, upon the subject of The Trinity, affected their right to the possession and control of the trust funds. It was the contention of the plaintiffs' counsel, that, inasmuch as the Unitarian worship was neither legal nor tolerated at the time the trust was established, nor at the time this meeting-house was erected in 1701, it could not be successfully claimed that the founders intended that the income of the fund should ever be used for the support of such worship; and therefore, that neither the trustees nor the congregation usually worshipping in said meeting-house had the right or authority to divert the fund or its income from the support of a Trinitarian minister, to that of a Unitarian minister. Upon this branch of the case the language of the Lord Chancellor is quite explicit. "What I have now to enquire is," he said, "whether the deed creating the trust does, or does not, upon the face of it (regard being had to that which the Toleration Act at the time of its execution permitted or forbade, with respect to doctrine) bear a decided manifestation that the doctrines intended by that deed to be inculcated in this chapel were Trinitarian?

Because, if that was originally the case, and if any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus manifest, were intended by the founders, I apprehend that they are seeking to do that which they have no power to do, and which neither they, nor all the other members of the congregation can call upon a single remaining trustee to effectuate. In this view of the case, also, supposing even that at the time of the establishment of this institution, it had been legal to impugn the doctrine of the Trinity, yet if the institution had been established for Trinitarian purposes, it could not now be converted to uses which are anti-Trinitarian." In view of this state of the law of trusts, and from the fact, that the deed in this case expressed in the most general terms the purpose of the grant "to establish a house, or place for the worship and service of God," it became necessary to inquire and determine, what forms of worship were, and were not permitted by the statute and common law at the time of the creation of the trust and the erecting of the house of worship; for as the court reasoned it could not be supposed that the donors intended to erect a house for the worship and service of God in a manner that was at the time forbidden by the civil law, meaning by civil law in this connection both statute and common law. The state of the statute law at the date of the trust deed and the erection of the meeting-house in 1701, could not have been in doubt, for by the toleration acts of 1 W. and M., c. 18, and 9 and 10 W. III., c. 32, it was provided "that the same should not be construed or extended to give any ease, benefit or advantage to persons denying The Trinity." And strange as it may seem to men of this generation, not familiar with the history of English legislation, that illiberal legislation was not repealed until the year 1813, by the St. of George III., c. 160, four years only before the cause in question was tried.

And it may not, in this connection, be wholly irrelevant

to call attention to the fact, as an indication of the great progress made during the present century, in freedom of discussion and toleration of warring religious opinions, that one of the foremost scholars of England and one of the staunchest defenders of Christianity against its latest assailants, is a member of a sect or denomination, which, a little more than seventy years ago, had no legal right of existence anywhere within the four seas; and that the same person is now, or, was recently, at the head of an institution of learning, wherein, under the full protection of law, doctrines are taught, which at the close of the last century were thought to be so subversive of civil order, as to make it necessary to except them from all "ease and benefit" enjoyed by other denominations under the toleration acts of that period. But it should never be forgotten in any treatment of this subject, however slight, that those acts of limited toleration were not founded upon any assumed right of Parliament, to punish any heretical opinions as such, but they were defended upon the ground, that the promulgation of the excepted opinions was dangerous to and subversive of civil government, and therefore, that government, in the exercise of the right of self-preservation, might suppress such promulgation by penal enactments.

Returning from this digression it is proper to say, that it was the contention of the learned counsel for the plaintiffs in the cause, that the repealing act of George III., above cited, left the common law unchanged, and that it could be construed neither directly nor by implication, as having any reference to that law, or as giving any relief from its penalties. It was thought necessary, therefore, to inquire what the common law upon the subject was, "for if the common law remains yet unaltered," said the Lord Chancellor, "and if the impugning of The Trinity be an offence indictable at common law, it is quite certain that I ought not to execute a trust the object of which is found to be illegal."

And here taking leave of the particular case, to which, possibly, too much time has already been given, I will proceed, in the light of decided cases and other sources of information, to the more general consideration of the true relation of Christianity to the common law or whether the common law does in fact recognize Christianity as part of the law of the land. Upon this subject there is a diversity of opinion; if there was not there would be little need, and less justification for occupying the time of the Society with an investigation and discussion of the subject. The views of that class of writers, who deny any such relation between the common law and Christianity, as is herein claimed, are fairly represented, so far as I know, in the writings of Thomas Jefferson on the subject; and his views are pretty fully expressed in two letters to different correspondents. The first of these letters was to his great contemporary, John Adams, under date of January 24, 1814. After characterizing some editor or compiler of Alfred's laws as a pious interpolator of those laws, he proceeds to say that "Our judges, too, have lent a ready hand to further these pious frauds, and have been willing to lay the yoke of their own opinions on the necks of others; to extend the coercions of municipal law to the dogmas of religion, by declaring that these make a part of the law of the land." He then traces in his own peculiar manner this doctrine as found stated in the Year Book of 34, Henry IV. to the time of Lord Mansfield, and charging Finch with the mistranslation of the words of Ch. J. Prisot in the Year Book above cited, and declaring that all subsequent decisions upon the subject are made to hang upon that dictum of Prisot, as mistranslated by Finch, he exclaims, "Who now can question but that the whole Bible and Testament are a part of the common law?'" With all due respect to the distinguished author of that criticism, it may be said that a more perfect travesty of the doctrine, as held by any intelligent student of law, that religion is a part of the common law, could not be devised.

The same writer in a letter to Dr. Thomas Cooper, under date of February 10, 1814, copying from his Commonplace Book, uses this language as to the origin and limitations of the common law. "We know," he says, "that the common law is that system of law which was introduced by the Saxons on their settlement in England, and altered from time to time by proper legislative authority from that time to the date of *Magna Charta*, which terminates the period of the common law, or *lex non scripta*, and commences that of the statute law, or *lex scripta*. This settlement took place about the middle of the fifth century. But Christianity was not introduced till the seventh century; the conversion of the first Christian king of the Heptarchy having taken place about the year 598, and that of the last about 686. Here, then, was a space of two hundred years, during which the common law was in existence and Christianity no part of it. If it was adopted therefore into the common law, it must have been between the introduction of Christianity and the date of *Magna Charta*." (A. D. 1215.)

Thus erroneously assuming, as will hereafter be shown, that the only means of growth known to the common law, after the Saxon period, was by legislative enactments. He then asserts that we have a tolerably full, though not perfect collection of the laws of that period, namely from the introduction of Christianity to the signing of the Great Charter at Runnymede, and that none of those laws adopt Christianity as part of the common law; and closes his various assumptions with the declaration that "we may safely affirm (though contradicted by all the judges and writers on earth) that Christianity neither is, nor ever was a part of the common law." To show the total misunderstanding or perversion by Mr. Jefferson of the language of the English judges a single additional quotation from his writings will suffice. After accusing the clergy of the perpetration of pious frauds upon the subject under consid-

eration, he says, "In truth, the alliance between church and State in England has ever made their judges accomplices in the frauds of the clergy; and even bolder than they are. For instead of being contented to go as far as the clergy had gone, they have taken the whole leap, and declared at once that the whole Bible and Testament (*sic*) in a lump make part of the common law; the first judicial declaration of which was by this same Sir Matthew Hale. And thus they incorporate into the English code laws made for the Jews alone." And then to support the truth of this extraordinary statement he cites the words used by Sir Matthew Hale in the case of the King *versus* Taylor that, "Christianity is part of the laws of England," meaning as every intelligent and unbiased reader would understand, just what Lord Mansfield afterwards said on the same subject, that "The *essential principles* of revealed religion are part of the common law," not that the whole Mosaic code was incorporated into the law. The error into which Mr. Jefferson, and the class of writers whom he represents on this subject, seem to have fallen, has a two-fold origin. First, an apparent failure to gain a true conception of what the common law is, and how it came to be what it is; and secondly, an entire misapprehension of the manner in which the common law is said to embrace Christianity and make it a part of itself.

"A great proportion," says Sir William Hale, "of the rules and maxims which constitute the immense code of the common law grew into use without any legislative interference. *It was the application of the dictates of natural justice and of cultivated reason to particular cases.* The common law of England is not the product of the wisdom of some one man, or society of men in any age; but of the wisdom, counsel, experience and observation of many ages of wise and discerning men." The contrast will at once be seen, between this comprehensive and philosophical account of the origin and gradual expansion, through many ages,

of the common law by one of England's greatest judges, and that narrow and stinted production of which Mr. Jefferson treats, and which he attributes to the most unlettered and least cultivated ages of English history.

Another legal writer,[1] whose works have done much to facilitate the study and enlarge the knowledge of English law, says, "It may on the whole be received as generally true, that our common law traces its *origin* to the early usages and customs of the aboriginal Britons, and was successively augmented in different ages by the admixture of some of the laws and usages of the Romans, the Picts, the Saxons, the Danes and the Normans, who spread themselves over the country; so that our laws, to use the words of Lord Bacon, "became as mixed as our language." Chancellor Kent in his commentaries on American law, after showing that the common law of England, so far as it is applicable to our situation and government, has been recognized in all the States, adds that it consists of a collection of principles to be found in the opinions of sages, or deduced from immemorial usages and receiving progressively the sanction of the courts."

Nor is there anything in this origin and gradual growth of the common law peculiar to the English or American systems of jurisprudence. "The Roman law," says a late learned writer,[2] "was not the result of philosophical theories conceived *a priori*, but was slowly elaborated by every day's experience and conformed, under the influence of magistrates and jurisconsults, to all the necessities of society." It is, indeed, one of the natural and necessary conditions of national existence and progress, that law—a common law—should be thus gradually developed by processes quite independent of the strictly legislative department of government. And this progress in the development of the common or unwritten law of a people does not terminate with any particular age, but is co-existent with the advancement of the State or nation along every other line

[1] Warren's Law Studies.

[2] M. Valette.

of its general civilization. The pervasive and all-embracing character of this law is well defined by the very learned Duponceau in his dissertation on the nature and extent of the jurisdiction of the courts of the United States. Having devoted some pages to an exposition of what the common law is, and its recognition in this country, he asks, "But why need I go into such a wide argument to prove what I consider a self-evident principle? We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet it when we wake and when we lie down to sleep, when we travel and when we stay at home; it is interwoven with the very idiom that we speak, and we cannot learn another system of laws without learning at the same time another language. We cannot think of right and wrong but through the medium of the ideas we have derived from the common law."

The next question I propose to consider is this: Does the Christian religion form part of the common law, or does the common law take cognizance of offences against that religion, and if so to what extent and upon what principles? This question cannot be fairly answered, or discussed with any justice to the subject or to those who hold the affirmative of it, by simply considering what offences or alleged offences against religion have in different ages been treated as penal; nor without carefully discriminating between those offences which have been made punishable by statute and those which have been held to be punishable at common law.

The relation of Christianity to this common law is clearly stated by Lord Chief Justice Mansfield in the following language: "There never was," says that great lawyer, "a single instance from the Saxon times to our own, in which a man was ever punished for *erroneous opinions* concerning rites and modes of worship, but upon some particular law." That is some particular statute. "The common law of England, which is only common reason or usage, knows

of no persecution for mere opinion. For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons being prosecuted and punished upon the common law, but bare non-conformity is no sin at common law." The same eminent judge reiterated these sentiments in a case of novel impression which came before the House of Lords for judgment upon a writ of error, in the year 1767. The case was that of the Chamberlain of London against Allen Evans for refusing to accept the office of sheriff to which he had been elected, and who pleaded in bar of the action, that he was not eligible to the office, not having taken of the sacrament according to the rites of the Church of England within the year next before the election; and the question was whether the defendant was at liberty or could be allowed to plead his inability on that ground, the plaintiff in error claiming that it was the duty of the defendant under the law to observe that rite, and that he could not be permitted to plead one infraction of the law in justification of his refusal to obey the law in another respect. In support of the legality and rightfulness of the defendant's plea Lord Mansfield spoke with great force and clearness, and among other things said, "There is no usage or custom independent of positive law which makes non-conformity a crime. The eternal principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; so that any person reviling, subverting or ridiculing them may be prosecuted at common law. But it cannot be shown from the principles of natural or revealed religion, that independent of positive law, temporal punishments ought to be inflicted for mere opinions respecting modes of worship." This clear discrimination pointed out by Lord Mansfield, between offences punishable by statute and at common law, is observed in the judgments of other great English lawyers who preceded and followed him in the great office which they have made forever illustrious by their genius and learning.

In Woolston's case, tried in King's Bench in the year 1729, Chief Justice Raymond, in reply to the objection of defendant's counsel that this court had no jurisdiction of the offence for which the defendant was on trial, said, "Christianity in general is parcel of the common law of England, and therefore to be protected by it; now whatever strikes at the very root of Christianity, tends manifestly to a dissolution of the civil government; so that to say an attempt to subvert the established religion is not punishable by those laws upon which it is established is an absurdity." He added, however, this qualification, "I would have it taken notice of that we do not meddle with any differences in opinion, and that we interfere only where the very root of Christianity is struck at." Sir Matthew Hale, in giving the judgment of the court in a case in which the defendant, besides other still more blasphemous words, had declared that Christianity was a cheat, said, "That kind of wicked words were not only an offence to God and religion, but a crime against the laws, state and government, and therefore punishable by this court (King's Bench). For to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; and that Christianity is a part of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of law."

As late as 1819, in a case before the King's Bench, Denman, afterwards eminent as a judge, moved in arrest of judgment, not on the ground that blasphemy had not been an offence at common law, but on the ground that the statutes providing penalities for blasphemy had in effect repealed the common law; but Chief Justice Abbott and his associates held otherwise, saying that when there is a misdemeanor at common law, a statute providing a particular punishment for it, does not repeal the common law, and therefore blasphemy was still an offence at common law.

The language of Lord Eldon to the same effect is emphatic. There can be no doubt, he declares, that prior to

this statute (9 and 10, W. III., c. 32) blasphemy was an offence at common law; and it is impossible to contend that the penalties inflicted by the statute give any foundation for supposing that there could no longer exist a punishment for blasphemy at common law independent of this statute. On the contrary, the common law is left by the statute exactly as it was before the statute was passed.

These authorities, and they might easily be multiplied, fully sustain the proposition that Christianity has been regarded as a part of the common law by the greatest masters of English jurisprudence, and they also show the limitations under which that doctrine is held, and that only offences against the fundamental principles of Christianity have been made punishable at common law, and that, not on the ground that these are heresies, but because they tend to the overthrow of public order and the subversion of civil government. It is undoubtedly true that offences have been held punishable in the civil courts at one time or age which would not be so treated at another time. In the case of Carlisle, who was indicted and convicted in the year 1819 for publishing Paine's Age of Reason, the defendant was fined fifteen hundred pounds and imprisoned three years, and required to find sureties for his good behavior for the term of his natural life. Such an indictment would hardly be returned by a grand jury at the present day, either in England or this country; and even if a party should be convicted of the publication of the book, the conviction would not be followed with such severity of sentence, not because the principle upon which governments act in these matters has been changed, but because there has been a change in the practical application of that principle. Some readers hold Cromwell as guilty of gross inconsistency when he said to the Governor of Ross, whom he had summoned to surrender, "As for that which you mention concerning liberty of conscience, I meddle not with any man's conscience. But if by liberty of conscience you mean a liberty to exercise

the Mass, I judge it best to use plain dealing, and to let you know where the Parliament of England has power, *that* will not be allowed of." But Cromwell then acted upon the same principle that the American senator of to-day does, when he says to the polygamous delegate from Utah, we meddle not with any man's conscience, but we judge it best to use plain language and to let you know that wherever the laws of the United States have power, there polygamy cannot be permitted to be practised. The two subjects are indeed widely different, but each is denounced in its time and place, because of the belief in its tendency to subvert social order and overthrow existing government.[1] It will be observed that it is the Parliament, and not the Church of England, whose power Cromwell invokes to preserve, not a mere dogma in religion, but public order and organized government. Causes which at one period are a menace to government may at another period cease to be sources of danger, and therefore are no longer proper subjects for penal procedure. Upon the question as to the true relation of Christianity to the common law, American authorities are in full accord with the decisions of the English courts. In a leading case argued at great length before the Supreme Court of Pennsylvania in the year 1824, the decision of the full court was that Christianity was a part of the common law of that State; and that maliciously to vilify that religion was an indictable offence and punishable at common law. The grounds on which the decision of the court rested were set forth in the following language: "While our own free constitution secures liberty of conscience and freedom of religious worship to all, it is not necessary to maintain that any man should have the right publicly to vilify the religion of his

[1] "The mass in those days meant intrigue, conspiracy, rebellion, murder, if nothing else would serve; and better it would have been for Mary Stuart, better for Scotland, better for the broad welfare of Europe, if it had been held at arms' length while the battle lasted, by every country from which it had been expelled."—History of the Reign of Elizabeth, by Froude, vol. 3, p. 589.

neighbors and of the whole country. These two privileges are directly opposed to each other. It is open, public vilification of the religion of the country that is punished, not to force conscience by punishment, but to preserve the peace of the community by an outward respect to the religion of the country, and not as a restraint upon the liberty of conscience; but licentiousness endangering the public peace, and tending to corrupt society, is considered as a breach of the peace, and punishable by indictment. Every immoral act is not punished, but when it is destructive of morality generally, it is because it weakens the bonds by which society is held together; and government is nothing more than public order." Judge Story, in giving the opinion of the Supreme Court of the United States in the case of Vidal against the Executors of Stephen Girard, better known as the Girard Will Case, sustained the position which Mr. Webster had strenuously contended for in his argument of the cause, that the Christian religion was a part of the common law of Pennsylvania. Chancellor Kent in an elaborate opinion given by him when he was Chief Justice of the Supreme Court of the State of New York, held that blasphemy was a public offence and punishable by the common law of that State. "The free, equal, and undisturbed enjoyment of religious opinion," said the learned Chief Justice, "whatever it may be, is granted and secured; but to revile with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Though the constitution has discarded religious establishments, it does not forbid judicial cognizance of those offences against religion and morality, which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation and weaken the security of social ties." Thus it will be seen that the proposition, that Christianity is a part of the common law, is supported by the very highest judi-

cial authority both in England and in this country, and further that the offences against Christianity, punishable at common law, are made so punishable, because of their tendency to disturb public order and to subvert organized government, and that they were never held to be punishable merely as offences against Christianity, much less as heresies; for the common law, whatever may have been done by statute law, never yet undertook to punish a heretic.

This brief survey of the authorities establishes beyond the reach of controversy the fact, that Mr. Jefferson and the school of writers to which he belonged misconceived and misrepresented the doctrine, as held and declared by the courts, both English and American, of the relation of the common law to Christianity; and it also reveals the interesting fact, that the framers of the early constitutions of our States perfectly well understood the doctrine as held by the courts, and incorporated in those constitutions the principles which the courts had often announced upon this subject in the practical administration of the law.

The second article of the Massachusetts Bill of Rights reads as follows: "It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the Great Creator and preserver of the Universe. And no subject shall be hurt, molested, or restrained, in person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; for his religious profession or sentiment; *provided he doth not disturb the public peace* or obstruct others in their religious worship." In an amendment proposed by Mr. Madison to the corresponding article in the Virginia Declaration of Rights, the same discrimination is made between what may, and may not, be the subject of inquiry in the civil courts. After stating that no man or class of men ought, on account of religion, to be invested with peculiar emoluments or privileges, nor

subject to any penalties or disabilities, that great civilian adds these words: "*unless*, under color of religion the preservation of equal rights and the *existence of the State be manifestly endangered*."

In the light of this discussion it may, I think rightfully be claimed, that whenever the question arises, either in the legislature or in the courts, as to what offences against Christianity shall be deemed misdemeanors and punishable by the civil power, the right answer will depend upon the consideration, as to whether the act or acts complained of, tend to the corruption of general morality and to the overthrow of public order, or not. And that the rights of conscience or private judgment, which are often passionately insisted upon, though leading to courses of conduct destructive of social order and regulated government, are to be regarded as perversions, and not the legitimate exercise of those sound and fundamental rights. The historical student who would reach just conclusions as to the justice or necessity of any given statute of toleration or intolerance must carefully consider the times and all attending circumstances and conditions. Acts and courses of conduct, on the part of individuals or societies, would be sufficient to imperil the safety of a colony like Massachusetts, during the early years of its existence, with its municipal institutions imperfectly organized, which would be attended with no appreciable danger to a powerful commonwealth with all its departments of government in full operation. And punishments might properly be inflicted for offences against the colony, which would be wholly unnecessary, and, even cruel, if resorted to by the commonwealth. Penal statutes, demanded for the public safety, were passed against Papists, under the reign of Queen Elizabeth, who had been excommunicated and deposed by the Pope, and whose life was in mortal peril from the hand of the would-be assassin, in the employment of that same Pope, which are wholly unnecessary under the reign of Victoria, and would therefore be

grossly unjust. In truth those statutes were enacted to provide for the punishment of treason against the civil government rather than to punish non-conformity in religion. In writing of the early years of Elizabeth's reign, Macaulay says, "It long seemed probable that Englishmen would have to fight desperately on English ground for their religion and independence. Nor were they ever for a moment free from apprehension of some great treason at home. For in that age it had become a point of conscience and of honor with many men of generous natures to sacrifice their country to their religion." But in this connection the distinction between Catholics and Papists should not be forgotten. The latter placed their allegiance to the church above that which they owed to the crown; but the former though strongly attached to the traditions and doctrines of the church, "distrusted as cordially as Protestants, the interference of a foreign power, whether secular or spiritual, with English liberty." Motley, writing of the same period of English history, says, "Many seminary priests and others were annually executed in England under these laws" (statutes) "throughout the Queen's reign, but nominally at least they were hanged not as Papists, but as traitors; not because they taught transubstantiation or even Papal supremacy, but because they taught treason and murder—because they preached the necessity of killing the Queen." And when read in the light of their own times and surrounding circumstances, most if not all the acts passed by the English Parliament from 1549 to 1689, abridging religious freedom, and for which there never was any sufficient justification, will be found by the impartial student of history, not to have been designed wholly for the punishment of heresies or mere non-conformity, but also for the preservation of civil government and public order.

But any further discussion of that extraordinary series of statutes, by which the religious rights of large portions of the English people were for centuries most unjustly

interfered with, and some of which were not repealed till as late as 1871, would lead beyond the purpose of this paper; which was to show historically the relation between Christianity and the common law, and to prove that whatever of religious persecution had taken place under the forms of law in England or in the English colonies, must be attributed to statute law, and not to the more liberal and rational principles of that law which is the product of cultivated reason and of the wisdom of many generations.