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MAYNOOTH COLLEGE.

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Disabilities of the Catholic Church in Ireland*

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THE description commonly applied to the Act of 1829—Catholic Emancipation—is picturesque and vivid, but open to misconception. It has led many persons to think, or given them the pretext for saying that since 1829 Catholics have been quite free from legal disabilities, and that the Catholic Church, enjoying full liberty and a favourable atmosphere, has with time acquired a position of privilege in this country.

The Act of 1829 was indeed a notable triumph for the Catholic cause. The winning of the right to be elected Member of Parliament may not have brought much political or economic benefit to the majority of Catholics, but it was undoubtedly a great social and religious victory. For two centuries Catholics had been held up to contempt by their Protestant brethren as idolators, perjurers, traitors: according to the law of the land they were an utterly inferior race, devoid of truth, justice, patriotism and true religion. To admit the bearers of this despised name to the honour and dignity of the Legislature—then highly esteemed—meant the retraction of all these calumnies and the disappearance of the ascendancy based on them. To realise this one has but to read the addresses protesting against Emancipation which poured in on Parliament in 1828-9. It is this which explains the determined opposition shown to O'Connell and the extraordinary jubilation of the Catholics.

Whilst it is true, therefore, that the Act of 1829 was a great triumph for the Catholic name, the impression that it removed all disabilities or gave the Church full liberty is not

*A lecture delivered at the Maynooth Union, 1929, the Centenary of Catholic Emancipation.

correct; Catholics were still debarred from the highest offices of State: they were still bound to pay tithes to a Church they did not believe in.

We are not now concerned with the legal position of the individual Catholic citizen, but with the rights allowed to the Catholic Church as such. We shall confine ourselves in this paper to the question of the liberty which the Catholic Church had in law to conduct Catholic worship and to develop Catholic religious or charitable activity. From that point of view the Act of 1829 is frankly disappointing. It contained no declaration of liberty, no edict of toleration. Quite the contrary: it prohibited the exercise of Catholic worship outside chapels and private houses: it forbade Catholic ecclesiastics to take the title of any deanery or bishopric: it allowed Catholic burial only with the permission in writing of the Protestant minister, and it enacted a whole series of pains and penalties against religious orders of men. The Act of 1829 therefore did not improve the legal position of the Church. The question then arises: When did the Catholic Church obtain the right to existence in English law? In the case of England the date is quite certain —1791. But in Ireland the Penal laws were different, and the date is open to controversy. In theory, according to those who are expert in the history of law, the Catholic religion had the right to toleration by the first article of the Treaty of Limerick, which was ratified by William III at Westminster on the 5th April, 1693.

In practice, however, the Catholic Church obtained legal right to existence in 1782, when the penalties against bishops, priests and regulars, and against the Mass were abolished: more fully still, in 1793, when the law requiring Catholics to attend Protestant Church each Sunday was repealed. Thereupon the Catholic Church obtained the same status in law as was already enjoyed by the dissenting Protestant sects, such as Presbyterians, Quakers. As distinct from "Establishment" that status is called toleration. To follow the fortunes of the Church during the last century, and to understand the present position, we must therefore first ascertain the extent of the rights contained in toleration; and secondly we must see whether there was any express limitation of these rights in the case of the Catholic Church.

The status of a tolerated religious sect is that of a private and voluntary association such as a club. The State allows a wide liberty to private associations, but not an unrestricted liberty to function in any and every manner. In the first place it reserves the right to prohibit and suppress any act or function which is contrary to public order or morality. So for example, Article 8 of the Constitution of the Irish Free State declares: "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen." In the second place the State claims supreme jurisdiction over all private associations: it decides their controversies and overrules their decisions, if need be.

The implications of these two conditions are of great practical importance. In regard to the first, it is the State, i.e., the Government in power, which decides what is contrary to public order. The matter is one that allows a very wide discretion. It was under the plea of the maintenance of public order that Napoleon added the famous Organic Articles which so largely nullified the Concordat of 1801. It was under the pretext of public order that in 1908 the Prime Minister of England, Mr. Asquith, forbade the Procession of the International Eucharistic Congress through the streets of London.

The more fundamental condition is the second: that a religious sect is subject to the authority and tribunals of the State. The civil courts do not interfere in matters of opinion or belief, but where a civil right such as property or reputation is involved, the Court will interfere if appealed to, and examine any judgment passed by an ecclesiastical court. Furthermore, the State will admit no rule preventing citizens from seeking redress in the civil courts. It is a rule of most religious bodies that domestic differences be decided by domestic tribunals, and be not carried into the public courts. So the law of the Catholic Church in this country is that cleric may not sue cleric, and neither cleric nor layman may sue a bishop before the civil court. That rule is admitted by most lawyers to be lawful, and in accordance with public policy, as tending to prevent scandals. But it is not allowed to oust the jurisdiction of the court, and no matter how flagrantly the rule be violated, the court will hear and decide any case brought before it.

The basis on which ecclesiastical cases are decided in the civil court is that of the observance or non-observance of a contract. The relations between a member and his Church are supposed to be those of a free contract. In the civil law the Catholic Church has no jurisdiction over its members other than that arising from contract. The jurisdiction of bishops is supposed to be founded on the agreement of the members of the Church, and to resemble the jurisdiction exercised by arbitrators. The terms of the contract in this case are the laws and ordinances of the Church. The court interprets for itself the rules of a voluntary association; but in the case of the law of the Catholic Church the procedure is that the law can be proved in evidence only by experts. The reason of this is the law of the Catholic Church is recognised to be a legal system and a science. But if the experts disagree the court will decide for itself.

This is the basis on which the civil courts have passed judgment in a number of famous ecclesiastical cases. The basis is the same for all religious bodies. It has remained the same during the last century through all changes of government —from the O'Keefe case of 1872 to the O'Callaghan case of 1924.

When, therefore, a religious body is said to be tolerated it should be understood that its freedom is subject to these two conditions—that the State may prohibit any of its functions in the name of public order and that it is subject to the jurisdiction of the State and its courts, even in cases affecting ecclesiastical issues which have already been decided by the competent ecclesiastical tribunal.

These conditions are said to be inherent in the status of toleration: they apply to all bodies possessing that status.

I wish now to call your attention to certain additional limitations of toleration which existed in the case of the Catholic Church only, inasmuch as the State deliberately refused to tolerate certain tenets and rules of hers and that long after 1829. I have already referred to some contained in the Act itself in regard to Catholic burial, worship outside chapels, ecclesiastical titles, religious orders. It has been declared that these limitations no longer exist: that they were abrogated by the Government of Ireland Act of 1920. There are, however, other restrictions about which there has been no declaration and in regard to the legal existence of which there is, to say the least, some doubt. For it is a legal principle, recognised in both civil and canon law, that in doubt the repeal of a law is not presumed but subsequent laws must be reconciled with those already existing. In canon law that principle is stated in Can. 23.

The laws containing the restrictions to which I am about to refer were the outcome of historical circumstances. To understand their force and effect, it is consequently necessary to remember the historical background.

The first express limitation concerns the constitution and government of the Church. The Act of Supremacy of 1559 declared that all jurisdiction, civil, spiritual and ecclesiastical, within the imperial realm belonged to the Crown: it was made the crime of treason to maintain that any foreign prince or prelate had spiritual or ecclesiastical jurisdiction within these realms. Under that Act hundreds of Catholics suffered the penalties of treason—hanging, mutilation while still alive, death. In 1846 a law was made abolishing the penalty of treason for this offence; but it was explicitly declared that it was still a misdemeanour to uphold the spiritual authority of a foreign prelate, or to receive or execute his rescripts. In 1848 an Act was passed for enabling Her Majesty to establish and maintain diplomatic relations with the Sovereign of the Roman States; but Section 3 affirmed that nothing in this Act shall repeal—or affect—the laws or statutes for upholding the supremacy of Our Lady the Queen in all matters, civil and ecclesiastical, within this realm and other Her Majesty's Dominions, or the laws which prohibit Her Majesty's subjects from communicating with foreign sovereigns on such matters.

Thus, twenty years after Emancipation, we find the Act of Supremacy reasserted. It might have been urged that in practice the law was a dead letter and not in force: for the Government knew that bishops were appointed by the Pope: rescripts from the Pope dealing with political and economic affairs had even been promulgated in the public Press and the Government had raised no objection. But when the matter

was tested in the courts it was found that the law was by no means a dead letter. In 1872 the famous O'Keefe-Cullen case was tried. Cardinal Cullen had acted against Father O'Keefe by virtue of special delegation from the Pope. When sued for libel his defence was that he had acted legally. The court decided that in the eyes of the law the Papal rescript was illegal, and any proceeding or plea based on it illegal. Since 1872 the validity of a Papal rescript has not been raised again in the courts. The Pope was again mentioned in 1919, in the case of a will of one Andrew Moore, who left a sum of money to the Pope for the purposes of his sacred office. The court decided that the bequest was void because the money could be used in purposes that are not only not charitable but possibly illegal according to the laws of this country. What the position is at present in regard to the Act of Supremacy is a question that raises big constitutional issues, because it concerns the right of the Crown. It cannot be discussed without raising also the Act of Settlement of 1690, by which the succession to the Crown is reserved to members of the Protestant Church. We shall refer to this matter later.

The second point in which the right of the Catholic Church to free profession and practice of her faith is limited concerns marriage. It is the Catholic faith, defined by Trent, that marriage is a sacrament: it is also of faith, defined by Trent, that the decision of matrimonial cases belongs to the ecclesiastical tribunals. Yet in this country the law regards marriage as a civil contract, and all cases of nullity or separation must be tried by the civil courts. If the marriage of a Catholic were found to be null and void by a competent ecclesiastical tribunal, and if the Catholic were to act on the decision he would find himself in jail for bigamy. Yet the Constitution guarantees him the free profession and practice of his faith.

The third point in which the Catholic Church finds her freedom of profession thwarted concerns the sacramental seal of Confession. In 1802, at Trim, in the case of O'Brien *v.* Trustees of Maynooth, Father Gahan was committed to jail for refusing to answer questions dealing with his sacramental ministrations to Lord Dunboyne. In 1860, at Durham, a Father Kelly was committed to jail for refusing to tell the name of

the person who had made restitution of a stolen watch to him. Since then there has been no change in the law or practice. Yet the privilege of confessional secrecy is upheld formally and legally in the interest of public policy by France, Belgium, Italy, Germany, Switzerland and most of the United States. In 1813 it was recognised in New York State, on the ground that to deny the seal of Confession is equivalent to denying the Sacrament to Catholics; for precisely the same reason it is advocated by Jeremy Bentham the great English jurist in these words:—"This institution is an essential feature of the Catholic religion and the Catholic religion is not to be suppressed by force."

Another matter in which the Catholic Church was subject to a special limitation of freedom is that of the acquisition of property. No bequest for Catholic religious purposes was valid until 1832; until recent times bequests for Masses or to religious Orders were void as being superstitious, or were denied to be charitable. There is one provision which is still, according to report, enforced: bequests to contemplative Orders are not recognised as charitable and must pay tax. This is a relic of the old hostility to religious Orders as such.

But if and when all such provisions were repealed and a Catholic could bequeath property for any Catholic purpose dear to him, there still remains this fundamental difficulty, that he cannot give legal ownership to the Catholic Church; he can only give it to some citizen in trust for the Catholic Church. The Catholic Church as such does not own any property in this country; neither does any Catholic diocese or parish. The law does not recognise their existence as legal entities. All the property of the Church in this country is vested in individual citizens on trust for her. Instead of having their diocese and parish recognised as a legal personality and legal owner, Catholics are forced to adopt this troublesome, expensive and dangerous method of the trustee system. It is troublesome because an anxious eye has to be kept on title deeds, in order that the names of trustees who have died be replaced by others; it is expensive, because the fees for this renewal are high; it is dangerous because the same person has his own private property as well as trust property, and it is not always easy to separate them, especially when one is dealing with executors. Who can

say what property has been lost, how many bequests defeated, as a result of this trustee system?

The time at our disposal does not permit the continuance of this list. Enough has been said to show that when we take stock of the strictly legal position of the Church, we find that instead of enjoying any favour or advantage of law in this country, she has not even received the same treatment as that given to any obscure sect of yesterday's growth and insignificant dimensions. She has been differentiated against in a number of points in which the law refused to tolerate her tenets or rules. She has never had more than a partial toleration and she has had to endure the distrust and suspicion of the law. In this country we have inherited a legal system which was built up by our religious enemies and which still bears many traces of religious animosity. For intance, our description in law is "Roman Catholic." We have inherited the effects of spoliation and persecution—not the least of which is the law under which we live; while the Church of a minority has inherited the fruits of establishment and endowment. To take another instance: according to a decision of the courts in 1917 the title of Lord Primate of all Ireland still belongs in law to the Protestant Archbishop of Armagh; so that if the Pope were to send a letter addressed to "the Primate of All Ireland" the Post Office would be bound, in law, to deliver it to the Protestant Archbishop.

Now, if attention be called to these restrictions of the status of toleration it should not be assumed that a plea is being made for establishment. I do not know whether there is any demand for legal establishment. I do know that the establishment that Irish Catholic people and clergy pray for, and work for, is establishment in the hearts of the people, of all the people of Ireland. At any rate it is not the intention of this paper to formulate any demand for endowment, privilege or preference, for I know that the granting of such is prohibited by Article 8 of the Saorstát Constitution. The demands that this paper would make are very modest and temperate. They are that the Catholic Church be given toleration—not the partial, restricted toleration of the bigoted past, but the full and free toleration that is guaranteed to her on paper.

Every citizen of Ireland is guaranteed the right of free profession and practice of religion. In the case of the Free State that guarantee is contained in Article 8 of the Constitution. In the case of the Six Counties, it is contained in the Government of Ireland Act, 1920, Section 5.

It is one thing to have a constitutional right; it is quite another to have it given certainty and force in a number of laws. That is all the more necessary when the full import of the constitutional right has not yet been worked out in legal theory or practice and when the ground is cumbered with contrary enactments. It has been declared that all the disabilities of individual Catholic citizens have been abolished. Are we not justified in claiming that the laws giving the Crown ecclesiastical jurisdiction and reserving the Crown to persons of Protestant faith—are abolished? Are we not justified in claiming that the law, by which jurisdiction over marriage is usurped as if it were, for all, only a civil contract—that that too should be abolished? For these laws restrict the free profession and practice of the Catholic Religion. If we are wrong in making this claim then we, Catholics, should be told the reason. If the reason given be the interests of public order, it should be shown us where and how the law of the Catholic Church is contrary to public order.

When questions concerning the relations of the State to the Catholic Church come up for discussion, there are two requirements essential—but unfortunately not always found—in those who engage in the discussion. The first is that they have examined the law of the Catholic Church closely and without prejudice. The Catholic Church is not one of these obscure sects which have had no history and will have no future. One of the proofs that has a certain appositeness here is that the Catholic Church has a body of law which is recognised even in the civil court as foreign law on a par with that of any European State. Chief Justice Kennedy dealt with this point at length in his judgment in the O'Callaghan case, March 31st, 1925. He described canon law as a scientific legal system and body of law, which had influenced national legal systems of Europe, had been one of the sources of English common law, and which still had life and growth. What other Church has a law of which that could be said? Canon law is the result

of a legislative activity and experience which, in extent of territory and duration of time, has not been paralleled. It belongs to a Church which has been associated with every form of government, of every type of civilisation. If the laws and institutions which enshrine justice and promote human happiness are to be found anywhere, that law has the first claim on the attention of the scholar and the man of affairs which has had the longest history and the widest influence. Any pretension that its prescriptions are contrary to public order will not be easily accepted outside the ranks of the ignorant and bigoted.

The second requirement that we would make of those who discuss these questions is that they be perfectly clear about the basis on which they would place relations between the State and religion. There are to be found men who give religion a high place in private life, but would exclude it from public affairs. In order to maintain impartial justice between different religions they hold it necessary that the State take no cognisance of religion. To keep the State non-sectarian they would make it irreligious. Thus they support the theory of the secularist State. However specious this theory may be on paper, in practice and in history it leads to the denial and suppression of the religious element whenever it comes in contact with the legal. If such a theory is being acted on consciously or unconsciously, it is time that it be exposed to the light of day. The world has gained some experience since the self-complacent atheism of the 18th century seized hold of legislatures. Whether law-makers recognise it or not, men will continue to believe that they have a destiny higher than this world, and they will obey God rather than man. But if law-makers are wise and will read the plain lesson of history, they will see that it is not in the interests of the State or of social progress to eliminate religion from public affairs, or to hamper its activity. It is faith in God and in a life to come which supplies the strongest motive for the observance of law, of justice and charity : it is that faith which is the greatest bulwark of social order and peace. It is a remarkable sign of the trend of events that a State which was so secularist in regard to marriage-law and education as was Italy, should now have adopted the principles of canon law on these matters. One of the strongest and most active States of Europe has thereby

shown that close and generous co-operation of Church and State is to be sought after even at great sacrifice. There is nothing that the world needs so sorely as the cordial co-operation of all those who work for the welfare of the people. But co-operation means equality and mutual respect. Attempts have been made to absorb the Church, to enslave or suppress it; but they have always failed. The Church has seen the rise and fall of many Empires. She faces the future with a quiet confidence, based on certain words uttered at Caeserea Philippi,* that the future is hers.

THE DISCUSSION.

DR. PIERCE said he had first to pay a well-merited tribute to the Paper. It was one which should provoke thought and discussion. He thought that Dr. Browne's plea for full toleration was altogether too modest. It was an extraordinary thing that they should be in the position of asking for toleration for Catholics at this hour of the day. He would go much further than Dr. Browne and say that legislation in this country should be more and more influenced by Catholic principles. Christ should reign not only in the Church, but in the State. We in this country had inherited the tradition of English secularism. Unemployment was an example. The pernicious doctrine was being preached by non-Catholics, and sometimes by Catholics, who had been poisoned by the atmosphere of secularism in which they lived, that the State had nothing to do with unemployment.

As far back as the 16th century a great writer, Vives, asserted emphatically that it was the duty of the State to provide some remedy for unemployment. "It was not only the duty of the State," said Dr. Pierce, "but the interest of the State, to deal with unemployment, for indigence and unemployment increase not only the number of the sick, but of malcontents and criminals that are a blot and a source of danger in the State."

*_Matthew_ xvi. 18. And I say to thee: That thou art Peter, and upon this rock I will build my church. And the gates of hell shall not prevail against it.

V. REV. M. SLATTERY, Missionary Apostolic, Provincial of the Society of African Missions, said that he wished Dr. Browne had given a definition of charity as it was understood in the Irish courts. He thought that the law only understood it in one of its lesser meanings, and not as the "love of God and our neighbour." The Income Tax Commissioners taxed nursing nuns on the ground that their patients, and not themselves, were the charity, and similarly they taxed an Order of priests who were training students for foreign missions on the ground that the students were the charity and that they did not do the work on the farm.

He added that the interpretation of the word charity followed by the Income Tax Commissioners was that contained in English law and judicial decisions and that the final decision in a matter which so closely concerned religion was with the Law Lords of England.

FR. BURBAGE, C.C., expressed his admiration for the Paper. It showed very clearly the difficulties and dangers of the situation. The disabilities inherent or potential in the present system were not felt because of the good dispositions prevalent, at present, in the Legislature. But if a change took place, there might be a great change in the position of the Church without any change in the law. He suggested that a committee be formed to push forward the work of having the laws affecting the status of the Catholic Church adjusted to the actual situation.

FR. DONAL A. REIDY, Bishop's Secretary, Killarney, congratulated Dr. Browne on his very able and timely Paper. The most important, perhaps, that had been read at the Maynooth Union for very many years.

The lecturer had animadverted on surviving anomalies in the legal status of Catholics. The most serious one was that the Catholic Church, representing 93 per cent. of the people of the Irish Free State, was in a position of legal inferiority to the three chief Protestant Churches which, by the Acts of 1869, 1871, 1915 and by the Methodist Church Act passed by the Irish Free State Government in 1928, were entitled to receive, hold and administer property and funds in their corporate

capacity. The Catholic Church had to make use of the Trustee System which was exceedingly troublesome and expensive and which had always, and always would lead to losses of Church property. At present when a Bishop died it probably cost each diocese £250 to effect the necessary transfer of diocesan funds, while the periodical revision of title deeds would average £100 a year.

Countries and Dominions, like the U.S.A. and Australia, had incorporated Catholic Dioceses and, without in any way contravening the Articles of the Treaty, the Irish Free State Government could give a juridicial recognition to the Catholic Church which would equalise it before the law with the Protestant denominations.

The marriage law demanded some rectification. At present it would seem possible to have a marriage between two Catholics valid in the sight of the Church and invalid in the eyes of the law and, conversely, an invalid Catholic marriage valid in the eyes of the law.

The laws governing child welfare lent themselves too readily to efforts of the Soupers, and parents' rights should be better safeguarded.

The Income Tax Acts were unsuited to our conditions. There were obvious hardships and absurdities which should be removed. A Sick Priests' Fund that the Speaker knew, was losing £25 per annum that the British Government always refunded.

The speaker believed that the Irish Free State Government would give a favourable hearing to suitable representations, and he expressed the hope that the movement initiated by Dr. Browne would give the Irish Catholic Church its rightful position in the Irish Free State.

The Chairman associated himself warmly with the tributes paid by the speakers to Dr. Browne's Paper.

Nihil Obstat:

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