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THE EVOLUTION OF THE LAW OF BLASPHEMY.

I.

PROSECUTIONS for the crime of blasphemy are rare. But one which took place recently in London has elicited from the Home Secretary an utterance which is of interest and of importance.

At the Central Criminal Court in December last a man named Gott was indicted for having hawked and sold in a London thoroughfare some pamphlets containing coarse and scurrilous ridicule of some of the narratives in the Four Gospels. The first jury disagreed; but on the second trial (which I witnessed) he was convicted. It being his fourth similar conviction, he was sentenced to nine months' imprisonment with hard labour. The Court of Criminal Appeal confirmed both the conviction and the sentence (16 Cr. App. R. 87). On a petition being made for a remission of the sentence, the Home Secretary pointed out the two-fold form—judiciary and statutory—of the English law against blasphemy. It was not under any statute but under the common law that Gott had been indicted. The Home Secretary (Mr. Shortt) wrote that "The common law does not interfere with the free expression of *bona fide* opinion. But it prohibits, and renders punishable as a misdemeanour, the use of coarse and scurrilous ridicule on subjects which are sacred to most people in this country. Mr. Shortt could not support any proposal for an alteration of the common law which would permit such outrages on the feelings of others as those of which Gott was found to be guilty." But, as to the statutory law, he added that "The Blasphemy Acts were intended to restrict freedom of religious opinion or its expression; and Mr. Shortt

is of opinion that those Acts may well be repealed. They are already obsolete."

II.

Gott's conviction, then, had been at common law. What is the common law on this subject? Its singular history affords a striking picture. Mr. Justice Stephen, as all readers of his "Digest" and his "History" know, thought the conflict of legal authorities on this matter to be so great that Parliament ought to interpose to settle the question. Since his death it has been settled; not indeed by Parliament, but in the House of Lords--by the opinion of a Court consisting of Lords Finlay, Dunedin, Parker, Sumner, and Buckmaster. Though not agreed upon the main point that happened to be before them, they were unanimous on this long-disputed one. A similar unanimity upon it had been shown in the Court of Appeal by all the Judges before whom the case had been heard there.

The common law on this subject has thus reached at last a position satisfactory—or almost satisfactory (as I shall ultimately prefer to say). But it has reached it through an evolution so curious as to be worth reviewing.

For some generations past it had been a question disputed amongst lawyers whether the common law rendered punishable *all* open expressions of a disbelief in Christianity, or only such as were couched in language so irreverent and scurrilous as to be likely to offend ordinary Christians deeply enough to provoke some of them to a breach of the peace. To put it briefly, could the mere Matter of an expression of disbelief constitute it an offence of criminal blasphemy, or would the offence arise only when the Matter was aggravated by the Manner?

The former and severer view seemed to be established, if not by any actual decision, yet certainly by a chain of unchallenged *obiter dicta* continuing throughout more than a century down into the reign of Queen Victoria. As Stephen says (History C. L. II, 475), in the convictions for blasphemy throughout that period the Bench usually laid down "the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth." If that principle be accepted, the results are grave indeed. For then (as Stephen elsewhere says) Strauss's *Leben Jesu*, Renan's *Vie de Jésus*, and the works of Auguste Comte—and, we might to-day add, all average numbers of the *Hibbert Journal*—would be blasphemous libels; "and every bookseller who sells a copy, every librarian

who lets one out to hire, nay, every owner of a copy who lends it to a friend, is liable to fine and imprisonment." Similarly, we may add, the purchaser of a copy could not be compelled to pay its price; and the printer who set its pages up in type could not enforce payment of his wages.

Let us trace this branch of law from its commencement. The first indictment for blasphemy belongs to the lax period when, after the fall of the Commonwealth, the Restoration of Charles II was followed by outbursts of disorderly licence. The misdoings that had formerly been checked by the Star Chamber and by the Ecclesiastical Courts had now lost those restraints. The former tribunal had been abolished before the death of Charles I; and the Courts Spiritual had suffered under Cromwell a paralysis from which they had not fully recovered. Hence the offences which under the monarchy these tribunals alone had punished gained, on the eclipse of Puritanism, a sudden freedom. In 1663 the dramatist Sir Charles Sedley and a group of his aristocratic boon-companions exhibited themselves naked on the balcony of a tavern of ill-fame in Covent Garden, before a crowd of several hundred persons. They proceeded to gestures and acts so gross that the crowd stoned them from the balcony and that even the laxest editors of Pepys' Diary have not dared to print his description of the scene. Yet the general opinion was, as Pepys regretfully records, that there no longer existed any authority that could legally repress such outrages on public decency. But under Foster L.C.J. the Court of King's Bench, by a bold innovation, promptly created one (17 St. Tr., 155); so Sedley, on being indicted, was fined £500. Thirteen years later the same tribunal, under the presidency of Sir Matthew Hale, by a cognate innovation, recognized blasphemy as a crime punishable in Courts of common law. The decision was important enough to attract the attention of two reporters (1 Ventris, 293; 3 Keble, 607). A man named Taylor had uttered orally many highly offensive words against religion, words so wildly violent as to suggest doubts of his sanity. He was fined by the King's Bench, and ordered to be pilloried thrice, and to find sureties for his good behaviour throughout his life. Sir Matthew Hale, who presided, emphatically asserted the jurisdiction of the secular Courts; saying "Contumelious reproaches of God or of the religion established are punishable here. . . . The Christian religion is a part of the law itself." And as to the particular case before him, Ventris records him as saying that "*Such kind*"—observe the limitation—"of wicked blasphemies are . . . a crime against the laws, State,

and government, and therefore punishable in this Court. . . . Christianity is parcel of the laws of England."

A permanent legal doctrine was thus created. The maxim from which it was deduced—that "Christianity is part of the law of England"—acquired a currency which lasted to our own day. It was a sweeping statement; for, as Lord Cranworth said, none of us have ever seen a man indicted in a Court of law for not loving his neighbour as himself. Whence had Hale derived it?

There was an important law book, Sir Henry Finch's famous *Common Law,* which for sixty years past had been in the hands of all lawyers, and which remained for a century and a half the principal manual of our legal system until Blackstone superseded it. Now Finch says (I. 3.) that "Holy Scripture is of sovereign authority. . . . To such laws as have warrant in Holy Scripture our law giveth credence." From whom did he draw this proposition? He quotes it as from Prisot, an expert lawyer who helped Littleton to write his *Tenures* and who in 1449 became Chief Justice of the Common Pleas. This quotation brings us to one of the most surprising and most enduring of all legal misapprehensions—one which vividly enforces Principal Routh's old warning, "Verify your references"; and shows how meticulous a precision ought to be observed by every lawyer in citing each single word of any authority that he relies upon. Finch does give, in his margin, Prisot's actual words; but he misunderstands and mistranslates them. The misunderstanding was first detected, so far as I am aware, not by any English lawyer, but by an American one, less known to us, indeed, as lawyer than as statesman—the acute and brilliant President Jefferson.[1] Prisot was dealing in 1458 with an action of *Quare Impedit* (reported in Y. B. 34 Hen. VI. fo. 38) brought by one Humphry Bohun, who claimed to be patron of a benefice then vacant, and had accordingly presented a priest to the Bishop of Lincoln for institution. But on the very same day another claimant of the same advowson had presented another priest to that Bishop. Bohun accordingly sued the Bishop and the rival claimant and the rival priest. The Bishop's defence was that "The law of Holy Church is that in such a case [*i.e.*, of conflicting claims of patronage] no Bishop is bound to admit either presentee until the disputed right of patronage has been judicially ascertained. And the Bishop is not bound to ascertain it." This was a doctrine doubly advantageous to the

[1] Judge Story's political animosity to Jefferson led him to treat the detection without his accustomed fairness (Life I, 431).

Bishop; not merely because it saved him trouble, but also because, if the two patrons were left to fight it out between themselves, their fight would probably be protracted beyond the first six months of the vacancy, and thereupon the right of presentation would lapse to the Bishop himself. In this case that half-year had expired; and the Bishop had asserted (and actually exercised) his right of presentation. The secular Court had now to determine whether this convenient ecclesiastical doctrine was one which they in the Common Pleas were bound to recognize and enforce. By what method were they to ascertain that it really was valid ecclesiastical law? By the oral testimony of doctors of canon law? Or how otherwise? As Prisot lucidly put it—"The point is, whether the law of the Church is as the Bishop says, or not. For if their law is so, we wish to accept it." Then, later on, he suggests the proper method. "To such laws as they of Holy Church have in ancient writing [*en auncient scriptur*] it is right for us to give credence. For that is common law, on which all manner of laws are founded" (fo. 40).

This is very much what Lord Denman said, just four hundred years later, in *Bishop Hampden's Case* (17 L. J. R., Q. B., at p. 268)—"The canon law forms no part of the common law of this realm unless practice can be shown to the contrary." Of such practice "ancient writing" would be an appropriate proof. To it, not to the Bible, Prisot must have intended to refer. He would not have spoken of the sacred volume by so mean a title as "ancient Scripture." Nor would he have thought it possible to find in the Bible rules concerning benefices and advowsons. But Finch's misunderstanding of him took root and flourished. When annotating Blackstone, Prof. Christian (whose preface admits his habit of not verifying quotations) boldly inserted Prisot's words, "Scripture est common ley" (without adding the qualifying "auncient"), as a basis for the law of blasphemy. And in that mutilated form the quotation survived in Stephen's *Commentaries* until late in Queen Victoria's reign. Prisot's words, in their full form, were indeed quoted, as if relevant, by Lord Sumner, even in 1917 (A. C., at p. 455).

Sir M. Hale, as we have seen, established a stringent judiciary law against blasphemy. Yet, stringent though it was, it was not severe enough to satisfy the indignation that was aroused by the devout and philanthropic Thomas Firmin's widespread dissemination of pamphlets controverting the doctrine of the Trinity. The Trinitarian dissenters and even the House of Commons addressed the Crown upon the matter. One result was the issue of that Royal Proclamation against vice and

profanity which the older amongst us used to hear read at assizes and sessions. A more potent result was the enactment of the statute 9 & 10 Will. III, c. 32; which made it a criminal offence (1) to maintain, either in writing or in advised speaking, that there are more Gods than one, or (2) to deny, in similar manner, the doctrine of the Trinity or the truth of the Christian religion, or the divine authority of the Scriptures; provided that the offender had been educated in Christianity or had made profession of it. This proviso was introduced avowedly to protect the Jews; who, during the brief period that had elapsed since Cromwell had readmitted them to the realm, had become already an important factor in the commercial world. The penalties imposed by the Act were, however, not those of the ordinary criminal law. The first conviction merely rendered the offender incapable of holding any public office or employment. But a second conviction disqualified him permanently from buying land or receiving a legacy or bringing an action; and exposed him to three years' imprisonment. It will be noticed that the Statute punishes every deliberate avowal of the forbidden opinions, "even in the most private intercourse" (3 B. & Ald., at p. 161), however reverently it be expressed, and though it involve no attempt to proselytise.

The Statute remains unrepealed; but it is a remarkable fact that no criminal prosecution has ever taken place under it. The threat of one, however, very soon after its enactment, secured the destruction of an entire edition of a book written by Servetus, whom Calvin burned at Geneva for his heresy concerning the doctrine of the Trinity. The particular clause in the Statute which punished denials of that doctrine was repealed in 1813 by 53 Geo. III, c. 160. Yet a few years afterwards, in the celebrated case of *Lady Hewley's Charities* (9 Cl. & F. 355), the fact that from 1698 to 1813 any deliberate expression of Unitarian opinions was clearly a statutory offence (if not also a common law one) was recognized as one of the causes which had in that period rendered illegal the establishment of any chapels or charities that were, or that could become, distinctively Unitarian. Hence, early in the nineteenth century, the Trinitarian Nonconformists organised an effort to eject the Unitarian holders of all such old chapels and charities. The effort succeeded in the case of Lady Hewley's wealthy endowment; but was thenceforward checked by an Act of 1844 (7 & 8 Vict. c. 45), memorable as having been supported by all the leaders of both political parties and as having elicited from Macaulay and from Gladstone two of their ablest speeches.

Since that time the Act of Wm. III has never, I believe, been brought into any practical operation. But the judiciary law pursued an active course. Half a century after *Taylor's Case*, the doctrine laid down by it was confirmed by a Court in bancc. Mr. Woolston, a fellow of Sidney College, Cambridge, resident there for many years, published a singular series of works which assailed in very coarse and offensive manner many of the Biblical narratives, including those of the miracles of Christ. He insisted that he was contradicting their historical correctness merely in order to insist that they were, in reality, only allegorical representations of important religious truths. That this was an insincere statement, put forth merely as a blind, is the opinion maintained by Strauss, in the unfamiliar company of Abp. Trench. But that it was, on the other hand, a sincere conviction, entertained by a man of unbalanced mind, is the opinion of Dr. Blake Odgers and of a once-famous Cambridge Professor of Divinity, Dr. Hey. The latter says: "When I think of Woolston I feel more compassion than indignation. He was a man of learning and probity . . . nay, of wit and humour . . . of great intellectual abilities and attainments" (*Divinity Lectures*, ed. 1796, I. 195, IV. 57). An interesting psychological question is thus raised.

As Hey's words may well suggest, Woolston's works had an enormous sale. Dean Swift depicts it vividly:—

"Here's Woolston's tracts, the twelfth edition;
They're read by every politician;
The country Members, when in town,
To all their boroughs send them down.
You never read a thing so smart,
The courtiers have them all by heart."

Woolston was tried in 1729, and convicted. The King's Bench refused to grant a new trial. Its decision attracted the attention of three reporters (Fitzgibbon, 64; 2 Strange, 832; 1 Barnardiston, 162, 266). The defendant was fined, sent to prison for a year, and ordered to remain there until he could find sureties for his good behaviour throughout life. He never found them.

Proceeding upon the authority of *Taylor's Case*, the Court said that the Christian religion is established in this country, and therefore they "would not allow any books to be writ which would tend to alter that establishment." "They would not suffer it to be debated whether to write against Christianity *in general* was not . . . punishable at common law." Raymond L.C.J. laid it down that "Christianity *in general* is

parcel of the common law of England; and therefore to be protected by it." "We do not," he said, "meddle with any differences in opinion; we interpose only when the very root of Christianity itself is struck at; as it plainly is by this allegorical scheme." The Court "desired it might be taken notice of, that they laid their stress upon the word 'general'; and did not intend to include disputes between learned men upon particular controverted points." A difficult problem, still unsettled, was thus raised—where shall the line be drawn between the doctrines so fundamental as to be part of the "very root" of Christianity, and those which, by forming no essential part of "Christianity in general," are matter for uncontrolled controversy? To which class (for instance) the doctrine of the Trinity is to be referred is a question. Upon it the Judges who in 1842 had to deal with it practically, in the case of *Lady Hewley's Charities* (*Shore* v. *Wilson*, 9 Cl. & F. 355), took, strange to say, a laxer view than approved itself in more recent days to two of the law lords who in 1917 decided *Bowman's Case* (pp. 433, 476). Woolston's language had been scurrilous and contumelious, like that of Taylor; and thus fell clearly within the condemnation pronounced by Sir Matthew Hale upon Taylor. But it will be seen that his Judges did not base their decision upon this, but laid down a general prohibition of attacks upon Christianity, irrespectively of the way in which they were expressed—a prohibition not merely of the Manner but of the Matter. This extreme view many subsequent Judges, even in our own lifetime, regarded as settled law; though no case ever turned upon it, and its authority was only that conferred by a long chain of *obiter dicta.*

The common-law offence of Blasphemy formed the subject of many prosecutions during the disturbed period of 1790-1830; several of them being directed against Paine's famous book, *The Age of Reason*, a book so influential that it provoked forty different works in reply. The most conspicuous prosecution was that of Williams in 1797, conducted for the Crown by Lord Erskine, who preferred his speech in it to even the greatest of his other forensic addresses. It was at this trial, too, that Lord Kenyon, whose literary attainments were but limited, fell into his famous blunder (26 St. Tr. 653) of re-naming Julian the Apostate as "Apologist" or—if we may trust the poet Coleridge's account—as "Apostle."[2] Throughout the long line of those prosecutions the authority of *Woolston's Case* was relied

[2] "The Emperor Julian, so celebrated for every Christian virtue that he was called 'Julian the Apostle'"; (Allsop's Letters of S. T. Coleridge, p. 53).

on; though the *dicta* in it extended—like the Statute of 1698 —to all denials of Christianity, however inoffensively expressed.

Hence Lord Macaulay protested, in a Parliamentary speech of 1833, that "It is monstrous to see any Judge try a man for blasphemy under the present law. Every man ought to be at liberty to discuss the evidences of religion." "But," he added, "no man ought to be at liberty to force, upon *unwilling* ears and eyes, sounds and sights which must cause irritation. . . . If I were a Judge in India, I should have no scruple about punishing a Christian who should pollute a mosque" (*Speeches*, p. 116). Accordingly, when Macaulay did become a legislator in India his code embodied an enactment (s. 298) making it an offence punishable with a year's imprisonment to utter any word or make any sound in the hearing of a person, or make any gesture or place any object in the sight of a person, with the deliberate intention of wounding that person's religious feelings.[3]

In 1841 the Commissioners on Criminal Law, in the Sixth of their learned and elaborate Reports, laid it down that "The law distinctly forbids *all* denial of the Christian religion." But they added that in actual practice "the course has been to withhold the application of the penal law unless insulting language is used."

In 1850 there occurred, however, in actual practice an extraordinary instance of the application of the law to a case where no shadow of insult was present. In *Briggs* v. *Hartley* (19 L. J. R., Ch. 416) a testator had bequeathed money as a prize for the best essay on Natural Theology "demonstrating the sufficiency of Natural Theology . . . to constitute a true perfect and philosophical system of universal religion." Mr. Bethell (afterwards Lord Westbury) argued against the validity of the bequest, "on the ground of its tendency to demoralise society . . . and to create ill-effects upon the constitution of this country." Accordingly, Shadwell V.C. declared that the bequest must fail, saying: "I cannot conceive that it is at all consistent with Christianity." It is not obvious how that conception involves much difficulty. The decision is explicable only as an instance of Bethell's influence; for of Shadwell's "complete subjection to Bethell, the leader of his Court, many stories are told" (*Dict. Nat. Biog.*). Fifty-five years ago, in an essay on this head of our criminal law (*Theological Review*,

[3] Mr. Gour, an Indian commentator on this Code, remarks gravely that "The wounding of feelings must be more than sentimental; which is easy to acquire if it costs nothing."

1867, p. 216), I mentioned the difficulty of maintaining the Vice-Chancellor's reasoning, in face of the universal approval that had been already given by the religious world to the series of *Bridgewater Treatises* (1833-1840), which a kindred bequest had produced. I am glad to have lived to see his decision discredited by Lord Cozens-Hardy and by the present Master of the Rolls (L. R., [1915] 2 Ch., 463, 467).

Yet already a more tolerant theory of the criminal law was making itself felt; a feeling that, as all the convictions had been in cases of scurrilous language, those judicial utterances which declared that blasphemy might be indictable even where there was no scurrility were nothing more than *obiter dicta*. Thus as early as 1812 a voice which proved to be far-reaching had been raised in protest. Mr. Starkie (afterwards Downing Professor of Law at Cambridge) was the author of what became for a whole generation, on both sides of the Atlantic, the accepted text-books on the Law of Evidence and on the Law of Libel. In the latter he said, in words often subsequently quoted, " The law visits not the honest errors, but the malice, of mankind." Hence he urged that the penalties of blasphemy should be limited to cases where the offender intended either to insult sacred subjects by contumelious language or to mislead his readers by wilful misrepresentation. He was in full accord with the spirit of Bishop Jeremy Taylor's somewhat over-graphic words: " You may as well cure the colic by brushing the man's clothes, or fill his belly by a syllogism, as prosecute him for Blasphemy. The blasphemer may be provoked into confidence and vexed into resoluteness. So, instead of erecting a trophy to God, you build a monument to the Devil " (*Liberty of Prophesying*, § xiii., 19).

Accordingly, when the Chartist movement, in the early years of Queen Victoria's reign, was accompanied by the publication of much irreligious literature, Lord Denman ruled, on Hetherington's trial for blasphemy (4 St. Tr. (N. S.) 590), that the question of criminality lies " not altogether on the matter of opinion, but is in a great degree a question as to tone and style and spirit." Hetherington was sentenced to four months' imprisonment. His case had a curious sequel. Realizing that all the prosecutions of the past half-century had been levelled against humble vendors of cheap and popular books, he desired to see how far the law would be enforced against the prosperous vendors of expensive literature. He accordingly prosecuted a leading publisher, named Moxon, for issuing an edition of Shelley's complete works. The trial was rendered remarkable by the extraordinary eloquence of the speech by which Serjeant

Talfourd—more eminent as a man of letters than as a lawyer—defended Moxon; a speech as eloquent and as ineffective as that defence of Peltier which won for Sir James Mackintosh a European fame. Talfourd's line of defence was that, although the works of Shelley did contain some censurable passages, the publication of those works in their entirety, so as to show completely the development of a great poet's mind, was desirable "in the cause of genius, the cause of learning, the cause of history, the cause of thought." But the presiding Judge (Denman L.C.J.) replied that if there was nothing in the context to neutralize the indictable passages, they would remain indictable. The jury promptly convicted Moxon. But no sentence was ever passed on him, as Hetherington dropped the prosecution upon being paid his costs by Moxon.

In 1857 came the trial for blasphemy of Pooley, a half-insane labourer, whose conviction aroused the protests of Buckle and J. S. Mill. Coleridge J., in his summing-up, adopted as law Prof. Starkie's moderate view of the legal rule. The prosecuting counsel in this case was the future Lord Chief Justice Coleridge, destined to play, a quarter of a century later, a very different part in the development of this branch of criminal law.

In our distant colonies the prohibition of blasphemy was retained. In New South Wales (February 18, 1871) a man named Jones was sentenced for that offence to a fine of £100 and two years' imprisonment. In New Zealand no prosecution for it occurred until the present year, when the editor of a newspaper was indicted for publishing a scurrilous poem by Mr. Siegfried Sassoon concerning Good Friday. He was acquitted (*Rex* v. *Glover, The Times* of February 24, 1922). Hosking J., said: "The law of blasphemous libel is not intended to enforce religious doctrine, but to maintain peace and order in the community and enforce respect for things sacred, and to prevent the bitter feelings and breaches of the peace which might arise from malicious desecration."

After a quarter of a century had elapsed without any prosecution in England (or probably in the United Kingdom) for blasphemy, there came a great turning-point in this evolution of judiciary law. In December, 1882, two men, named Foote and Ramsay, the publishers of a weekly paper containing hideously offensive caricatures—literary and pictorial—of religion, were convicted before North J., and imprisoned. In the following April they were again prosecuted before Coleridge L.C.J., who delivered a judgment of remarkable eloquence, in which he expressed dissent from the many *dicta* which had declared, it

criminal merely to question the truth of Christianity. And he ruled that "*If the decencies of controversy are observed,* even the fundamentals of religion may be attacked without the attackers being guilty of blasphemous libel."

Two successive juries disagreed; but on the third trial Foote was sentenced to a year's imprisonment. The conviction aroused much feeling among the working classes; and at the general election of 1885 "the repeal of the Blasphemy Laws" was strongly urged upon all candidates for working-class constituencies. On my entering Parliament in that year, Mr. Bradlaugh, then the leader of the Secularist party, asked me to introduce a Bill for that purpose, which I accordingly did. This "Religious Prosecutions Abolition Bill" proposed to do away with both the common and the statute law against blasphemy; but to replace them—as I felt to be essential—by the enactment of Macaulay's prohibition against intentional insults to religious feeling. Here, however, was a fatal difficulty. The general body of Secularists at large refused to accept anything but an unqualified and absolute licence in controversy. Mr. Bradlaugh accordingly, though personally approving of the Indian clause, said that he must oppose the Bill if it were carried to a second reading. It accordingly dropped. But when he in 1889 re-introduced it without Macaulay's protecting clause, the absence of that limitation was made so strong an objection to the measure that the second reading was negatived by 111 votes against 46.

The common law rule—whatever it were—thus remained in force. And Lord Coleridge's view of it did not remain unchallenged. In Molière's phrase, "the deceased was not yet dead." In a civil action brought by a man who had been slanderously accused of being a blasphemer, Huddleston B. and Manisty J. dismissed that view as being a mere dictum, not binding upon them (*Pankhurst* v. *Thompson,* 3 T. L. R. 199).

But in all criminal prosecutions subsequent to Lord Coleridge's judgment, his authority was accepted and followed; as, for instance, by Phillimore J., in *Rex* v. *Boulter* (72 J. P. 188). Finally, it received, in 1917, a unanimous approval in the House of Lords.

In *Bowman* v. *The Secular Society, Ltd.* (L. R. [1917] A. C. 406) a testator had given his residuary estate upon trust for the Secular Society, Ltd. One of that society's fundamental objects was "to promote the principle that human conduct should be based upon natural knowledge and not upon super-

natural belief, and that human welfare in this world is the proper end of all thought and action." The testator's next of kin disputed the validity of the gift, on the ground that the objects of the Society were unlawful. But the gift was held lawful by Joyce J. and by a unanimous Court of Appeal. In the House of Lords, Lord Finlay took the opposite view. Yet as regards criminal law he accepted the rule laid down by Lord Coleridge in *Foote's Case;* and agreed that attacks upon Christianity would not be punishable if "decently conducted." But he considered that "the law will not *help* endeavours to undermine Christianity." His acceptance of the rule in *Foote's Case* was unanimously confirmed by the other four law lords who sat; an age-long controversy being thus set at rest. The four, however, went further, and held Mr. Bowman's bequest to be consequently valid, as the mere propagation of anti-Christian doctrines was thus not in itself illegal. Indeed, the question of its illegality was held by three of the Lords to be immaterial; as the Society, in their opinion, did not take the property upon any trust, legal or illegal, but received it in absolute beneficial ownership.

After the general doctrine as to Blasphemy had thus been conclusively established, two minor points were settled in *Rex* v. *Gott*—the recent prosecution mentioned at the beginning of the present article. (1) Avory J. laid down the rule—and it was not dissented from by the Court of Criminal Appeal—that it is not necessary that the offensive words should cause a breach of the peace then and there, at the time of publication. It would be sufficient if one were caused subsequently, "by some one taking the pamphlets home and reading them, and then next day finding the vendor still selling them." Nor indeed need there be any actual breach of the peace at all; the mere tendency to provoke one suffices. But (2) this tendency must not be measured by the susceptibilities of a person of strong religious feelings, but by those of the general community. The libel must be so bad as to be—in the words used by the Court of Criminal Appeal (16 Cr. App. R. 89)—"offensive to any one in sympathy with the Christian religion, whether he be a strong Christian, or a lukewarm Christian, or merely a person sympathising with their ideals." Of that offensiveness the jury are, by Fox's Libel Act, made the judges. In cases of seditious libels, that Act has usually worked in the defendant's favour. But in cases of blasphemy it may be doubted whether the jury will not be likely to view him less impartially than a High Court Judge would.

We have seen that, from Sir Matthew Hale's time onward, it has been clear that the crime of blasphemy, unlike that of private defamation, may be committed by utterances merely oral, as well as by words written. Nor indeed are words at all necessary; there may be blasphemy by a pictorial caricature; or even by silent acts of irreverent insult, as when in October, 1909, at a public skating rink in Dublin, one of the skaters appeared dressed as a travesty of Christ. An instance better known is the contemptuous burning of copies of the authorised English version of the Bible by Roman Catholic controversialists; for which a monk was convicted, about seventy years ago, at Mayo Assizes by a jury of mixed faiths, and Padre Petcherini was prosecuted in Dublin but acquitted (7 Cox 84).

Our review of the history of the crime of blasphemy shows that its *actus reus* can now be defined with precision. But a question may be raised as to the necessary degree of *mens rea*. Is it sufficient that the defendant did intend to publish the blasphemous words for which he is indicted? Or is it necessary that he should have known their offensive character and have intended to offend? In civil actions to recover damages for a libel, no such intention is necessary; a man who, by mistaking it for a different and innocent letter, unintentionally posts a libellous one which also he has written, must suffer for his mistake (9 B. & C. 382). But in criminal proceedings, guilt can only arise where the offensive matter was published with full knowledge of its contents and with readiness to offend. "Wilful intention," as Professor Starkie said, "is the criterion and test of guilt." A foreigner imperfectly acquainted with English may well have failed to appreciate the coarseness or contemptuousness of the phrases he has used.

III.

The judiciary law as to blasphemy has, then, reached at last a condition congenial with the tolerant spirit of modern times. No argumentative attack upon Christianity is now criminal unless it contain (in Lord Parker's words in *Bowman's Case* (p. 446)) "such an element of vilification, ridicule, or irreverence, as would be likely to exasperate the feelings of others and so lead to a breach of the peace."

A wise rule. But a rule which, it seems to me, needs to be universalized by Parliamentary legislation. Christianity is thus protected against wanton insult. But the rule falls far short of Macaulay's Indian clause, which protected *every* man

against an insult to the religion dear to him. On the prosecution in 1838 of a clergyman named Gathercole, for a libel on the nuns of a convent in Yorkshire (2 Lewin, 237), it was laid down by no less a Judge than Alderson B., in terms which have since been constantly quoted as authoritative, that "If this is only a libel on the whole Roman Catholic Church generally, the defendant is entitled to be acquitted. A person may, without being liable to prosecution for it, attack Judaism or Mahometanism; or even any sect of the Christian religion, save the established religion of the country." Very bluntly was the same position stated by no less eminent an American Judge than Chancellor Kent. In 1811, in *The People* v. *Ruggles* (5 Am. Dec. 335), he recognized and followed the common-law doctrine that it is indictable to revile Christianity with malicious contempt. But he added that it would be no crime to make "the like attacks upon the religion of Mahomet or of the Grand Lama. . . . The morality of this country is ingrafted upon Christianity and not upon the doctrines . . . of those impostors. . . . The imputation of malice could not be inferred from any invectives upon superstitions equally false and unknown."

But, not to speak of the rights of dissenting Christian sects or of the Jews, the presence in England to-day of many followers of Muhammad and of Buddha suggests the importance of an extension, even to those faiths, of the protection—what is now the moderate and just protection—which the law gives to Christianity. A century and a-half ago, Voltaire's tragedy of *Mahomet*, with its hostile portrayment of Islam, used to be performed with general applause both in France and England. To-day such a performance would be impossible. So great, indeed, is the respect shown now to Oriental faiths that we have recently seen the Lord Chamberlain prohibit the use of the word "Mecca" as the title of a play; so that "Cairo" was accordingly substituted.

A further point in which the law needs amendment at the hands of the Legislature is, as we saw at the outset, the repeal of those impotent anachronisms—the Statutes which punish the expression of opinions upon religion. There still survive two enactments of the Reformation period (1 Edw. VI. c. 1, s. 1; 1 Eliz. c. 2, s. 3), the former of which punishes with fine and imprisonment the use of contemptuous words concerning the Eucharist, whilst the other threatens a fine—or, on a third conviction, imprisonment for life—for speaking in derogation of the Prayer-Book. And—of more direct importance at the

present day—there is that Act of William III. of which I have previously spoken, which Stephen J. condemned as "ferocious," Lord Lindley as "cruel," and Lord Coleridge as "shocking"; and which (as I mentioned at the outset) the present Home Secretary "is of opinion may well be repealed."

These three old enactments are approved of to-day by no one. They have lingered into longevity only through having been left in lethargy.

Just two years after the House of Lords had in *Bowman's Case* settled one long-disputed question in the law concerning matters of religion, it proceeded by a more startling decision to overthrow in that branch of law a doctrine that rested upon a chain of decisions which went back to 1602 and (in the words of the Lord Chancellor) had for generations been treated as binding. For in *Bourne* v. *Keane* (L. R. [1919] A. C. 815) it declared the validity of a bequest of money to provide masses for the repose of the testator's soul. These two epoch-making decisions are akin in enlarging—on the one hand for the Freethinker, on the other for the Roman Catholic—the liberty to devote property to promote the purposes which he holds dear. They have been hailed warmly as final landmarks of legal progress.

Yet are they final? I foresee the possibility that a future Legislature, alive to the supreme importance of truth and to the value of unbiased inquiry and discussion as the best avenue to truth, may some day advance to the point of prohibiting all permanent endowments for the maintenance of any crystallized form of doctrine upon any subject, sacred or secular. For such endowments tend to preserve that doctrine into a factitious survival, and so mar the uniformity with which the judgment of mankind, if left to its normal action, would have travelled towards truth.

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